

# Revolutionising Inheritance Laws for the Shia Sect: A Case for the Protection of Childless Widows of Shia Husbands

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## **Abstract**

In Pakistan, childless widows have been historically deprived of an equitable share in the inheritance of their deceased Shia husbands' property. It has been generally accepted by the society and ruled upon by the courts that childless widows do not receive any share in the immovable property of their deceased Shia husbands. Keeping this tradition in mind, this article examines the origin of this principle and its application from the early Islamic period (around 732 A.D.) to current times. It points out the inconsistent approach taken by Pakistani courts due to the absence of a definite piece of legislation upon the matter. It also critically analyses the possibility of the success of a revolutionary legislative recommendation by a renowned Shia scholar, which declares the earlier rulings as un-Islamic and proposes that a childless widow, as prescribed by the Qur'an, should be entitled to one-fourth of the entire estate left behind by her deceased Shia husband. For this article, the entirety of case law and Shia jurisprudence was evaluated. This research has been complemented by the interviews of leading Shia clerics on the matter. We conclude that there are visible chances of success for this recommendation to achieve positive outcomes for childless widows of Shia husbands. In order to ensure that the objectives of the recommendation are duly achieved, this article advocates for the revision in the language of the Muslim Family Laws (Amendment) Act 2019, alongside a few procedural additions to rule out any visible ambiguities.

**Keywords:** Childless Widow of Shia Husband, Inheritance, Immoveable Property, Legislative Recommendation, Un-Islamic, Ambiguities

## **Section I: Introduction**

The principles regarding inheritance are among the most prominent areas of difference between the Sunni and Shia schools of law.<sup>1</sup> While the Sunni school makes no distinction between movable and immovable property in determining the inheritance share of a widow, a childless widow of a Shia husband is not entitled to any share in her husband's immovable property under the Shia school of law.<sup>2</sup> This principle has been perpetuated and frequently cited by literature on Shia Islamic family law.<sup>3</sup> The National Assembly of Pakistan, realising the inconsistency of this principle with Qur'anic teachings,<sup>4</sup> and the discriminatory effect it has on childless widows of Shia

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<sup>1</sup> Shahbaz A. Cheema, 'Shia and Sunni Laws of Inheritance: A Comparative Analysis' (2012) 10 *Pakistan Journal of Islamic Research* 69.

<sup>2</sup> Ibid.

<sup>3</sup> Al-Syid Hussain and Al-Syid Qamr-ul-Zaman, *Jamia-ul-Masaail* (Kutub Khana 2007) 366; Ayatullah Al-Uzma Al-Sheikh Bashir Hussain Al-Najafi, *Tozeeh ul Masaail* (Jaamia Taleemat e Islami 2019) 539; Syed Ali Hussaini Seestani, *Tozeeh-ul-Masaail* (Jaamia Taleemat e Islami 2005) 427- 428.

<sup>4</sup> The Holy Qur'an, 4:12 makes no distinction between immoveable and moveable property when it comes to inheritance of widows; The Medium, 'The Muslim Law of Inheritance' (*The Medium*, 29 June 2018) <<https://medium.com/@legalresolved/the-muslim-law-of-inheritance-4ac8866ab490>> accessed 10 January 2020; Lakshmi Narayana, *Muslim Law of Inheritance* (District Court in India Publications 1934) 4.

husbands, decided to take the initiative in 2019 to amend the Muslim Family Laws Ordinance, 1961. Through this amendment, childless widows of Shia husbands will also be entitled to a one-fourth share in the entire property of their deceased husband, a principle that Qur'an expressly lays down in *Surah Al-Nisa*.<sup>5</sup>

This paper traces the origin, history, and development of this principle in the Islamic world. It compares the teachings of inheritance laid down in the Qur'an regarding inheritance of widows and highlights how these contravene the rules and practices of the Shia school of law as laid down by the Imams of the Shia sect. It analyses the approach adopted by the courts to adjudicate upon this issue over a period, from the pre-partition Indian subcontinent to post-1947 Pakistan, by delving into the reasons behind the courts' shift in approach: from refusing to interfere in the application of this principle to making recommendations to the legislature for an amendment. This paper concludes by evaluating the need and feasibility of the proposed bill in the National Assembly and its effects, its likelihood of success and comparison to Shia inheritance law for childless widows in Iran, Lebanon, Bahrain, and Iraq. Highlighting the shortcomings within the bill itself, this paper recommends that the amendment proposed in the National Assembly needs to be procedurally revised to have a positive effect on childless widows of Shia husbands and bring the law in line with the Qur'anic teachings.

