

SUCCESSION UNDER ISLAMIC LAW

Islam has laid great emphasis on the importance of property and wealth and has never considered wealth and welfare as an evil and filthy phenomenon. It has set many regulations and provisions for acquiring wealth and has laid down certain rules and limitations for its expenditure and distribution, never considering it as the sole objective of human life or the final goal of men's struggle.

As a matter of fact, wealth is given to a person to test his spiritual strength and his response to the fulfillment of his obligations towards other human beings. According to Muslim Law, after the attainment of majority a girl and her brother have equal rights to fulfill their material needs and manage their own affairs. They have similar rights to hold property, and dispose it of, as they desire.¹

They are free to mortgage it, to give it on lease, or to bequeath it for their own benefit. The Quran says: "From what is left by parents and those nearest related, there is a share for men and a share for women, whether the property be small or large- a determinate share".²

In another Quranic verse, it is said: "God (thus) directs you as regards your children's (inheritance) to the male a portion equal to that of the two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. And to his (the deceased) parents a sixth share of the inheritance to each, if he have a son, and, if no children, and the parents are the only heirs, the mother has the third: if the deceased left brothers (or sisters), the mother has a sixth. The distribution in all cases is, after

¹ Jafri Begum, *Muslim Society in India*, Kanishka Publishers, (First edition), P. 23-24.

² Holy Quran, Surah IV, Verse 7.

the payment of legacies and debts; ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by God; and the God is All-knowing, Al-wise".³

It may be noted that when a Muslim dies intestate, his heirs' estate vests in his heirs and no one is charged with its distribution. There is yet another view, that the estate of a deceased may be distributed, even if it is insolvent.⁴

Muslim jurists gave a great deal of importance to the laws of inheritance, and they were never tired of repeating the saying of the Prophet: Learn the laws of inheritance, and teach them to the people; for they are one half of useful knowledge; and modern authors have admired the system for its utility and formal excellence.⁵

Tyabji says: The Muslim law of inheritance has always been admired for its completeness as well as the success with which it has achieved the ambitious aim of providing not merely for the selection of a single individual or homogenous group of individuals, on whom the estate of the deceased should devolve by universal succession, but for adjusting the competitive claims of all the nearest relations. As to the excellence of the system in a formal sense, Sir William Jones said: I am strongly disposed to believe that no possible question could occur on the Muhammadan Law of succession which might not be rapidly and correctly answered.⁶

The Islamic law of inheritance is often considered an arbitrary scheme based upon the whims of a Semitic deity. This is a superficial view. On a critical examination of the fabric of the law, it will be found that the law consists of two distinct elements: the customs of ancient Arabia and the rules lay down by the Quran and the Founder of Islam. The Quranic reform came as a superstructure upon the ancient tribal law; it corrected many of the social and economic inequalities then prevalent; and thus it is another illustration of the profound truth that the Quran is to be likened to 'an amending act', rather than

³ Holy Quran, Surah IV, Verse 11.

⁴ Aqil Ahmad, *Text Book of Mohammadan Law*, pp 290-291.

⁵ Asaf A.A.Fyzee, *Outlines of Muhammadan Law*, Oxford (Fourth edition), p.387.

⁶ Tyabji, *Muslim Law*, (Third edition), p.316.

an exhaustive Code.

By the spirit of reform inculcated by the Prophet, the ingenuity of jurists and the force of circumstances, the two distinct elements were welded together into a coherent and living organism; and yet, to borrow a phrase from equity, while the two streams flow in one channel, their waters do not mix and it is possible, even after centuries, to distinguish between them. It is therefore essential to try to understand these two systems, before analyzing the existing structure of the law.

Taking a broad view, the Islamic scheme of inheritance discloses three peculiarities:

- (i) the Quran gives specific shares to certain individuals;
- (ii) the residue goes to agnatic heirs, and failing them to uterine heirs;
- (iii) bequests are limited to one-third of the estate.

The fundamental principles of the Muhammadan law of inheritance are well explained by that mastermind, Mahmood J., in the leading case on pre-emption, *Gobind Dayal vs Inayatullah*⁷:

I may observe that pre-emption is closely connected with the Muhammadan law of inheritance. That law was founded by the Prophet upon republican principles, at a time when the modern democratic conception of equality and division of property was unknown even in the most advanced countries of Europe. It provides that, upon the death of an owner, his property is to be divided into numerous fractions, according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of the heirs, unless that consent is given after the owner's death, when the reason is, not that the testator had power to defect the law of inheritance, but that the heirs, having become owners of that property, could deal with it as they liked, and could therefore ratify the act of their ancestor. No Muhammadan is allowed to make a will in favour of any of his heirs, and a bequest to a stranger is allowed only to the extent of one-third of the property.⁸

⁷ (1885) 7 All at pp 782-3.

⁸ Supra No 5 at pp. 388-389.

The Muhammadan law of succession is totally based on Pre-Islamic customary law of succession. It is based on the patriarchal form of family. Under Muhammadan law all properties devolve by succession, so the rights of heirs come into existence only on the death of the ancestor. The whole property vests in them. Some near cognates are buttressed side by side with agnates and a female also inherits property and she takes her share absolutely and without any restrictions. The law of succession is a unique aspect of Muhammedan law, though it is complicated and not easily understandable yet it is an interesting piece of Muhammedan Law.

The Sunni and Shia systems differ a lot in matters of succession. In Pre-Islamic Customary law of succession some changes were introduced by the Prophet and this super-imposition of the principles on the customary law of succession had led to divergence of opinions among the Sunnis and Shias, resulting into the emergence of two different systems of succession. Generally, the Sunni Law is led by the Hanafis because in India most of the Sunni are Hanafis, so we will discuss the Hanafis Law of inheritance. Before going to a detailed study of law of succession, it is necessary to go through the Pre-Islamic customary principles of succession as well as Islamic principles of succession.

3.1. PRE-ISLAMIC CUSTOMARY PRINCIPLES OF SUCCESSION

In the Pre-Islamic Arabia, the law of succession was based on the principle of agnatic preference and exclusion of females. Following were the principles of Pre-Islamic customary law of succession: -

- (i) The nearest male agnate or agnates were entitled to succeed to a deceased Muhammadan to the exclusion of remoter agnates. For example, if a Muhammadan died leaving behind a son and a son of a pre-deceased son, the son would inherit the entire property totally excluding the son of a pre-deceased son (grand-son).

- (ii) All females and cognates were excluded from inheritance. For example, a daughter or a sister, or a daughter's son or sister's son could not inherit the property of the deceased.
- (iii) The descendants were preferred over ascendants and ascendants over collaterals. For example, if a Muhammadan died leaving behind a son and father, then the son (being the descendant) would inherit. Similarly in the presence of father (ascendant) brother (collateral) could not inherit.
- (iv) Only relations by blood could inherit excluding the relations by affinity. For example, the husband and the wife could not inherit each other.
- (v) Male agnates of equal degree could inherit equally taking equal shares. For example, if a Muhammadan died leaving behind four sons, all of them would get one-fourth of the property.

3.2. ISLAMIC PRINCIPLES OF SUCCESSION

The Prophet introduced reforms in the Pre-Islamic customary principles of succession. Following were modified principles of succession reformed by Islamic law: -

- (i) The ascendants, (parents and certain other ascendants) were allowed to inherit along with the descendants. For example, if a Muhammadan died leaving behind a son and a father, both would inherit.
- (ii) Females and cognates were also recognized as heirs. For example, sisters, daughters and sons (daughters as well as daughter's sons were recognized as heirs.
- (iii) Relatives by affinity were entitled to inherit. For example, the husband and the wife could inherit to each other.
- (iv) The newly created heirs (known as sharers) such as females, agnates and relations by affinity, inherited the specified shares along with those heirs who were recognized under Pre-Islamic Customary

Principles of Succession. After giving specified shares to the sharers, the residue was given to these customary heirs (known as residuaries). For example, if a Muhammadan died leaving behind a widow and four sons then the specified share of widow (being a sharer) is $\frac{1}{8}$ and she would get $\frac{1}{8}$ and the remaining $\frac{7}{8}$ would be divided between the four sons equally, it means that each son would get $\frac{7}{32}$ as a customary heir.⁹

3.3. GENERAL PRINCIPLES OF INHERITANCE

The Quran says: God hath thus commanded you concerning your children. A male shall have as much as the share of two females but if they be females only and above two in number, they shall have two-thirds part of what the deceased shall leave, and if there be but one, she shall have the half, and the parents of the deceased shall have each of them a sixth part of what he shall leave, if he had a child; but if he have no child, and his parents be his heirs then his mother shall have the third part and if he have brethren, his mother shall have a sixth part after the legacies, which he shall bequeath, and his debts be paid. Ye know not whether your parents or your children be of greater use unto you. Moreover, you may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and their debts be paid; they also shall have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth of what ye shall leave after the legacies which he shall bequeath and your debts be paid. And if a man or woman's substance be inherited by a distant relation and he or she have a brother or sister, each of them two shall have a sixth part of the estate; but if there be more than this number they shall be equal sharers in the third part, after payment of the legacies which shall be bequeathed, and the debts without prejudice to the heirs.

⁹ Nishi Purohit, *The Principles of Mohammedan Law*, 2nd edition, pp.432-433.

They will consult thee for thy decision in certain cases, say unto them. God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue and have a sister, she shall have the half of what he shall leave, and he shall be heir to her, in case she have no issue; but if there be two sisters, they shall have, between them, two third parts of what he shall leave; and if there be several both brothers and sisters, a male shall have as much as the portion of two females.¹⁰

It was observed by the Privy Council in *Murtaza Hussain Khan vs. Mohammad Ali Khan*¹¹ that the Quran did not sweep away the then existing laws of succession, but made a great number of amendments. The Sunnis and the Shias have differently interpreted those amendments. The Sunnis to some extent allow the principles of the pre-Islamic customs to stand, and they add or alter those rules in the specific manner mentioned in the Quran and by the Prophet. The Shias, on the other hand, have deduced principles and fused these principles with the pre-existing customary law. In doing so they have raised a completely altered set of rules.

Both the Sunnis and the Shias are generally agreed on the principle by which the individuals who are entitled to inheritance in the estate of the deceased can be distinguished from a numerous body of relations of the deceased—that is, a distinction between the inheriting and non-inheriting relations. Certain settled principles have emerged in making a distinction between the inheriting and non-inheriting relations.¹²

It is to be remembered that no court is permitted to recognize a line of succession unknown to Muslim law, unless it is amended by Parliament as has been done in Pakistan by the Muslim Family Law Ordinance, 1961, where the arrangements made by a deed of settlement were an attempt to limit the succession of male heirs only to the exclusion of the female heirs, it was held

¹⁰ Holy Quran, IV.

¹¹ 33 All 532.

