EVOLUTION OF THE EDUCATIONAL REFORM MOVEMENTS IN THE 19th CENTURY BRITISH INDIA AND THEIR IMPACT ON THE SYSTEM OF EDUCATION IN PAKISTAN

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Two different educational ideologies emerged from the Muslims Educational Reforms movements initiated by the Dar ul uloom Deoband and Aligarh School. The educational reforms promulgated by the two movements stemmed from the conviction that existing Muslim traditional institutions were incapable of meeting the changing needs of a Muslim society living under colonial rule. The present system of education in Pakistan inherits the legacies of the both. Highlighting the perspectives of these two educational reform movements, this research paper reviews the present system of education in Pakistan and finally, some workable solutions have been proposed.

Introduction: With the loss of their power in 1857, the conditions of Indian Muslims deteriorated and the educational fabric of the Muslim society was affected to the worst extent. The old educational system was replaced with a new system and English language was made compulsory in educational institutions and to get the government jobs. The Hindus welcomed these emerging educational trends whereas the Muslims showed their continuous disregard to such a type of policies as they thought that the new English system of education did not synchronize with their culture and this was in fact, an effort to centrifuge the Muslims from Islam. This research paper dilates upon the evolution of two institutions, *viz.*, Dar ul uloom Deoband and Aligarh School and their impact on the system of education in Pakistan after the 1947 and finally attempts to answer the research question that whether the reform agenda put forth by these two 19th Century Muslim Educational Reform Movements is applicable on the system of education in the prevailing circumstances in Pakistan.

Methodology: This is a library based research – a most widely used technique in the social sciences research. A library based research is a piece of scholarship in which the work of others is put

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[10] 2012 SCMR 695
[11] 2012 CLD 850
[12] 2010 YLR 410
[13] 2010 CLC 555
[14] 2008 CLC 43
[15] 2008 YLR 589
[16] Muhammad Hussain v. Ghulam Qadir 2012 CLC 298
[17] 2012 MLD 1013
[18] PLD 2012 SC 217
[19] PLD 2011 Lah 23
[20] 2009 CLC 1273
[21] 2005 CLC 1160
[22] 2010 CLC 260
[23] 2007 CLC 1787
[24] 2007 MLD 800
[25] 2005 SCMR 1595
[26] 2005 YLR 29

interventionist attitude in the sphere of law of inheritance and to a large extent this area has been left uncodified. This attitude facilitates the courts to decide cases in accordance with the traditional laws of inheritance as is understood by Sunni and Shia Muslims. This does not mean that this area of law has exclusively been left unattended; there is one important adjustment of the traditional law made by the state in form of Sec. 4 of the Muslim Family Laws Ordinance pertaining to inheritance rights of the descendants of predeceased children from their grandparents in presence of their uncles and aunts. In this respect, the courts of the country apply and will continue to apply the said law until that remains as an applicable law.

NOTES AND REFRENCES

[1] There are some provisions in the Constitution of Pakistan, 1973, which put this responsibility on the shoulders of the state, for instance, Articles 2-A, and 31. Mahmood, M. The Constitution of Islamic Republic of Pakistan (Lahore: Pakistan Law Times Publictions, 2010).

[2] This law was enacted by General Ayub Khan on the basis of recommendations made by the Marriage and Family Law Commission. For details please see Rahman, Dr. Tanzilur, Muslim Family Laws Ordinance, Islamic & Social Survey (Karachi: Royal Book Company, 1997). Khan, Hamid, The Islamic Law of Inheritance: A Comparative Study of Recent Reforms in Muslim Countries (Karachi: Oxford University Press, 2007).

[3] Section 4 of the Muslim Family Laws Ordinance, 1961, states that "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".

[4] Hamid, The Islamic Law of Inheritance. Mulla, D. F. Principles of Mahomedan Law (Lahore: PLD Publishers, 1995).

[5] Allah Rakha v. Federation of Pakistan PLD 2000 FSC 1

[6] Ullah, Al-Haj Muhammed (1986) The Muslim Law of Inheritance (New Delhi: Kitab Bhavan, 1986). Hamid, The Islamic Law of Inheritance. Asaf A. A. Fyzee (2009) Outlines of Muhammadan Law, Edited by Tahir Mahmood (New Delhi: Oxford University Press), 304-369. Mulla, Principles of Mahomedan Law, 65-180.

