The Law of Inheritance in Pakistan in view of Sec. 4 of the Muslim Family Law Ordinance (MFLO) 1961

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Introduction

Muslim law of inheritance has always come forth as quite a complex, and at the same time extremely significant topic of discussion within Islamic law. The gravity of the law of inheritance in Islamic jurisprudence can be ascertained by the fact that Allah Almighty has laid down specific emphasis upon the substance and principles governing inheritance laws in the Quran[1]; **Surah Nisa, Verse 7** states:

"From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large--a determinate share."

Law, whether divine or manmade, is always for the well-being of the human beings. In other words, laws are ultimately related to life experiences which are not a monopoly of the theologians only.[2] As the society is not any constant phenomenon, it inevitably changes every moment. As a result laws are needed to be changed in compliance with the changing demands of the society. In Islamic Legal System as well the iron fist of *taqlid* (the doctrine of imitation) had to give way to *ijtihad* (meaning independent and free exercise of intellect to interpret interpretation of Islamic laws). It is always open for and permitted to, the thinkers, lawmakers and the rulers who are entrusted to apply *shariah* in society. In this short commentary, I intend to address a particular issue relating to the orphaned children's inheritance right. This is an extremely practical anomaly of the Doctrine of Representation usually escaping our notice.

This article specifically refers to the discussion of inheritance laws in Pakistan and shall focus on a particular aspect that has been subject to a profusion of debate in the country, namely: **Sec. 4** of the **Muslim Family Law Ordinance (MFLO) 1961**, and the controversy surrounding the said provision of the latter legislation being contrary to the set injunctions of Islam. The ensuing part of this work shall emphasize the role of the august courts of Pakistan and the part they have played (or ought to play) in bringing to an end the apparent dispute that has arisen by the enactment of the abovementioned provision.

Before embarking upon a detailed discussion as to the prominence of **sec.4** of **MFLO** and the contentious nature of the latter that has resulted in decades-long agitation, it is first vital to briefly highlight as to what **sec.**

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[1] Al- Quran [4:11]; [4:12]; [4:33]; [4:177].

[2] Report of Pakistan Commission on Marriage and Family Laws, 20th June, 1956.

4 actually is. The latter provision became part of **MFLO** that came into existence pursuant to the recommendations of the Commission on Marriage and Family Law in Pakistan to reform personal laws[3]. It was a result of a question framed by the Commission which stated[4]:

"Is there any sanction in the Holy Qur'an or any authoritative Hadith whereby the children of the predeceased son or daughter are excluded from inheriting property?"

It was following this question, that **sec. 4 MFLO** came into existence which reads as follows:

"In the event of death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes, receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive."

Grand children's Inheritance Right: the Islamic Law

The Islamic law of inheritance does not all together deny the grandchild of the *propositus* their right to inheritance. Sunni Law places them in the list of Quranic sharers. Unless excluded otherwise, they inherit from their grandparent. The doctrine of representation comes into question in case of allotment of their shares. The doctrine is accepted at least for two purposes: [5]

A) For the purpose of determining who are entitled to inherit

However, while using the doctrine of representation for the purpose of determining who are entitled to inherit, the principle of exclusion (nearer in degree excluding the remote) is not curtailed or suspended. Thus, if A dies leaving him surviving a son and grandsons by a predeceased son, the grandsons are excluded from inheritance by their uncle. They do not take in their father's stead though he would have been an heir had he survived his father. This is true in Shia and Sunni Law alike.