¹² S.K.Mitra, *Mahomedan Law*, Second edition, p.58.

that the disposition in disguise created a line of succession unknown to the Muslim law and as such the deed was bad in the eye of law.¹³

3.3. (i). PROPERTY

The Muslim law makes no distinction between movable and immovable property for the purposes of inheritance. Only one distinction recognized by the Shia law is that a childless widow is not entitled to a share in the *land* belonging to her husband. *Land* does not include buildings or trees standing on it; she is entitled to a share in the value of such buildings etc.

Under Muslim law, there is no 'joint family property' or 'separate property'. Heirship does not necessarily go with membership of the family. A 'member' of the family may not be an heir, and *vice versa*. The institution of joint family is a foreign concept in Muslim law. It is not contrary to law, however, for a Muslim adult male to hold assets and carry on business on behalf of other members of the family. Such practice is common in Andhra Pradesh. Such a case will be an instance of partnership (express or implied) and the adult will stand in fiduciary relationship to other members. Thus when it was found that two brothers had used for themselves the goodwill of their father's firm after his death and also the shares of other members under their control entirely to their own advantage, it was held that they stood in fiduciary relationship to the other members and the provisions (Section 23 and 28) of the Trusts Act applied to the two.¹⁴

Joint family property not being recognized, the principle of survivorship is also not known to Muslim law. The heirs of the deceased take their shares as tenant in common, and not as joint tenants with rights of survivorship. They are separate co-sharers. Acquisitions by one member are not thrown in a common purse, nor debts incurred by one are to be shared by others. In case of a joint business, the rules of partnership will apply and the partnership would

¹³ *Imam Saheb vs. Ameer Sahib*, AIR 1955 Mad 621.

¹⁴ *Mohd. Abdul Rahim vs. Mohd Abdul Hakim*, AIR 1931 Mad 553.

terminate on the death of one of the partners, unless there is evidence to the contrary.¹⁵

3.3. (ii). PRINCIPLE OF REPRESENTATION

Fyzee says that the word 'representation' has several meanings in law. For instance, we may speak of representation to the estate of a deceased man, and in this context we speak of 'personal representatives' i.e., executors or administrators. The second meaning is the process whereby one person is said to 'represent' the share receivable by him through another person, who was himself an heir. Here, we are concerned with this second meaning.

The doctrine of representation (or, more properly of Stirpital Succession), however, could be used in a limited way; that is, for deciding the quantum of the share of any given person, in case he is entitled to inherit.

According to the Sunni Law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will. According to the Shia Law, it does pass by succession in some cases.¹⁶

Macnaghten puts it thus: "The son of a person deceased shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance, if he have a paternal uncle. For instance, A, B and C are grandfather, father and son respectively. The father B dies in the lifetime of the grandfather A. In this case the son C shall not take *jure representationis*, but the estate will go to the other sons of A".¹⁷

Permissive occupation even for a decade by the children of a predeceased son of the deceased would not convert into a legal right to remain in their grandfather's property as only the surviving children and wife, if any, were the heirs of the deceased.¹⁸

¹⁵ Syed Khalid Rashid, *Muslim Law*, Third edition, pp 308-309.

¹⁶ Mulla, *Principles of Mahomedan Law*, 19th edition, p.37.

¹⁷ Macnaghten, William H., *Principles and Precedents of Moohummudan Law*, (1825), p.2.

¹⁸ *Mohd. Amirullah Khan vs. Mohd. Haku Mullah*, (1999) 3 SCC 753.

To this extent there is no difference between the Sunni and the Shia Law. The concept of principle of representation though totally alien in the Sunni Law is not so in the Shia Law. A simple illustration will explain this position. The father F dies leaving three grandsons one by the eldest son and two by the other, as his only heirs. Under the Sunni Law each of them will inherit as a grandson and shall take one-third. They will take the inheritance per capita and not per stripes. But under the Shia Law the grandson by the eldest son will get his father's half share while the two grandsons by the other son will get a quarter each, dividing equally the moiety assigned to their father. Fyzee calls it stripital succession and observes, "It is therefore submitted that 'representation' as an explanatory term can and should be avoided".¹⁹

So, for the limited purpose of calculating the share of each heir, the Shia law accepts the principle of representation as a cardinal principle throughout. Accordingly, the descendants (or ascendants) of a pre-deceased son, if they are heir, take the portion, which he, if living, would have taken, and in that sense represent the son. (The same principle applies to the descendants of daughter, brother, sister or aunt).

In Sunni law, even this limited meaning of the term 'representation' is not accepted. The division among them would be per capita and not per stripes. The right of representation, however, is recognized to a limited extent to the succession of the cognates. For example, half-sisters and brothers on the mother's side, when they do succeed, take the mother's share. There are some other instances of the same kind.²⁰

Recently, J.N.D. Anderson has criticized the rule against representations as causing much hardship. He says that this rule is of pre-Quranic origin. The reason why this rule was not over-ruled by the Prophet was that he himself was debarred from succeeding to his grandfather. Thus, in order that he might not be suspected of personal bias or motives, he did not change the rule. This argument of Prof. Anderson is not, however, convincing. There were many

¹⁹ Supra No. 5 at p.451.

²⁰ Ameer Ali, Syed, *Mahommedan Law*, Vol. II, Fifth edition, p.35.

things which the Prophet did, even at the cost of being assumed biased, provided he once became guided or convinced that the thing was for the good.

In fact, the more plausible reason behind the survival of the rule against representation seems to be the fact that the law of inheritance in Islam is very much connected with the provisions of wills and gifts, and a defect in one may be corrected by another. Thus, a person who has been adversely affected by this rule may be compensated by a gift or bequest. But there may arise situations in which the execution of a gift or will may not be possible. In such cases, the rule against representation may really cause hardship. Take the example of a grandfather who dies suddenly as a result of heart collapse, so common these days, and could not find time to make a gift or bequest in favour of a son of his pre-deceased son. According to Muslim law, the son of a pre-deceased son gets nothing of his grandfather's estate. Now, the grandson is wholly dependant upon the mercy of other relatives who have inherited. If they chose to ignore him, the grandson could do nothing. In such cases there is a need of reform.²¹

3.3. (iii). NEARER IN DEGREE EXCLUDES THE MORE REMOTE

Within the limits of each class of heirs, an heir nearer in blood excludes the more remote. Both schools, though really covered by the former, recognize this rule, but there is great divergence as to the mode of its application in consequence of the difference in the classification of heirs. For example, the Sunni group the heirs under two heads, viz. agnates and cognates; the agnates and cognates are again respectively subdivided into descendants, ascendants and collaterals. The object of this division and subdivision is to indicate the order of succession, and the rule applies to each class of heirs, but not to the heirs of the different classes. For instance, a son will take in preference to a son's son, both being the first class of heirs; but a son's son will take the residue in preference to the father, although the latter is nearer than the former, because the father is included in the second class of heirs.

Similarly, the Shias divide the heirs into three classes without the distinction between agnates and cognates. Each of these classes is subdivided into two branches; the above rule applies to the heirs of the different classes, but not to heirs of the two branches of the same class. For instance, the parents and descendants from the first class and (*sic*) are its two branches; accordingly, a great grandson, although he will not exclude the father, will take in preference to the grandfather or brother notwithstanding that these are nearer in kinship, for they belong to different classes. Similarly, a grandfather cannot exclude a brother's grandson, for they belong to different branches of the same class. Thus the rule must be understood to be subject in its application to the classification of heirs, in which respect only there is a distinction between the two schools... the Sunnis prefer the nearer in degree to the more remote, in the succession of male agnates only, whilst the Shias apply the rule of nearness or propinquity to all classes without distinction of class or sex. If a person dies leaving behind him a brother's son and a brother's grandson, and his own daughter's son, --- among the Sunnis, the brother's son being a male agnate and nearer to the deceased than the brother's grandson, takes the inheritance in preference to the others; whilst among the Shias the daughter's son, being nearer in blood, would exclude the others.²²

3.3. (iv). SPES SUCCESSIONIS NOT RECOGNISED

The right of an heir-apparent comes into existence for the first time on the death of the ancestor, and until then his right to succeed is nothing more than a mere *spes successionis*. The Muslim Law "does not recognize any... interest expectant on the death of another and till that death occurs which by force of that law gives birth to the rights as heir in the person entitled to it according to the rules of succession, he possesses no right at all".²³

As such, when a son sued the donee in whose favour a gift was made by the father alleging that gift was procured by undue influence must be dismissed

²¹ Supre no 15 at 313-14.

²² Ibid.

if the suit was filed during the lifetime of the donor. In this case the son had no cause of action during the lifetime of his father. But the gift may be liable to be set aside if the suit is brought after the donor's death.²⁴

3.3. (v). LIFE-ESTATE AND VESTED REMAINDER

A 'life-estate' implies the transfer of the corpus of the property to a person with certain limitations as to its use and alienation by the transferee. Under the Hindu Law, as it stood before the Hindu Succession Act, 1956, the female heirs enjoyed life-estate in the properties, which had developed upon them. The matter was even worse before 1937. Unlike the old Hindu Law, Muslim female gets absolute right in the property, which she inherits. The question is whether a Muslim by a deed can create a life-estate. The Privy Council has held that life-estate is unknown to Muhammedan Law as administered in India.²⁵

Earlier²⁶ also the Privy Council has held that the Muhammedan Law, pure and simple, does not recognize vested estates in remainder. In other words, whilst the property is in the hands of the owner, his heirs have no vested reversionary interest in it, such as would be assignable or pass to their heirs by right of inheritance.

But there is nothing in the Muhammedan Law to prevent an arrangement to the effect that A should have a life-interest in a particular property, or that an estate should be vested in him or her for life, and that upon his or her decease it should devolve upon A's heirs or any particular person or persons by way of a remainder. In fact, such family settlements are recommended under the head of *tawris* in order to prevent family disputes. An arrangement of this nature was recognized by the Judicial Committee in the case *Khwajeh Solehman vs. Nawab Sir Salimulla Bahadur*.²⁷

²³ *Hasan Ali vs. Nazo* (1889) 11 All 456.

²⁴ *Kurrutulain vs. Nazhat-ud-dowla* (1905) 33 Cal 116.

²⁵ *Sardar Wawazish Ali vs. Sardar Ali Raza Khan*, AIR 1948 PC 134.

²⁶ *Abdul Wahid Khan vs. Mussumat Nurum Bibi* (1885) (IA) 91.

²⁷ (1922) 49 IA 153.

Coming to the question of creating a life-estate by a gift it is to be remembered that both the corpus and the usufruct can be the subject matter of gift. Hence the gift may be in respect of the thing itself, but also in respect its use, benefit, produce or profits. For instance, the right to reside in a house, the right to fish in a stream, the right to take the produce of a garden, etc.