[7] 2007 CLC 1840

[8] 2011 CLC 736

[9] PLD 2011 Kar 232

Brief facts of the case are that an original owner of property Mughla died and left behind his son Khizar Hayat and legal heirs of another predeceased son Maula Dad (a widow and two daughters). Khizar Hayat inherited half of his estate, while another half was for the legal heirs of Maula Dad. Maula Dad's widow was entitled to 1/8 and his daughters to 2/3 from his half share as sharers; the residue of Maula Dad's half share was inherited by his brother Khizar Hayat. It was argued on behalf of the widow and the daughters of Maula Dad that nothing should have been given to deceased's brother Khizar Hayat from his estate under Sec. 4 of the Muslim Family Laws Ordinance as it was their right to inherit it under the doctrine of radd/return. The court observed that the application of Sec. 4 of the said law is meant to protect the rights of descendants of predeceased children of a propositus and the same could not be extended to override the shares of other eligible heirs under the general provisions of Islamic law. Thus, the application of the said law would be tolerated to the extent it does not interfere with the shares of other heirs under Islamic law.

Farah Chaudhry v. Shahid Mahmood Malik[26] deals with the issue whether Sec.4 of the Muslim Family Laws Ordinance is applicable to non-Muslims or not. Facts of this case are as under: Mahmood Ahmed Malik died and left behind many legal heirs including a daughter of his predeceased son namely Mehwish Khalid. Both the courts below concurrently decided that all legal heirs would be entitled to the deceased's estate as per applicable law. In this civil revision, it was contended that Mehwish Khalid belongs to Ahmadi faith; hence she could not have anything from the estate of Mahmood Ahmed Malik through his predeceased father as the said law is only applicable to Muslims. The people professing the Ahmadi faith would only be governed by their own laws. Thus, the present revision was partly accepted to disinherit a legal heir of a predeceased son of the propositus belonging to Ahmadi faith.

4. Conclusion:

The paper has analyzed the application of the traditional law of inheritance by the Pakistani superior courts. The courts' attitude in this regard is shaped by the fact whether the state has enacted any law relating to any issue of inheritance or not; if there is any enacted law then that is applied by the courts and if there is none then they search for the solutions in the traditional law of inheritance. Generally, the state has adopted a minimalistic

court did not find any merit in the petitioners' contention to set the concurrent judgements of the lower courts aside; hence it was dismissed.

In Qamarul Bashir v. Muhammad Ghous Khan,[24] an interesting issue was discussed as to whether the application of Sec. 4 of the Muslim Family Laws Ordinance could be extended to include in the list of beneficiaries those relatives who have not been mentioned in the section specifically. Brief facts of the case are that a person died and left behind a full sister, two sons of predeceased brother and a son of predeceased sister. The suit was originally filed by the two sons of predeceased brother and another son of the predeceased sister (the petitioner). During the proceedings at the level of subordinate court the issue of inheritance with respect of the sons of the predeceased brother was settled; hence they did not participate in the present suit. The petitioner, in the instant case, falls in the category of distant kindred whose right to inheritance could only be entertained in absence of the sharers and the residuaries. In this case, the full sister is a sharer who will have 1/2 of the estate and the two sons of the predeceased brother are the residuaries who will inherit the residue. Thus, the distant kindred/the petitioner will not be entitled to anything in the estate. It was contended on behalf of the petitioner that he should be given share in inheritance on analogy of Sec. 4 of the Muslim Family Laws Ordinance; meaning thereby the son of predeceased sister of a propositus should be treated similar to the treatment extended by the said law to children of predeceased children of a propositus. The court has observed that the said law is only applicable to those who have specifically been mentioned in it, i.e. the descendants of predeceased children of a propositus, and no one else could have been benefited under its application as Islamic law of inheritance is otherwise exhaustive in its application which provides for all possible eventualities. The petitioner, in the instant case, is a distant kindred who is excluded by the presence of the sharer (the full sister) and the residuaries (the two sons of the predeceased brother). Thus, the application of the said law cannot by extended by way of analogy so as to facilitate the children of predeceased sister of a propositus.

Mst. Bhaggay Bibi v. Mst. Razia Bibi[25] deals with an intricate question of conflict between the general provisions of Islamic law of inheritance and Sec. 4 of the Muslim Family Laws Ordinance.

limitation nor the conduct of the petitioner could estop the rightful owner from claiming his right.

Rehman Ghani v. Shahzad Khan[22] deals with applicability of Sec. 4 of the Muslim Family Laws ordinance during the pendency of appeal against its repugnancy to Islamic law in the Shariat Appellate Bench of the Supreme Court. Brief facts of the case are that a deceased left behind his son (the petitioner) and children of his predeceased son (the respondents). The petitioner assailed the right of inheritance of the respondents on the basis that their father predeceased the propositus/grandfather of the respondents, and Sec. 4 of the Muslim Family Laws Ordinance on which their right to inheritance was founded was declared un-Islamic by the Federal Shariat Court. Hence, they are not entitled to any share in the estate left by their grandfather/propositus. The court has decided, in the case, that grandchildren are entitled to inherit that share which their father would have inherited had he been alive at the opening of the succession under Sec. 4 of the Muslim Family Laws Ordinance. Responding to the issue of inconsistency of the said section with Islamic law, the court has observed that an appeal is pending in the Shariat Appellate Bench of the Supreme Court of Pakistan and till the decision of that pending appeal the judgement of the Federal Shariat Court cannot be given effect as per Article 203-D of the Constitution of the Pakistan. Thus, the applicable law till the decision of the Shariat Appellate Bench is that which is contained in the said law and not the judgement of the Federal Shariat Court.