## **Section II: Bill proposed in the National Assembly for the amendment in the Muslim Family Laws in Pakistan**

The superior courts in Pakistan have repeatedly been inconsistent while dealing with the inheritance of a childless widow of a Shia husband. The main reason behind this inconsistency is the absence of legislation on the issue. In 2016, the Lahore High Court in *Khalida Shamim Akhtar v Ghulam Jaffar*,<sup>6</sup> confronted this issue and decided the case solely in light of the Ayat no. 12 of *Surah Al-Nisa*. The court disregarded the prior narrative of not giving the childless widow a share from the immovable property of her deceased Shia husband. It held that the provisions of Shia inheritance law for childless widows were in complete negation to the Qur'anic provision regarding inheritance.<sup>7</sup> The court also held that the Government of Pakistan in the Ministry of Law is expected to undertake legislative measures to promulgate a codified law in this regard in order to protect the rights of childless widows of Shia husbands in getting their due share of the inheritance. Relying on this judgment, a bill was proposed in the National Assembly of Pakistan by a renowned Shia scholar and member of the Council of Islamic Ideology (CII), Dr. Allama Syed Iftikhar Hussain Naqvi, in May 2019. The bill, called the Muslim Family Laws (Amendment) Act, 2019, seeks to protect the right to inheritance of childless widows of Shia husbands. The bill proposes that a childless widow, as prescribed by the Qur'an, is entitled to one-fourth of the estate left behind by her deceased husband.

## **Section III: Qur'anic teachings regarding inheritance rights of widows**

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<sup>5</sup> The Muslim Family Laws (Amendment) Bill 2019.

<sup>6</sup> PLD 2016 Lahore 865.

<sup>7</sup> *Daulai Khatoon v Amina Bibi* PLD 1958 WP (Rev.) 67.

When it comes to a widow's share in inheritance from her deceased husband's property, the Qur'an does not make any distinction between widows who have children and the ones who do not. Ayat no. 12 of *Surah Al-Nisa*, which lays down the share of inheritance for spouses, reads:

“And for you [the widower], is half of what your wives leave if they have no child. But if they have a child, for you is one-fourth of what they leave, after any bequest they [may have] made or debt. For the wives [widows], is one-fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt.”

The wording of this provision of the Qur'an is unambiguous: it lays down the rule that widows, in case they are childless, will inherit one-fourth of what “their husbands leave behind”. Even though the verse makes no distinction in what kind of property left behind will be subject to inheritance, the verse is interpreted differently by the Shia and Sunni sects in Islam based on the different chain of commands that both sects follow.<sup>8</sup> There is no other provision of the Qur'an that addresses the distinction of the movable and immovable property while giving the widows their share in inheritance. An article on Muslim Law of Inheritance argued that “under Muslim law, there is no stringent difference between immovable or movable property and incorporeal or corporeal properties. Because of the lack of a property distinction, when a death occludes, all property owned by the deceased is subject to inheritance”.<sup>9</sup>

#### **Section IV: Tracing the origin of inheritance law for childless widows of Shia husbands**

Before tracing the origin of Shia inheritance law regarding childless widows, it is important to define the category of “childless widows”. N.J. Coulson, in his book “Succession in the Muslim Family”, highlights that a childless widow means “the surviving widow is without a child, alive or in embryo and subsequently born alive, at the time succession to the estate opens”.<sup>10</sup> The Supreme Court of Pakistan in *Noor Bibi v Ghulam Qamar* relied upon this narrative,<sup>11</sup> and addressed this question in greater detail. According to the judgment, authored by then Chief Justice Anwar Zaheer Jamali, the following are characterised as childless widows who are not entitled to inherit from their deceased Shia husbands' (propositus) immovable property: where a widow never gave birth to a child from the propositus or widows who had children with the propositus, but the children did not survive the propositus.<sup>12</sup>

Thus, the restriction under the principles laid down in Shia law of inheritance regarding immovable property is applied to such widows. After establishing which widows fall under the category of “childless widows”, it is important to understand the origins of this principle in Shia

<sup>8</sup> Cheema (n 1); Lucy Caroll, ‘The Ithna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia’ (1985) 19 (1) *Modern Asian Studies* 85.

