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From Exclusion to Inclusion: A Historical Examination of the Struggle for Inheritance Rights among Issueless Shia Widows in Pakistan

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Abstract

This research has analyzed the most important and valuable right i.e. right to inheritance. Historically issueless Shia Widow was not allowed to inherit and same was being practiced since colonial period. After partition in 1947, the Pakistani Courts adopted the same colonial approach and denied the issueless Shia Widows from their share in inheritance which was against the injunctions of the Holy Quran. In 2016 Justice Ibad ul Rehman Lodhi of Lahore High Court took the lead and held in a landmark judgment that it is against Qur'anic injunctions that an issueless Shia Widow is denied her due share in estate of her deceased husband and decided that there is no such restriction in Primary sources of Islamic Law and she is entitled like any widow. This took a considerable period and present study has discussed all the historical developments and arguments which adopted and acted upon during this long period. Furthermore, it has also been considered that countless widows had not been able to inherit their part they must be compensated by the state or system because they have suffered irreparable loss. Though legislative measures have been taken to address the issue in future but many are still waiting those who have deprived in the near past.

Introduction

Islam grants women the right to inheritance, stipulating a twofold portion for males and a single part for women. This approach was undoubtedly a very modern approach at the times when female was recognized as independent life and she was considered able to be entitled for such precious. It is also crystal clear that when Islam declared the female that she is allowed to own assets and properties, it was a dark time when she herself was considered as a property and she was inherited by other members of the society like a commodity. It was not less than a revolution that she was given an independent identity after the death of her husband formerly that she was declared entitled to inheritance and secondly she was free to initiate a new life after observing the period of iddat. Currently, there is no universal succession rule governing all Muslims. In several Muslim nations, the Sharia is theoretically upheld, while women are practically denied inheritance rights. In several Muslim nations, Muslim women are granted equal succession rights alongside males. Most non-Muslim nations use a standardized rule of succession applicable to all its inhabitants. Apart from these practical hurdles there are many instance where hardships are faced by the females in obtaining their due right. This research paper is aimed to focus on the hardships in general and specifically the hardships faced by issueless Shia widow



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in obtaining succession from her late husband. It is also important to note that Muslims are integral part of the global community. The only difference is that in some countries they are in majority and in minority in other countries. Here an important question arises that whether estate of Muslim deceased will be decided by his personal law or the law of the land. In earlier times it was the personal law (Privy Council, 1927)ⁱ and it was presumed that people carry their personal law wherever they go but later on it was decided and now accepted globally that moveable assets of the deceased will be distributed according to personal law and immovable assets will be distributed according to law of the land. It is also known as *Lex Situs* (Collins, 1986)ⁱⁱ. In Pakistan it is well settled principle that inheritance is to be distributed as per personal law of the deceased. To understand the idea in depth it is pertinent to mention that in Pakistan inheritance is distributed among legal heir as personal law of the deceased. It is presumed that deceased plays a central role because there is possibility that among legal heirs there might be people who practice different personal. It means personal law in terms of Fiqh. In Pakistan with respect to Muslim citizens there are two types of jurisprudences which are followed. One is Sunni jurisprudence generally known as Hanfi Jurisprudence and other is Jafri Fiqh or jurisprudence followed by Shia School of thought. No other interpretation is accepted with respect to Muslim cases of inheritance. It means that inheritance of the deceased has either to be distributed as per Sunni jurisprudence or Shia Jurisprudence. As earlier mentioned then deceased plays a central role and it is seen that whether the deceased follows Sunni jurisprudence or Shia jurisprudence and then his estate is distributed accordingly. This paper becomes more specific as it goes on focus on the interpretation of Shia Jurisprudence in general and specifically interpretation of Shia Jurisprudence for a widow who is issueless from a specific deceased. Relying upon certain interpretations of scholars of Shia Jurisprudence an issueless widow was deprived from inheriting the immovable property of her late husband during the colonial period and it was continued to be followed by Pakistani Courts. In this article it has been seen that why this approach was adopted historically and what were different instances later on that forced the Pakistani Courts to stay with the colonial approach.