In Allah Dewaya v. Muhammad Hussain,[23] a deceased left behind two sons and two daughters along with children of predeceased daughter. The deceased's estate was transferred in favour of his living children (the petitioners), while nothing was given to the children of his predeceased daughter (the respondents). The respondents challenged the transfer of the estate to their maternal uncles and aunts excluding their right to inheritance through their mother on the basis of Sec. 4 of the Muslim Family Laws Ordinance. Both the trial court and the first appellate court decided in their favour and awarded them the share their mother would have inherited had she been alive at the time of opening of succession, i.e. 1/7. It was mooted in the High Court that since the said law has been declared repugnant to the injunctions of Islam, reliance could not be placed on it in matters of inheritance. But the

grandchildren from their grandparents and there is nothing in the relevant section to warrant any inheritance rights to spouse of a pre-deceased child. The court has decided that the provisions of the Muslim Family Law Ordinance are not meant to override the Shariah principles and the application of this law cannot be carried out in a manner to exclude those who are otherwise entitled to inheritance. Thus, the petitioner (widower of a predeceased child) is also entitled to inheritance in the estate of his deceased wife.

In another case decided by the same High Court namely Qutab-ud-Din v. Zubaida Khatoon,[20] it has been observed that Sec. 4 of the Muslim Family Laws Ordinance only confers the rights to inheritance on the children of a predeceased child and the spouse of that child would not have anything from the estate devolved upon by the operation of the said law. The decision of this case seems to be in conflict with the dictum laid down in the preceding case. Let us elaborate another case below which confirms the decision of the present case.

Mst. Saabran Bibi v. Muhammad Ibrahim[21] deals with the issue of inheritance of the widow of predeceased child. The owner of the disputed property Mehr Din had three sons and two daughters; one of them namely Muhammad Shafi died in his life and left behind a son and a widow Mst. Hassan. At the death of Mehr Din, the share of his predeceased son Muhammad Shafi was divided between his son and widow; the latter got 1/8 out of that share. Mutation to this effect was attested in 1966. Later on, Mst. Hassan, the widow of Muhammad Shafi married to another brother of his deceased husband and had children from him. She transferred some of her inherited properties to them through mutation attested in 1983. It was contested in the case that the widow did not have any right in the estate of her deceased husband and his entire share should have been transferred to his son. Both the trial court and the first appellate court taking into account unreasonable delay did not accede to the above contention; hence the present revision. The court has decided in this case that the widow could not have anything from the estate devolved on her deceased husband by operation of Sec. 4 of the Muslim Family Laws Ordinance as the said law has been enacted to save the children from hardship and the widow cannot be read into the phraseology mentioned in the law by any stretch of interpretation. Moreover, neither the

heirs, but if someone transfers his right once his right has been established then the case would not be of collusive transfer of the property rather than it would be voluntary relinquishment of one's right and its transfer to someone else. The present case falls under the latter category and cannot be regarded as any deviation from the above-referred principle of inheritance of the traditional laws of Sunnis and Shias.

3. Pakistani Case-Law Influenced by Sec.4 of the Muslim Family Laws Ordinance:

This section will explore the extent to which Sec. 4 of the Muslim Family Laws Ordinance has influenced the traditional law of inheritance. The courts while applying the said law have generally tried to give it restrictive import so that its application might not deprive of those relatives who are otherwise eligible under the traditional law of inheritance. Let us now analyze some selected cases.

Mst. Sarwar Jan v. Mukhtar Ahmad[18] deals with the issue of retrospective/prospective applicability of the Muslim Family Laws Ordinance. In this case, the Supreme Court of Pakistan rejected the plea that the said law could have retrospective application. The facts of the case are that Mr. Ilam Din died in 1956 and one of his sons died a year before his death, i.e. in 1955. The descendants of the predeceased son applied for their share in the estate of their grandfather on the basis of the right created in Sec. 4 of the Muslim Family Laws Ordinance. It was decided by the court that the above law would only be applicable prospectively and the matters relating to inheritance which were settled before the promulgation of the said law will not be reopened to financially benefit the children of predeceased children of a propositus.