<sup>9</sup> The Medium (n 4).

<sup>10</sup> Noel J. Coulson, *Succession in the Muslim Family Law* (Cambridge University Press 1971) 212.

<sup>11</sup> SCMR 2016 1195.

<sup>12</sup> *Umaradaraz Ali Khan v Wilayat Ali Khan* (1896) ILR 19 All 169; *Mir Alli Hussain v Sajuda Begum* (1897) ILR 21 Mad 27; *Aga Mahomed Jaffer Bindanim v Koolsom Beebee* (1897) 25 Cal. 9; *Muzaffar Ali Khan v Parbati* (1907) 29 All 640; *Durga Das v Muhammad Nawab Ali Khan* (1926) ILR 48 All 557; *Syed Ali Zamin v Syed Muhammad Akbar Ali Khan* 116 IC 525; and *Syed Muhammad Munir v Abu Nasar, Member (Judicial) Board of Revenue* PLD 1972 SC 346. This dictum has also been followed by the Allahabad High Court and Syed Ameer Ali, a scholar on Muslim inheritance law.

Islam. During his time in Madinah, the Holy Prophet (PBUH) extensively expounded upon the teachings of Sharia in Islam. After his death, there were two possible approaches to carry out the process of interpretation: either by Ahl-e-Sunnah or by Ahl-e-Bayt.<sup>13</sup> Followers of the Shia sect claim that the difference between Shias and Sunnis arise based on their different interpretations of some of the Qur’anic texts. The Sunnis accept the interpretations given by Ahl-e-Sunnah (the four Imams, Sahabah — companions of the Holy Prophet — and Tabai’), whereas the Shias rely on the interpretations of the Holy Qur’an given only by the Ahl-e-Bayt (members of the Holy Prophet’s household) beginning with Hazrat Ali (RA) and ending with the last Imam. As such, followers of the Ahl-e-Bayt school of thought claim that their interpretation is likely to be more correct,<sup>14</sup> as no one would be able to know the Qur’an better than Hazrat Ali (RA), who recorded interpretations based on the instructions of the Holy Prophet in his book.

For the teachings of the Shia sect, the chain of the command followed is from Allah to the Holy Prophet (PBUH) to Hazrat Ali (RA) to Hazrat Hassan and Hussain (RA) to Imam Zain-ul-Abideen to Imam Baqir and finally to Imam Jafar Sadiq.<sup>15</sup> Once an interpretation is traced back to Imam Jafar Sadiq, Shias do not question the authority of the teaching, or doubt its chain, since it automatically means that the chain highlighted above was followed. These Ahadith were passed down from the Holy Prophet (PBUH) to Imam Jafar Sadiq, constituting an authentic source for Shias. Out of the four ways to gain religious teachings (Qur’an, Sunnah, Ijma, and Aql’) under the Shia school of thought, the inheritance of widows is decided by the Sunnah. Had there been a specific Ayat in the Qur’an laying down the distinction between widows who are childless, and widows who have children, Shias would have relied upon that Ayat.<sup>16</sup> In the absence of this, the Ahadith quoted by the members of Ahl-e-Bayt hold authority in this regard.

In Chapter 6 of *Masayel-us-Shariah*,<sup>17</sup> which is a compilation of Ahadith by members of the Ahl-e-Bayt, quite a few Ahadith can be found concerning the inheritance of childless widows of Shia husbands. It highlights that when a widow is childless, she does not inherit from land<sup>18</sup> — whether agricultural or barren —<sup>19</sup> or weapons or animals that form the property of her deceased husband.<sup>20</sup> However, she does get a share in the value of other things,<sup>21</sup> including doors, locks, wood, bricks, trees, and dates.<sup>22</sup> Upon inquiring why, a childless widow does not inherit from permanent things like land but does inherit from temporary things like bricks, Imam Jafar Sadiq narrated that “this is so because a woman’s relation with a man is temporary and not a blood

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<sup>13</sup> Interview with Maulana Israr Hussain, Aalim-e-Deem for Shia sect at *Jamia Tul Muntazir* (Lahore, Pakistan, 19 November 2019).

<sup>14</sup> Ibid.

<sup>15</sup> (n 13).

<sup>16</sup> Ibid.

