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Question of Inheritance: Modern Legal Framework, Constitution and Islamic Philosophy

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Executive Summary

Issue

The legal obsession with literal interpretation of numeric ruling in relation to the matters of *Mu`amalat* is a matter of substantial debates especially in cases of 2:1 ruling of inheritance for female children. There are no *prima facie* judicial techniques sanctioned in the Quran to interpret numerical revelations. Consequently, the question that arises that if the explicit prohibitions can be rationalized to prohibit other matters through *Qiyas*, then why rationalization can't be applied to understand the meaning of *Mufassad*?

Recommendations

- Islamic Council of Ideology and Ministry of Religious Affairs need to produce a detailed policy paper which shall act as soft law to clarify the dissonance stemming from the ideological clashes in society.
- The use of the judicial approaches towards *Mu`amalat* in Islamic text needs to be outlined especially if the Quranic ruling is *Mufassad*.
- Application of judicial techniques such as *Maslaha* and *Hilah* on *Mufassad* needs clarity in Pakistan.
- Modern Islamic jurisprudence from texts such as *Hidaya* which British judges applied law needs to be re – considered.
- Systematic filtering of the ancient Arabic culture from the Islamic textual ruling while using the supreme benevolent essence of those rulings to frame laws which neutralize the barbarity of Western interest based economics and rigidity of the social taboos in Pakistan.
- Federal and Provincial Governments need to amend their laws accordingly which shall reflect the structure of society and aspirations which is *raison d`etre* for finesse in any aspect of Pakistan.
- A separate legislation shall be required to outline the rights of inheritance of women and the position of the government on that matter which shall be reflective of current Islamic thought in Pakistan.

Overview

In the 7th Century Arabia, Islam dawned on the face of the Earth. In an utter break from Arabic history, it explicitly provided women the right to own and to inherit property from their ancestors. In this context, the Holy Quran provided half of the share in inheritance to female children in relation to the male children and gave a '2:1 ruling' on inheritance.¹ This share was a huge amount considering the social and economic context of 7th Century Arabia. However, as the societies progressively evolved, the women`s half share in inheritance became a contentious issue in the Muslim world. This revolutionary right slowly became an archaic idea especially with the carving of the nation-states in the post-colonial world of the 20th Century. Unlike many legal questions in Islamic law, the women`s equal share in inheritance was not discussed in most Islamic countries. The reason was its clash with the cardinal rule of the traditional Islamic legal system that *Mufassad* cannot be overruled. Classical Islamic legal thinkers generally answered in absolute negation for any contemporary interpretation of *Mufassad* and stated that *Ta`awil* is inapplicable in these cases.² In contrast, modernist Muslim scholars answered this question with mixed responses. Some of these scholars attempted to rationalize this unequal division while others interpreted it in the light of the Arabic culture. To understand this issue, it is necessary to divulge into the views of the Islamic scholars on this issue. The brief shall ascertain that whether any legal space either in the classical or modern interpretation of Islamic law is present which may allow equal inheritance for both the genders?

Analysis

I) Classical Islamic Techniques

Classical Islamic law developed various techniques for the interpretation of Islamic text. Some of the important techniques included *Qiyas* and *Istihsan*.³ These techniques provided many innovative solutions to novel questions. However, the

¹ Al Quran: 4: 11.

² M.H Kamali, *Principles of Islamic Jurisprudence* (first published 1989, Islamic Texts Society 2005) 94.

³ M.H Kamali, *Principles of Islamic Jurisprudence* (first published 1989, Islamic Texts Society 2005) 181, 220.

established rules of Islamic law made these techniques directly dependent upon the presence of a ruling in Islamic text. The 2:1 ruling in the Quran was extremely clear and specific. Therefore, the judicial techniques developed in classical Islamic legal structures were simply inapplicable in this specific case. As an alternative, some scholars attempted to rationalize the 2:1 ruling. One of these scholars is Mustafa Khan who examined the 2:1 ruling in the light of different burdens placed on men and women. In his opinion, “the inequality of women in the share of inheritance is matched by the corresponding increase in the economic burden of men, which makes the two sexes equal in respect of their economic rights.”⁴