In Mian Mazhar Ali v. Tahir Sarfraz,[19] the petitioner was husband of Mehmooda Begum who predeceased her parents. He claimed his share from the estate of her wife which she inherited from her parents owing to the application of Sec. 4 of the Muslim Family Laws Ordinance. According to Sec. 4, there has not been any cavil to the issue that children of Mehmooda Begum will have the share in the estate of their mother, but there has arisen an important question as to the right of inheritance of Mehmooda Begum's husband; whether he is entitled to inherit from the estate devolved upon Mehmooda Begum from her parents. It was argued that applicability of Sec. 4 is restricted to the inheritance rights of

after perusing the record and hearing to the arguments of the parties, has came to the conclusion that it is not proved that the deceased was a Shia and unless one is not proved to be a Shia he will be treated as a Sunni. Moreover, the will attributed to the deceased has not been proved in the manner it ought to have been proved. The facts which are proved in the case are that the deceased left behind his widow and collaterals. Thus, the estate of the deceased is to be divided among them; the widow will have 1/4 and the rest will be inherited by the collaterals including Allah Ditta as there is no child of the deceased.

It is a well settled proposition and has been affirmed in many judicial pronouncements of the superior courts that legal heirs of a deceased would become owners of their shares in the estate without completing any technical formalities, e.g. mutation or declaration by a court.[16] In Mst. Rabia Bibi v Muhammad Anwar,[17] an interesting question has arisen as to this settled law. A person died issueless leaving behind one brother and children of another predeceased brother. In such circumstances, the brother was entitled to the entire estate left by the deceased. But he himself facilitated the mutation of half of the estate to the children of his pre-deceased brother and the rest of the estate was transferred in his name. The brother remained alive for 18 years after this mutation and he did not take anything from the estate given to the children of his predeceased brother. After his death, his children did not challenge the mutation for about 9 years. Thereafter, they agitated that the mutation had been wrongly and collusively carried out and contended that the children of the pre-deceased brother/their paternal uncle's children did not have any right in the estate as their father was exclusively entitled to the entire estate at the opening of succession. They argued on the basis that the presence of their father excluded the children of predeceased brother/their uncle's children from inheriting anything from the estate as nearer in degree is preferred over the more remote relatives. After perusal of the record, the court has drawn a fine line between the opening of succession and settlement of inheritance rights of legal heirs at the death of a deceased on the one hand, and on the other, relinquishment of proprietary rights after having knowledge of its ownership. The court concluded that there has not been any problem with the principle that the rights of inheritance are transferred at the death of a deceased to his legal

court in the instant case set aside the concurrent judgments of the courts below and decided that Mehnga/the respondent had no right to inherit the disputed property as her mother died earlier than the death of Fazal Din. Actually there was no sharer and residuary alive at the death of Fazal Din. There were only distant kindred alive; one of them was his brother's daughter (Mst. Rasheedan Bibi) and another was daughter of his brother's daughter (Mehnga). So, the property was rightly transferred to Mst. Rasheedan to the exclusion of Mehnga. As it is well-recognized rule in the traditional Islamic law that when there are distant kindred of the same class, then their right to inheritance would be determined on the basis that the nearer in degree will exclude the more remote.

In Muqadar v. Mst. Roshah,[14] the dispute was as to the distribution of estate of deceased Rajab who left behind his widow, a daughter (the respondents) and collaterals (the petitioners). The court calculated the shares of the parties as per dictates of Islamic law. The widow was held to be entitled to 1/8 and the daughter to 1/2 which would become 3/24 and 12/24 respectively. While the residue, i.e. 9/24, would go to the collaterals/residuaries. In addition to the calculation of shares of the legal heirs, another question was mooted in the case as to the manner of distribution of the deceased's estate; whether the shares of these ladies/the respondents would be deducted first and then the remaining share shall devolve upon the residuaries or out of the total share each one of the L.Rs. would get his/her share. The court termed the question as simple taking into account the different classes of legal heirs provided in Islamic law. Thus, it was affirmed by it -in line with the traditional law of inheritance- that the sharers would take their shares and then the residue would be inherited by the residuaries.

In Pathana v. Allah Ditta,[15] Ghulam Taqi died issueless leaving behind his widow Mst. Naseem Akhter and collaterals including Allah Ditta. Allah Ditta produced a will in the trial court executed by the deceased in his favour stating therein that he had served him during his life so the deceased has transferred the whole estate to him. Allah Ditta also contended that the deceased was a Shia Muslim as the said will could not be given effect in toto unless it was proved that the deceased was so. Both the trial court and the first appellate court accepted the case of Allah Ditta and decreed as such. Hence, this civil revision filed in the High Court. The court

that the father being a nominee only in the instant case did not have any right to disturb or override the provisions of Islamic law of inheritance as he was only entitled up to the extent of his share and the rest would be distributed among other heirs of the deceased; hence, the widow would get her prescribed share.