B) For the purpose of determining the share of the heirs

But 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. In that case,

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[3] Re-inventing the Islamic Law of Inheritance: The Share of Orphaned Grandchild in Islam and Pakistani Legal System by Dr. Muhammad Munir

[4] Re-inventing the Islamic Law of Inheritance: The Share of Orphaned Grandchild in Islam and Pakistani Legal System by Dr. Muhammad Munir

[5] M. Hedyatullah and Arshad Hedayatullah (Ed), *Mulla's Principles of Mahomedan Law*, 19th Edition, Tripathi, 1990, Para 93(1) at p 85

the principle of representation is applied in Shia Law for the purpose of ascertaining the share of each grandson. If the principle is applied, the estate of the *propositus* shall be distributed *per stripes* among the grandchild. The grandsons of one branch will have to divide into three what the grandsons of other branch will divide in half. However Sunni Law does not recognize representation in that case. The five grand sons shall inherit *per capita* in their own rights as heirs of the *propositus*, not as the representatives of the predeceased son or daughter.[6]

Reform through Muslim Family Laws Ordinance (MFLO) in 1961

Being excluded by heirs of nearer degree, as shown above, the orphaned grandchild become economically and socially vulnerable. So all over the Muslim world the jurists thought and tried to solve this problem, using different devices, intending to preserve the interest of the orphaned grandchildren in the property of the *propositus*. To this end, a new sort of doctrine of representation was adopted in Pakistan in 1961. The Government of Pakistan promulgated the Muslim Family Laws Ordinance (hereinafter MFLO) in 1961 touching some of the substantive Islamic personal law issues. Section 4 of the Ordinance reads as follows:

In the event of death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes, receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

Thus, it is clear that Section 4 of the MFLO, 1961 has accommodated the doctrine of representation by suspending the rule of nearer excluding the remote. It has also incorporated into Sunni Law, the Shia concept of stirpital succession. Now the orphaned grand-children are *per stripes* allotted the share which their deceased parents would have taken had he or she survived the propositus.

There are several notable aspects of **sec.4 MFLO** that require acknowledgement in order to understand the law better. The foremost point of consideration is that the provision will only apply in those cases where son and daughter of a predeceased son or daughter are sought to be excluded on account of the existence of other heirs of the same category to which predeceased son or daughter belonged[7]. This is due to the factors advocated by the entities in favour of **sec. 4** of **MFLO** that were of the view that no verse was specifically mentioned in the Quran that excludes an orphan grandchild from inheritance. Moreover, another point that substantiates the claim of the

[6] Syed Amir Ali, *Mahomedan Law,* Vol II, 5th Edition, 1985
[7] PLD 1986 SC 228.

framers and favorers of **sec. 4** is the notion of humanity and compassion[8]. Furthermore, it is worthy to note that the principles of succession being 'per stripes' shall be in accordance with root or stock to which grandchildren belong and will get only such share to which grandchild is entitled through the parent. In case of a single surviving grandchild, principle of per stripes is pushed to the background but cannot be employed to support a principle which militates against Islamic law of inheritance[9].

In stark contrast to the abovementioned view, the newly formed provision sparked controversy within the scheme of the Islamic jurisprudence that governs this aspect of inheritance law in Islam. A big number of *ulema* rejected the updated law and the latter was subjected to severe criticism as being outside the parameters and principles set by the Quran and the Sunnah[10]. The major arguments that were highlighted that challenged the validity of **sec. 4** were that several verses of **Surah Nisa** clearly stated the manner in which the shares of inheritance were to be distributed, and nowhere does it state that a grandchild shall be given a share in inheritance like other sons of the propositus. Furthermore, it is also imperative that a *Hadith* of the Prophet (peace be upon him) be mentioned regarding the subject, which states:

"Narrated by Ibn-e-Abbas, the Holy Prophet said: give the shares of the inheritance as prescribed in the Holy Quran to those who are entitled to receive it, then whatever remains, should be given to the closest male relative of the deceased."[11]

In another *Hadith*, the Apostle of Allah Almighty said:

"The 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, a granddaughter as a daughter, can inherit (their grandparents') property as their own parents would (where they are alive) and they prevent the sharing of the inheritance with all those relatives who would have been prevented from the same, where their parents are alive. So, one's grandson does not share the inheritance with one's own son (if the son is alive)".[12]

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[8] Ibid footnote 3, para 52.