<sup>17</sup> Allama Sheikh Muhammad Bin Ahsan Alhara Aamali, *Masayel-us-Shariah* (Volume 17, Misbah ul Qur’an Trust 2017) 316-318.

<sup>18</sup> Muhammad Allama Al Sheikh, *Wasail ul Shia* (Chapter 6, Hadith 3, Misbah ul Qur’an Trust 2017) 316.

<sup>19</sup> Syed Iftikhar Hussain Naqvi Najafi, *Qanoon e Munakihaat: Kitaab e Meeras* (Shareektah Al Hussain Publications 2016) 239.

<sup>20</sup> *Al Kaafi* 127:7 (Part 1); *Al Tehzeeb* 298:9 (Part 66); *Al Istibsaar* 152:4 (Part 572); Aamali (n 17); Al Sheikh (n 18) 450.

<sup>21</sup> Aamali (n 17) Hadith 1 and 8.

<sup>22</sup> Muhammad Hasan al-Najafi, *Jawahir Al Kalam* (Volume 39, Dar 'Ihya' al-Turath al-'Arabi 1984) 215; Al Sheikh (n 18) 238, 450; Al-Najafi (n 3) 525.

relation (which is permanent, like his parents and children)”<sup>23</sup> Such was also confirmed by Imam Raza, who highlighted that the *illat* behind not giving women a share in the land of their deceased husbands is that there is no possibility of a change in the land, but there is a possibility of change in the relationship of a husband and a wife.<sup>24</sup> Thus, “relations that are temporary (whose status may change) inherit from temporary property (moveable, which can undergo a change), and those which are permanent (whose status do not change) do so from permanent property (immovable, which cannot undergo a change).”<sup>25</sup>

Another reason for this rule is to prevent strangers (through a second marriage by the wife)<sup>26</sup> from getting a share in the property of the family. In the presence of other sharers, the inclusion of such a stranger in the property that originally belonged to the husband will be uninvited as the share of such heirs are fixed and recognised under Islamic law.<sup>27</sup> The rulings of Imam Muhammad Baqir were based on Hazrat Ali’s (R.A) book, which clearly stated that a childless widow of a Shia husband does not get a share in immovable property of her husband. The excerpt from Hazrat Ali’s (R.A) book consisted of a letter dictated by the Holy Prophet (PBUH).<sup>28</sup>

During the time these teachings were laid down, a number of Ahl-e-Bayt members registered their concerns regarding the rule on the inheritance of childless widows of Shia husbands. In response to this, Hazrat Ali (R.A) held that when their government is established, and people refuse to agree with this ruling, they would use the power of lashes and sword to make them agree.<sup>29</sup> One exception to this general rule of inheritance is that a childless widow can inherit from the property which she does not normally inherit from (immovable property) by obtaining the consent of the other legal heirs.<sup>30</sup>

Thus, the teachings laid down in these Ahadith were widely adopted by Shia clerics, writers and scholars all over the Muslim world.<sup>31</sup> In comparison to this, Sunni clerics, following the teachings laid down by members of Ahl-e-Sunnah (who took the word of Allah, laid down in the Qur’an, and the interpretation of the Holy Prophet as the final authority),<sup>32</sup> did not make any distinction between immovable and moveable property while calculating a widow’s inheritance share in the property of her deceased husband.

### **Section V: From the Indian subcontinent to Pakistan – superior courts and the application of this principle**

<sup>23</sup> Aamali (n 17) Hadith 2-4; Al Sheikh (n 18).

<sup>24</sup> Aamali (n 17) Hadith 7; Al Sheikh (n 18) 241.

<sup>25</sup> Aamali (n 17) Hadith 7.

<sup>26</sup> There is a possibility that the childless widow may get married a second time, signifying her temporary relationship with the deceased. Shababa Mahfooz, ‘Journey to legal rights’ (*The News*, 4 March 2018) <<https://www.thenews.com.pk/tns/detail/565060-journey-legal-rights>> accessed 11 January 2020.

<sup>27</sup> Aamali (n 17) Hadith 5.

<sup>28</sup> Ibid Hadith 8.

<sup>29</sup> Ibid Hadith 6.

<sup>30</sup> Al Najfi (n 3) 431.