In Muhammad Akbar v. Haji Sher Muhammad,[12] an owner of a disputed property Muhammad Ismail died issueless and his property was transferred to Muhammad Siddique's son and daughter who was his first cousin, while another first cousin namely Haji Sher Muhammad (the respondent) of the same degree was not given anything. The reason for transferring the disputed property in favour of Muhammad Siddique's children was that he was not alive at the death of Muhammad Ismail, so his children were benefited. The respondent thereafter challenged the transfer of the property and contended that he was entitled to the same on the basis of his residuary status. Both the courts below, i.e. the trial court and the first appellate court, decided in favour of Haji Sher Muhammad/the respondent on the basis that he and Muhammad Siddique were first cousins of the deceased. Keeping in view the principle of Islamic law that the nearer in degree would exclude the more remote, it was concurrently arrived at by the both courts that the respondent had a preferred right as a residuary to the disputed property over the children of Muhammad Siddique as they were liable to be excluded by his presence. The court in the instant case affirmed the concurrent decisions of the learned lower courts and dismissed the revision filed by the petitioner.

In Mst. Rasheedan v. Mehnga,[13] the issue related to the right of inheritance between brother's daughter and daughter of brother's daughter. In this case Fazal Din, brother of Nizam Din, died issueless. Eventually his brother's descendents were entitled to his estate as his brother was not alive at his death. Nizam Din had two daughters one Mst. Rasheedan Bibi (the petitioner) and another Mst. Barkat Bibi. Mst. Barkat Bibi predeceased Fazal Din and left behind her daughter Mehnga (the respondent). The property of Fazal Din was transferred to Mst. Rasheedan Bibi and Mehnga was not given anything. Thereafter, Mehnga challenged the transfer of the property exclusively to her maternal aunt and contended that she also had the same right to inherit the property. Her contention was accepted by the courts below; hence the petitioner filed the civil revision assailing the concurrent findings of the courts. The

a residuary in the estate on the basis of the contention that the deceased was a Sunni Muslim. He presented evidence in the court that his funeral prayer was led by a Sunni Imam. To counter this situation, the mother of the deceased contended and adduced evidence to the effect that his son was a Shia Muslim as it was the only way to deprive the collateral from inheriting the deceased. The court after going through the evidence on record concluded that the substantial piece of evidence presented by the sister/appellant in the case was evidence of the deceased's mother which appeared to be interested as she was motivated to benefit her daughter/deceased's sister financially. Hence, the Supreme Court dismissed the petition of deceased's sister and accepted the plea of his collateral for the residue of the estate which was calculated to be 1/6th share.

Syed Shah Pir Main Kazmi v. Mst. Nelofer[11] deals with the issue of entitlement of a nominee in an estate left by a deceased; whether any person can be given any preferential treatment on the basis that he was nominated as such by a deceased before his death or such nomination may/may not override the substantial provisions of Islamic law of inheritance. Brief facts of the case are that the appellant/father and his son, whose widow is respondent in the present case, opened three joint accounts in 2000, 2002 and 2003. Later on, in 2004, the son died who was employed in United Kingdom during the above mentioned years and had been earning a handsome amount which he used to transfer to these joint accounts. After his death, the deceased's father asserted that the entire amount in the accounts belonged to him as it was mentioned in the documents of the banks that whoever would survive between the joint account holders would manage the accounts. It was further contended by him that the amount under dispute had been gifted to him by the other joint account holder. The respondent/widow of the deceased came up with the contention that the entire amount deposited in the accounts was earned by her husband and the appellant did not have any source of earning during those years. The court after hearing the arguments of the parties and going through the record of the case came to the conclusion that unless it had been specifically proved that the amount deposited in the joint bank accounts was gifted by one account holder to another, there would not be any justification to assume existence of a gift. Moreover, it was decided by the court

three sons of his different brothers (two from the same brother and third from another brother). In such situation, the widow would have 1/4 and the rest would be distributed among the residuaries/the sons of deceased's brothers. The court of first instance distributed the residue among all the three brothers' son equally. When the case was brought before the first appellate court, it decided that the brothers' sons would not get equal shares as they substituted their ascendants (different brothers of the deceased). As per decision of the first appellate court, the shares of the sons of different brothers of the deceased would not be equal and the sole son of one brother would have double share than that of the two sons of other brother because of the fact that he was the only son of his father and his share would be equivalent to what his father would have taken had he been alive. Aggrieved from this decision, the two sons of the same father/brother of the deceased brought the case in the Lahore High Court. The court after perusing the record of the case affirmed the traditional principle of Sunni law that if all residuaries belong to the same category but are linked to the deceased from the different ascendants they will inherit from the estate equally meaning thereby their rights to inheritance are given effect on the basis of per capita distribution and not per stripes.