“Therefore, according to Muhammedan Law as received in India, you can make a gift of the corpus; this is called *hiba*. Or you may make a gift of the usufruct; this can be done by the rules as to *ariya*, *wasiyyat bil-manafi*, *tazwrihi* and in various other ways. A life-interest may therefore be considered as a transfer of the usufruct for a well-defined period”.²⁸

In *Anjad Khan vs. Ashraf Khan*²⁹ this issues was raised in an acute form. The deed described the transaction as a gift without consideration. It recited that the donee and the heirs of the donor had consented. By it the donor gave to his wife his entire property as to one-third with power to alienate and “as to the rest she shall not possess any power of alienation but she shall remain in possession thereof for her lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor’s collaterals”. On the question whether the interest given in the one-third was an absolute interest or was only a life interest plus a power to alienate, the Judicial Committee took the latter view. Their Lordships decided the case by asking, as matter of construction of the deed, what was the subject matter of the gift? Was it merely a life interest in the property together with a power of alienation over one-third thereof? Or was it an absolute interest in the property coupled with an inconsistent condition? Holding on the construction of the deed that the subject matter of the gift was a life interest only (together with the power of alienation as to one-third) they dismissed the appeal of the donee’s heir: the gift of a life-estate was not given the effect of an absolute estate. On the argument that a life-estate could not be created by gift *inter vivos* their Lordships expressed no

²⁸ *Supra* No. 5 at 246.

²⁹ (1929) 56 IA 213 affirming AIR 1925 Oudh 568.

opinion, holding that, if right, it would only mean that the donee took nothing by the gift—a result that would carry no benefit to her heir.³⁰

3.3. (vi). VESTED INHERITANCE

A 'vested inheritance' is the share, which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance, which has vested in him, will pass to such persons, as are his heirs at the time of his death. The shares therefore are to be determined at each death.

A dies leaving a son B, and a daughter C. B dies before the estate of A is distributed leaving a son D. In this case, on the death of A, two-thirds of the inheritance vests in B, and one-third vests in C. On distribution of A's estate, after B's death the two-thirds which vested in B must be allotted to his son D.

Macnaghten explains this principle in the following way:

"where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the rule is that the property of the first deceased must be apportioned among his several heirs living at the time of his death, and it must be supposed that they received their respective shares accordingly.

The same process must be observed with reference to the property of the second deceased, with this difference, that the proportion must be ascertained between the number of shares to which the second deceased was entitled at the first distribution, and the number into which it is requisite to distribute his estate to satisfy all the heirs."³¹

3.3. (vii). SUCCESSION TO DECEASED (MURDERED)

A person causing the death of another, under the Sunni Law, cannot inherit to the latter, no matter whether the person is killed intentionally or by accident. But under the Shia Law, homicide is not a bar to succession unless the death was caused intentionally.

An act, however, committed by an infant or an insane person which causes death, does not exclude such infant or such insane person from succeeding to the estate of the deceased. Or, if a person were to kill another in

³⁰ Supra no 14 at 39.

³¹ Supra no 15 at 21.

justifiable war, or when inflicting punishment under the direction of the law, such person would not be excluded from the inheritance of the person killed. Being the indirect cause of a person's death without any intention is not a sufficient ground for excluding from his inheritance, as for instance, when a person has dug a well into which another falls, or placed a stone on the road against which he stumbles and is killed in consequence.

In other words, any act committed by one person which causes the death of another leads to the forfeiture by the former of his right of inheritance to the latter, if the act is such as would render him punishable under the law³²

As under Islamic Law—those who are entirely excluded by reason of personal disqualification do not exclude other heirs—

An heir incapable of inheriting by reason of homicide though considered as non-existing does not exclude others from inheritance. For instance, A dies leaving a son B and a grandson C by B and a brother D. B has caused the death of A. As such, he will be totally excluded as if he were dead. The inheritance will open between the grandson C and the brother D. C will succeed to the whole estate, D being a remote heir.

3.3. (viii). POSTHUMOUS CHILD AND PARENTAGE

When a Muslim dies leaving a widow, she is prohibited from marrying before the expiration of four months and ten days. This is called the *iddat* or probation of widowhood, and is prescribed for discovering whether she is *enciente* or not. If she is, her probation will not terminate until she is delivered. If a child were born within the ordinary period of gestation he or she would succeed to its father.

Regarding the period of gestation, Islamic Law ordains that—

1. A child born within six months of the marriage is illegitimate, unless the father acknowledges it.
2. A child born after six months of the marriage is legitimate, unless the father disclaims it.
3. A child born after the termination of marriage is legitimate if born—

Within 10 lunar months—in Shiite Law;

Within 2 lunar years--- in Hanafi Law; and

Within 4 lunar years--- in Shafii or Maliki Law.

In the Islamic Law there cannot be any legitimation, when the father acknowledges the child to be his own, it is deemed to be a declaration of legitimacy and not of legitimation.

The presumption of legitimacy depending upon the time of birth as ordained in the Islamic Law must be deemed to have been altered by Section 112 of the Evidence Act. The provisions of the said Act bind the Muslims and non-Muslims alike.³³

Section 112 of the Evidence Act runs as follows—

Birth during marriage, conclusive proof of legitimacy--- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Mere disclaimer of the paternity by a Muslim husband is not enough that the child born out of lawful wedlock is not his child. Section 112 raises a conclusive presumption that a child born during the continuance of a valid marriage between his mother and any man is the legitimate son of that man, and this conclusive presumption can only be rebutted if it is shown that the parties to the marriage had no access to each other at any time when he could have been begotten.³⁴

The period of gestation, under section 112 of the Evidence Act is 280 days; but this period is a varying period. The case of shortest gestation is that of a wife who gave birth after a period of 174 days when her husband returned to

³² *Supra* no. 18 at 191-2.

³³ *Mt. Rahim Bibi vs. Chiragh Din*, AIR 1930 Lah 97.

her, Held that there was no ground for holding that the child was illegitimate.³⁵ The Supreme Court also held on the same line that--- giving birth to a viable child after 28 weeks' duration of pregnancy is not biologically an improbable or impossible event.³⁶

Conversely, where the paternity of a child, that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Muhammedan Law recognizes 'acknowledgement' as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for purposes of inheritance. The acknowledgment, however, must be of a legitimate sonship.³⁷

As the question of inheritance of a posthumous child may be linked up with the question of his or her paternity, the law relating to acknowledgment becomes important. Parentage can be established in Islam in one of the two ways only---

- (i) by birth during a regular or irregular marriage; or
- (ii) by acknowledgement.

Now the question comes up how the inheritance of a posthumous child will be determined. If a child, unless found to be illegitimate or not of the deceased, is born, it would succeed to its father and in the matter of inheritance of its father's property the legal fiction is that the child was born immediately before the death of its father. But when the child is born dead it does not inherit, and there is no other legal effect or consequence, provided no violence has been done to the mother.

3.3. (ix). ILLEGITIMATE CHILD

A bastard is considered to be the son of his mother only. He has no father; as such neither he inherits from 'father' (the husband of his mother) nor

³⁴ *Ammatheyee vs. Kumarsen*, AIR 1967 SC 569.

³⁵ *Clarke vs. Clarke*, (1939) 2 All ER 59.

³⁶ *Duktar vs. Farooq*, 1987 Cr LJ 849.

³⁷ *Supra* No 18 at 220.

the 'father' inherits from him. The reciprocal right of inheritance exists between him and his maternal relations and his mother. They are also his residuary heirs. Of course his other descendants are his/ her spouse, and his descendants, except his father and the latter's relations.

An illegitimate child, in Hanafi Law, cannot inherit from the father, but he or she may inherit from the mother and its relations and they also inherit from such child. Thus, where a Hanafi woman dies leaving an illegitimate son of her sister and her husband, in *Bafata vs. Bilaibi Khanum*³⁸ it was held that the husband will take $\frac{1}{2}$ and the sister's son, though illegitimate, will take the other half as a distant kinsman, being related to the deceased through her mother.

In *Rahamat-Ullah vs. Maqsood Ahmad*³⁹, it was held that an illegitimate son couldn't inherit from the legitimate son of the same mother. This decision rests on the principle that the "mother's relations" do not include her relations by a subsequent marriage. Following this logic it can be said that the "mother's relations" do not also include her relations by a previous marriage.

On the question of inheritance by or from an illegitimate child, the Shia Law is altogether different from the Hanafi Law. Under this School, an illegitimate child does not inherit at all, not even from his mother or her relations. They also do not inherit from the illegitimate child.

3.3. (x). MISSING PERSON—THE *MAFKUD*

A *mafkud* is a person regarding whom it is not known whether he is dead or alive. In Islam the law relating to a *mafkud* has been exhaustively dealt with so as to solve diverse problems.

Ameer Ali observes that there is great difference of opinion as to the period during which the share of a missing person should be held for him; some have fixed 90 years, others 70, whilst 'moderns' generally have fixed 60 years. But the recognized rule as laid down in the *Fath-ul-kadi* is that the Judge may

³⁸ (1903) 30 Cal 683.

³⁹ AIR 1952 All 640.

give any direction having regard to the circumstances of the particular case, as to the probability of the missing person's death, and the period for which the partition should be delayed.⁴⁰

At this juncture, it may be submitted that --- modern authorities hold the view that these rules have now become obsolete, and the presumptions contained in the Indian Evidence Act, sections 107 and 108 apply. Section 107 runs as—"when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the who affirms it."

Section 108 then provides "that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Section 107 deals with the presumption of continuance of life. Section 108 deals with the presumption of death. Both these sections must be read together because section 108 is virtually a proviso to the rule contained in section 107, and both constitute one rule when read together.⁴¹

Sections 107 and 108 cannot totally abolish the Muslim Personal Law. The cumulative effect of the Islamic Law and the provisions of the Indian Evidence Act would be that on the expiry of the period of seven years the right to succeed him will accrue from that date and not from the time when he has disappeared.

When a person dies leaving certain heirs, one of who is missing the division would be made after excluding the share of the missing person. For example, if a man dies leaving two daughters, a son who is missing and the son of a predeceased son, the daughters will get one-fourth each, a moiety will be kept in trust for the missing person.

⁴⁰ Supra no 18 at 92-96.

⁴¹ *State vs. Bachan Singh*, AIR 1956 Punj 1232.

3.3. (xi). APOSTASY

Under the pure Islamic Law, an apostate, (non-Mohammedan) is not entitled to inherit the property from a deceased Mohammedan. In India, the position is different. Section 3 of the Caste Disabilities Removal Act, 1850, removed this disability. A non-Mohammedan is entitled to inherit in the property of a deceased Mohammedan whose heir he is, but his non-Mohammedan descendants will not be entitled to inherit the property of a deceased Mohammedan.⁴² For example, if a Mohammedan, M dies leaving behind a son S who has renounced Islam, two grandsons S₁ and S₂ who are born to S after renunciation of Islam. In the case, S would inherit to his specific share in the property of M but S's sons S₁ and S₂ would not inherit in the property of M because they are non-Mohammedan descendants of an apostate.

