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Predeceased Children's Right to Inherit under Muslim Personal Laws in Pakistan

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Abstract

It is argued that Muslim Personal Law does not allow the predeceased children to inherent from their grandparents after their parents have passed away, however, the primary sources of Islamic law are silent on this. This article attempts to understand and explain if the predeceased children have the right to inherent from their grandparents under Muslim Personal Law in Pakistan, and also understand the difference between the Sunni and Shia Islamic schools on this issue. It further explores the legality of section 4 of the Muslim Family Law Ordinance, 1961, in this regard, as well as other related issues such as a childless widow belonging to Shia Islamic school or the right of great-grandchildren to inherent from their great-grandparents after their parents have died.

Keywords: Predeceased children, Muslim Family Law Ordinance -1961, The Commission on Marriage and Family Laws, Federal Shariat Court.

Introduction

The grandchildren have always been excluded to inherit from their grandparents after the death of any of their parents under the Muslim Personal Law, but Pakistan has attempted to remedy this wrong by the enactment of the Muslim Family Law Ordinance (MFLO), 1961, specifically its section 4. However, it has been argued that the said section is un-Islamic and continues to face opposition by ordinary Muslim Pakistani citizens and religious scholars alike. This issue has been severely and extensively debated and deliberated upon by the students of law especially Islamic law, but it seems that it is difficult, if not impossible, to find consensus and a common ground. This article, therefore, attempts to answer if the predeceased children have the right to

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inherent from their grandparents under Islam, and also whether there is any difference between the Sunni and Shia (also known as Ahl-e-Tashih; Fiqa-e-Jafariya; and Fiqah-e-Jafri) Islamic schools, while analysing other related issues, which is not possible without examining the relevant Pakistani laws.

Muslim Personal Laws in Pakistan

Section 4 of MFLO allows upon the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter living at the time the succession opens, to receive per stirpes a share equivalent to the share which such son or daughter, would have received if alive.[1]

It, however, violates the Islamic principles of inheritance in the light of section 52[2] of *Mulla's Principles of Muhammadan Law* (MML) which ranks as one of the foremost leading texts on Islamic law applied in India and Pakistan;[3] by Sir Dinshah Fardunji Mulla, who served as Law Member of the Council of the Governor General of India and a judge of the Bombay High Court.

Under section 52 of the MML, the birth right is not recognised, and the right of an heir-apparent comes into existence for the first time on the death of the ancestor, and he/she is not entitled until then to any interest in the property to which he/she would succeed as an heir if he/she survived the ancestor.[4]

Section 53 of MML discusses the principle of representation, stating that according to the Sunni Law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will, however, it further says that according to the Shia law, it does pass

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1 Mumtaz Faridi, *The Family Laws* (Lahore: Imran Law Book House, 2023), 3-4.

2 Mulla Dinshah Fardunji, *Mulla's Principles of Mahommedan Law*, ed. Munir Ahmed Khan, rev. by M. Hidayatullah (Lahore: Imran Law Book House, 2018), 111.

3 Nisar Ahmad Ganai, 'Review of *MULLA'S PRINCIPLES OF MAHOMEDAN LAW*', (19th ed.) M. Hidayatullah and Arshad Hidayatullah, *Journal of the Indian Law Institute*, 33:2, 294-99, http://www.jstor.org/stable/43951362

4 Mulla Dinshah Fardunji, *op.cit*., 111.

by succession.[5] The passing of expectant right of an heir-apparent by bequest here should not be confused with bequeathing to heirs, as discussed under section 117 of the MML, which makes a bequest to an heir valid unless the other heirs consent to it after the death of the testator.[6]

Regarding the principle of representation under the Shia law of inheritance, section 93 of MML states that it may be applied for deciding what persons are entitled to inherit; and secondly, the quantum of the share of any given person on the footing that he is entitled to inherit.[7]

Section 93(2), regarding what persons are entitled to inherit, states that the rule of exclusion, that is, the nearer in degree excludes the more remote, is not recognised as the qualifying rule of exclusion by both Sunni and Shia schools, stating that if a person dies leaving him surviving a son and grandsons by a predeceased son, the grandsons are excluded from inheritance by their uncle, and that they do not take their father's stead though he would have been an heir had he survived his father.[8]

Section 93(3) states that if both sons predeceased the propositus who died leaving three grandsons by one son, and two by the other, then all the grandsons are heirs.[9] Then the principle of representation is applied for the purpose of deciding the quantum of the share of any given person on the footing he/she is entitled to inherit, for ascertaining the share of each grandson.[10]

Section 93(4) of MML states that the principle of representation is considered cardinal by the Shia school for calculating the share of each heir.[11] Under this principle the descendants of a deceased son, if they are heirs, take the portion which he if living would have taken and in that sense represent the son.[12] It allows the descendants of a deceased daughter represent the daughter, if they inherit, they take the portion which the

5 *Ibid*., 112.
6 *Ibid*., 275.
7 *Ibid*., 242.
8 *Ibid*.
9 *Ibid*.
10 *Ibid*.
11 *Ibid*., 243.
12 *Ibid*.

daughter if living would have taken, and it similarly applies to the descendants of a deceased brother, sister or aunt.[13]

Section 93(5) of MML states that this principle applies in the ascending and descending line.[14] It allows great-grandparents to take the portion which the grandparents, if living, would have taken; and the father's uncles and aunts take the portion which the deceased's uncle and aunts, if living, would have taken.[15]