In Syed Iftikhar Hussain Jafri v. Mrs. Shamshad Begum,[9] a person died and left behind his widow, a son and a stepbrother. It was asserted by the stepbrother that the deceased did not marry to Mrs. Shamshad Begum who has fraudulently claimed to be his widow; and when she was not married to the deceased how could her son be attributed to him. The stepbrother further contended that he, being the only heir of the deceased, was entitled to the deceased's entire estate. Though the case was rejected on the basis of res judicata, but the court through its judgement has affirmed the traditional law of inheritance (both Sunni and Shia) that in presence of deceased's son, his brother will not be entitled to any share in his estate.

In Qamar Sultan v. Mst. Bibi Sufaidan,[10] an unmarried person died and left behind his mother, a sister and a collateral/cousin as relatives who might be eligible to inherit his estate. The deceased's estate had been mutated on the basis that he was a Shia Muslim and consequently all of his estate was transferred to his mother and sister, while the collateral could not get anything. Thereafter, the collateral initiated a judicial proceeding to get his share (i.e. 1/6) as

traditional law of inheritance as articulated by the Sunni and Shia schools of thought. Let us now analyze some selected cases to demonstrate this aspect in the judicial pronouncements.

In Mst. Nooran Bibi v. Rajab Ali,[7] a person died issueless and left behind a widow, and collaterals (brothers and sisters). The contest in this case was with respect to inheritance of the deceased's agricultural land. The agricultural land was in possession of his widow on the basis of mutation attested by the official authorities assuming that the deceased was a Sunni Muslim. According to traditional Sunni law of inheritance, a widow may inherit her prescribed share from all kinds of properties including movable and immovable, while Shia law does not allow a widow of an issueless husband to inherit from his immovable properties. The respondents/collaterals assailed the above mutation that the deceased was a Shia Muslim and his agricultural land could not have been transferred to his widow. Moreover, the said mutation was got attested surreptitiously by his widow without bringing it into the notice of the respondents whose right to agricultural land is established under the traditional Shia law of inheritance. The trial court accepted the plea of the widow that the deceased was a Sunni Muslim; hence his agricultural land was held to be properly transferred to her. The respondents in the present case were not happy with the trial court's decision, so they appealed against it to the first appellate court which set aside the decision. Thereafter, the widow brought the matter into the High Court. The High Court after going through the arguments of the parties and the record of the case, decided that the deceased was a Sunni Muslim as there could not be any more relevant evidence than the evidence of his wife/widow, who have categorically said that he was a Sunni Muslim. In light of the above situation, the High Court set aside the decision of the first appellate court and affirmed the decision of the trial court. Consequently, the widow was declared to be rightfully in possession of the deceased's agricultural land.

In Umar Nawaz v. Mst. Alam Khatoon,[8] a question has arisen as to whether the residuaries of the same category but descending from different ascendants would get an equal share (per capita) or they would step into the shoes of their ascendants (per stripes) for the purpose of inheritance. The parties in the case belonged to Sunni/Hanafi sect, so their rights had to be decided as per their personal law. The deceased, in this case, left behind a widow and

principle of representation. As per traditional laws of Sunnis and Shias, this principle is only applicable when there is no direct descendant of a propositus; in that case his estate is devolved upon the descendants of his predeceased children (in Sunni law male children only, while in Shia law on male and female children as well). In a situation where there are other children of a propisitus alive they will exclude the descendants of their predeceased brother/sister.[4] The above referred law has allowed the application of the principle of representation even in those situations where there are other children of a propositus alive in addition to his predeceased children's descendants.

The above-referred change has been introduced in order to protect the proprietary rights of paternal and maternal grandchildren whose parents have predeceased their grandparents. After a long drawn judicial battle over the validity or otherwise of the said section of the law, it was eventually declared by the Federal Shariat Court as inconsistent to the provisions of Islamic law; hence liable to be brought in confirmatory to Islamic law.[5] The said judgement of the Federal Shariat Court is pending decision of the Shariat Appellate Bench of the Supreme Court of Pakistan and until the decision of the latter Bench, the Sec. 4 of the Muslim Family Laws Ordinance, 1961, will remain applicable.

Without getting into the debate of in/validity of the law, our job, in this paper, is to catalogue the effect of this law on the distribution of shares in a Muslim family. There is another important limitation of the paper that it does not explain the traditional law of inheritance for its own sake and only refers to it in context of the case-law catalogued. Thus, the uninitiated reader is advised to consult books on the subject if interested in details.[6]

The paper is divided into two sections in addition to this introduction and a conclusion: the first section will deal with that case-law which has affirmed the traditional law of inheritance of Sunnis and Shias, while the second section will analyze that case-law which is the outcome of application of Sec.4 of the Muslim Family Laws Ordinance, 1961.