<sup>31</sup> Al Sheikh (n 18) 238; Dinshah Fardunji Mullah, *The Principles of Muhammadan Law* (17<sup>th</sup> edn, Al-Qanoon Publishers 2009) 113.

<sup>32</sup> *Noor* (n 11).

Shia Islam has a long history and deep roots in the Indian Subcontinent, where it was introduced during the final years of the Rashidun Caliphate in the seventh century.<sup>33</sup> Since then, dynasties under Shia rulers have enforced Shia teachings of Islam on their subjects, including that of inheritance. Even when the British took over the Indian subcontinent, Shia inheritance law continued to be enforced as it upheld and served their property interests.<sup>34</sup>

Courts in the Indian subcontinent consistently followed the rule that childless widows of Shia husbands do not inherit from the immovable property of their deceased husband since the decision of the Calcutta High Court in *Mst. Asloo v Mst. Umdutoonnissa*.<sup>35</sup> In many instances, courts adopted the view that it would not be proper on their part to attempt to put their construction on this issue in opposition to the express ruling of such important authorities within the Shia sect,<sup>36</sup> and have declined to interfere in this matter.<sup>37</sup> In 1897, the Privy Council in the case of *Aga Mohamed Jaffer Bindaneem v Koolsom Bee Bee* observed, “it would be wrong to attempt to put [their] own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.”<sup>38</sup> The Allahabad, Madras, and Patna High Courts upheld the same rule in *Umaradaraz Ali Khan v Wilayat Ali*,<sup>39</sup> *Durga Das v Nawab Ali*,<sup>40</sup> *Mir Ali Hussain v Sajuda Begum*,<sup>41</sup> and *Syed Ali Zamin v Syed Muhammad Akbar Ali Khan*.<sup>42</sup>

In 1972, the disinheritance of childless widows of Shia husbands from landed properties surfaced in the Supreme Court of Pakistan in *Syed Muhammad Munir v Abu Nasar, Member (Judicial) Board of Revenue*.<sup>43</sup> The Court once again refused to put its own construction against existing express rulings, and held, “to depart from a rule of succession, which the Shia community has universally been following ever since the days of Imam Jafar Sadiq, 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.”<sup>44</sup>

Despite this ruling, an attempt to promulgate a legislation contrary to the established Shia principles of inheritance was carried out in 1972 by the West Pakistan Legislative Assembly. Under that legislation, it was proposed that childless widows would be given a one-fourth share in

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<sup>33</sup> Burjor Avari, *Islamic Civilization in South Asia: A History of Muslim Power and Presence in the Indian subcontinent* (Routledge 2013) 91.

<sup>34</sup> Email correspondence with Dr. Khalid Masud, Ex-Director General, Islamic Research Institute, International Islamic University (IIU), Islamabad and Judge, Federal Shariat Court, Pakistan.

<sup>35</sup> 20 W.R. 297.

<sup>36</sup> Dr. Shahbaz Ahmad Cheema, Dr. Muhammad Zubair Abbasi and Asadullah Khan, ‘Contribution of the Lahore High Court in the Development of Islamic Family Law in Pakistan’ (2018) 14 (1) *Journal of International Law and Islamic Law* 20.

<sup>37</sup> *Syid Murtaza Husain v Musammat Alhan Bibi* 1909 IC (Vol.2) 671; *Sharif Bibi v Munir Hussain Shah* 2000 YLR 2580; *Husain Khan v Amiri Bibi* AWN 1889, 192; *Mst. Nautan Jan v Mst. Mahmudi Begum* 3 Agra 13; *Mirza Ali Hussain v Sajuda Begum* 21 Mad 2; *Muzaffar Ali Khan v Paravati* 4 ALJ 521; *Syed Murtaza v Mst. Alhan Bibi* 2 IC 627.

<sup>38</sup> (1897) 25 Cal. 9.

<sup>39</sup> (1896) ILR 19 All 169.

<sup>40</sup> (1926) ILR 48 All 557.

<sup>41</sup> (1897) ILR 21 Mad 27.

<sup>42</sup> 116 IC 525.

<sup>43</sup> PLD 1972 SC 346.