Spiritual Succession under section 94 of MML, explains the principle of representation in different words, and with an example that suppose a Shia Muslim die leaving two grandsons by a predeceased son A, and one grandson by another predeceased son B, then the estate under Shia Islamic law will be notionally divided first among the two sons A and B, therefore, each takes 1/2nd; and thereafter, the A's share 1/2nd goes to his two sons, each taking 1/4th, while B's share 1/2nd passes to his only son.[16]

The Shia Islamic school is different due to the principle of representation. This principle was accepted by the Commission on Marriage and Family Laws, appointed by the government of Pakistan, on 4th August, 1955, which published its report on 11th June, 1956.[17] The recommendations of the Commission were given effect by promulgating MFLO, 1961, as per its preamble.[18] The report states:

> It may be mentioned that if a person leaves a great deal of property and his father has predeceased him, the grandfather gets the share that the father of the deceased would have got. This means that the right of representation is recognised by Muslim law amongst the ascendants. It does not, therefore, seem to be logical or just that the right of representation should not be recognized among the lineal descendants. If a person has five sons and four of his sons predeceased him,

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13 *Ibid*.
14 *Ibid*.
15 *Ibid*.
16 *Ibid*., 244.
17 'Report of the Commission on Marriage and Family Laws 1956', The Gazette of Pakistan, Extraordinary, Karachi, 20 June 1956, 1197.
18 Mumtaz Faridi, *op.cit*., 1.

> leaving several grant children alive, is there any reason in logic or equity whereby the entire property of the grandfather should be inherited by the son only and a large number of orphans left by the other sons should be deprived of inheritance altogether. The Islamic law of inheritance entails a grandfather to inherit the property of his grandsons even though the father of the testator has pre-deceased him; why can the same principle be not applied to the lineal descendants, permitting the children of a predeceased son or daughter to inherit property from their grandfather.[19]

Upon the recommendations of the Commission, the principle of representation was applied while drafting the section 4 of MFLO. But for a clearer understanding, it is necessary that the primary sources of the Islamic law are referred.

The Primary Sources of Islamic Law

The Holy Quran and Hadith, being the primary sources of Islamic law, have precedence over other secondary sources, can help understand this issue.

The Holy Quran on this issue

Surah An-Nisa and Al-Baqarah have dealt with near relatives and their right to inheritance. The second Surah Al-Baqarah, Ayat 180, states:

> It is prescribed for you, when death approacheth one of you, if he leave wealth, that he bequeath unto parents and near relatives in kindness. (That is) a duty for all those who ward off (evil).[20]

Fourth Surah An-Nisa, Ayat 6 to 14 states:

> 6. Provide orphans from till they reach the marriageable age; then, if ye find them of sound judgment, deliver over unto them their fortune; and devour it not by

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19 'Report of the Commission on Marriage and Family Laws 1956', *op.cit*., 1222-23.

20 Muhammad Marmaduke Pickthall, (trans.), *Al-Quran al-Karim* (Islamabad: Islamic Research Institute Press, 1988), 17.

squandering and in haste lest they should grow up. Whoso (of the guardians) is rich, let him abstain generously (from taking of the property of orphans); and whoso is poor, let him take thereof in reason (for his guardianship). And when ye deliver up their fortune unto orphans, have (the transaction) witnessed in their presence. Allah sufficeth as a Reckoner.

7. Unto the men (of a family) belongeth a share of that which parents and near kindered leave, and unto the women a share of that which parents and near kindered leave, whether it be little or much—a legal share.

8. And when kinsfolk and orphans and the needy are present at the division (of the heritage), bestow on then therefrom and speak kindly unto them.

9. And let those fear (in the behaviour toward orphans) who if they left behind them weak offspring would be afraid of them. So let them mind their duty to Allah, and speak justly.

10. Lo! Those who devour the wealth of orphans wrongfully, they do but swallow fire into their bellies, and they will be exposed to burning flames.

11. Allah chargeth you concerning (the provision for) your children: to the male the equivalent of the portion of two females, and if there be women more than two, then theirs is two-thirds of the inheritance, and if there be one (only) then the half. And to each of his parents a sixth of the inheritance, if he have a son; and if he have no son and his parents are his heirs, then to his mother appertaineth the third; and if he have brethren, then to his mother appertaineth the sixth, after any legacy he may have bequeathed, or debt (hath been paid). Your parents and your children: Ye know not which of them

is nearer unto you in usefulness. It is an injunction from Allah. Lo! Allah is Knower, Wise.

12. And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after any legacy they may have bequeathed, or debt (they may have contracted, hath been paid). And unto them belongeth the fourth of that which ye leave if ye have no child, but if ye have a child then the eighth of that which ye leave, after any legacy ye may have bequeathed, or debt (ye may have contracted, hath been paid). And if a man or a woman have a distant heir (having left neither parent nor child), and he (or she) have a brother or a sister (only on the mother's side) then to each of them twain (the brother and the sister) the sixth, and if they be more than two, then they shall be sharers in the third, after any legacy that may have been bequeathed or debt (contracted) not injuring (the heirs by willing away more than a third of the heritage) hath been paid. A commandment from Allah. Allah is Knower, Indulgent.