This colonial approach is also termed as pre-partition baggage by many writers. Later on in 2016 a Judge of Lahore High Court held that this interpretation is not the true interpretation as given by various scholars or jurists of this area but it has been misunderstood. He not only decided the case against this interpretation but also recommended the government to take legislative measures so that this deprivation of issueless Shia widow can be eliminated. Although legislative measures have been taken but still it is of utmost importance that it has left many females in state of chaos that why they have been deprived. Is it their only fault that they approached the court in 2010 or earlier. If they had approached later in 2016 or onwards they could have secured their inheriting rights associated with life partners. What are the hurdles for the system that's why system is unable to address the grievances of that deprived class? This is the very practical object this study is going to focus on. It is also important that there are two instances which can possibly raise with regard childless Shia widow. One is who never gave birth to a child and other who gave birth to the child but the child was not surviving at the time of death of deceased. Pakistani Courts have



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considered both females to be childless because of the fact that interpretations are done on the basis of time of death of deceased. It is the time which is in fact known as opening of succession.

In this study following flow is going to be followed:

- Importance of Islamic Law of Inheritance and its interpretations
- Practical approach by Pakistani Courts
- Evaluation of Case Laws in which childless widow has been deprived.
- Leading judgment that entitled the childless widow and changed the approach adopted for decades.
- Legislative measures taken by the legislature to address the issue.
- Suggestions to further improve the efficacy of the specific area as well to ensure the definite justice with regard to other such matters.

Islamic Law of Inheritance: Introduction and Importance

Islamic law of inheritance is one the most important branches of Islamic Jurisprudence. It was considered half of the knowledge by Holy Prophet and he encouraged the companions to learn it and it was ordered in the given words: “Learn the knowledge of inheritance and teach it as it is half of the knowledge and eventually it will be forgotten. It would also be the first branch of the knowledge which will be taken away from the Ummah”. (Ibn-e-Majjah)

As compared to other rules of Shariah the basics of this law has been given in the Holy Quran and Sunnah and realizing the importance of this area classical jurists wrote chapters on this area in their writings. It shows the significance of this area. It is also well argued that it paves the way for happy society by relying upon the given principles:

- I. Ensuring the social justice
- II. Shares in inheritance on the basis of relationships rather than any other preference
- III. Proper distribution of wealth
- IV. No deprivation on the basis of being weak
- V. Deceased to be considered central character rather than legal heirs
- VI. Philosophy of strengthening the basic family unit
- VII. Harmonized relations among the members of the Family
- VIII. Wealth Circulation
- IX. Poverty alleviation
- X. Guarantee for strong family ties.
- XI. Females introduced as legal heirs.

On the other hand, it is complex, subtle, meticulous and systematic science of Islamic Jurisprudence. It requires equal need of deeper understanding of theories of Islamic Law and reliable expertise of numerical solution which enhances its importance. Therefore, scholars of Islamic Jurisprudence had made best tries to make it as easy as possible and many academic works have been written on the subject. Furthermore, in the recent times many software have been developed which yield accurate results as per true letter and spirit of law after correct data is provided to the software.

Interpretation of the Principle by Pakistani Courts

Primarily since the colonial period it has been seen that courts have not shown any sympathy towards issueless widow and she has not been given due share in



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the inheritance though such distinction is not found in Hanfi law of inheritance. It is important to note that there are basically two systems of inheritance are being followed in Pakistan i.e. Law of Inheritance as interpreted by Hanfi School of thought and Islamic law of inheritance as interpreted by Shia School of thought. It is decided on the sect of the deceased that which interpretation is to be applied in a specific case or situation.ⁱⁱⁱ The present study aims to focus on the deprivation of issueless Shia widow. She was deprived from her share in immoveable property because of being issueless but no such distinction had been there in Hanfi law or a widow of a Hanfi husband.^{iv}

In the given lines few cases are being discussed which have been decided by Pakistani Courts and it is aimed to be observed that how this principle of exclusion was justified by Courts in their judgments.