[9] PLD 1983 Lahore 546.

[10] Ibid footnote 2.

[11] Sahih Bukhari, Hadith No. 724, Vol. 8, P. 477.

[12] Sahih Bukhari, English, Vol. 8, P. 479

It is clear from the abovementioned sources of Islamic law, as prescribed by the Quran and the Sunnah of the Holy Prophet (pbuh), that the principle prevalent with regard to the law of inheritance is that the nearer in kinship excludes the remoter from inheritance, and this rule does not have any exceptions[13]; grandchildren are only to be considered as one's own children in the distribution of inheritance provided that none of the propositus' children is still alive. The grandchild, therefore, has been particularly excluded from inheritance if other children of the propositus are still alive. The principle laid down by this *Hadith* has been followed by all classical Islamic schools of thought, including *Fiqh-e-Jafria*[14].

As mentioned above, the framers of **sec. 4 MFLO** laid credence upon the aspects of humanity and compassion towards the orphans as being of vital essence. However, the fact worth noticing is that, as discussed previously, the principles of inheritance in Islam are based on nearness and proximity, and not upon any financial point of view, and the latter aspect has nothing to do with the concept in question. If the same is regarded as the base ideology in structuring the principles of inheritance, it would engender immense complications. For example, if the orphaned children of the predeceased are to be given a share in the *propositus* property as the other children of the *propositus;* why not include the widow of the predeceased child of *propositus* in the share in inheritance? Why not include, for that matter, the children of predeceased brothers or sisters etc. and if such stance is taken, there will be no end to the inclusions[15] bringing about greater uncertainty. The critical point which seems to be ignored by the legislatures is that this scheme of inclusion has disturbed the divinely settled/Quranic shares of legal heirs and any discretion in such matters without the consent of the legal heirs would be akin to curtailing divinely settled rights and distribution of wealth.

An important question that needs consideration, following the aforementioned discussion, is: what would be the solution for the apparent socio-economic problem that might arise for the orphaned grandchild after the demise of the propositus, who may have left an estate from which uncles and aunts would inherit, but the grandchild would be deprived of the same? This problem has been tried to be solved by some Muslim states such as Egypt and several Middle-Eastern states through the appreciation of a principle known as 'obligatory bequests'[16]whereby a mandatory will is drawn up in favor of the orphaned grandchild for a share in *propositus* inheritance equal to what the

[13] Ibid footnote 2.

[14] Ibid footnote 3, para 46.

[15] Ibid footnote 3, para 52.

[16] Ibid footnote 2.

parent would have inherited had he survived provided that this does not exceed one-third of the total property. This view finds support from **Verse 180** of **Surah-Baqarah** of the Holy Quran:

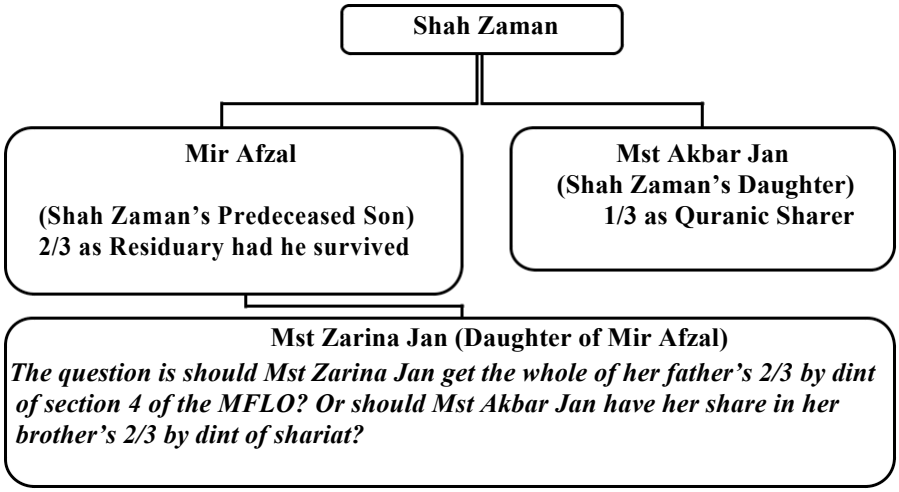
"It is prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable--- a duty upon the righteous."[17]

Anomalies of Section 4:

This accommodation of stirpital succession has caused some anomalies with which the Courts in Pakistan had to deal with at least in three cases.