<sup>44</sup> *Noor* (n 11).

the entire estate of her deceased Shia husband.<sup>45</sup> In that connection, Allama Mufti Syed Tyeb Agha Musavi Jazairi, a prominent Shia cleric of the twentieth century who was also a member of the Parliament, seriously opposed the proposed amendment. He argued that the proper translation of the text of the Holy Qur'an with respect to the inheritance of widows was provided in the pamphlet *Beevi Ki Meeras*. The pamphlet highlighted, "the rule excluding a childless widow from inheriting agricultural lands is based on the true traditions of Imam Jafar Sadiq (the founder of the Shia School), and the well-narrated Hadith where Imam Baqir summoned the Book of Hazrat Ali (R.A) and found that for widows, there was no share prescribed in the lands of their deceased [Shia] husband."<sup>46</sup> Strongly grounded in Shia authority, the pamphlet argued that the widow does not belong to the family of the deceased husband and hence is excluded from any inheritance in the land to avoid disputes, which are likely to occur if she remarries and thus introduces an outsider in the family. Seeing that the Shia community was agitated by the move, the Legislative Assembly did not legislate on the matter.<sup>47</sup>

In 2016, the approach of the superior courts in Pakistan changed from refusing to interfere in a matter where established Shia authorities had already ruled to including a provision of recommendations for bringing a change in the legislation.<sup>48</sup> In their recent judgments, they have put forward recommendations that Shia inheritance rulings "must be made consistent with Qur'anic teachings by the Legislature itself, after consulting the Shia Community."<sup>49</sup> Such recommendations were put forward in *Noor Bibi v Ghulam Qamar*<sup>50</sup> and *Khalida Shamim Akhtar v Ghulam Jaffar*,<sup>51</sup> where the Court held that the disinheritance of childless widow in Shia law was not supported by religious texts. They also held, "[the] exclusion of a childless widow in Shia school of thought is against the explicit meaning of the Qur'anic verse 4:12, as the verse does not differentiate on the basis of the nature of the property that the widow would be entitled to."<sup>52</sup> The Court recommended, "it is expected that the Government of Pakistan in the Ministry of Law would take legislative measures to promulgate a codified law in this regard in order to protect the right of childless widows from Ahl-e-Tashih in getting their due shares from the inheritance of their deceased husbands."<sup>53</sup>

## **Section VI: Other authorities supporting this legal rule**

Superior courts, both in the Indian subcontinent and now in Pakistan, have frequently relied on the inheritance table provided in Mullah's book to rule that a childless widow takes no share in the land of her deceased Shia husband but is entitled to a one-fourth share in the value of trees and

<sup>45</sup> AUJ Lawyers, *Inheritance Share of Childless Widow from Fiqa-e-Jafariya* (Lahore, 2 June 2016) <<http://aujlawyers.com/inheritance-share-childless-widow-fiqa-e-jafariya/>> accessed 11 January 2020.

<sup>46</sup> Ibid; Translation of *Beevi ki Meeras*, quoted in *Syed Muhammad Munir v Abu Nasar, Member (Judicial) Board of Revenue* PLD 1972 SC 346.

<sup>47</sup> Malik Asad, 'LHC judgment sets precedent on widows' inheritance' (*Dawn News*, 10 July 2016) <<https://www.dawn.com/news/1269845>> accessed 11 January 2020.

<sup>48</sup> *Mst. Latifa Bibi v Muhammad Bashir* 2010 SCMR 1915; *Shahzado Shah v M. Sardaro* 2004 SCMR 1783; *Muhammad Hussain v Ghulam Kadir* 2012 CLC 298.

<sup>49</sup> *Noor* (n 11); PLD 1972 SC 346.

<sup>50</sup> *Noor* (n 11).

<sup>51</sup> *Khalida* (n 6).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

buildings standing thereon.<sup>54</sup> Many scholars of inheritance have accepted the table provided in Mullah's book as the authority for justifying this legal rule.<sup>55</sup> Fyzee argues that a childless widow does not take her share from the immovable property of her deceased Shia husband; but is entitled to her proper share in the value of the household effects, trees, buildings, and moveable property, including debts due to the deceased.<sup>56</sup> Likewise, Ameer Ali and Tyabji also adopt the same principle in their books and refer to Mullah as the authority.<sup>57</sup>