This approach is probably the most publicized globally in general perception of 2:1 rulings. It was evident via a personal correspondence with a Swiss female convert to Islam. She viewed fairness as a basic principle but agreed with the precept that the burden of maintaining wife makes it a natural corollary that half share must be accorded in inheritance to women. Moreover, in her perception of Islam, the Quran’s words cannot be changed.⁵ Saad-ul-Buti also takes this restrictive view of the 2:1 ruling and states that “notions of the good contradicting the Quran and Sunnah cannot be made law at the pleasure of changing human ideas of pleasure and good.”⁶ He rejects the modernist notion and considers it as a product of an excessive obsession with utilitarianism in Western civilization. Madudi modifies Buti’s assertion and states that Islamic inheritance law should be within the Quran as Allah has left nothing in the Holy Quran.

Maslaha is a classical legal technique which is generally presumed to be applied in the cases of such nature. Different models of interpretation emerged with time in relation to the interpretation of this specific technique. Ghazali proposes one of these models. He states that the overruling of Quranic norms is only allowed when it is certain that not overruling it would threaten the whole Muslim community in the essential elements of religion, life, intellect, offspring, and property. Therefore,

⁴ M. Mustafa Khan, ‘Islamic law of Inheritance a New Approach’, (first published 1989, Kitab Bhava) 216.

⁵ Muhammad Shahzeb Usman, Interview with Cindy Hammed, ‘Electronic Communication via internet’.

⁶ Chaudary Zainab, ‘The myth of misogyny: a reanalysis of women's inheritance in Islamic law’ (1997) LexisNexis

overruling must not be merely on the necessity or improvement.⁷ Tufi observes that there is supremacy of *Maslaha* in the law-finding process. However, this supremacy is not applicable to the acts of worship and *Maslaha* should neither overrule fixed textual injunctions nor a 'specific indicant' from the Qur'an, Sunnah or consensus.⁸ As opposed to Ghazali and Tufi, Shatibi takes a liberal approach and argues that Meccan Surahs provides the universal sources of the law while the Medinan Surahs constitute the particulars of the law. Therefore, universal sources of law should be immutable whereas the particulars of the Islamic law should be probable.⁹

II) Modernist Islamic Techniques

In contrast, the modernist and contemporary legal thinkers overwhelmingly abandon the traditional judicial techniques while approaching the 2:1 ruling. Tunisian scholar Haddad and Indonesian scholar Sjadzali argue that religion is 'innocent' of any negative judgment on women.¹⁰ Therefore, any injustice committed to 'any interpretation of Islamic religion' is *prima facie* wrong as it is against the basic nature of Islam.¹¹ Thus, these scholars do not venture to search for any legal justification within the Islamic legal text. They also do not attempt to use *Hilah* or other classical legal techniques. This approach is especially important as this perspective implicitly considers that Islamic legal texts could be contingent on contemporary standards. David Power contextualizes the 2:1 ruling and asserts that the advent of Islam corresponded with the era in which the Arabic society was slowly shifting towards the concept of a nuclear family. Therefore, the Quran added a number of heirs that were previously excluded from the right to inheritance. After the Prophet's (P.B.U.H) lifetime, the tribal patriarchal culture re-asserted itself and dominated the interpretation

⁷ Felicitas Opwis, 'Maslaha in Contemporary Islamic Legal Theory' (2005), 12 *Islamic Law and Society* 182, 193.

⁸ Felicitas Opwis, 'Maslaha in Contemporary Islamic Legal Theory' (2005), 12 *Islamic Law and Society* 182, 195.

⁹ Felicitas Opwis, 'Maslaha in Contemporary Islamic Legal Theory' (2005), 12 *Islamic Law and Society* 182, 196.

¹⁰ Amel Grami, "Gender Equality in Tunisia", (2008) 35 *British Journal of Middle Eastern Studies*, 349, 350.

¹¹ Sugiri Permana, 'Implications of Hazairin and Munawir Sjadzali; Thoughts in Establishment of Islamic Inheritance in Indonesia', 18 *AHKAM Jurnal Ilmu Syariah* 376, 384.

style and techniques on the matter of inheritance.¹² This interpretation reproduced for over a millennium and the status-quo maintained until the contemporary times in which the nuclear family system has re-established itself sufficiently in many Muslim nations such as Tunisia.