Syed Muhammad Munir vs Abu Nasr etc.:^v

This is one of the leading cases in which scope of inheritance for childless widow was defined. There were 2 concerns that whether childless widow is prohibited from inheritance or not and secondly which widow is to be presumed as childless widow. There were mainly 2 possibilities or 2 types of widows i.e. firstly, those widows who never gave birth to a child and secondly those widows who gave birth to a child but the child did not survive the deceased or child was predeceased as to propositus. In this case Apex Court held that either type of widow is not eligible to get her share in property of her deceased Husband. Decision was given in the below terms:

- I. In Shia Islamic law, it's generally accepted that a widow without children doesn't inherit a share of her late husband's agricultural land. Shia scholars base this rule on the authentic teachings of Imam Jafar Sadek, the founder of the Shia school of thought. Interestingly, these traditions don't actually differentiate between widows with or without children — the rule applies to all widows. The reasoning behind this is that since the widow isn't considered part of her late husband's family, she's excluded from inheriting land to prevent potential family disputes, especially if she remarries and brings someone new into the family circle. The Shia community explains that their differences with Sunni Muslims on this issue come down to how each group interprets certain verses of the Quran.
- II. It's said that Sunnis follow the interpretations of the Qur'an provided by the four major Imams — Imam Abu Hanifa, Imam Malik, Imam Ahmad, and Imam Shafi'i. In contrast, Shias base their understanding solely on the interpretations passed down by the Ahl-e-Bait — the family of the Prophet — starting with Hazrat Ali and continuing through to the last Imam. Because of this, Shias believe their interpretation is more accurate, arguing that no one could have understood the Qur'an better than Hazrat Ali himself. According to tradition, Hazrat Ali recorded these interpretations under the guidance of the Prophet. Given this fundamental difference in how the two sects interpret the Qur'an, it's argued that courts should not override long-standing rulings made by respected early scholars. Changing a rule of inheritance that the Shia community has consistently followed since the time of Imam Jafar Sadek — and which is supported by the unanimous agreement of Shia jurists —



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would not be appropriate. If there is a need for change, it should come from the Legislature, and only after proper consultation with the Shia community.

To reach above said conclusion Supreme Court relied upon the file arguments in favor as well as against the decision. Basically the arguments against the decision were advanced by the parties and those were made part of the judgement.

- I. First argument was taken from the work of a well-known jurist in the given terms: "A childless widow does not take her share from the immovable property of her husband; but she is entitled to her proper share in the value of household effects, trees, buildings, and movable property, including debts due to the deceased. The exact meaning of the expression 'childless widow' is in doubt. Does it mean a woman who has had no children, or does it merely imply that the widow has no children living at the time of the death of her husband? This question has not yet been finally settled."^{vi}
- II. Another reference was made in support of aforesaid claim that Tyabji's Muhammadan Law has addressed the issue in these words: "This passage indicates a conflict of opinion. If the translation is accurate the rule is limited to cases where the widow has had no child by the deceased. But the Allahabad High Court has followed Syed Ameer Ali's dictum that "when she has no child, or when a child was born but died before the decease of her husband, then she is entitled to 1/4 share in the personal estate only, including household effects, trees, buildings etc., she takes no interest in the landed property. On referring to the mere wording of the Shahrai-ul-Islam in the original Arabic, it seems that the point may not be without some doubt; and there is little to throw light on it even in the very exhaustive commentary, the Jawahir-ul-Kalam".^{vii} This author was further noted be saying that deceased person does not affect the right of living person. It means that if a widow is not surviving a child that means that the predeceased child is no more existing hence he will not be able to give any benefit or loss to widow. She is to be ranked childless.
- III. Learned Counsel also relied on the Lecture of Shama Churan lectures whereby it is mentioned that when a wife gives birth to a child that she inherits from everything but when she never gave birth to child then she is not entitled to inherit from the immoveable assets but she is only entitled to inherit from the belongings, cash and moveable assets.^{viii}
- IV. In another very important judgment which was reported in ILR ^{ix} and an interesting interpretation was approached that childless means a women to whom a child was never born and it was concluded after consulting the Arabic Shia Texts. It gave rise to controversy which was itself minor in nature as compared to the Macro level problem but on itself it was also a bigger problem to be resolved. Court was of the opinion that this controversy has arisen after the interpretation of shair ul Islam.
- V. Another factor was reported by the Court was to have a look on a case in which the renowned Scholar Ameer Ali appeared as a council and reported as Mst.Asloo v. Mit. Umdutoonnissa (20 W R 297). It was a case before the Calcutta High Court. The Learned Ameer Ali was counsel for one of the parties and his translation was accepted by the Court whereby