13. These are the limits (imposed by) Allah. Whoso obeyeth Allah and His messenger, He will make him enter Gardens underneath which rivers flow, where such will dwell for ever. That will be the great success.

14. And whoso disobeyeth Allah and His messenger and tansgresseth His limits, He will make him enter Fire, where he will dwell for ever; his will be a shameful doom.[21]

Ayat 33 of Surah An-Nisa states that:

And unto each We have appointed heirs of that which parents and near kindred leave; and as for those with whom your right hands have made a covenant, give

[21] *Ibid*., 50-52.

> them their due. Lo! Allah is ever Witness over all things.[22]

Ayat 176 of Surah An-Nisa states that:

> They ask thee for a pronouncement. Say: Allah hath pronounced for you concerning distant kindred. If a man die childless and he have a sister, hers is half the heritage, and he would have inherited from her had she died childless. And if there be two sisters, then theirs are two-thirds of the heritage, and if they be brethren, men and women, unto the male is the equivalent of the share of two females. Allah expoundeth unto you, so that ye err not. Allah is Knower of all things.'[23]

These verses do not exclude grandchildren from the category of near relatives or children and, therefore, they can inherent from their grandparents in case their parents die.

In the second Surah Al-Baqarah, Ayat 180, the word وَٱلۡأَقۡرَبِينَ *(Wal-Aqrabeena)*; and in the fourth Surah An-Nisa, Ayat 7, word وَٱلۡأَقۡرَبُونَ *(Wal-Aqraboona)*, and in Ayat 33: وَٱلۡأَقۡرَبُونَ *(Wal-Aqraboona)* have been used, which means near relatives, and were derived from the word أقرب *(aqrab)*.[24] In the fourth Surah An-Nisa, Ayat 8, ٱلۡقُرۡبَىٰ (*Al-Qurba*) is used to describe near relatives, derived from the word قرب *(qurb)*, which means nearness and closeness.[25]

In the fourth Surah An-Nisa, Ayat 9, word ذُرِّيَّةً (*Zuriyatan)* has been used, derived from the Arabic word ذرية *(durriya)*,

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22 *Ibid*., 54.
23 *Ibid*., 68.
24 J. M. Cowan, ed., *The Hans Wehr Dictionary of Modern Written Arabic*, 4th ed. (Wiesbaden: Harrassowitz, 1979), 884.
25 *Ibid*., 883.

which means progeny, descendants, children and offspring.[26] In the fourth Surah An-Nisa, Ayat 11: وَأَبْنَآؤُكُمْ *(Wa-ab-Naaukum),* is used to describe children, derived from the word ابن *(ibn)* and أبناء *(abna),* which mean descendant, scion, offspring and son.[27]

In the fourth Surah An-Nisa, Ayat 12 أَخٌ *(Aa-Khun),* which means brother, derived from أخ *(ak)* meaning brother;[28] and أُخْتٌ *(Ukh-tun),* which means sister, derived from أخت which means sister.[29]

The Quranic words used for near relatives and children do not exclude grandchildren from inheriting from their grandparents in case their parents die, and while sister and brother have been specifically mentioned in Surah An-Nisa regarding their inheritance rights, grandchildren have not been expressly mentioned and excluded from the category of near relatives or/and offspring.

Permanent relations beyond death

The Surah An-Nisa Ayat 23,[30] forbade a Muslim to marry his daughter in law, when his son dies. It says:

> Forbidden unto you are your mothers, and your daughters, and your sisters, and your father's sister, and your mother's sisters, and your brother's daughters and your sister's daughters, and your foster-mothers, and your foster sisters, and your mother-in-law, and your step-daughters who are under your protection (born) of your women unto whom ye have gone in—but if ye have not gone in unto them, then it is no sin for you (to marry their daughters)—and the wives of your sons who (spring) from your loins. And (it is forbidden unto you) that ye should have two sisters together, except

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26 *Ibid*., 356.
27 *Ibid*., 92.
28 *Ibid*., 11.
29 *Ibid*.
30 Muhammad Marmaduke Pickthall, *op.cit.*, 52-53.

> what hath already happened (of that nature) in the past. Lo! Allah is ever Forgiving, Merciful.[31]

Certain relations continue even after death, and if the relations do not change after death, then it is not possible that the laws of inheriting prescribed Quranic shares would change without any express command in the Holy Quran, as Surah An-Nisa Ayat 23, expressly forbade marrying two sisters, but after the death of one sister, it is permitted to marry another sister. Therefore, relations which are not subject to change after death, the laws of inheritance surrounding them can also not change.

Various Hadiths on this issue

Hadiths or sayings by Prophet Muhammad (may peace be upon him) also do not exclude grandchildren from near relatives or offspring. In Sahih Bukhari, Hadith 724, Volume. VIII, states:

> Give the Faraid (the shares of the inheritance that are prescribed in the Quran) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relatives of the deceased.[32]

Sahih Bukhari, Volume. VIII, states:

> Grandchildren are to be considered as one's children (in the distribution of inheritance) in case none of one's own children are still alive: A grandson as a son, and granddaughter as a daughter, and they (grandsons and granddaughters) inherit (their grandparents' property) as their own parents would (were they alive, and they prevent the sharing of the inheritance with all those relatives who would have been prevented from the same, were their parents alive. So one's grandchild does not share the inheritance with one's own son (if the son is alive).[33]

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31 *Ibid*.