These scholars have cited each other to support this rule, but only Mullah goes into some detail regarding judicial decisions that held this principle of inheritance. However, even Mullah falls short of tracing the history and origination of this rule. Tyabji goes further and refers to *Sharay-ul-Islam* in his book,<sup>58</sup> which is one of the supreme sources of law for Shia Muslims. It lays down the rule that when the widow has a child, she inherits out of all that her deceased Shia husband has left, and if there is no child, she takes nothing but her share of the value of the households and buildings.<sup>59</sup> For Tyabji, this opinion is the one that appears to be best founded on traditional authority. He argues that in this matter, the general principle is that deceased persons do not affect the rights of the living. Hence, unless the widow has a child, she must rank as childless.<sup>60</sup>

However, the Federal Shariat Court, in *Khalida Shamim*, ruled that Muhammadan Law by Mullah is only a reference book and not a statutory law applicable in Pakistan and thus can no longer be relied upon by the Court as an authority on Shia principles of inheritance.<sup>61</sup> This makes reliance upon the original authorities of Shia law even more important.

## **Section VII: Evaluation**

Although the proposed bill under discussion aims to bring clarity to the Shia inheritance law regarding childless widows of Shia husbands, it seems ambiguous in its language and the procedure it lays down. Section 2 (3) of the proposed bill states that in case of a dispute arising due to difference of opinion, the parties or any of the parties may either have recourse to a court of competent jurisdiction or approach the Mujtahid-e-Alam.<sup>62</sup> The decision of the Mujtahid-e-Alam will then have the status of a binding award governed by the provisions of the Arbitration Act, 1940.<sup>63</sup>

Within this section of the proposed bill, two substantial shortcomings might limit its effective and purposeful implementation. Firstly, it fails to address the specific nature of disputes that may arise and can be taken to the court or the Mujtahid-e-Alam. Despite the fact that the word "estate" is used, there is no distinction between movable and immovable property; hence, this

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<sup>54</sup> Mullah (n 31) 42.

<sup>55</sup> Ibid 103.

<sup>56</sup> Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (first published 1949, 4th edn, OUP New Delhi 2002) 466.

<sup>57</sup> Syed Ameer Ali, *Mahomedan Law* (2nd edn, Thacker, Spink and Co. 1894) 118; Faiz Badruddin Tyabji, *Principles of Muhammadan Law* (D. B Taraporewala Sons 1913) 630-632.

<sup>58</sup> Ibid 631.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> *Khalida* (n 6).

<sup>62</sup> Muslim Family Laws (Amendment) Act 2019, s 2.

<sup>63</sup> The Arbitration Act 1940 (Act X of 1940), s 9 (b).



begets an uncertainty into the nature of the inheritable property, which might cause more disputes. Secondly, where the parties seek recourse to the Mujtahid-e-Alam, there is a chance that they might rely on pre-established principles as discussed before and again restrict the right of a childless widow from inheriting the immovable property of her deceased Shia husband.<sup>64</sup>

Based on the aforementioned ambiguity due to the text of the law, there exists a need to revise the language of the proposed bill. This may be attained by clarifying that the inheritance share will be calculated from the entire estate of the deceased Shia husband and specifying the nature of the disputes for which a recourse may be made to a court of competent jurisdiction or the Mujtahid-e-Alam. The proposed bill should also incorporate precise adjudication guidelines for the Mujtahid-e-Alam to ensure consistency in the application of this legislation. The revised bill, if passed, will provide childless widows with an equitable and just inheritance share from the estate of their deceased Shia husbands.

The success of the proposed bill might help bring Pakistan closer to other Muslim countries, which have incorporated progressive legislation to protect the rights of childless widows of Shia husbands. In Lebanon, succession among the Muslim communities is governed by classical non-codified rules of the Ja'fari doctrine for Shi'a Muslims. It dictates that a widow's share in her deceased Shia husband's estate is one-quarter if the deceased has no children and one-eighth if he does have children.<sup>65</sup> The same legal rule is also codified in Bahrain.<sup>66</sup> In both these countries, there is no distinction between immovable and moveable property pertaining to the inheritance of childless widows. Iraq has also enacted legislation to protect the inheritance right of childless widows of Shia husbands, and legislatively removed the difference between moveable and immoveable property. Article 91(1) of the Personal Status Law, 1959 specifies that the widow of a deceased Shia husband will be entitled to one-eighth of the legacy when there is an inheriting descendant, and to a quarter when the latter does not exist.<sup>67</sup>

Such progressive legislation in these countries can help set favourable precedents for other Muslim countries where equitable inheritance legislation is non-existent.<sup>68</sup> In Iran, even though there is no distinction between widows who are childless and those who are not, neither of them inherits any real property from the estate of their deceased Shia husbands. They take no share in the substance of the said property but only inherit from the value of the buildings and the household effects. However, in case the other legal heirs refuse them any share in inheritance, the widows may demand their share in the immovable property as well.<sup>69</sup> Any change in Iranian domestic law as a result of these favourable precedents will help bring Iran closer to the Qur'anic principles, which do not make any distinction between movable and immovable property for determining the inheritance share of a childless widow.<sup>70</sup>

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<sup>64</sup> (n 5) s 2 (I) (c).