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he opined that “The husband takes a share in all kinds of property left by his deceased wife, and so does the widow when she has a child "born of her womb", or child's child. But when she has no child, or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including household effects trees, buildings, etc. She takes no interest in the landed property.”^x

- VI. The Court also took into consideration the invaluable opinion of K.P. Saxena which was mentioned in the book “Muslim Law” stating that under Shia Law share of widow who never gave birth to a child or a child was not surviving at the time of death of her husband then she is to presumed childless and she can lodge her claim against personal assets of her deceased husband but she cannot claim any right over the immoveable property of her husband.^{xi}
- VII. N.J.Coulson^{xii} was reported that he has concluded in his book Succession in Muslim Family that in this context childless means a widow without a child. It is immaterial that whether she did not give birth to a child or the child was not surviving when the succession opened. He further added that she will take her part in lands only if issues of propositus inherit among her.
- VIII. The Court further noted that the majority view and view taken by Ameer Ali was also considered by Privy council in case of Agha Muhammad Jaffer vs. Koolsom Bee in which Judicial Committee of the Privy Council held that if the widow had not given birth to a daughter of deceased she would not be entitled to inherit from the lands of deceased. This is the issue in the form of a daughter who made her entitled to inherit in the immoveable property of her deceased husband. In other words, it was held that childless widow is not entitled to inherit in the immoveable property of her deceased husband.

Arguments Against The Decision

The court also gave a detailed and patient hearing to the arguments of other side and following arguments were advanced by the Learned Counsel in this regard:

- I. Firstly, the learned counsel placed the reliance on the Holy Quran and he argued before the court that in grading of sources under Islamic law it is well settled principle that prior source is to prevail over the later sources. It is also well settled principle that one can only move to the later source when the prior source is exhausted. In the grading of sources, the given scheme is strictly followed:
 - a) Quran
 - b) Sunnah
 - c) Ijma
 - d) Qiyas
 - e) Rest of the Sources
- II. He further submitted that as per text of Quran there is no such distinction between a widow having children and a childless widow. And if this interpretation is taken from the later sources then later sources are not to prevail over prior sources as a matter of general principle.



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- III. This view was further supported by Maulvi Muhammad Ali, Sahebzada Peer Muhammad Karam Shah of Bheera Shareef and Molana Ashraf Ali Thanvi and they favored this opinion that no such distinction has been created by the Holy Quran. They said that Quran has not differentiated childless and childful widow. Peer Karam Shah mentioned this opinion in his well-known book Ziaul Qur'an.
- IV. Another important point to be considered that was distribution of assets into moveable and immovable was never found to be there in Islamic Law of inheritance. Islamic law of inheritance always speaks about the assets of the deceased or estate of the deceased and it includes all the assets having value. Quran and Sunnah has not created various classes of assets. He further asserted that in Islamic law of inheritance the word Tarkah is used for inheritance and in almost all the dictionaries Tarkah refers to both moveable and immovable assets of the deceased. A reference was made to Hughes Dictionary meaning in which Tarkah was defined as legacy, bequest and inheritance. In general, and literal meaning it means leftover and specifically in the context of Islamic law of inheritance it means estate leftover by deceased.