32 Dr. Muhammad Muhsin Khan, *The Translation of the Meaning of Sahih Al-Bukhari: Arabic-English*, vol. VIII (Lahore: Kazi Publications, 6th ed., 1983), 477.

33 *Ibid*., 479.

Sahih Muslim, Volume 4:

> Give the shares of inheritance to those who are entitled to them, and whatever is left of inheritance, then it is for the closest male relatives.[34]

Thus, Hadiths do not exclude predeceased children from inheriting from their grandparents. The Commission stated:

> It was admitted by all the members of the Commission that there is no sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a predeceased son or daughter could be excluded from inheriting property from their grandfather.[35]

Tracing the origins

Excluding predeceased children from inheriting from their grandparents was implemented through Ijtihad, and not the primary sources. This practice was found in pre-Islamic Arabia, or the period of *Jāhiliyyah*, or 'the Age of Ignorance'.[36] The book *Mufaṣṣal fī tārīkh al-'Arab qabla al-Islām*,[37] by Jawād Ali, deals with Pre-Islamic Arab tribal society.

Under pre-Islamic Arab customs, when a member of one tribe killed someone from another tribe, whether intentional or not, deceased's heirs or the tribal chief would demand the offender for execution, however, the matter might be compounded by paying fine or compensation.[38] In case both tribes enjoyed cordial relations, and the accused denied the charges, then the matter would be resolved after fellow tribesmen took oath for his

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34 Imam Abul Hussain Muslim bin al-Hajjaj, (ed. and ref.) Hâfiz Abu Tâhir Zubair 'Au Za'i,(trans.)Nasiruddin al-Khattab, (ed.) Huda Khattab, *Sahih Muslim Volume 4: Ahadith 3398-4518* (Riyadh: Darussalam, 2007), 339-340.

35 'Report of the Commission on Marriage and Family Laws 1956', *op.cit*., 1222-23.

36 The Editors of Encyclopaedia, 'Jāhiliyyah', *Encyclopedia Britannica*, 14 February 2020, https://www.britannica.com/topic/jahiliyah

37 Jawad Ali, *Al-Mufassal Fī Tārīkh Al-'arab Qabla Al-Islām* (Beirat: Dar al ilm lil Malayin, 1968), https://www.arabicbookshop.net/mufassal-fi-tarikh-al-arab-qabla-al-islam/77-267

38 Sir Abdur Rahim, *Muhammadan Jurisprudence* (Lahore: Mansoor Book House, 1983), 3.

innocence.[39] During that period, a tribe would take care of an individual and excluding predeceased orphaned grandchildren might not have harmed them, which is not possible today. The Commission found:

> It appears that during (زمانہ جاہلیت) this custom prevailed amongst the Arabs, and the same custom has been made the basis of the exclusion of deceased children's children from inheriting property of their grandfather.[40]

The Commission also stated:

> It was stated by Maulana Ehteshamul Haq that all the four Imams are agreed that the son of a predeceased son or daughter shall be excluded from inheritance. The Maulana Sahib was not prepared to re-open this question in view of the unanimous opinion of all the Imams. The views of the Maulana Sahib would be elaborated by him in his note of dissent.[41]

This dissent fails to acknowledge that any Imam's opinion cannot clash with the Quranic injunctions. Ijtihad's legal effect is the probability of the conclusion so arrived at being correct, but all Sunni schools agree that there is a possibility of it being erroneous.[42]

Even Taqlid, meaning following a religious leader without due inquiry,[43] cannot obstruct the substantial justice nor the progress of laws for the modern society's requirements, because Imam Abu Hanifa and his disciples agreed upon only a few questions, and they or the later jurists of recognised authority, the last of whom lived in the fourteenth century, could not have anticipated every question which presently arise under various circumstances, and the scholars who collected and examined the

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39 *Ibid*.

40 'Report of the Commission on Marriage and Family Laws 1956,' *op.cit*., 1222-23.

41 *Ibid*.

42 Sir Abdur Rahim, *op.cit*., 143.

43 Thomas Patrick Hughes, *A Dictionary of Islam* (Delhi: Rupa & Co, 1993), 628.

ancient jurists' works disagree among themselves on various conflicting versions.[44]

In *Allah Rakha v. Federation of Pakistan,* the FSC, however, declared section 4 of MFLO being repugnant to the Islamic injunctions and directed the President of Pakistan to bring it in conformity with Islam.[45] The judgment arbitrarily discarded the Commission's report, and failed to address the question asking under which Quranic verse, the grandchild was excluded. On one hand, the verdict relies upon the consensus of Imams, but then states that no one should question the wisdom of Allah Almighty. This contradictory stance fails to resolve this issue.

It was previously held that FSC cannot make any declaration regarding Muslim Personal Law, as this falls under the Council of Islamic Ideology's (CII) mandate. It was held in *Federation of Pakistan v. Mst. Farishta,*[46] that:

> This should not cause any stir, because, there are other laws also like laws of procedure of a tribunal or Courts, fiscal laws, banking laws, taxation laws and insurance laws etc. which have been kept outside the jurisdiction of Shariat Courts. Merely, because jurisdiction has not been given to such Courts to examine their validity, it does not mean, that they become 'Muslim Personal Laws' of Muslims in their Divine sense, and all that it means is, that to remedy them, it will be the Council of Islamic Ideology which will deliver the goods in their own way, and not the Shariat Courts.[47]

It was further held that:

> Section 4 of the Mush Family Laws Ordinance VIII of 1961 being in that sense a part of the law applicable to Muslims and in that context being 'Muslim Personal Law', its scrutiny is outside the jurisdiction of the

44 Sir Abdur Rahim, *op.cit*., 162.
45 PLD 2000 Federal Shariat Court 1.
46 PLD 1981 Supreme Court 120 [Shariat Bench].
47 *Ibid*.