Here, one point may be noted that Mohammedan Law governs the inheritance to the property of a convert to Islam and his heirs would inherit accordingly.⁴³

3.3. (xii). SLAVERY

The status of slavery is a bar to succession under the Sunni as well as under the Shia Law. Under the Shia Law, if a person dies leaving no other heir but a bondsman, his property is to be sold, and the proceeds applied to the emancipation of the slave. But when he dies leaving one heir free and another a slave, the whole would go to the one who is free, though he may be more remote, to the exclusion of the bondsman though he be nearer to the deceased. Both the Sunni and Shia laws accept this principle. But the Sunnis do not recognize the principle of selling the property for utilization of the sale proceeds for the emancipation of the slaves. They hold that under the circumstance the inheritance escheats to the *Bait-ul-Mal*.

⁴² *Sundarmal vs. Ammenal*, AIR 1927 Mad 72.

⁴³ *Baikhatija vs. Karimbhai*, AIR 1974 Guj 4 (7), *Chandra Shekharappa vs. Government of Mysore*, AIR 1955 Mys 26.

As the status of slavery does not exist in India (concept of Slavery obsolete by the Act V of 1843), this rule of Muslim Law has only an antiquarian interest.

3.3. (xiii). DOCTRINE OF EXCLUSION: PERSON EXCLUDED MAY EXCLUDE OTHERS

Both under Shia and Sunni systems, every person is entitled to inherit, unless there is something to exclude him. A child in the womb is regarded as a living person provided he is born alive.

The doctrine of exclusion rests on a set of the following three rules: -

- (i) Rule 1- a person who is related to the *propositus* through another is excluded by the presence of the later.
- (ii) Rule 2- within the limits of each class of heirs, an heir nearer in blood excludes the more remote.
- (iii) Rule 3- a person excluded may exclude others.

There are several causes, which debar a person from succeeding to the estate of the *propositus* notwithstanding that he may stand to the deceased in the relation of an inheriting kinsman. Exclusion is said to be of two kinds—partial and total. The former, though called exclusion, is in reality a reduction of the share receivable by one heir from the fact of co-existence with another heir.

The third rule contemplates total exclusion and that too by a person who himself is excluded. For instance, a Sunni Mohammedan dies leaving father, father's mother and mother's mother's mother. The father excludes Father's mother. She again excludes the mother's mother's mother. But if the deceased had not left the father's mother, the mother's mother's mother would have taken 1/6, for being a true maternal grandmother, she is not excluded by the father. Let us take another example; A Sunni Muslim dies leaving mother, two sisters and father. The mother takes 1/6 because there are two sisters. But the father who takes 5/6 as the residuary excludes the sisters.

In the application of the Rules of Exclusion the Sunnis and Shias do not always see eye to eye and the application of these Rules in different schools may be better illustrated with reference to the Sunni and Shia Laws of succession. The circumstances, which tend to exclude a person from inheritance either wholly or partially rest on the fact of his or her co-existing with some other preferentially entitled. The death of the later would remove the cause of exclusion.

3.3. (iv). THEORY OF PROPINQUITY

Propinquity means nearness in blood. In determining the preferential claims of the heirs, the Shias adopt the principle of consanguinity, and ignore those of agency. They prefer the nearest kinsmen to those more remote. The Sunnis, on the other hand, fully recognize the distinction between agnates and cognates. They treat the cognates as "distant kindred", who are neither sharers nor residuaries. The theory of propinquity is fully recognized by the Shias, but partially by the Sunnis.

3.4. HANAFI LAW OF INHERITANCE

There are two schools of Muslim law, namely, the Sunni and the Shia. This division is based on political reasons. We have seen earlier that according to the Shias the breach was due to Ayesha, one of the widows of Mahommed who had procured the election of her own father Abu Bakr as Caliph instead of Ali who was the first disciple, cousin and son-in-law and also beloved companion of Prophet Mahommed. The Shias accordingly advocated that the succession to Caliphate should be in the Prophet's own family or according to his nominees. They rejected the Sunni doctrine that the succession should devolve by election, determined by the votes of the *jamaat*. The Shias, therefore, do not recognize the first three Caliphs, viz., Abu Bakr, Umar and Usman whom they regard as usurpers. According to Sunnis, on the other hand, they were beloved of the Prophet.

The Sunnis are sub-divided into—(1) Hanafis, (2) Malikis, (3) Shafeis and (4) Hanbalis. The Shias have three sub-sects – (1) Asna-Ashariyas or Imamias, (2) Ismailias, and (3) Zaidias.

The development of four Sunni Schools is an important event that took place during this century. Imam Malik extensively used reasoning in combination with tradition. Abu Hanifa seems to be the sort of a “Theoretical Systematizer” who achieved considerable progress in technical legal thought. A high degree of reasoning, often somewhat ruthless and unbalanced, with little regard for practice, is typical of Abu Hanifa’s legal thought as a whole.

Majority of Muslims in India are Hanafis, whose founder was the Great Imam Abu Hanifa. The main features of this School are:

- (1) Less reliance on Traditions unless their authority is beyond any doubt;
- (2) Greater reliance on Qiyas;
- (3) A little extension of the scope of Ijma; and
- (4) Evolving the doctrine of Istihsan, i.e., applying a rule of law as the special circumstances required

Among the famous disciples of Abu Hanifa were: Abu Yusuf and Imam Muhammad. Through them the Hanafi School spread to fame. This School is followed in Syria, Lebanon, Turkey, Egypt, Afghanistan, Pakistan, India, China, etc. Its adherents constitute more than one-third of the Muslims of the world.⁴⁴

The Hanafis allow the framework or principles of the pre-Islamic customs to stand; they develop or alter those rules in the specific manner mentioned in the Qurān, and by the Prophet. The Hanafis interpret the principles of customary law and Islamic law in such a manner as to blend them together in a harmonious manner; the customary heirs are not deprived of their right of inheritance in the estate of the deceased, but only a portion out of the estate is taken out and given to the heirs enumerated in the Quran. This means that the basic structure of customary succession viz., the rule of agnatic preference, is retained--- the agnates are still preferred over cognates. The

Quranic succession takes the agnatic principles further by recognizing the right of female agnates. Thus, if there is a female agnate (as specified in the Quran) nearer to a male agnate (as specified under the customary law), then, by virtue of nearness of her claim to take a share in the estate of the deceased, she is allowed to take a share. But thereby, the male agnate is not deprived of a share in the inheritance. The female heir takes her specified share, and male agnate takes the residue. Or where the female agnate and the male agnate are equally near to the deceased, then the male heir takes twice the share of the female heir. It is submitted that this principle applies not only to female agnates but also to male agnates (i.e., those heirs who are made heirs by the Quran), and it is wrong to generalize that the male heir as such always takes double share of a female heir. Thus, uterine brother and father as sharers do not take more than the uterine sister and mother respectively. It should also be noticed that most of the newly created heirs (i.e., those specified by the Quran) are the near blood relations of the deceased who were ignored in the customary law.

Under any law of intestate succession, two questions, that arise, are: (i) who are the heirs of the deceased, and (ii) to what share the heirs are entitled. Hanafi jurists divide heirs into seven classes, the three principal and the four subsidiary classes.⁴⁵

Principal classes:

- (i) Quranic Heirs *dhawul-furud* (Sharers);
- (ii) Agnatic Heirs *asabat* (Residuaries);
- (iii) Uterine Heirs *dhawul-arham* (Distant Kindred).

Subsidiary classes:

- (iv) The successor by contract;
- (v) The Acknowledged kinsman;
- (vi) The Sole Legatee;
- (vii) The State, by Escheat.

⁴⁴ Supra no 15 at 18.

⁴⁵ Fyzee, 397.

The first step in the distribution of the estate of a deceased Mahomedan after payment of his funeral expenses, debts and legacies, is to allot their respective shares to such of the relations as belong to the class of sharers and are entitled to share. The next step is to divide the residue, if any, among such of the residuaries as are entitled to the residue. If there are no sharers, the residuaries will succeed to the whole inheritance. If there be neither sharers nor residuaries, the inheritance will be divided among such of the distant kindred as are entitled to succeed thereto. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which distant kindred will inherit with a sharer, and that is where the sharer is the wife or husband of the deceased.⁴⁶

In the absence of a member of the three principal classes (i.e., Quranic, Agnatic and Uterine heirs) the right of inheritance devolves upon subsidiary heirs, among whom each class excludes the next.

Successor by contract is a person whose right of inheritance is based on a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom. Fyzee says that it is merely of antiquarian interest, because compensation for criminal offences is not payable in India.

Acknowledged kinsman is a person of unknown descent in whose favour the deceased has made an acknowledgment of Kinship, not through himself, but through another. Consequently, a man may acknowledge another as his brother (descendant of father), or uncle (descendant of grandfather), but not as his son.

Universal legatee—In the absence of three classes of Principal heirs and the above-described classes of two Subsidiary heirs, a person is entitled to bequeath the whole of his estate to any person, who is called the Universal legatee.

⁴⁶ Mulla, *Principles of Mohammedan Law*, 84.

The State, by escheat—In the absence of either Principal or Subsidiary heirs, or a will, the whole of a estate of a deceased would escheat to the Government.⁴⁷

3.4. (i). QURANIC HEIRS

They are person whose shares have been specified by the Quran. They are entitled to receive a fixed share allotted to them in a certain order of preference and mode of succession. The sharers are twelve in number.

Two of the close legal heirs of every deceased person are invariably regarded as his or her Quranic heirs – the mother and the surviving spouse.

Seven other female relatives of the deceased may be regarded as Quranic heirs in some prescribed circumstances. These are the mother's mother, the father's mother, daughter, son's daughter, and sister – full, half and uterine.

Three male relatives of the deceased may be regarded as Quranic heirs in some prescribed circumstances. These are the father, father's father and uterine brother.

Among the twelve Quranic heirs, notably, as many as nine are women.

After the payment of funeral expenses, debts and legacies, the first step is to ascertain which of the surviving relations belong to the class of sharers and which again are entitled to a share of the inheritance and then to proceed to assign their respective shares.

A. *Surviving spouse*: -

1. Husband—A surviving husband invariably inherits from his deceased wife. His share is $\frac{1}{4}$ of her heritable estate, when there is a child or child of a son how low so ever; $\frac{1}{2}$ when no child or child of a son how low so ever.

2. Wife—A surviving wife invariably inherits from her deceased husband and gets $\frac{1}{4}$ of his heritable estate if he has not left a child or son's or grandson's child; if he has – she gets $\frac{1}{8}$. If, exceptionally, a person has left behind two wives they have to share this entitlement equally.

⁴⁷ Supra note 15 at 320.

B. Parents: -

1. Father—Father will be a Quranic heir if the deceased has left behind a child or son's or grandson's child, and get $\frac{1}{6}$ – if not he will be a non-Quranic heir placed in the class of agnates or residuaries.

2. Mother-- Her share is $\frac{1}{6}$

(a) when there is a child or child of a son how low so ever, or

(b) when there are two or more brothers or sisters, or even one brother and one sister, whether full, consanguine or uterine.