Hence, with the advent of nuclear family complemented with the access of women to the workplace, the 2:1 ruling is deprived of its rationality and subsequently any implementation. Hassan Mahmud supports this argument and also breaks away from the traditional legal discourse stating that when a particular situation changes, the Quranic provisions can change accordingly.¹³ Rashid Rida provides an interesting and unique insight on 2:1 ruling and maintains that a distinction must be made between *Mu'amalat* and *Ibadat*. The former can change while the latter is not liable to change. Moreover, in terms of *Mu'amalat*, a larger public interest need to be extracted from the Quranic provision. In addition, human needs and necessity need to be accorded paramount importance as Islam is a religion of ease and not rigidity. Thus, if the revealed texts are not fulfilling the test of just considerations in the contemporary era, they can be modified.¹⁴

Souroush continued this approach and stated that *Usul-ul-fiqh* is inherently incapable of accommodating modern requirements. Consequently, *Ijtihad* must be a 'natural product of rationality prevailing in any particular era'.¹⁵ In line with this thinking, Fazal-ur-Rehman coined the term 'Double-Movement'. The aim of this movement is to extract 'general from the traditional' and apply it to the particular situations of modern times. Therefore, the Arabic character must be extracted from the Islamic legal corpus¹⁶. Ashwami illustrates this idea with the example of Jihad and limits it to the context of belligerent attacks on the Holy Prophet (P.B.U.H). He also extended this unique approach to *Riba* and contextualized it to the crude exploitation of the poor in

¹² David S. Powers, 'The Islamic Inheritance System: A Socio-Historical Approach', (1993), 14, JSTOR,

¹³ Hasan Mahmud, 'The Quranic Inheritance Law: the Case for a Gender Neutral Understanding' (Hasan Mahmud Dot Com) <<https://hasanmahmud.com/index.php/articles/islamic-english/109-inheritance-law> >

¹⁴ Wael Hallaq, *Sharī'a: Theory, Practice, Transformations* (first published 2009, Cambridge University Press 2009) 505.

¹⁵ Wael Hallaq, *Sharī'a: Theory, Practice, Transformations* (first published 2009, Cambridge University Press 2009) 519, 520.

¹⁶Wael Hallaq, *Sharī'a: Theory, Practice, Transformations* (first published 2009, Cambridge University Press 2009)528,529.

Arabia. Consequently, the modern practices of financing big businesses with interests were saved from the explicit illegality of *Riba* enshrined in the Holy Quran.¹⁷

The arrival of feminism in political and legal discourse also produced interesting viewpoints on the 2:1 ruling. According to Amina Wadud, the Quran does not discriminate between men and women and the reason for treating men superior to women in Islamic judicial interpretation is because there were no women to interpret it.¹⁸ Resultantly, biases of men were reflected in the interpretations. Zainab Anwar agrees with this idea and terms the principle that no modification can be made in the scriptural text as a 'patriarchal circumvention to retain power'.¹⁹

III) Culture and Islamic Law

Islam was revealed in the Arabian culture but it swiftly interacted with other well-established cultures of the world. This interaction revealed many new facets and prisms through which the Islamic inheritance law could be analysed. An interesting example was observed in Indonesia where it was revealed that Muslim regions such as *Minangkabau* always followed their *adat* law and never followed Islamic law. The reason was that 2:1 ruling conflicted with the *raison d'etre* of *adat* law i.e. a bilateral system of inheritance.²⁰ Therefore, many Indonesian regions never adopted 2:1 ruling and continued to divide it equally as per their customs.

Hazairin endeavoured to legitimize the bilateral system from within Islamic law. He based his argument on the observation that traditional matrilineal and patrilineal systems do not allow marriages with women related through mother or father respectively. However, the Holy Quran allows marriage between cousins which proves that Islamic inheritance law is 'bilateral' in nature. Resultantly, Hazairin rejected the

¹⁷ Wael Hallaq, *Shari'a: Theory, Practice, Transformations* (first published 2009, Cambridge University Press 2009) 523,526

¹⁸ Aiysh Madani, 'A Review of Contemporary Thoughts in Women Rights', (Poorab Academy, 2005), 111

Annelies Moors, 'Women Property and Islam, Palestine Experience, 1920-90', (first published 1995, Cambridge University Press), 51