<sup>65</sup> Centre on Housing Rights and Evictions, *In Search of Equality: A Survey of Law and Practice related to Women's Inheritance Rights in the Middle East and North Africa (MENA) Region* (COHRE 2009) 65.

<sup>66</sup> Siobhan Ferguson, 'Succession principles in the Middle East: Bahrain' (2009) 15 (10) *Trusts & Trustees* 817–820.

<sup>67</sup> Musawah project, '*IRAQ: Overview of Muslim Family Law and Practices*' (Musawah 2017) 23.

<sup>68</sup> Kimberly Amadeo, Sunni Versus Shiite Conflict Explained (*The Balance*, 4 June 2019) <<https://www.thebalance.com/sunni-shiite-split-3305550>> accessed 12 February 2020.

<sup>69</sup> Hamid Khan, *The Islamic Law of Inheritance* (OUP 2007) 126.

<sup>70</sup> Narayana (n 4).

## **Section VIII: Conclusion**

Caught between both religious and political rulings, childless widows have long suffered the fate of being denied their equitable inheritance share in the immovable property of their deceased Shia husbands. Neither the courts nor prominent Islamic scholars such as Mullah<sup>71</sup> have been willing to stand against unfair and discriminatory practices.<sup>72</sup> Where most of the existing literature has fallen short of tracing the origin of the inheritance rule for childless widows of Shia husbands, this paper has not only traced the authority of this rule back to the Imams who led the sect but also highlighted the events that led to the introduction and subsequent enforcement of this rule in the Indian subcontinent.

Nevertheless, owing to the efforts of a few progressive Shia clerics, a bill to amend the provisions of the Muslim Family Law Ordinance, 1961 has been introduced in the National Assembly of Pakistan, which aims to bring domestic inheritance law in line with the teachings laid down in the Qur'an. Two new developments provide a beacon of hope for the proposed amendment in 2019 to not suffer the same fate as that of the 1972 amendment, and thus increases its probability of being successfully legislated upon by the National Assembly of Pakistan. First, Shia scholars have been consulted to guide the proposed legislation. Second, the views of contemporary Shia clerics are now being reformed. Allama Syed Iftikhar Hussain Naqvi Najafi<sup>73</sup> in his book, *Kitab-e-Meeras*, argues that even a childless widow is entitled to inherit one-fourth share from the leftover estate of her deceased Shia husband by making a reference to Ayat No.12 of *Surah Al-Nisa*.<sup>74</sup> Even though this is just the beginning of such a reform, in the near future it is expected that this will pave the way for a move towards a more equitable inheritance share for childless widows of Shia husbands, which is the motive behind such legislation.

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<sup>71</sup> The Hon'ble Federal Shariat Court, in *M. Nasrullah Khan v The Federation of Pakistan* PLD 1994 SC 23, has ruled that said Muhammadan Law by D. F. Mullah is only a reference book and not a statutory law applicable in Pakistan and thus can no longer be relied upon by the Court as an authority on Shia principles of inheritance.

<sup>72</sup> Caroll (n 8); W.H. Machnaghten and William Sloan, *Principles and precedents of Moohummudan Law* (Cambridge University Press 2012) 38; Malik Bashir Ahmad Bagvi, *A Learner's Guide to The Division of Inheritance (Hanafi, Shia, Jafaria, Hindu)* (Pakistan Research Centre 1966) 137; (n 54) 446; (n 67) 126; Ameer Ali, *Muhammadan Law* 118; Baillie, *A Digest of Muhammadan Law* (Qazi Publications 1869) 295.

<sup>73</sup> A prominent contemporary Shia cleric and a sitting Member of Council of Islamic Ideology, Government of Pakistan.

<sup>74</sup> Al Sheikh (n 18) 9.