2. Pakistani Case-Law Confirming the Traditional Law of Inheritance:

This section is meant to discuss those cases which have confirmed any principle of the traditional law of inheritance. In absence of any enacted law, the courts in Pakistan generally follow the

An Analysis of the Application of Traditional Islamic Law of Inheritance in Pakistani Courts

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This paper will showcase some selected cases decided by the superior courts including Supreme Court of Pakistan and different High Courts constituted at various provinces with reference to application of the traditional Islamic law of inheritance in Pakistan. During the course of analysis, the paper will explore how and to what extent the traditional Sunni and Shia laws on inheritance are observed by the courts. There are two distinct trends, which are in reality two sides of the same coin, visible in this regard; firstly, the traditional Sunni and Shia laws are observed to the maximum extent particularly in those areas where there are no enacted law, and secondly, with respect to that issue where the legislature has assumed the authority to modify the traditional law of inheritance, the courts follow the enacted law despite latter's inconsistency with the former.

Key words: Inheritance; Islamic law; Muslim Family Laws Ordinance and Pakistani courts.

1. Introduction:

Pakistan is a Muslim majority country and its constitutional law provides that the Muslims of the country will be provided with such an atmosphere where they would live according to the dictates of Islam.[1] This firm commitment is manifested in many legal spheres in Pakistan; family and property laws are examples of this generous accommodation of the Muslims. In line with the same commitment, the successive governments in Pakistan have not interfered with the traditional law of inheritance as is applied by Sunnis and Shias in their respective domains. Sunnis and Shias are two major sectarian denominations constituting the Muslim population of Pakistan and their respective interpretations are given credence by the courts.

There is no comprehensive code in Pakistan dealing with law of inheritance; the state has left this area uncodified so as to facilitate the courts to implement the traditional law of inheritance of different Muslim sects. There is one important change which has been introduced by Sec. 4 of the Muslim Family Laws Ordinance, 1961.[2] The said section provides that descendants of predeceased children will be entitled to inheritance from their grandparents even in presence of latter's other children.[3] This change is generally regarded as an extension in the application of the

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26. Al-Baladuri, Abu'l Abbas Ahmed bin Yahya, "Futuh al Buldan", 1866, P. 431
27. Barni, Ziya, al Din, "Firuz Shahi" 1753 P. 111.
28. Sarkar, Jadu, Nath, A History of Awaranzeb, vol V P. 296-7.
29. Dhaku Allah, Tarikh-i- Hundustan P. 89.
30. Ghazi, Mehmood Ahmed Islamic Renaissance in South Asia, The Role of Shah Wali Allah and his successors, 2002, P. 89
31. Ibid P. 96-7.
32. Ibid P. 107-9.
33. Sarkar "Islamic Culture" 1933 P. 613
34. Dr. Mehmood Ahmed Ghazi, P. 115
35. Dr. Mehmood Ahmed Ghazi P. 131
36. Ibid P. 157
37. Freeland, Abbott, Islam and Pakistan, P. 76-7.
38. Dihlvi, Muhammad Mian, Ulama-i-Hind ka Shandar Mazi 1957. P. 77.
39. Nadvi, Abul Hassan, Tarikh Dawat-o-Azeemat, Majlis Nashriat-e-Islam, Karachi. Vol V, P 341.

highlights his epoch making contribution at a time the community was witnessing a major socio-political turmoil in its eventful history.

NOTES AND REFRENCES

1. Mansoor Agha, Syed "Jadeed Khabr", Urdu Roznama, Topic "Mehmood Ahmed Ghazi, New Delhi, India 2010 P. 21
2. Ibid P. 23
3. www.http.mehmoodghazi.com
4. Nadvi, Gatreef Shahbaz. Dr., Monthly "as Sharia" topic. Dr. Mehmood Ahmed Ghazi "Fakr-o-Nazar Kay Chand Namia Pehlo", as Sharia Accedamy Hashmy colony, Kangani Wala, Gujranwala, 2010 P. 288
5. Ibid P. 288
6. Syed Mansoor Agha P. 191.
7. Gatreef Nadvi P. 289
8. Ibid
9. www.mehmoodghazi.com
10. Ghazi Mehmood Ahmed, "Muhazrat-e-Qunani", Al-Faisal, Gazni street, Lahore, 2nd edition 2005, P. 457.
11. Ibid, Page 458
12. Ghazi Mehmood Ahmed, Dr, "Muhazart-e-Hadith", Al-Faisal, Gazni street, Lahore, 2005 P. 90
13. Ibid, P. 92
14. Ibid, P. 191
15. Ibid, P. 193
16. Ibid
17. http://mehmoodahmedghazi.com
18. Ghazi, Mehmood Ahmed. Muhazrat-e-Fiqah 2005 P. 534
19. Ghazi, Mehmood Ahmed, Islamic Renaissance, Islamic Research institute, International Islamic University Islamabad, 2002 P. 6
20. Freeland Abbott, Madiaeval Muslim India, Oxford University Press, London 1920, 3rd Edition P. 71.
21. Sindhi, Ubaid Allah, Shah Wali Allah aur Un ki Siyasi Tahrik, 1965 P. 92-3
22. Ibid P. 96
23. Shah Wali Allah, Waisyyat Nama 1275 AH. P. 8.
24. Shah Wali Allah, Tafhimat-i-Ilahiyyah, 1936, P. 203.
25. Nadvi, Syed Sulaiman, Arab va Hind ki Ta,alluqat, 1950 P. 141