¹⁹ Hasan Mahmud, 'The Quranic Inheritance Law: the Case for a Gender Neutral Understanding' (Hasan Mahmud Dot Com) <<https://hasanmahmud.com/index.php/articles/islamic-english/109-inheritance-law>>

²⁰ Soejorno Soekanto, "Inheritance adat law in Indonesian peasant society" (1972), 14 *Malaya Law Review*, 244, 255.

export of any Arabic traditions such as patrilineal descent.²¹ Genders should be equal in all aspects of Islamic law including the principle of representation and exclusion. However, he still did not advocate to attack the 2:1 ruling.²²

In the Indian Sub-Continent, the advent of Islam resulted in the 'Indianization' of Islam which also reflected in the inheritance law. This was particularly manifested in the practices of Gujarati Khojas who even after converting to Islam continued to follow the Hindu inheritance law. Similarly, the Punjabi culture continued to exclude women from inheritance and provided women only a life interest in inheritance. This was also reflected in the legislation such as the Muslim Personal Law Application Act 1937 which was passed in the British era and exempted the agricultural lands from the application of Islamic law.²³

IV) Colonialism and Islamic Law

The historical transformation of Islamic law takes a dramatic turn after the start of the colonial era. At the end of the 19th Century, Muslim nations around the world were either under direct or substantial influence of the European powers. This subjugation resulted in a reaction in the sub-conscious of the Muslims. This reaction stemmed from their self-image of the righteous nation and the nostalgia of the 'Islamic golden age'. Moreover, bitterness for evolution intensified with the forceful and sudden imposition of the modernity coupled with subjugation.²⁴ The result was a gradual breeding of 'siege thinking' in the Muslim politico-legal discourse. This thinking systematically suffocated expansive interpretation and focused on a literal interpretation of the classical judicial interpretations of the legal text as it gave Muslims an identity emanating from their glorious past.

This phenomenon was amplified in British India where the Colonial rulers used selective translations of books such as *Hidaya* and presented them as the ultimate

²¹ R Micheal Keener, 'Indonesian Movements for the creation of a National Madhab' (2002) 9 Islamic Law and Society, 83,110.

²² R Micheal Keener, 'Indonesian Movements for the creation of a National Madhab' (2002) 9 Islamic Law and Society, 83,115.

²³ Z Abbasi and S Cheema, *Family Laws in Pakistan* (1st edn, Oxford University Press 2018) 370,371.

²⁴ Ebrahiam Afsah, "Contested Universalities of International Law; Islam`s struggle with modernity" (2008) 10 Journal of History of International Law 259, 264-265.

authority for adjudication.²⁵ This intervention in Islamic law loaded with the assumptions of the Western legal system further exacerbated the rigidity in Islamic law. All of these 'adventures' resulted in the fragmentation of the legal frameworks in Islamic countries as it became a mixture of many traditions.

After the formation of Muslim states at the end of the era of Colonialism, Muslims strived again for the establishment of their own legal systems in accordance with their contemporary aspirations. The lack of unifying force led them to respond differently according to their own circumstances. The most interesting example is Turkey which was not colonized but lost World War 1. The result was a system of governance that was entirely secular with no string of Islamic law of inheritance. The aspiration of this system primarily stemmed from the feeling of being 'left behind' due to the rigid interpretation of Islam in the Ottoman era. In Iraq, the seemingly religious society engulfed a movement in its orbs for the equal inheritance which bore fruit in 1959. The 1959 Iraqi law stipulated that articles 1187-1199 of the Civil Code shall provide equal shares to both men and women in all cases. However, the 1963 amendment restored the provisions of the Sharia but adopted a more expansive Shia system of inheritance.²⁶

V) Tunisia and Islamic Law

In this context of the nation-state, the Tunisian approach towards Islamic law was the most radical. A correlation of modernist scholars and rulers such as President Bourguiba allowed the progressively rooting development of Islamic inheritance law in Tunisia.²⁷ As a result, the possibility that the feudalists shall occupy the government's offices with their populist narratives was reduced. ²⁸ Moreover, the belief in constitutionalism also increased with time. Thus, article 2 and article 21 of the Tunisian

²⁵ Mummad Zubair Abbasi, "Islamic Law and Social Change: An insight into the making of Anglo-Muhammadan Law" (2014) *Journal of Islamic Studies* 1, 6-7.