Observations of the Court

The Court after entertaining all the arguments and hearing the parties at length made the given observations in this very important case:

- I. This question was raised in the legislative assembly of west Pakistan and the argument that this practice is against the text of Quran, it was vehemently opposed by Allama Mufti Syed Tyeb Agha Musavi Jazairi and he said that proper translation of the Quran does not say so. It means that he raised objection over the translation and that turns the direction of the debate. He further stressed that rule to exclude the childless widow from estate is based on the true tradition of Imam Jaffer Sadiq, the founder of Shia School, and it is reported at multiple sources. He also argued that Imam Muhammad Baqir summoned the book of Hazrat Ali. Imam brought the book whereby it was written in Hazrat Ali's handwriting that there will not be any share for childless widows in the lands of their deceased husbands. This handwriting was recognized by Imam Muhammad Baqir.
- II. The Court also noted that Shia community believes that widow is presumed to be part of the family when she is having motherly relations with the kids of the deceased and in absence of kids the chain establishing the relation is presumed to be broken hence she is not considered part of the family hence she is deprived from the share in immovable property.
- III. The court opined that differences in Shia and Sunni interpretations arise as a result of different interpretations of Quranic Text. The Sunnis accept the interpretations given by four Imams I.e. Imam Abu Hanifa, Imam Malik, Imam Ahmad Bin Hanbal and Imam Shafi while on the other hand Shias rely on the interpretations given by members of household of Holy Prophet starting from Hazrat Ali (Commonly known as Ahl-e-Bait). They claim that no one better than Hazrat Ali could understand the



Quran and Hazrat Ali himself have recorded these interpretations under the instructions of Holy Prophet.

- IV. In the concluding paragraph the court resorted to define its scope and did the due diligence that in religious matters what is the scope of the court. The court opined that it is well admitted fact this practice to deprive the childless widow is being followed since very long and considerable period. It is also well admitted fact that both the jurisprudences are well recognized in Pakistan and cases of individuals are decided as per their respective jurisprudences i.e. either Sunni Jurisprudence or Shia Jurisprudence. Court is not finding itself in a position that to change the settled principle pertaining to the religious affair. Indirectly the court conveyed the message that this matter might have different interpretation but because of its being religious nature the same is not to be considered on merit or other principles but only on the basis of religious principles and religiously this principle is well supported by the scholars of that community. The court also observed that as long as there is issue of Quran Translation there is difference in translation given by Allama Mufti Syed Tyeb Agha Musavi Jazairi and S. V. Mir Ahmad Ali. The Court also advised that the matter may be taken up by the legislature and legislation can be made after consultation with the Shia Community. Court observed that such a widespread and practice since long time can validly be considered Ijma and it is not mandate of the Court to interfere with that. It is also pertinent to mention that at this stage that court did not feel comfortable to decide the case on merit though court has ample powers to interpret the matters while considering the sources of Islamic but court left the matter for legislature which was not taken up by the legislature even after lapse of four decades and it was followed in hundreds of cases in this considerable period unless it was overturned in a landmark judgement of Lahore High Court. In the coming lines a precise overview is being taken of few judgments which were given on the same issue keeping in mind this case having the force of precedent.
- V. Another fact that convinced the court to not interfere with the practice that was it long and historical practice and later on it was followed by the Privy Council during the colonial period which cannot be used as an argument that because it was followed by the Privy Council so it shall not be changed.

FAIZ AHMAD and others VS. Mst. SAHIBAN and others:^{xiii}

In this judgment mainly two issues were taken into consideration:

- I. It was contention of one party that deceased died being Shia subject and the same was held in three courts below the Supreme Court which was not challenged, the court held that any fact which was not challenged in lower courts the same cannot be pressed before the Supreme Court.
- II. The second question was with respect to if he died being Shia subject whether the issueless widow is entitled to her share in the immoveable assets of her husband? The court held that inheritance of a Shia Husband is to be distributed according to that specific jurisprudence.