It is $\frac{1}{3}$ when no child or child of a son how low so ever and not more than one brother or sister, if any; but if there is also wife or husband and the father, then only $\frac{1}{3}$ of what remains after deducting the wife's husband's share.

C. Grandparents: -

1. Maternal Grandmother—In the absence of the mother of the deceased the maternal grandmother or her mother will inherit and get $\frac{1}{6}$ – even where the father of the deceased is alive.

2. Paternal Grandmother—The paternal grandmother of the deceased will inherit only in the absence of both parents of the deceased and get $\frac{1}{6}$. In her absence the paternal grandfather's mother may take her position.

If there are two or more grandmothers of the deceased – whether maternal or paternal – entitled to inherit, their joint share will be $\frac{1}{6}$, which they will share equally.

3. Paternal Grandfather—In the absence of the father of the deceased the paternal grandfather or great-grandfather, will inherit as a Quranic heir and take $\frac{1}{6}$; in the absence of a child or son's or grandson's child of the deceased he will take the father's place among the agnatic heirs or residuaries.

Notably, the maternal grandfather of the deceased – or of either parent of the deceased – is not a Quranic heir and can inherit only as a uterine heir.

D. Daughters: -

The daughters of the deceased will be Quranic heirs in the absence of any son; in the presence of a son they will be non-Quranic heirs placed with him in the preferential class of the agnates.

As a Quranic heir one daughter gets $\frac{1}{2}$, while two or more of them get $\frac{2}{3}$, which they take in equal shares.

E. *Son's daughters:* -

In the absence of any child of the deceased the daughter of a predeceased son will be a Quranic heir – provided that such a son has not left behind a son of his own; provided that such a son has not left behind a son of his own; if he has she will be a non-Quranic heir placed with the grandson in the class of agnates or residuaries.

So inheriting, a single granddaughter gets $\frac{1}{2}$, and two or more $\frac{2}{3}$, which they will share equally.

As an exception, such granddaughters—one or more – when surviving with a single daughter of the deceased get $\frac{1}{6}$ in all (i.e., the balance of two or more daughters' joint share of $\frac{2}{3}$).

In the same circumstances a grandson's daughter may also inherit as a Quranic heir, if succession otherwise passes on to the next generation of the descendants.

F. *Full and Half sisters:* -

1. Full sisters—If the deceased has left behind no child, or son's or grandson's child, and also not the father or grandfather; the sisters of the deceased by full blood will be Quranic heirs in the absence of such a brother; with such a brother they will be non-Quranic heirs placed with him in the preferential class of the agnates or residuaries.

2. Half sisters (consanguine sister)—In the same above circumstances, if there is no full sister or brother the place of a full sister may be taken by a half sister of the deceased—provided that there is no half brother; if there is one they both may inherit as non-Quranic heirs placed among the agnates.

As a Quranic heir one full or half sister gets $\frac{1}{2}$; while two or more such sisters get $\frac{2}{3}$ which they will share equally.

As an exception, if there is only one full sister inheriting as a Quranic heir and there is also a half sister eligible as such an heir, the latter will also get $\frac{1}{6}$ (i.e., the balance of two or more full or half sisters' joint share of $\frac{2}{3}$). The same will be the position if there are two or more half sisters with one full sister.

G. Uterine sister-brother: ¹

Uterine sisters and brothers of a deceased person who is not survived by the father or grandfather, or by any child or a son or grandson's child, will inherit as Quranic heirs. The share of one such sister or brother will be $\frac{1}{6}$; and of two or more of them $\frac{2}{3}$ which they will share equally.⁴⁸

The Quranic heirs or Sharers and their specified shares may be explained in tabular form in the following table:

	Heirs	Shares		When entirely excluded	When share may be affected	How the share is affected
		One	Two or more			
1.	Wife	$\frac{1}{8}$	$\frac{1}{8}$	never	When no child or child of a son h.l.s.	Share is increased to $\frac{1}{4}$
2.	Husband	$\frac{1}{4}$	---	never	When no child or child of a son h.l.s.	Share is increased to $\frac{1}{2}$
3.	Daughter	$\frac{1}{2}$	$\frac{2}{3}$	never	Where there is a son	She becomes a residuary
4.	Son's	$\frac{1}{2}$	$\frac{2}{3}$	In the presence	(a) when	(a) share is

⁴⁸ Tahir Mahmood, *The Muslim Law of India*, Third edition, pp 204-5.

	daughter			of (i) a son, (ii) more than one daughter, (iii) higher son's son and (iv) more than one higher son's daughter	only one daughter (b) one higher son's daughter (c) equal son's son	reduced to 1/8 (b) share is reduced to 1/8 (c) she becomes a residuary.
5.	Full sister	1/2	2/3	In the presence of (i) son, (ii) son's son how low soever, (iii) father, and (iv) true grandfather.	When there is a full brother	She becomes a residuary
6.	Half sister	1/2	2/3	In the presence of (i) son, (ii) son's son how low soever, (iii) father, (iv) true grandfather, (v) full brother, and (vi) more than one full sister	(a) where there is a full brother (b) when there is a consanguine brother	(a) share is reduced to 1/6 (b) she becomes a residuary
7.	Uterine brother	1/6	1/3	In the presence (i) child, (ii) child of a son, how low so ever, (iii) father, and (iv) true grandfather	---	---

8.	Uterine sister	1/6	1/3	In the presence (i) child, (ii) child of a son, how low so ever, (iii) father, and (iv) true grandfather	---	---
9.	Mother	1/6	---	never	(a) where there is no child or son's child, how low so ever (b) one brother or sister (c) when husband or wife co- existing with father	(a) share is increased to 1/3 (b) share is increased to 1/3 (c) 1/3 of the residue after deducting the share of husband or wife.
10.	The grand mother h.h.s. Maternal Paternal	1/6	1/6	In the presence of (i) mother, and (ii) nearer maternal or paternal grand- mother. In the presence of (i) mother, (ii) nearer maternal or	---	---

				paternal grand-mother, (iii) father, and (iv) nearer true grandfather		
11.	Father	1/6	---	never	Where there is no child or child of a son how low so ever	He becomes a residuary
12.	True Grand-father	1/6	---	In the presence of (i) father, and (ii) nearer true grand-father	Where there is no child or child of a son how low so ever	He becomes a residuary

3.4. (ii). RULES FOR DETERMINING SHARES OF QURANIC HEIRS OR SHARERS

The following are the rules for determining shares of Quranic heirs or Sharers:

1. First of all, the heritable property is to be determined; it is the residue that remains after payment of the funeral expenses, debts and legacies.
2. Then, it is ascertained as to which of the surviving relations of the deceased—(i) belong to the class of sharers, and (ii) are entitled to a share of the inheritance, that is, they are not totally or partially excluded. Whoever is related to the deceased through other person shall not inherit while that person is living. Further within the limits of each class of heirs, the nearer in degree excludes the more remote.

3. Then the respective shares, to which the sharers are entitled, are assigned to them. If it is found that the total of the shares exceeds unity then the shares of each sharer is proportionately diminished by the process called "increase".
4. If there is any residue left after satisfying the claims of the sharers, it devolves upon the residuaries. If, however, there is no residuary, the residue reverts to the sharers in proportion to their shares by the process called "return".⁴⁹

3.4. (iii). DOCTRINE OF 'AUL' OR INCREASE

It is pretty clear that in the Muslim law of inheritance which allots a number or fractional parts of unity to various heirs, it may happen that the fractions when added together may sometimes be (i) equal to unity, (ii) more than unity, or (iii) less than unity. When the sum of fractions is equal to unity, there is no problem. But if it is more or less than unity, the shares of respective heirs are reduced or increased respectively. The process whereby the shares are reduced is called the Doctrine of Increase (AUL); and the process whereby the shares are increased is called the Doctrine of Return (Radd).

Increase or 'aul' is affected in the following manner:

If the total of fractional shares allotted to sharers exceeds unity, the share of each sharer is proportionately diminished by "reducing the fractional share, to a common denominator; and increasing the denominator so as to make it equal to the sum of the numerators".

*Illustrations*⁵⁰

(a) Husband 1/2

Two full sisters 2/3

Since the total of $\frac{1}{2}$ and $\frac{2}{3} = \frac{7}{6}$, which is more than unity, doctrine of 'increase' will apply in this case.

First step—'Reduce fractional shares to a common denominator'

⁴⁹ M.P.Tandon & R. Tandon, *Mohammedan Law*, Eleventh edition, p.343.

⁵⁰ Syed Khalid Rashid, 327-8.

Thus, $\frac{1}{2} + \frac{2}{3} = \frac{3}{6} + \frac{4}{6}$. (here 6 is the common denominator).

Second step—'Increase the denominator to make it equal to the sum of numerators, and allow the individual numerators to remain'.

Thus, $\frac{3}{6} + \frac{4}{6}$ becomes $\frac{3}{7} + \frac{4}{7}$. (here 7 is the sum of numerators 3 and 4). The shares are thus proportionately reduced and the sum of fractions comes equal to unity ($\frac{3}{7} + \frac{4}{7} = \frac{7}{7} = 1$).

(b) Husband	$\frac{1}{2} =$	$\frac{3}{6}$	reduced to	$\frac{3}{8}$.
Two full sisters ..	$\frac{2}{3} =$	$\frac{4}{6}$	reduced to	$\frac{4}{8}$.
Mother	$\frac{1}{6} =$	$\frac{1}{6}$	reduced to	$\frac{1}{8}$.
	---		...	
		$\frac{8}{6}$		$\frac{8}{8}$

(c) Widow ...	$\frac{1}{4} =$	$\frac{3}{12}$	reduced to	$\frac{3}{15}$.
Two full sisters	$\frac{2}{3} =$	$\frac{8}{12}$	reduced to	$\frac{8}{15}$.
Uterine sister	$\frac{1}{6} =$	$\frac{2}{12}$	reduced to	$\frac{2}{15}$.
Mother	$\frac{1}{6} =$	$\frac{2}{12}$	reduced to	$\frac{2}{15}$.
	
		$\frac{15}{12}$		$\frac{15}{15}$

(d) Wife..	$\frac{1}{8} =$	$\frac{3}{24}$	reduced to	$\frac{3}{27}$.
Two daughters...	$\frac{2}{3} =$	$\frac{16}{24}$	reduced to	$\frac{16}{27}$.
Mother	$\frac{1}{6} =$	$\frac{4}{24}$	reduced to	$\frac{4}{27}$.
Father	$\frac{1}{6} =$	$\frac{4}{24}$	reduced to	$\frac{4}{27}$.
	
		$\frac{27}{24}$		$\frac{27}{27}$

3.4. (iv). DOCTRINE OF RETURN OR 'RADD'

If the sum total of fractions allotted to sharers is less than unity (that is, something is left behind after satisfying the claims of each sharer) and there is

no residuary to take the residue, the residue reverts back to the sharers in proportion of their shares.