> Shariat Courts and finding of the High Court to the contrary is not correct.[48]

Similarly, it was held in *Mst. Kaneez Fatima v. Wali Muhammad and another*[49] that the jurisdiction of the FSC and the Shariat Appellate Bench of the Supreme Court does not extend to the Family Laws, nor the Constitution of the Islamic Republic of Pakistan, 1973.[50] In *Dr. Mahmood-ur-Rahman Faisal v. Government of Pakistan through Secretary, Ministry of Justice, Law and Parliamentary Affairs, Islamabad*,[51] it was decided that the Islamization of laws kept the personal law of each Muslim sect outside the scope of scrutiny of FSC under article 203-D of the Constitution.[52]

The honourable FSC, bulldozed these precedents and encroached the jurisdiction by holding:

> 10. Against the abovementioned decision of this Court appeal was taken to the Shariat Appellate Bench of the Supreme Court of Pakistan. The Shariat Appellate Bench of the Supreme Court of Pakistan decided the appeal on 13th of June, 1993, in the case titled 'Dr. Mahmood ur Rehman Faisal v. Government of Pakistan' reported as PLD 1994 SC 607. Hon'ble Shariat Appellate Bench of Supreme Court of Pakistan differed with the earlier view of the Shariat Bench of Supreme Court of Pakistan in Mst. Farishta's case (PLD 1981 SC 120) and held that only by reasons of being a codified or statute law and applicable exclusively to the Muslim population of the country, a law would not fall in the category of 'Muslim Personal Law' unless it is also shown to be the personal law of a particular sect of Muslims based on the interpretation of Holy Qur'an and Sunnah by that sect and therefore, the Zakat and Ushr Ordinance was not outside the scope of scrutiny of the

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48 *Ibid.*
49 PLD 1993 Supreme Court 901.
50 *Ibid.*
51 PLD 1994 Supreme Court 607.
52 *Ibid.*

> Federal Shariat Court under Article 203 D of the Constitution.
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> 11. In the wake of the aforementioned judgment of the Hon'ble Shariat Appellate Bench of the Supreme Court of Pakistan holding that codified/statute laws applicable to the general population of the Muslims are open to question before the Federal Shariat Court for examination as to whether the said law are violative of the Injunctions of Islam or not the petitions under consideration as detailed in the opening para. of this judgment were filed before this Court questioning sections 4, 5, 6 and 7 of the Ordinance as being violative of the Injunctions of Islam.[53]

Thus, the jurisdiction exercised by the FSC is questionable along with its verdict of section 4 of MFLO being repugnant to Islam, especially because article 203-B(c) of the Constitution explicitly and expressly bars FSC from examining and deciding questions pertaining to Muslim Personal Law. The section itself has a wider scope and tremendous importance with respect to other related matters.

Other matters related to the Section 4 of MFLO

The rights of orphaned grandchildren

The Ijtihad of excluding predeceased children directly clashes with the Quranic verses on the orphans' rights as it deprives an orphaned grandchild. Surah An-Nisa, Ayat 6 to 10, on this issue was discussed above. Surah Al-Baqrah, Ayat 220 states:

> Upon the world and the Hereafter. And they question thee concerning orphans. Say: To improve their lot is best. And if ye mingle your affairs with theirs, then (they are) your brothers. Allah knoweth him who spoileth from him who improveth. Had Allah willed He could have overburdened you. Allah is Mighty, Wise.[54]

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53 PLD 2000 Federal Shariat Court 1.

54 Muhammad Marmaduke Pickthall, *op.cit.*, 21.

The sixth Surah Al-Anam, Ayat 152 states:

> And approach not the wealth of the orphan save with that which is better, till he reach maturity. Give full measure and full weight, in justice. We task not any soul beyond its scope. And if ye give your word, do justice thereunto, even though it be (against) a kinsman; and fulfil the covenant of Allah. This He commandeth you that haply ye may remember.[55]

The eighth Surah Al-Anfal, Ayat 41 states that:

> And know that whatever ye take as spoils of war, lo! A fifth thereof is for Allah, and for the messenger and for the kinsman (who hath need) and orphans and the needy and the wayfarer, if ye believe in Allah and that which We revealed unto Our slave on the Day of Discrimination, the day when the two armies met. And Allah is Able to do all things.[56]

The seventeenth Surah Bani Israel, Ayat 34 expressly deals with the property rights of orphans, and states:

> Come not near the wealth of the orphans save with that which is better till he come to strength; and keep the covenant. Lo! of the covenant it will be asked.[57]

The fifty-ninth Surah Al-Hashr, Ayat 7 states:

> That which Allah giveth as spoil unto His messenger from the people of the townships, it is for Allah and His messenger and for the near of kin and the orphans and the needy and the wayfarer. That it become not a commodity between the rich among you. And whatsoever he forbiddeth, abstain (from it). And keep your duty to Allah. Lo! Allah is stern in reprisal.[58]

The seventy-sixth Surah Al-Insan, Ayat 8 states:

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55 *Ibid*., 98.
56 *Ibid*., 120.
57 *Ibid*., 192.
58 *Ibid*., 384-85.