***Mst. Zarina Jan* v. *Mst. Akbar Jan* PLD 1975 Peshawar 252**

In *Mst. Zarina Jan*, the propositus Shah Zaman left one daughter Mst. Akbar Jan and one predeceased son Mir Afzal's daughter Mst. Zarina Jan. There was no dispute that Mir Afzal and Mst. Akbar Jan would inherit 2/3 and 1/3 of the property respectively. The controversy was whether the whole of Mir Afzal's share would go to his only daughter Zarina Jan or not. To put it in the alternative, the question was whether Mir Afzal's Sister Akbar Jan would also inherit from him according to the *Shariat* or not. The problem may be presented through a graphical presentation:



The lower Appellate Court held:

Section 4 of the Muslim Family Laws Ordinance, 1961 has given a right to the heirs of a pre-deceased son to inherit the share of their father in the property of their grand father. This section has not ousted the application of *Shariat* in other matters of inheritance and it has just given a right to the heirs of a pre-deceased son to inherit the share of their father in the property of their

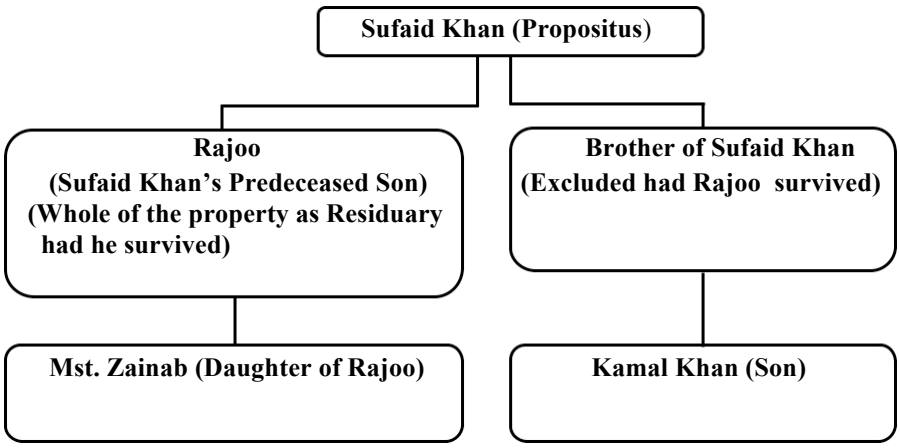
[17] Translation by Sahih International.

grandfather. Thus, *Shariat* will apply to the inheritance of Mir Afzal, father of Mst Zarina Jan.[18]

In other words, Mst Zarina Jan would inherit ½ of the 2/3 of the estate to which her father Mir Afzal was entitled and the other half would go to Mst Akbar Jan, the sister of Mir Afzal. At the end the gross allocation shall be: Mst Zarina Jan would get ½ of 2/3 = 1/3 and Mst Akbar Jan would get ½ of 2/3 plus 1/3 = 2/3 of the property. However, the Peshawar High Court reversed the decision by giving Mst Zarian Jan the whole of her father's share and depriving Mst Akbar Jan from any share in her deceased brother It held:
Under the Ordinance Mst. Zarina daughter of Mir Afzal is entitled to inherit the same share to which her father Mir Afzal was entitled in the inheritance of his father Shah Zaman. The reason is that the Ordinance by adopting the principle of *per stripes* distribution of inheritance meant to keep intact the share of the predeceased son or daughter to be inherited by his son or daughter according to it, the heirs of the predeceased issue will inherit from propositus what their predecessor-in-interest would have inherited. The impugned interpretation militates against the letter and spirit of Section 4 of the Ordinance which could not be the intention of the Law makers.[5]