Exception—In the presence of any heir, neither the wife nor husband is entitled to the 'Return'.

*Illustrations*⁵¹

(a) Mother	1/6.
Daughter	1/2.

As the total of 1/6 and 1/2 is 2/3, thus 1/3 remains to be distributed. The doctrine of return would apply.

First step—'Reduce the fractional shares to a common denominator'.

Thus, $1/6 + 1/2 = 1/6 + 3/6$ (here 6 is the common denominator).

Second step—'Decrease the denominator to make it equal to the sum of the numerators, and allow the individual numerators to remain.'

Thus, $1/6 + 3/6$ becomes $1/4 + 3/4$ (here 4 is the sum of numerators 1 and 3). The shares are thus proportionately increased, so that their sum becomes equal to unity ($1/4 + 3/4 = 4/4 = 1$).

(b) Husband	1/2
Mother	1/2 (1/3 as sharer and 1/6 by Return).

(c) Wife	1/4
Sister (full or half)	3/4 (1/2 as sharer and 1/4 by Return).

(d) Mother	1/6	increased to 1/5.
Full sisters	$1/2 = 3/6$	increased to 3/5.
Uterine brother	1/6	increased to 1/5

	5/6	5/5
(e) Husband	1/4	4/16.
Mother	1/6 increased to 1/4 of 3/4 =	3/16.
Daughter	1/2 = 3/6 increased to 3/4 of 3/4 =	9/16.
	----	-----
	11/12	16/16
(f) Mother	1/6 increased to	1/5.
Daughter	1/2 = 3/6 increased to	3/5.
Son's daughter	1/6 increased to	1/5.
	----	-----
	5/6	5/5
(g) Wife	1/8 (gets no Return)	5/40.
Mother	1/6 increased to 1/5 of 7/8 =	7/40.
Two son's daughters	2/3 = 4/6 increased to 4/5 of 7/8 =	28/40.
	----	-----
	23/24	40/40.
(h) Wife	1/4	4/16.
Full sister	1/2 = 3/6 increased to 3/4 of 3/4 =	9/16.
Half sister	1/6 increased to 1/4 of 3/4 =	
	3/16.	
	----	-----
	11/12	16/16.
(i) Father's mother } Mother's mother }	1/6 increased to	1/5.
Full sister	1/2 = 3/6 increased to	3/5.

⁵¹Supra Note 16 at 81-82.

Half sister	$1/6$ increased to	$1/5$.
	----	----
	$5/6$	$5/5$.
(j) Father's mother } Mother's mother }	$1/6$ increased to	$1/5$.
Son's daughter	$2/3 = 4/6$ increased to	$4/5$.
	----	----
	$5/6$	$5/5$.
(k) Husband	$1/2$	
Daughter's son	$1/2$.	

In the presence of an heir, whether he be of the class of 'distant kindred' as daughter's son, the husband is not entitled to get any 'return'. The surplus will, therefore, go to the daughter's son.

3.4. (v). AGNATIC HEIRS

When there are Quranic heirs or sharers and a residue of estate is left after allotting them their shares, or when there are no Quranic heirs or sharers, then whatever is left in the former case, and the entire estate in the latter case, goes to the Agnatic heirs or residuaries. The Agnatic heirs may be classified into (i) Agnatic Descendants, (ii) Agnatic Ascendants, and (iii) Agnatic Collaterals (Father's agnatic descendants and Grandfather's agnatic descendants). They may be depicted in tabular form as below:

(i) Agnatic Descendants:

Heirs	When portion of estate they take
1. Son	(a) when there is a daughter, he takes double portion.

	(b) when there is no daughter, he takes the entire residue.
2. Son's son how low so ever	(a) when there is son's daughter, he takes double portion. (when there is equal son's son, but there is a lower son's son's daughter. If she does not inherit as a sharer, inherits as residuary with lower son's son.) (b) nearer son's son excludes remoter. (c) two or more son's son take the estate in equal shares.

(ii) Agnatic Ascendants:

Heirs	When portion of estate they take
3. Father	As a residuary he takes the entire estate.
4. True Grandfather	(a) As a residuary he takes the entire estate. (b) The near true grandfather excludes the remoter.

(iii) Agnatic Collaterals:

Heirs	When portion of estate they take
Collaterals Descendants of the father	
5. Full brother	(a) where there co-exists a full sister, he takes double portion. (b) In the absence of the sister, he takes the entire residue.
6. Full sister	In the absence of the full brother and aforesaid residuaries, she takes the residue, if any, if there is/ are daughter/ daughters or son's daughter/ daughters how low so ever or one daughter and son's daughter/ daughters, how low so ever.
7. Consanguine brother	When there is consanguine sister, he takes double portion.
8. Consanguine	In default of a consanguine brother and above-mentioned

sister	residuaries she takes the residue, if any, if there be daughter/daughters how low so ever or one daughter and a son's daughter/ daughters how low so ever.
9. Full brother's son	In the default of above residuaries he takes the entire residue.
10. Consanguine brother's son	In the default of above residuaries he takes the entire residue.
11. Full brother's son's son	In the default of above residuaries he takes the entire residue.
12. Consanguine brother's son's son	In the default of above residuaries he takes the entire residue
Then come remoter male descendants of No. 11 and No. 12, that is, the son of No. 11, then the son of No. 12, then the son's son of No. 11, then the son's son of No. 12 and so on in like order.	
Collaterals Descendants of the true grandfather	
13. Full paternal uncles	He takes the entire residue.
14. Consanguine paternal uncle	He takes the entire residue.
15. Full paternal uncle's son	He takes the entire residue.
16. Consanguine paternal uncle's son	He takes the entire residue.
17. Full paternal uncle's son's son	He takes the entire residue.
18. Consanguine paternal uncle's son's son	He takes the entire residue.

After them come the remoter male descendants of full paternal uncle's son's son and consanguine paternal uncle's son's son's son alternatively. Then come the descendants of the remoter true grandfathers, in like order and manner as the deceased paternal uncles and their sons and son's sons.

It may be noted that all Agnatic heirs or Residuaries are related to the deceased through a male. Residuaries are of three types⁵²: these are (i) residuaries in their own right; these are all male residuaries, (ii) residuaries in the right of another; these four female residuaries, namely, daughter, in the right of the son, son's daughter, how low so ever, in the right of son's son how low so ever, full sister, in the right of full brother, and the consanguine sister in the right of the consanguine brother, and (iii) residuaries with others, viz., full sister, consanguine sister, when they inherit as residuaries with daughter and son's daughter, how low so ever. However, from the point of view of the order of succession, it would be better to classify them into: (a) descendants of the deceased, (b) ascendants of the deceased, and (c) collaterals of the deceased. The collaterals may be further divided into (i) descendants of the deceased's father, and (ii) descendants of the deceased's father's father, how high so ever.

There are certain Quranic heirs or Sharers who do not take their specified shares if a residuary equal rank co-exists. In such a case they become agnates or residuaries. They are called the Quranic residuaries with another. They may be stated in the tabular form as below:

	Sharers	Circumstances in which the sharer becomes residuary
1.	Daughter	When there co-exists a son of the deceased
2.	Son's daughter	When there co-exists: (a) Son's son, or

⁵² Supra Note 16 at 73-77.

		(b) a male agnatic heir in a lower degree.
3.	Son's son's daughter	When there co-exists: (a) Son's son, or (b) a male agnatic heir in a lower degree.
4.	Full sister	Where there co-exists a full brother
5.	Consanguine sister	When there co-exists a consanguine brother

3.4. (vi). DISTRIBUTION OF ASSETS AMONG THE QURANIC AND AGNATIC HEIRS

After the payment of the funeral expenses, debts and legacies (in case the deceased had left a will), the next step is to distribute the estate of the deceased among the heirs. Among the heirs the Quranic heirs or the sharers are to be given their shares first, then the residue is to be distributed among the Agnatic heirs or the residuaries. In the absence of the sharers, the residuaries take the entire estate. In the absence of both the sharers and the residuaries, the estate devolves on the distant kindreds or uterine heirs. In their absence, the estate goes to the State.

The peculiarity of the Muslim law of inheritance is that although the sharers are Class I heirs and the residuaries are Class II heirs, they together share the property. The sharers are Class I heirs in the sense that they have the right to be allotted their shares at the first instance. After the prescribed shares have been allotted to them, the remaining property goes to the residuaries. Thus, if a Muslim dies leaving behind a mother, M, a son, S, and a daughter's son DS, then mother as sharer will take 1/6, and S will take the remaining 5/6 as residuary. DS will be totally excluded from the inheritance, since he is a distant kindred. There is only one case when a distant kindred inherits along with a sharer, viz., when the sharer is a husband or wife and there is neither any other sharer nor a residuary, then the distant kindred inherits along with the husband or the wife. Thus, if a Muslim dies leaving behind a widow, W, and

full sister's son FSS (who is a distant kindred), then W will take $\frac{1}{4}$ as sharer, and the residue of the estate, namely, the $\frac{3}{4}$ will go to FSS.

As is evident from the above-mentioned Tables, among the heirs of a class as to which one of them will take the estate and in what portion, depends upon the circumstances of each case. The general rule of preference is that a nearer heir excludes a remoter one. Thus, if a Muslim dies leaving a son and a grandson (son's son or a son from a predeceased son), then son alone will inherit, and the grandson will be excluded, though both are residuaries. Similarly, if a Muslim dies leaving behind a father and a true grandfather, then the father alone will inherit and the true grandfather will be excluded, even though both are sharers. Among the residuaries, the descendants are preferred over ascendants and collaterals, and ascendants are preferred over collaterals. Among the collaterals, the descendants of a nearer ancestor are preferred over the descendants of a remoter ancestor. When all the heirs claiming property are equally near, they share equally, with this rider that a male heir (generally) takes double the portion of a female heir.

Another general rule is that when one is related to the deceased through another, one does not inherit so long as that another is alive. Thus, father excludes both a brother and a sister. However, the mother does not exclude brothers and sisters. The reason is that when the mother is alive, she cannot claim to inherit the entire estate. When there is no other heir, she takes part of the estate as a sharer, and the rest by return.

In Hanafi scheme of inheritance, the following five heirs are always entitled to a share in the estate, namely, husband, wife, child, father and mother. These heirs are called primary heirs. Next to them are "substitutes". They are the substitutes of the last three primary heirs. These are children of a son how low so ever, true grandfather, and true grandmother.

3.4. (vii). UTERINE HEIRS

In the absence of the sharers and the residuaries, the estate devolves on the uterine heirs or distant kindred. There is only one case in which the distant

kindred inherit along with a sharer. When the only surviving sharer is a husband or a wife and there is no residuary, then the husband or wife takes his or her share, and the rest of the estate to the distant kindred.