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Mst. SHARIF BIBI VS. MUNIR HUSSAIN SHAH^{xiv}

In this case petitioner was widow of a Shia Husband and she was deprived from her in the immovable property of her husband. She filed this petition in the High Court and it was stressed that there is no law that prohibits her from exercising this right. On the other hand, it was opposed by the respondents and High Court held that this practice is being followed since long and there is no evidence on record that suggests that this rule shall be overturned. Hence the case was decided as earlier and issueless widow was denied to be having any interest in the immovable property of her husband.

SHAHZADO SHAH VS. M. Sardar and others^{xv}

In this case brother of deceased tried to get the entire immovable property belonging to deceased claiming that his wife being issueless and she is not entitled to any share as per Shia law of inheritance. But different facts were brought on record as the land was already mutated in favor of all legal heirs including issueless widow according to Islamic law of inheritance as interpreted by Hanfi school of thought. The same was not objected before the revenue authorities. Issueless widow was in receipt of pension of deceased. Claiming brother had not produced any evidence that suggests that funeral rituals of deceased were concluded according to Shia Practices. In these circumstances claim of the brother was denied but principally the concept remained intact.

Mst. LATIFA BIBI VS. MUHAMMAD BASHIR^{xvi}

This case highlighted another important issue that how it is to be assessed that whether a person dying issueless was Sunni or Shia? Normally legal heirs claim the status which suits them financially in terms of inheritance. But the Court held that it is not the claim of legal heirs which will decide whether the deceased is Shia or Sunni. Along with few parameters the court established a presumption that majority in Pakistan is Sunni Muslim hence every disputed deceased is to be treated Sunni unless otherwise is proved by given factors:

- I. Offering or rituals of Janaza prayer are not determining factors as that is done after his death and he is not in a position to consent to it. Same is the case having birth in house as that is also without will and wish of the subject.
- II. Conduct of the deceased is very important during the lifetime as that shows the independent will of the subject.
- III. Opinion and faith of close relatives is not a determining factor.
- IV. If any statement is made by the deceased in any document like a will or gift deed that is to be considered relevant and no hard and fast rule can be laid down. It is the conduct of the subject and inferences drawn thereby are having the utmost relevance.

MUHAMMAD HUSSAIN VS. GHULAM QADIR^{xvii}

It was suit for declaration of rights and the same was entertained by the court by adding some more law points.

- I. Where there is co-ownership in inherited that does not need to be declared through a civil suit but as soon as succession is open co-owners become owners of their shares in joint inherited to the extent of their as



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- prescribed by Shariah and the relevant jurisprudence either that is to be dealt under Sunni jurisprudence of Shia Jurisprudence.
- II. Issueless widow of Shia Husband is not entitled to any share in immovable property but she is only entitled to share in movables and personal belongings of the deceased.
 - III. It was also held that keeping in mind the complexities of the case and material importance of the rights involved in such cases, the question of limitation would not be attracted in such. It is also said that technicalities are not supposed to destroy the substantive rights of the people. In this situation question of limitation is technicality and rights attached with inheritance are substantive rights.

Judgment as a Turning Point: A Case That Changed Everything

After all that long history spread over many decades or even centuries a landmark judgment was given by Lahore High Court commonly known as Khalida Shamim Case.^{xviii} The main thing or important point of this case is that a judge of Lahore High Court did an attempt which was not taken up by judges of Supreme Court earlier in many cases. As we have seen in earlier in this study that Supreme Court was reluctant to apply this principle but it held that they don't feel comfortable to interfere with religious interpretations. The unique or distinguished feature of this judgment is that it took the lead and primarily held that classical interpretations of religious laws are not absolute and these are subject of creative interpretation of Quran and Sunnah. It also highlighted that interpretation of inheritance laws is to be done keeping in mind the entirety of Islamic Law of inheritance. If we have a look on history of Islamic law of inheritance, it seems that it did not abolish the old law that was there in the Arab tribes but it reformed the old law. In this entire process of reformation one thing is observed that Islamic law of inheritance that it focused on the minors and females and tried its level best that their rights are ensured and they are not victimized. The Court also kept this principle in mind while proceeding with the decision of this history making case.