> And feed with food the needy wretch, the orphan and the prisoner, for love of Him.[59]

The eighty-ninth Surah Al-Fajar, Ayat 14-21 also deals with inheritance and orphans, and states:

> 16. But whenever He trieth him by straitening his means of life, he saith: My Lord despieth me.
> 17. Nay, but ye (for your part) honour not the orphan.
> 18. And urge not on feeding of the poor
> 19. And ye devour heritage with devouring greed
> 20. And love wealth with abounding love.[60]

The ninetieth Surah Al-Balad, Ayat 12-16, states that:

> 12. Ah, what will convey unto thee what the Ascent is!—
> 13. (It is) to free a slave,
> 14. And to feed in the day of hunger
> 15. An orphan near of kin,
> 16. Or some poor wretch in misery'[61]

The ninety-third Surah Al-Duha; Ayat 5 to 11 states that:

> 5. And verily thy Lord will give unto thee so that thou wilt be content.
> 6. Did He not find thee an orphan and protect (thee)?
> 7. Did He not find thee wandering and direct (thee)?
> 8. Did He not find thee destitute and enrich (thee)?
> 9. Therefore the orphan oppress not,
> 10. Therefore the beggar drive not away,
> 11. Therefore of the bounty of thy Lord be thy discourse.[62]

The one hundred and seventh Surah Al-Maun, Ayat 1-2.

> 1. Hast thou observed him who belieth religion?
> 2. That is he who repelleth the orphan,[63]

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59 *Ibid*., 413.
60 *Ibid*., 427-28.
61 *Ibid*., 428.
62 *Ibid*., 431.

The Commission also recognised the rights of orphaned grandchildren and stated:

> There are numerous injunctions in the Holy Qur'an expressing great solicitude for the protection and welfare of the orphans and their property. Any law depriving children of a predeceased son from inheriting the property of their grandfather would go entirely against the spirit of the Holy Qur'an.
>
> It has been suggested in some of the replies that the grandfather can, by will, leave one third of his property to his grandchildren. This provision does not do full justice to the orphans as is evident from the example given above. We, therefore, recommend that legislation should be undertaken to do justice to the orphans in respect of the property of their grandfathers.[64]

The utility of section 4 of MFLO in protecting the rights of orphaned grandchildren is ordained in the Holy Quran. In fact, the nature of grandfather's relation is of utmost importance in Muslim Personal Law. He is a legal guardian of the property of the child under section 359 of MML,[65] making it absurd because while he can make decisions about the property of the minor child, but the said child cannot inherent from his property, making that child destitute. Both, the son and father of a killed deceased can claim Qisas and Diyat. The grandfather cannot marry his daughter in law after his son dies, as per Surah An-Nisa Ayat 23,[66] and section 261 of MML,[67] because these relations continue even after death, and so must the property rights attached with these relations. Similarly, after father, the grandfather is the guardian in cases pertaining to marriages under section 271 MML.[68] Also, the grandfather can

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63 *Ibid*., 438.

64 Report of the Commission on Marriage and Family Laws 1956', *op.cit*., 1222-23.

65 Mulla Dinshah Fardunji, *op.cit*., 742.

66 Muhammad Marmaduke Pickthall, *op.cit*., 52-53.

67 Mulla Dinshah Fardunji, *op.cit*., 582.

68 *Ibid*., 592.

inherent from his grandson then the grandson should also inherent from his grandfather.

The grandparents can transfer their property to their grandchildren through gift or will, and section 4 of MFLO serves the same purpose by allowing the grandparents to transfer the share of their grandchildren to them from their property, in case the parents of the said grandchildren unfortunately untimely die. Through will and gift, the grandchild is shown pity, but section 4 of MFLO, protects the right to inherent property with dignity, which is in accordance with the Quranic injunction.

Section 4 of MFLO also does not negate the parentage of the predeceased child which is the essential ingredient to inherent as a legal heir. They are inheriting from their grandparents being their legal heirs by blood, and would otherwise be competent to inherent if not for the untimely death of their parents, unlike in the case of adoption which is not recognised as a mode of filiation under section 347 of MML,[69] nor illegitimate child under section 114 of MML.[70] However, under section 338 of MML,[71] a child born because of Zina (adultery) is recognised as a child of his/her mother and inherits from her and her relations.

The case of the great-grandchildren

The scope of section 4 of MFLO was put to test in *Hassan Aziz and others v. Meraj ud Din and others*[72] which dealt with the issue of the great-grandchildren. The honourable Supreme Court of Pakistan (SCP) held that:

> Read as a whole, the purpose and intent behind section 4 is clear. The exception created by it is limited and circumscribed. It applies only to those grandchildren as are living at the time of the death of the propositus. An extended meaning cannot be given to the section in terms as urged by the learned counsel for the leave petitioner. They, being the great grandchildren, did not

69 *Ibid*., 722.
70 *Ibid*., 266.
71 *Ibid*., 709.
72 2022 SCMR 1131.