***Kamal Khan* v. *Mst Zainab* PLD 1983 Lahore 546**

In *Kamal Khan* the Lahore High Court dissented from the above view of Peshawar High Court. The fact of the case may be presented as follows:



The Lahore High Court explained the philosophy behind Section 4 of the MFLO, 1961:

The starting point is, that notionally the off spring of the *propositus* is deemed to be alive for the purpose of succession, at the time of the death of the

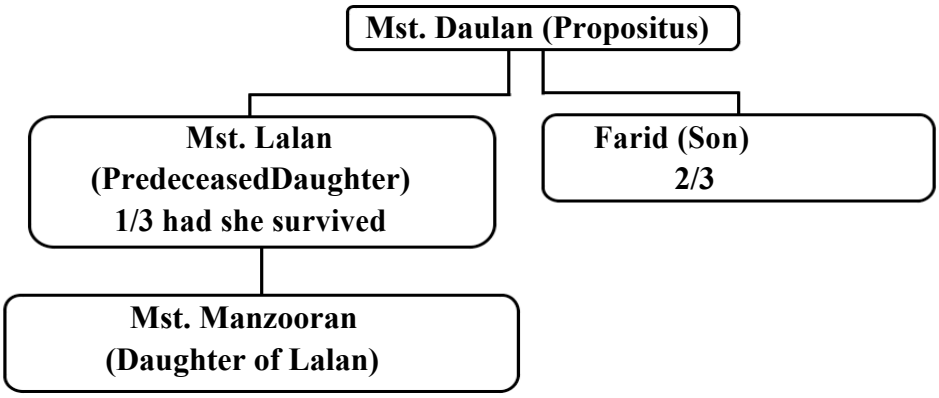
[18] PLD 1975 Peshawar 252, at 253

propositus, and the succession of the grandchild is to be calculated again notionally as if the parent of the grandchild died after the death of the original propositus.[19]

Thus Rajoo would inherit the entire estate of Sufaid Khan as being his only son and Zainab would inherit half of Rajoo's estate and the remaining half would revert to the nearest agnate Kamal Khan. According to the Peshawar decision Zainab would have inherited the entire estate of her Grandfather.

***Farid* v. *Manzooran* PLD 1990 SC 511**

The Pakistani Supreme Court took note of the matter in. the table of this case may be as follows:



At the time of the opening of the inheritance of Mst. Daulan her predeceased daughter Mst. Lalan would be taken as living under section 4 of the MFLO and accordingly she would get 1/3 of the inheritance, 2/3 going to Mst Daulan's son Farid. The question is whether or not Mst. Lalan's daughter Mst Manzooran will get whole of the estate of Mst. Lalan. According to the judgment of the Lahore High Court, Mst. Manzooran would get one half of the estate, the other half going to the reversionaries including Farid but according to that of the Peshawar High Court, she will take the whole of the estate of her deceased mother. So the issue before the Supreme Court was:

The Supreme Court of Pakistan confirmed the Lahore High Court decision of ***Kamal Khan* v. *Zainab*** and held that Section 4 could not be construed against the interest of other heirs of the deceased who were entitled to share the inheritance under the rules of Muslim Law of inheritance.[20]

[19] PLD 1983 Lahore 546 at 548

[20] Whether it was not the intention of law-making in section 4 of the Family Laws Ordinance, 1961, to provide an opportunity of obtaining only Islamic law shares, to the children of the predeceased son or daughter of the propositus and that intention was not to increase their Islamic Law shares. Ibid, p. 103

Critics of the Pakistan Supreme Court

Dr Lucy Carrol finds the Peshawar decision preferable to that of Lahore. She questions the hypothesis of Lahore High Court:

The Ordinance does not say that the orphaned grandchild will receive that share of the grandparent's estate to which he would be entitled (1) on the assumption that the predeceased parent had been alive at the time of the grandparent's death, and (2) on the further assumption that the predeceased parent had then died leaving his notional share of the grandparents' estate to be distributed among his heirs.[21]

To Carroll, as the purpose of the legislation is to improve the position of orphaned grandchild, it is hardly surprising that she would receive a larger share than she would have received under the traditional law.[22] Dr. Alamgir Muhammad Sirajuddin also is not wondered to see that in the prevailing 'mood of conservatism' the Supreme Court of Pakistan would confirm the Lahore decision in 1990 and 'strike at the root of Section 4'.[23]

Defending the Supreme Court of Pakistan's stance

It is submitted, however, that the critics of the Supreme Court of Pakistan have overlooked at least two seriously important points. On substantial grounds, I support the Pakistan Supreme Court and recommend the adoption of it in the MFLO, 1961.

Firstly, section 4 may be seen as a sort of insurance for the orphaned grandchildren. It is a cardinal principle of law of insurance that under no circumstances the insured is allowed to benefit more than the loss suffered by him. This is because, if that were so, the temptation would always be there to desire the insured event and thus to obtain the policy proceeds.[24]

Under the Peshawar High Court scheme, the grandchildren would be benefited more if their parents predecease their grandfather. Now they shall get the whole of their parent's share, which they would otherwise have to share with other heirs of their parents like the case of Zarina Jan above. The

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[21] Ibid, p. 103

[22] Lucy Carroll, 'Divorce and Succession – Some Recent Cases from Pakistan', *Islamic CLQ* 4 (1984): 249-50

[23] Supra Note 7, p. 101

[24] Ibid, p. 104

sole spirit of *shariah* is to ensure the sanctity of life of the *propositus*. That is why there is no vested right recognized in Islam and a murderer is excluded from inheritance. Who knows due to the interpretation of Peshawar High Court, now a daughter would wish her parents predecease her grandparents!

Secondly, what section 4 aims at is justice for the otherwise excluded and destitute orphans. Justice will be done if they are substituted in the position in which they would have been had their parent survived. To do justice to the orphans we cannot do injustice towards others. Say for example, the case of a widow whose husband died before her father-in-law. Now her sons and daughters would get whole of her husband's share in exclusion of her. Had her husband not died before her father-in-law, she would have a share in her husband's estate. Who shall do justice to her?

Further, moving on to dilate upon the role of the Pakistani courts subsequent to the enactment of **sec. 4**, it is vital to first acknowledge that the **Constitution of Pakistan** in **Art. 203D** lays down an aspect significant for the topic under discussion. The said provision vividly asserts the jurisdiction and power of the Federal Shariat Court to call in question and decide, whether or not, any law or provision of law is in contrast with the injunctions of Islam, as laid out in the Quran and Sunnah. If the Court holds any law to be against the injunctions of Islam, the President or the Governor of a Province[25] has to take all the necessary steps to amend the law and bring it in conformity with the injunctions of Islam, and such law shall cease to have effect on the day the decision of the Court takes effect.

A practical applicability of the contents of the aforementioned paragraph can be seen in a famous case of ***Allah Rakha vs Federation of Pakistan*** [26]where the Federal Shariat Court declared **sec. 4** to be against the tenets and injunctions of Islam. This decision of the Federal Shariat Court was appealed to the Shariat Appellate Bench of the Supreme Court on March 2000 and is still pending adjudication. The dilemma surrounding the entire prospect concerning a matter of such grave importance due to the pending adjudication of the phenomenon in question cannot be ignored and subsided in a manner currently being implied. The practical repercussions of such an indiscreet mannerism towards such a topic of value left hanging in such a fashion speaks volumes of the ineffectuality of our judicial system. It is vital to emphasize upon the recent trend seen in the case law pertaining to the principles concerning **sec. 4 MFLO**. Due to the pending adjudication for the determination of the fate of the mentioned provision, the heirs of the predeceased children of the *propositus* are subjected to the share of the latter's inheritance as equals to the share of the living children of the *propositus*;

[25] Art. 203D(3)(a) of Constitution of Pakistan.