Facts Of The Case And Reasons Behind The Landmark Judgment

Basically it was a case of childless widow and civil court declared her entitled to her share in immovable property of her husband. But following the traditional approach first appellate court reversed the decision and the matter came up before Lahore High Court where Justice Ibad Ur Rehman Lodhi of Lahore High Court dealt with case and took a brave and revolutionary step that changed the history. He did not only decide the case in favor of widow stating that Islamic law of inheritance is there to protect the rights of the weaker class that is minors and females but this interpretation has deprived them from their important rights. Furthermore, the court also advised the legislature to legislate upon the matter to remove ambiguities and secure an effective implementation. The court discussed the following points and dealt with them through a well speaking order.

- I. Firstly, the court gave a public notice and invited Shia Ulama to come into the Court and assist the court to reach a right conclusion. In response to this public invitation Allama Syed Iftikhar Hussain Naqvi Najafi (a sitting member of Council of Islamic ideology) appeared before the court and assisted the court on this important matter in hand. He also referred to



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his own written book *Kitab-e-Meeras* where it is mentioned that a childless widow of Shia husband is not to be deprived from her share in inheritance in immovable property. Allama Najafi also said that entire Shia Community keeps a heavy regard for instructions of Quran and they cannot even think of deviating from it.

- II. The court also noted that specific law in hand which prohibits Shia widows from inheritance is against the clear injunctions of Quran.^{xix} It was concluded that verse entitling a widow to $\frac{1}{4}$ in absence of descendants does not differentiate the properties or assets but that deals with inheritable assets which includes both moveable and immovable property.
- III. Muhammadan Law by D.F. Mullah also states that childless widow takes no share in the lands of the husband. But court rejected this argument by stating that Mullah gives no explanation for this rule except it says that it is rule of Shia Fiqh which cannot be treated as evidence. Court further cited a decision of Federal Shariat Court where it was decided that rulings of Mullah are not to be considered binding where these are found against injunctions of Islam. It was also noted that propositions in the book are not to be acted upon when they are not in confirmation with the golden principles of equity, justice and good conscience.
- IV. Court showed very serious concern over the lack of legislative measures since many decades.
- V. Before parting with the judgment Justice Lodhi gave an advice to the government that it is hoped that government will legislate over the issue through ministry of law to protect the rights of issueless Shia Widow.

Legislative Measures To Address The Issue

After the advice in the judgement it was expected that legislature will come into action quickly and responsibly but it took almost 5 years when the new provisions were added to section 4 of Muslim Family laws ordinance specifically in the given words:

Succession

(2) If a Muslim male from Ahl-e-Tashih dies, the share of a widow in the immovable property left behind by her deceased husband shall be as follows:

(a) one-fourth share of the fixed price or value of the property, if there is no child left behind the deceased husband; and

(b) one-eighth share, if there is child left behind.

(3) If there are two or more widows, the share, as mentioned in sub-section (2), shall be divided equally among them.

Ultimately after an ignorance of many decades and even after pointation by a competent court this problem came to an end and after a lapse of five years it got legislated.^{xx}

Conclusion and Findings

Undoubtedly after pointation of court the issue of exclusion from invaluable right changed to inclusion but this practice was not for weeks or months but for decades. It is very unfortunate and irreparable loss caused to those subjects who were deprived from their very legitimate right during this period of deprivation



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even in absence of any fault at their part. This all happened because lack of judicious approach and following the settled practices. Though issue has been resolved but following observations are being made for improvement of system or future reform of like nature:

1. In case any such point is highlighted by any constitutional court that shall be given with a time frame or there must be some mechanism at the parliament that such type of issues shall be legislated on priority basis because these matter truly affect public at large.
2. In the leading judgement of Honorable Supreme Court, it was said that the Court finds it very difficult to change the settled norm. it clearly depicts that Court finds something which is not in line with principles of justice and equity but court looked helpless. Such a helpless attitude is not expected from the apex court of the land. It was a challenge for legal think tanks and civil society but nobody bothered to look into the matter or raised any voice that is main reason it was overlooked for almost a century after that. It could have been resolved more efficiently if the matter was referred to a board of Ulma or Council of Islamic Ideology to have an expert opinion. Such an effort was not seen merely because of a presumption that it is a sensitive matter.
3. This principle is also found to be against the natural preferences of marital tie. At the same time, it seems to be unethical as well. It is not in preferences of marriage that there must be a guarantee for an unknown event that she will must give birth to a child. Sometimes child is not born because of some illness at part of husband or wife. Then why the only female is left for suffering as there is not any prohibitory interpretation for the husband. The same was discouraged in the early times when Islamic law of inheritance was introduced. Its purpose was to secure the rights of weaker class and it includes minors and females. It is also against the natural desire which is found in both husband and wife. But if that does not happen because of an act of God then the female must not be loser end and that also in absence of definitive source or evidence.
4. It also meant that wife does not come in proper definition of wife unless and until she gives birth to a child. The same requirement is not there in Islamic law for conclusion of marriage. It is pertinent to mention that mutual rights and obligations are created soon after conclusion of marriage. Right to inherit is also one of them.
5. This case has significance and desires utmost appreciation because it changed and bypassed the decades old precedents including the judgments of Supreme Court. Courts were found to be implementing this principle even before the partition. In the hierarchy of judicial precedents, it not considered a good sign that a lower court overrules the precedents of superior court but the way Lahore High Court has played a significant role and relied upon the primary sources of Islamic law i.e. Quran and Sunnah that is not against the spirit of the norms but a lime light and application of an independent and judicious mind which is desirable in each and every individual case.



End Notes

- ⁱ Blawant Rao vs Baji Rao (1927) 47 IA 213 [Privy Council]
- ⁱⁱ Re Collins (1986) Ch. 405, Duncan vs Lawson (1889) 41 Ch. D. 393
- ⁱⁱⁱ Ahmed Cheema, Dr. S. (2017). *Islamic Law of Inheritance, Practices in Pakistan* (1st ed., pp. 13–14). Shariah Academy International Islamic University Islamabad. (Original work published 2017)
- ^{iv} Ahmed Cheema, Dr. S. (2017). *Islamic Law of Inheritance, Practices in Pakistan* (1st ed., pp. 230-231). Shariah Academy International Islamic University Islamabad. (Original work published 2017)
- ^v Syed Muhammad Munir vs Abu Nasr etc., (Supreme Court of Pakistan 1972). P L D 1972 Supreme Court 346.
- ^{vi} Fayzee, A. A. (n.d.). *Outlines of Muhammadan Law* (3rd ed., p. 438).
- ^{vii} Tyab JI. (n.d.). *Muhammadan Law* (3rd ed., p. 908).
- ^{viii} Tagore, S. C. S. (n.d.). *Law Lectures on Muhammadan Law* (p. 260).
- ^{ix} Fazal Rab v. Khatun Bibi, (ILR 1929). 29.
- ^x ALI, A. (n.d.). *Muhammadan Law* (Vol. ii, p. 113).
- ^{xi} Saxena, K. P. (n.d.). *Muslim Law* (3rd ed., p. 882).
- ^{xii} Coulson, N. J. (n.d.). *Succession in Muslim Family* (p. 113).
- ^{xiii} 1989 SCMR 1142
- ^{xiv} 2000 YLR 2580
- ^{xv} 2004 SCMR 1783
- ^{xvi} 2006 CLC 1076
- ^{xvii} 2012 CLC 298
- ^{xviii} PLD 2016 Lahore 865
- ^{xix} 12:4 (Al-Quran)
- ^{xx} Muslim Family Laws Ordinance 1961., 4 (1961).