as a second source of law. He quotes mostly in "Hujjat al Balgha" the authentic Ahadith for the purpose. Freeland Abbott compares him with Dante in this respect. Maulana Abdu-al-Haq, Maulana Muhammad Ismaeel Shaheed (1831) Shah Muhammad Wazih, Shah Abu Said (1836) Syed Muhammad Masum and Syed Muhammad Numan kept the movement alive in Jehad Moment and Haider Ali (1782) Tipu Sultan (1799) were also influenced by this circle.[36]

11. Shah Wali Allah and his Successors

Karamat Ali (d 1873), Maulvi Muhammad Imran, Moulavi Sa,ad Din Badayuni and several others contributed to the movement for the dissemination of the Sunnah. Shah Walli Allah influence on the forthcoming generations resulted in the war of independence and orientalists activities though were countered by contemporary Muslim scholars like Maulana Rahamat Allah Kirawani (1891) who was assisted by Dr Wazir khan. Maulana Faiz Ahmed Badauni.[38] Rahmat Allah conducted a debate with reverend C.G.Pfounder (d.1865) who did not returned the third day founding no answer of the questions of Rahmat Allah on certain Christians concepts. A part from active and practical work he wrote Izhar-al-Haq.

Dr. Muhammad Ahmed Ghazi truly concludes the influence of Shah Walli Allah and his followers took the Muslims to the battle of 1857 though not won but made the Muslims active in politics. Another notable aspect of the renaissance movement is launching of so many institutions like Aligarh, Nadva tul Ulama Lucknow, Jamia Millia Delhi; later on, the British government also had to carry out the good pathway opening a lot of institutions in sub-continent, that chain accomplished at the emergence of Pakistan in 1947.[39]

Conclusion

This is a study of evolution of Islamic thought in the subcontinent in general and Shah's contribution in it particular for he represents the zenth of Islamic intellectual contribution and scholarly excellence in South Asia. The author, Dr. Mehmood Ahmed Ghazi and with his insight into the dynamic of Islamic history traces significant moments of the rise and fall of cultural career of the Indian Muslim community until the crisis ridden era of Prophet (s.w.s) against this back-drop, he brings out the impact of the great thinker on the development of Islamic thought and

be quoted as he gives his pleasure of feeling.

"After the battle was over. Ahmad Shah inspected the battlefield, making a personal survey of the Muslim and Maratha casualties. In the course of his survey, he saw the body of the messenger who had brought Shah Wali Allah's letter to him. When Ahmad Shah went to Delhi, he visited the man's house to condole with the martyr's widow and gave her some presents; he also issued instructions to the concerned officials that she should be properly looked after and given due protection. This incident demonstrates the great respect of Abdali had for Shah Wali Allah. It is no, however, known whether the Durrani conqueror met Shah Wali Allah in Delhi or not".[36]

Shah Walli Allah was a great thinker and bridge between the medieval and the modern periods in the religio-intellectual. History of the region Shah wrote extensively on politics, 'Hajjat Allah al Balighah' and 'al Badur al Bazighah' particularly his 'Izalat al khafa' is an encyclopedia on the history and philosophy of the al Khalifah al Rashiden.

Shah Walli Allah, according to Dr. Ghazi, considered the Khalifa as a role model on the foot-steps of the Holy Prophet (SWS). He is not only responsible for the obedience of Allah's Orders but also a first example of practicing the laws of Islam.

9. Shah Wali Allah as Social Reformer

The true greatness of Shah Wali Allah lays not so much in his role as a political seer and social reformer, but in his lasting academic work. He perfected the scheme initiated by Shah 'Abd al-Rahim and Shaikh Abu'l-Riza Muhammad. Their efforts in the intellectual field were directed towards evolving a common tradition that could be adopted with equal ease by the Muslim philosopher, sufi, mutakallim (theologian), and jurist. They attempted to reconcile intuition, intellect, and revelation, so that a true, holistic Islamic outlook could emerge. Their legacy was enriched when Shah Wali Allah came into contact with Shaykh Abu Tahir al-Kurdi in Arabia; the Shaykh's approach to matters of the intellect was akin to that of Shah 'Abd al-Rahim. Both of them also traced their intellectual lineage to the celebrated philosopher, Jalal al-Din al-Dawwani.

10. Great Concern on Authenticity of Hadith

For the rehabilitation of Islamic teachings Shah suggests the deep study of Hadith, for the purpose he layed stress opting it