> have any share in the property left behind by the propositus on the basis of section 4.[73]

This judgment is silent about why the great-grandchildren were excluded by the court when in the Holy Quran, the words near relatives and offspring are used in the matters pertaining to inheritance. Secondly, the court instead of treating section 4 of MFLO as a rule for not violating any Quranic verse or authoritative Hadith, it wrongly treated it as an exception. Third, the judgment is silent on the rights of orphans and failed to provide any logical reasoning for making an orphaned great-grandchild destitute.

The rules of interpretation require internal and external aids, to determine the intent of the legislature behind any enactment, which was available to the honourable SCP in the present matter in form of the report of the Commission which has accepted the right of orphaned grandchildren to inherit from their grandparents, which should have been extended to the orphaned great-grandchildren, but the same was not referred, and instead deprived the orphaned great-grandchild arbitrarily and unjustly by a flawed interpretation.

The case of the childless widow

A widow from both, Sunni and Shia schools, is denied the protection of section 4 MFLO as it only mentions grandchildren. It was held in *Haji Muhammad Hanif v. Muhammad Ibrahim and others*,[74] that this section entitled the son of the deceased and not his widow.

A childless widow belonging to Shia school, however, is not entitled to her prescribed share of inheritance in the immovable estate of her deceased husband in ordinary circumstances and this remained unchallenged for presumably being backed by religious precepts.[75] Section 113 of MML states that under Shia law of inheritance, a childless widow takes no share in her husband's lands, except for 1/4th share in the value of trees and buildings

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73 *Ibid*.

74 2005 MLD 1.

75 Hamid Khan. *The Islamic Law of Inheritance*, 2nd edition (Karachi: Oxford University Press, 2021), 66.

standing thereon, or in his movable property including debts due to him.[76] Under section 51 of the MML, there is no distinction between movable and immovable property, or between ancestral and self-acquired property under the Islamic law of inheritance.[77] SCP held in *Syed Muhammad Munir v. Abu Nasar, Member (Judicial) Board of Revenue*:

> In view of this difference in the interpretation of the Quranic text itself, we feel that it would not be proper on our part at this stage to attempt to put our own construction in opposition to the express ruling of commentators of such great antiquity and high authority. To depart from a rule of succession which the Shia community has universally been following ever since the days of Imam Jafar Sadek, as evidenced by the unanimous opinions of the Shia jurists on this point, would be wrong. It is not open to us to change a settled rule of succession, having the force of Ijma behind it at this stage. If a change is desired to be made this work should be undertaken by the Legislature itself after consulting the Shia Community. We can only point out that the Urdu translation given by Allama Mufti Syed Tyeb Agha Musavi Jazairi does not tally with the English translation given by S. V. Mir Ahmed Ali, another eminent Shia scholar.[78]

The Lahore High Court, however, took a strong stance on this issue in *Khalida Shamim Akhtar v. Ghulam Jaffar and another*, and held:

> According to Para-113 of Muhammadan Law by D.F. Mulla, a childless widow takes no share in her husband's lands, but she is entitled to her one-fourth share in the value of trees and buildings standing thereon, as well as in his movable property including debts due to him though they may be secured by a usufructuary mortgage or otherwise.

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76 Mulla Dinshah Fardunji, *op.cit*., 265.
77 *Ibid*., 97.
78 PLD 1972 Supreme Court 346.

> This Para is in complete negation of Ayat No.12 of Sura Al-Nisa, whereby a childless widow is entitled to 1/4th share from the leftover estate of her husband. The legislation has not declared Muhammadan Law as codified one.
>
> In 'Kitab-e-Meeras' Volum-3, Chapter-9 by Allama Syed Iftikhar Hussain Naqvi Najafi, even a childless widow of Fiqa-e-Jafariya, is held entitled to inherit 1/4th share from the leftover estate of her deceased husband and while appearing before this Court, he has reiterated his such version as taken in the referred book and submitted that, Ahl-e-Tashih or Fiqa-e-Jafariya are first Muslims and cannot think of a different thinking, as have been settled by Holy Qur'an. Ayat No.12 of Sura Al-Nisa, has been referred by Allama Syed Iftikhar Hussain Naqvi Najafi, in support of his such version.[79]

The court rightly relied upon the Ayat 12 of Surah An-Nisa which protects the rights of a widow and further held:

> The question of competence of a childless widow from Fiqa-e-Jafariya has not yet been adjudicated upon by the Judiciary and unless the Legislature, by performing its duty, legislate any codified law in this respect, it is declared that even a childless widow from Fiqa-e-Jafariya would be entitled to claim 1/4th share from the leftover estate of her husband.[80]

The judgment highlighted that the Government would legislate to protect the rights of childless widows following Shia school, in getting their due shares from the inheritance of their deceased husbands.[81]

Amendment was introduced in 2021, to section 4 of MFLO,[82] to protect a widow from Shia school, however, it does

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79 PLD 2016 Lahore 865.

80 *Ibid*.

81 *Ibid*.