[26] Ibid footnote 3.

which, as has been depicted quite clearly in the earlier part of this Article, is prima facie repugnant to the limits set by Allah and His Messenger (PBUH). In the case of ***Allah Dewaya vs Muhammad Hussain*** [27]the contention that the claim of heirs of a predeceased daughter for the shares of the inheritance left by the original owner is illegal, was repelled due to the fact that the appeal against the judgment (Allah Rakha case) concerning **sec. 4** of **MFLO** was pending adjudication in the Supreme Court, and hence the decision of the Federal Shariat Court would stand suspended till disposal of the appeal by the Supreme Court.

The case mentioned in the preceding paragraph, as well as a plethora of other recent cases[28] are seen to give effect to the antagonistic principles as portrayed by **sec. 4 MFLO**; giving an orphaned grandchild the legal right to attain the share of inheritance as his/her predeceased parent would have gotten had they been alive, whereas this is in staunch disparity with the laws of Islam. The only prominent reason for this seems to be the undecided principles of **sec. 4 MFLO**.

Conclusion

To conclude the discussion, the primary aspect worth acknowledging is that Islam is a religion that has laid down a complete code of conduct in regard to each and every aspect of human life, ranging from the matters of minutest of details to the laws of immense importance (i.e. inheritance, *zakat,* etc). It is vital for every Muslim to abide by the limitations and the commands as fixed by Allah Almighty. The law of inheritance is one such topic, the substance and procedure of which is depicted by Allah Himself in the Quran, and explained by the Prophet (pbuh), hence holds immense importance in Islam.

The enactment of **sec. 4 MFLO 1961** has come to be seen by many Islamic jurists, scholars and researchers as being in direct conflict with the instructions of Allah Almighty, as an orphaned grandchild is given shares from an inheritance he/she is not qualified to receive. The **Constitution of Pakistan**, in **Art. 203D**, has bestowed upon the Federal Shariat Court, a prerogative to question any law that is deemed to be repugnant to the injunctions of Islam. We have seen that the Court has held **Sec. 4** as being in clear violation of the commands of Allah and his Prophet (pbuh). However, the fact that the said ruling is held suspended until the Shariat Appellate Bench of the Supreme Court decides the matter, and the fact that the adjudication regarding this matter has been pending for almost many years, is nothing but hazardous; meanwhile, the courts in Pakistan are routinely applying the principles of **Sec. 4**, entitling heirs to a share in the propositus' property, openly opposing the

[27] CLC 2007 Peshawar 1787

[28] SCMR 2015 869; MLD 2015 Peshawar 652; YLR 2014 Lahore301

word of Allah and his Prophet (pbuh). An ordinary citizen of Pakistan has every right to ask the supreme judiciary of Pakistan to bring about a transparent standpoint regarding this matter of immense importance. The latter's stagnancy over this issue is not only disappointing but also hypocritical as a pending adjudication for many years clearly depicts the fact that resolving this contention concerning a vital aspect of Islamic law is not on their agenda, whereas they profess to be the bearers and protectors of Islam and *Sharia*. Controversial provision in Section 4, the Muslim Family Laws Ordinance, 1961. Although no one, in the cases in Pakistan, has challenged this section, from the prospective of proposition regarding right to inherit by the sons & daughters of predeceased uncles and aunts, the question - whether the change brought by the section is justified or not should not go unexamined and unanswered. I think we should amend Section 4 of MLFO to address the per stripes succession from its right perspective. This should be taken as a matter of immense importance and urgency and should conclude the pending adjudication, bringing certainty and clarity to the subject once and for all.

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