In the class of uterine heirs or distant kindred are all those blood relations of the deceased who have not found a place either among the sharers or residuaries. These are: (a) female agnates, and (b) cognates, both males and females. These two classes of relations constitute the distant kindred, whom Ameer Ali designates as "uterine relation"⁵³ and Fyzee as "uterine heirs"⁵⁴.

The Uterine heirs or the distant kindred are divided into four classes who succeed in the order given below: -

I. Descendants of the deceased

1. Daughter's children and their descendants.
2. Children of son's daughters how low so ever and their descendants.

II. Ascendants of the deceased

1. False grandfathers how high so ever
2. False grandmothers how high so ever

III. Descendants of parents

1. Full brother's daughters and their descendants.
2. Consanguine brother's daughters and their descendants.
3. Uterine brother's children and their descendants.
4. Daughters of full brother's sons how low so ever and their descendants.
5. Daughters of consanguine brother's sons how low so ever and their descendants.
6. Sisters (full, consanguine or uterine) children and their descendants.

IV. Descendants of immediate grandparents (true or false)

1. Full paternal uncle's daughters and their descendants.
2. Consanguine paternal uncle's daughters and their descendants.
3. Uterine paternal uncles and their children and their descendants.

⁵³ Ameer Ali, II, 57.

⁵⁴ Fyzee (Third edition) 420.

4. Daughters of full paternal uncle's sons how low so ever and their descendants.
5. Daughters of consanguine paternal uncle's sons how low so ever their descendants.
6. Paternal aunts (full, consanguine or uterine) and their children and their descendants.
7. Maternal uncles and aunts and their children and their descendants.
8. Descendants of remoter ancestors how high so ever (true or false).

The order of precedence among distant kindred in each class and the rules by which such order is determined are given below:

Class I – Descendants

Rules of exclusion—The order of succession in this class is to be determined by applying the following rules:

1. The person who is nearest in degree to the deceased is entitled to succeed first, e.g., the daughter's daughter succeeds in preference to the son's daughter's daughter, as the latter is more distant by one degree than the former from the deceased.
2. If the claimants are equal in degree, the child of an heir is preferred to the child of a distant relation. Thus a son's daughter's daughter is preferred to a daughter's daughter's son, because the son's daughter is an heir (being included among the sharers and residuaries), and the daughter's daughter is a distant kindred consequently, though the two claimants are equal in degree, both in the third degree of affinity, the child of an heir is preferred to those of distant kindred.
3. If the claimants are equal in degree and there is not among them any child of an heir, or if all of them be the children of heirs, then (a) if all the claimants be the same sex and the persons through whom the claimants are related to the deceased be, when in the same rank, also of the same sex (that is, all males or all females), they would get equal shares; and (b) if there be difference of sex among the claimants only,

but there be no disagreement of sex among their ancestors of the same degree, each male would get the share of two females, as in the case of residuaries. Thus, if the deceased had three daughters, each of whom died leaving a daughter, then these three daughters' daughters would inherit equal shares; because they are all related through heirs—the deceased's daughters, they are all of the same sex and the persons through whom they related to the deceased are all females.

Order of Succession: - The rules of exclusion given above lead to the following order of succession and of these groups each in turn must be exhausted before any member of the next group can succeed: -

1. Daughter's children.
2. Son's daughter's children.
3. Daughter's grandchildren.
4. Son's son's daughter's children.
5. Daughter's great-grandchildren and son's daughter's grandchildren.
6. Other descendants of the deceased in like order.

Allotment of shares: - After ascertaining which of the descendants of the deceased are entitled to succeed, the next step is to distribute the estate. The distribution of the estate is governed by the following rules:

Rule I—If the intermediate ancestors do not differ in their sexes, the estate is to be divided among the claimants per capita, the male taking a double share.

Illustrations

(a) 2 sons of daughter (Fatima) – $\frac{4}{5}$ (each taking $\frac{2}{5}$).

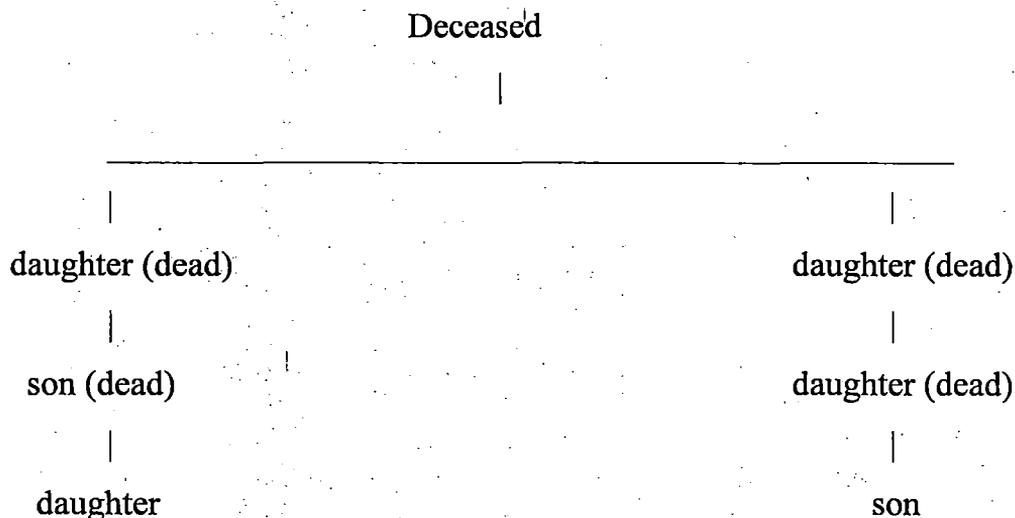
1 daughter of daughter (Kulsum) – $\frac{1}{5}$.

(b) 2 sons of daughter's daughter (A) $\frac{4}{6}$ (each taking $\frac{2}{6}$).

2 daughters of a daughter's daughter (B) – $\frac{2}{6}$ (each taking $\frac{1}{6}$).

Rule II—If the intermediate ancestors differ in their sexes, the distribution will take effect according to the following sub-rules:

Sub-rule (i): **Two claimants, two lines of descent** – According to Mulla, the simplest case is where there are only two claimants, the one claiming through one line of ancestors, and the other claiming through another line, as shown below:



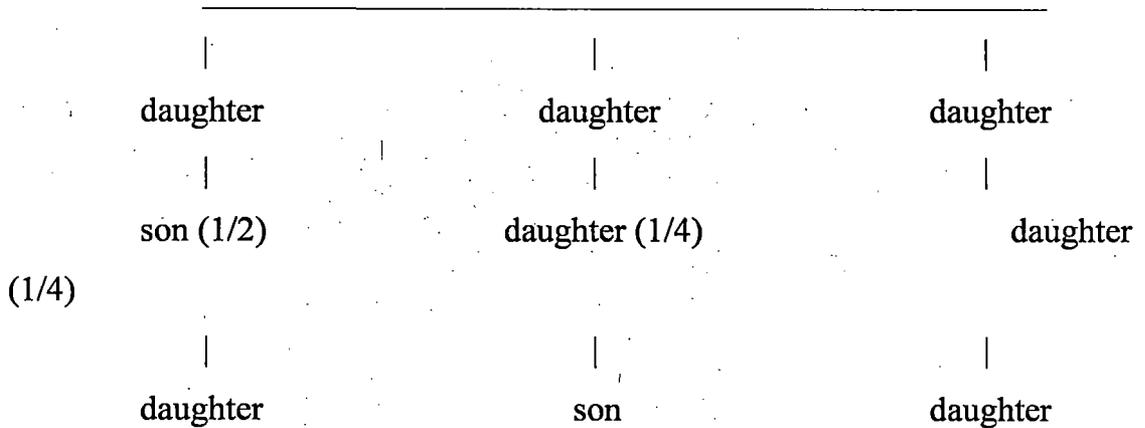
According to **Abu Yusuf**—The sex of the intermediate ancestors is to be disregarded, and the sex of present heirs counts. The allocation of share will be: male and female taking in the proportion of two to one. Thus, in the above example, daughter takes $1/3$ and son $2/3$.

But, unfortunately, this simple rule is not followed in India, and the complex rule of Imam Muhammad is preferred.

According to **Imam Muhammad**—This method of distribution is to pause at each degree where the sexes differ. In the above example, the sexes do not differ in the first generation (both are daughters); but in the second generation (one is a son and the other is a daughter). Here, applying the principle that male takes double to female; dead son gets two shares and dead daughter gets one share. These shares devolve upon the two present living heirs. Thus, the son gets one share and the daughter two shares.

Sub-rule (ii): **Three claimants, three lines of descent**—Take the example of a Muslim who dies leaving a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown below:

Deceased



The first step is to stop at the first line in which the sexes of the intermediate ancestors differs, and to assign to each male ancestor a double portion. Thus—

Daughter's son = $1/2$.

Daughter's daughter = $1/4$ }

Daughter's daughter = $1/4$ }

Collective share of females = $1/2$.

The second step is governed by the rule that the individual share of each ancestor does not descend on his or her descendants as in the preceding case, but the collective share of each male ancestors is to be divided among all the descendants claiming through them, and the collective share of all the female ancestors is to be divided among their descendants. Male is given double share.

Now, applying this principle to the above problem, the daughter's son stands alone and his share descend to his daughter; but the collective share of the two daughter's daughter is to be distributed among their descendants, on the principle: double share to male. Thus—

Daughter's daughter's son— $2/3$ of $1/2 = 1/3$.

Daughter's daughter's daughter— $1/3$ of $1/2 = 1/6$.

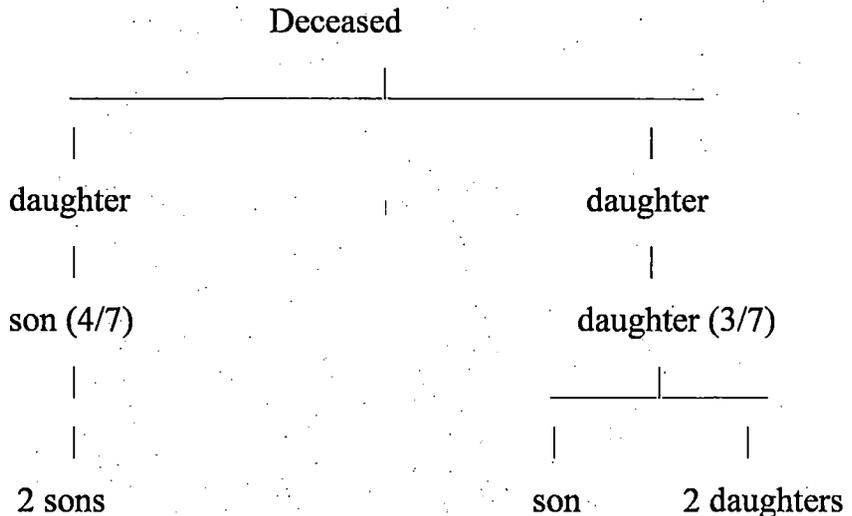
Hence, the full answer to the problem is—

$dsd = 1/2$

$$\text{dds} = 1/3$$

$$\text{ddd} = 1/6.$$

Sub-rule (iii): **More than two claimants, two lines**—When there are two or more claimants through the same intermediate ancestor, there is a further rule to be applied. “Count for each such ancestor, if male, as many males as there are claimants claiming through him, and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants. Take this example:



Here, daughter's son (in the second degree) will count two males because he has two surviving heirs, and the daughter's daughter will count as three females because three of her descendants are among the surviving heirs.