²⁶ Efrati, N, 'Negotiating Rights in Iraq: Women and the Personal Status Law', (2005), 593, JSTOR

²⁷ Amel Grami, "Gender Equality in Tunisia", (2008) 35 *British Journal of Middle Eastern Studies*, 349, 353.

²⁸ Benjamin G. Bishin and Feryal M. Cherif, 'Women, Property Rights, and Islam' (2017) 49 *Comparative Politics*, 501,505.

Constitution was used as legitimization tactics for equal inheritance. These articles in conjunction aimed at citizenship with equal rights and duties.²⁹

Moreover, when the bill for equal inheritance was introduced in 2018, 65% of the Tunisian population lived in urban areas while the literacy rate of the young female population was observed as 93%.³⁰ Significant developments in the areas of polygamy and marriage in the Code of Personal status 1956 significantly imbued women rights into the grassroots of the society. As a result, wide protests for an equal inheritance, unlike many Muslim countries, were observed.³¹ Women rights were made a national symbol.³² Therefore, it is reasonable to assert that Tunisians progressively changed the interpretation of Islamic law to the rationalization of Quranic texts and the pinnacle of this movement was an equal inheritance for women and unified family law.³³

VII Pakistan and Islamic Law

Pakistan also experienced colonization in its journey of Independence. Pakistani Constitution also promises gender equality and equality of citizens.³⁴ Country comprises of 63.6% rural population.³⁵ Certain improvements in the literacy of the young female population are observed with their literacy rate increasing to 65%.³⁶ However, the female labour force participation rate is still very low i.e. 21% of the female as opposed to 80% of men.³⁷ The introduction of Article 2A in Constitution has resulted in a stricter interpretation of Islamic law.³⁸ Therefore, Courts do not have

²⁹ The Constitution of Tunisia 2014, Art 2 and 21.

³⁰ Global Economy, 'Tunisia Economic Indicators' (*Global Economy*, 2019) <<https://www.theglobaleconomy.com/Tunisia/>>

³¹ Alison Williams, 'Tunisian President proposes inheritance equality for women, with exceptions' *Reuters* (2018) <<https://www.reuters.com/article/us-tunisia-women/tunisian-president-proposes-inheritance-equality-for-women-with-exceptions-idUSKBN1KY1GE>>

³² Norbakk M, 'The women's rights champion. Tunisia's potential for furthering women's rights' (2016) 15 <<https://www.cmi.no/publications/5973-the-womens-rights-champion>>

³³ Amel Grami, "Gender Equality in Tunisia", (2008) 35 *British Journal of Middle Eastern Studies*, 349, 351.

³⁴ Constitution of Pakistan 1973, Art 25.

³⁵ Rana S, '6th Census Finding; 207 Million and Counting' *The Express Tribune* (2017) <<https://tribune.com.pk/story/1490674/57-increase-pakistans-population-19-years-shows-new-census/>>

³⁶ Global Economy, 'Pakistan Economic Indicators' (*Global Economy*, 2019) <<https://www.theglobaleconomy.com/Pakistan/>>

³⁷ Global Economy, 'Pakistan Economic Indicators' (*Global Economy*, 2019) <<https://www.theglobaleconomy.com/Pakistan/>>

³⁸ Constitution of Pakistan 1973, Art 2A.

any reverence to expansive interpretations in relation to Islamic law. This is manifested in the Supreme Court's attitude in the appeal of *Khalida Shamim Akhtar* case.³⁹ In this case, even the Shia *ijma* was not overruled - lest explicit Quranic statements.

Similarly, in *Maulana Dawood* case, the Supreme Court clearly stated that if there is some ruling clearly present in Quran or Sunnah, Courts shall refrain from overruling it.⁴⁰ Certain fragment of liberal interpretation is observed such as in *Balqis Fatima* case of 1956 in relation to marriage law but the attitude of Courts is far from reaching any adjudication in inheritance which may reinterpret the 2:1 ruling.⁴¹

VIII) Conclusion

The scrutiny of the classical and modernist perspectives on Islamic law amalgamated with the recent socio-economic environment of the Muslim world leads to some important conclusions. Like all legal structures, Islamic Law is based on set of assumptions. These assumptions are rooted in a certain philosophy of life. The *raison d'etre* of this philosophy is community, spiritualism and morality. Western system is fundamentally different in terms of philosophy as it is rooted in capitalism, intellectualism, and individuality. There is no need to comment on the superiority of any one philosophy.