82 Muslim Family Laws (Amendment) Act, 2021, https://na.gov.pk/uploads/documents/61aa1a64156b5_131.pdf

not apply upon a widow from Sunni school. Section 4(2) states that when a Muslim male from Ahl-e-Teshih dies, his widow shall have share in his immovable property left behind by him, and that her share will be 1/4th, if there is no child left behind the deceased husband; and 1/8th, if there is a child left behind.[83]

Section 4(3) of MFLO, states that if there are two or more widows, the share under section 4(2) of MFLO shall be divided equally among them.[84] Section 4(5) makes a widow entitled to her share in the movable property of her deceased husband.[85] Section 4(6) of MFLO states that Fiqah-e-Jafri recognises the right of a husband to get his share from the property left by his deceased wife, either movable or immovable, 1/2nd share, if there is no child left behind; and 1/4th share of property, if there is a child left behind.[86]

The judgment of the honourable SCP in *Noor Bibi v. Ghulam Qamar*[87] upheld section 113 of MML, and also stated that even if a widow has given birth to a child out of her wedlock with the propositus, and the said child dies before the death of the said propositus, that widow would then not be entitled to inherit the immovable property of the propositus for being a childless widow under Shia law.

The honourable SCP has erred by ignoring the difference between the child born dead and the child born healthy but immediately died afterwards. The Book XXI of Evidence in Charles Hamilton's the *Hidaya* (or Guide), states that if a child dies immediately on birth, without making a noise, the child is then considered in law to have been brought forth dead, and that child neither succeeds to a portion of the father's estate, nor are funeral prayers read over it, however, if the child makes the smallest noise, then that child is held to die possessed of his/her portion, and funeral prayers are read over that child.[88] Thus, if a person dies, leaving his wife pregnant, then the division of his estate is suspended till the birth of the child, but if it is proved to be a dead

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83 Mumtaz Faridi, *op.cit*., 4.
84 *Ibid*.
85 *Ibid*.
86 *Ibid*.
87 2016 SCMR 1195.
88 Charles Hamilton, *The Hedaya or Guide: A Commentary on the Mussulman Laws* (Lahore: Premier Book House, 1982), 355.

child, that is, one that appeared dead immediately at the birth and made no noise, the estate is divided as if no such child was born, but if the noise was made, then that child's share is allotted and divided amongst its heirs.[89]

The 2021 amendment of section 4 of MFLO has enabled a widow under Shia Islamic law, whether childless or not, to inherent moveable and immovable property from her deceased husband's property, as per her prescribed share.

The issue of Taqlid

Pakistani Muslims often follow the opinions of religious scholars and voluntarily surrender their shares, and oppose section 4 of MFLO being un-Islamic. The 2021 amendment deals with this issue as section 4(7) of MFLO states that in case of dispute, the parties may approach a court of competent jurisdiction or the Mujtahid-e-Alam (juris-consult) from the panel maintained by the CII, and that the decision of Mujtahid-e-Alam has the status of an award which shall be dealt under the provisions of the Arbitration Act, 1940.[90]

The 2021 amendment recognises the role of Taqlid and Mujtahid along with the court, but with some restrictions, such as the name of the said Mujtahid-e-Alam has to be included in a panel approved by the CII, and his decision will be governed by the provisions of the Arbitration Act, 1940, and therefore, implemented through the process of the rule of court. Article 230 of the Constitution,[91] deals with CII's functions, but does not mention about maintaining such a panel, because by preventing someone to follow any religious leader or Imam can create a controversy, which the courts should avoid. Traditionally, the Shia Muslims of Indian subcontinent followed the Shia Mujtahid-e-Azam-e-Iraq or the highest Shia Mujtahid of Iraq, but afterwards they also adhered to the religious authority of the Iranian Mujtahid, and therefore, remained divided.[92]

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89 *Ibid*.

90 Mumtaz Faridi, *op.cit*., 4.

91 The Constitution of the Islamic Republic of Pakistan, 1973, https://www.pakistani.org/pakistan/constitution/part9.html

92 Nadeem Hasnain (ed.), *Islam and Muslim Communities in South Asia* (New Delhi: Serials Publications, 2006), 147.

Section 34 of MML states that courts, in administrating Islamic law, should not, as a rule, attempt to put their own construction on the Quran in opposition to the express ruling of Muslim commentators of great antiquity and high authority.[93] However, section 38 of MML empowers courts to apply the rules of equity, stating that the rules of equity, commonly recognised in Courts of Equity in England, are not foreign to the Islamic system, and often invoked in the adjudication of cases, because Islam does not believe in creation of privileged classes rather in equity before law of ruler and governed alike.[94] This enhances the scope of courts, empowering them to protect the property rights of predeceased children and a childless widow in accordance with the primary sources of Islam.

The way forward

The judiciary's reluctance, especially FSC, to simply implement the Islamic law as per primary sources, specifically the Holy Quran, pose a serious challenge, as Muslims prefer to follow the religious scholars of their particular school instead of the law of the land. The second challenge is for Muslims of Pakistan to accept the law of the land over the opinions of religious scholars, especially with respect to the property rights of the predeceased child, as there is no clash between the law of the land, that is, section 4 of MFLO, and the primary sources of Islamic law, because the right of the predeceased child to inherent from his/her grandparents after his/her parents have passed away is recognised under Islam. The report of the Commission on Marriage and Family Laws should be treated as a modern-day Ijtihad which is in accordance with the Holy Quran and Hadith. Opinion of any religious scholar under the doctrine of Ijtihad or Taqlid cannot be allowed to clash and override the Quranic injunctions in this regard. The judiciary, legislation, executive, and even a common Muslim should play their role in the protection of the rights of the orphaned grandchild, a childless widow or any vulnerable Muslim.

93 Mulla Dinshah Fardunji, *op.cit*., 65.
94 *Ibid*., 69.