However, if the assumptions of a particular philosophy is not in coherence with the conclusions, society disintegrates. A large number of population shall be frustrated which is a problem for national security. It is necessary that one model is implemented completely. Fusion causes dissonance in law. If the agenda is to promote women empowerment, then equality in all facets will be a natural demand eventually. If the assumption is that women need not to indulge in the capitalistic engine to protect the nurturing family ideas, then pressure on them due to the higher education and to make to a living need to be reduced while also recognizing their autonomous equality.

Without a modernist fluid interpretation, it shall be impossible to claim the preservation of traditional Islamic laws, capitalism, human rights and Western

³⁹*Khalida Shamim Akhtar V. Ghulam Jaffar* [2016] PLD 865 Lah.

⁴⁰*Mualana Dawood v. Registration Office, Lahore* [1986] PLD 564 SC.

⁴¹*Balqis Fatima v. Najam ul ikram Qureshi* [1959] PLD 566 Lah.

liberalism. A confused society does not produce anything worthwhile whether culturally, economically, linguistically or politically and ultimately results in class apartheid.

IX) Recommendations

- Islamic Council of Ideology and Ministry of Religious Affairs need to produce a detailed policy paper which shall act as soft law. The paper shall provide an account of their approach in collaboration with all relevant stakeholders to clarify the dissonance stemming from the ideological clashes in society.
- The use of the judicial approaches towards *Mu'amalat* in Islamic text needs to be outlined especially if the Quranic ruling is literal in interpretation and is a *Mufassad*. Moreover, application of judicial techniques such as *Maslaha and Hilah* on this particular ruling needs clarity in Pakistan.
- There needs an Islamic consultation process in collaboration with Parliament in which there is an attempt for ending the post – colonial psychosis in Pakistan. Islamic jurisprudence from texts such as *Hidaya* which British judges applied and which slowly dissolved in the common law of Pakistan needs to be re – considered
- The inherent ideological clashes within Pakistan can be resolved through a systematic filtering of the ancient Arabic culture from the Islamic textual ruling while using the supreme benevolent essence of those rulings i.e., *illat* to frame laws. This will neutralize the barbarity of Western interest based economics and rigidity of the social taboos in local cultures of Pakistan.
- Pursuant to that policy paper, the Federal and Provincial Governments need to amend their laws accordingly which shall reflect the structure of society and aspirations which is *raison d'etre* for finesse in any aspect in Pakistan. These amendments shall be required in inheritance laws of the country, human rights of the country and the Constitution of Pakistan.
- A separate legislation shall be required to outline the rights of inheritance of women and the position of the government on that matter which shall be reflective of current Islamic thought in Pakistan.

Recommendations and Action Matrix

Legal Options for Government

Recommendations	Pathways to Solution	Implementation of Solution	Actors Responsible	Implementation Timelines
Policy Paper acting as Soft Law	Consultation process from Police, local judges, family lawyers, Islamic theologians, corporate sector to discuss the drafting of the policy.	Drafting of a comprehensive policy paper on State position on inheritance laws, Islamic judicial techniques and modern workplace by Council of Islamic Ideology.	<ol style="list-style-type: none"> 1. Council of Islamic Ideology 2. Federal and Provincial Ministries Religion 3. Federal and Provincial Ministries of Law 4. Ministry of Human Rights 	<p>2-6 Months for consultation</p> <p>6-12 Months for a policy paper</p>
Legal Amendments	A need to shift that soft law policy into black letter law with perusal of relevant judicial decisions and academic debates which can provide wisdom for the drafting of various conditions.	Ministry of Law to provide clear law subsequent to that policy design which overrides current, inheritance laws and human rights legislation.	<ol style="list-style-type: none"> 1. Council of Islamic Ideology 2. Federal and Provincial Ministries Religion 3. Federal and Provincial Ministries of Law 4. Ministry of Human Rights 	3 - 6 Months to formulate the amendments.