Thus we have—

$$\text{Daughter's son} = 4/7$$

$$\text{Daughter's daughter} = 3/7$$

The $4/7$ of daughter's son will go to his two sons equally, each taking $2/7$.

The $3/7$ of daughter's daughter will go to her son and two daughters, the son taking twice the share of the daughter. Thus—

$$\text{Daughter's daughter's son} = 2/4 \text{ of } 3/7 = 6/28.$$

(each) daughter's daughter's daughter— $1/4$ of $3/7 = 3/28$. Thus, the final shares will be:

dss = 8/28.

dss = 8/28.

dds = 6/28.

ddd = 3/28.

ddd = 3/28.

Class II – Ascendants

Order of Succession: -

1. In the absence of the distant kindred of the first class, the whole estate will devolve upon the mother's father on account of his being the nearest relation among distant kindred of second class.
2. If there is no mother's father the estate will devolve upon such of the false ancestors in the third degree as are related to the deceased through sharers, i.e., father's mother's father and the mother's mother's father.
3. If there are none of these, the estate will devolve upon the remaining false ancestors in the third degree, namely mother's father's father and the mother's father's mother.
4. Lastly, the remoter false grandparents succeed subject to the rule of double share for the paternal side.

Rules of Succession: -

Succession among distant kindred of class II is governed by the following rules—

1. The nearer in degree exclude the more remote.
2. The ascendants related through the sharers are preferred to those related through the residuaries as between the heirs of the same degree.
3. The heirs on the paternal side take double the portion of the heirs on the maternal side.
4. The members of the same sex share equally when there is no difference in rank and the degree, but in case of difference in sexes the male member is entitled to a share double that of a female.

5. The doctrine of Imam Muhammad as to sex differentiation at an intermediate state is applicable.

Class III – Descendants of parents

Rules of Succession: -

The rules of succession among the distant kindred of the third class (which comprises the sister's children, brother's daughters, brother's how low so ever son's daughters, sons of uterine brother and the children of these) are as follows:

Rule (1)—The nearer in degree excludes the more remote. Thus the children of brothers and sisters exclude their grand children; the sister's son excludes the brother's son's daughter.

Rule (2)—Among the claimants in the same degree of relationship, the children of residuaries are preferred to those of distant kindred. Thus a full brother's son's daughter, being a child of a residuary (full brother's son), is preferred to full sister's daughter's son who is the child of a distant kins woman (full sister's daughter).

Rule (3)—In the same degree of relationship, subject to rule (2) above, the descendants of full brothers exclude those of consanguine brothers and sisters. But the descendants of full sisters do not exclude the descendants of consanguine brothers and sisters, and the latter take the residue, if any, after allotting shares to the descendants of full sisters and of uterine brothers and sisters. Descendants of either full or consanguine brothers or sisters do not exclude the descendants of uterine brothers and sisters, but they inherit with them.

According to Sirajiya among those equal in degree distribution between the heirs is affected by considering the branches and the roots. Share is assigned to the roots with reference to the number of the claimants in their own line of descent respectively according to Imam Muhammad.

In the case of issue of uterine brothers or sisters difference of sex is not considered in the intermediate roots and they all share equally.

Order of Succession—

The above rules give rise to the following order of succession: -

1. Full brother's daughter, full sister's children and children of uterine brothers and sisters.
2. Full sister's children, children of uterine brothers and sisters; consanguine brother's daughters and consanguine sister's children, the consanguine group taking the residue, if any.
3. Consanguine brother's daughters, consanguine sister's children, and the children of uterine brothers and sisters.
4. Full brother's son's daughter (children of residuaries).
5. Consanguine brother's son's daughters (children of residuaries).
6. Full brother's daughter's children, full sister's grandchildren, and grandchildren of uterine brothers and sisters.
7. Full sister's grandchildren, grandchildren of uterine brothers and sisters, consanguine brother's daughter's children and consanguine sister's grandchildren, the consanguine group taking the residue, if any.
8. Consanguine brother's daughter's children, consanguine sister's grandchildren, and grandchildren of uterine brothers and sisters.
9. Remoter descendants of brothers and sisters in like order.

The members of the above groups each in turn must be exhausted before any member of the next group can succeed.

Allotment of shares—

After determining the order of succession of the descendants of brothers and sisters, the estate is distributed in accordance with the following rules: -

1. Divide the estate among the roots, i.e., brothers and sisters, and treat each brother who has two or more claimants descended from him as so many brothers, and each sister who has two or more claimants descended from her as so many sisters. If there is a residue left after

assigning the shares to the roots, but there are no residuaries among the roots, the doctrine of return should be applied.

2. When the hypothetical shares have been determined give the uterine brother and sisters one sixth if one, or two-third if more than one and divide that share equally among them without distinction of sex.

Class IV – Descendants of immediate grandparents

Order of Succession—

In the absence of the distant kindred of the first three classes, the estate devolves upon the distant kindred of the fourth class in the following order: -

1. Paternal and maternal uncles and aunts of the deceased, other than his full and consanguine paternal uncles who are residuaries.
2. The descendants how low so ever of the above, other than sons how low so ever of his full and consanguine paternal uncles of the father who are residuaries.
3. Paternal and maternal uncles and aunts of the parents, other than the full and consanguine paternal uncles of the father who are residuaries.
4. The descendants how low so ever of the above, other than sons how low so ever of the full and consanguine paternal uncles of the father who are residuaries.
5. Paternal and maternal uncles and aunts of the grandparents, other than the full and consanguine paternal uncles of the father's father who are residuaries.
6. The descendants how low so ever of the above, other than sons how low so ever of the full and consanguine paternal uncles of the father's father who are residuaries.
7. Remoter uncles and aunts and their descendants in like order.

All the members of the above groups each in turn must be exhausted before any members of the next group can succeed.

Rules for determining the order of succession—

The paternal relations together take a double share to that taken by the maternal relations, i.e., two-thirds and one-third by paternal and maternal side respectively.

Those of full blood exclude those of half-blood by the father or mother and those of the half-blood on the father's side exclude those of the half-blood by the mother.

The issues of residuaries are preferred where the claimants are equal in degree or relationship.

A male member takes a share double to that of a female.

Uncles and Aunts

Allotment of shares—

Allotment of shares to the uncles and aunts is regulated by the following rules: -

1. Assign two-thirds to the paternal side and one-third to the maternal side.
2. Then divide two-thirds share among—
 - (a) Full paternal aunts in equal shares; failing them, among
 - (b) Consanguine paternal aunts in equal shares; failing them, among
 - (c) Uterine maternal uncles and aunts, according to the rule of double share of the male.
3. Finally, divide one-third among—
 - (a) Full maternal uncles and aunts, failing them, among
 - (b) Consanguine maternal uncles and aunts, and failing them, among
 - (c) Uterine maternal uncles and aunts subjects to the rule of double share to the male.
4. If there is no uncle or aunt on the paternal side, the maternal side will take the whole and *vice versa*.

If there are no uncles and aunts, the estate will devolve upon the other distant kindred of the fourth class in the order of succession given above.

Descendants of Uncles and Aunts

The rules regulating the succession of the children of distant kindred of the fourth class are: -

1. The person nearest to the deceased is first entitled to the inheritance, whether the father's side or the mother's side of the deceased relates that person. Thus, sons and daughters of paternal aunts are preferred to the children of sons and daughters of paternal aunts.
2. When the claimants are equal in degree and are related on the same side, that is, when all are by the father's side, or all by the mother's side, of the deceased, the order of succession is regulated by the strength of consanguinity, which means that a relation of the whole blood will be preferred to uterine relations. For example, if the claimants be the children of paternal aunts of the whole blood, children of paternal aunts by the father's father's side, and of paternal aunts by the father's mother only, the children of paternal aunts of the whole blood would exclude the children of the two others; and among the children of the two latter, the children of paternal aunts by the father's father would be preferred to the children of the paternal aunt related through the father's mother only.
3. If the claimants were equal in degree and also in blood, and be related by the same side, the child of a residuary is preferred to the child of a more distant kindred, who is not a residuary. Thus, where the claimants are the daughters of a full paternal uncle, and the son of a full paternal aunt both of them are equal in degree and also in blood, and both related by the father's side of the deceased. The estate goes to the daughter of the full paternal uncle, as she is related through a residuary, her father.
4. When the claimants are equal in degree, but some of them are related by the father's side and others by the mother's side, of the deceased, then no preference is given to the strength of blood, nor the fact that any of them are related through a residuary is taken into consideration, but two-thirds of the whole are allotted to the paternal relations, and one-third to

those claiming through the mother's side of the deceased. Then, what has been allotted in each sect or side is distributed among the individuals of that sect, according to the above rules (1), (2) and (3) and the rules of distribution as in class I of the distant kindred.

Illustrations

1. Where the claimants are a daughter of a full paternal uncle, and the daughter of a maternal uncle or aunt by the same father and mother, or by the same father only or by the same mother only, no distinction is made on account of difference in blood as they are related by different sides, and as they are equidistant from the deceased, two-thirds will go to the daughter of the full paternal uncle, and one-third to the child of the maternal uncle or aunt.
2. Where the claimants are
 - A son of a paternal aunt of the whole blood,
 - A daughter of a paternal aunt of the whole blood,
 - A son of a maternal uncle of the whole blood,
 - A son of a maternal uncle by the same father, and
 - A son of a maternal uncle by the same mother.

Two-thirds of the whole will belong to the full paternal aunt's son and daughter, in the proportion of two shares to the former and one to the latter; the remainder one-third goes to the full maternal uncle's son alone, as the son's of the maternal uncles of the half-blood are excluded by the full maternal uncle.

Chart of Succession among Distant Kindred

Class I—

1. Daughter's sons and daughters.
2. Son's daughter's children.
3. Daughter's son's or daughter's children.
4. Lower descendants of daughters and son's daughters, according to proximity or degree.

Class II—

1. Mother's father.
2. Mother's mother's father, and father's mother's father.
3. Mother's father's father; and mother's father's mother.
4. Higher ancestors on both sides, according to proximity of degree and strength of consanguinity.

Class III—

1. Brother's daughter's sister's children and children of uterine brothers and sisters.
2. Daughters of brothers, and sons and daughter of sisters, by the father's side of the deceased.
3. Daughters of sons of brothers by the same father and mother.
4. Daughters of sons of brothers by the same father.
5. Daughters or sons of children of uterine brothers; daughters or sons of full or uterine sister's sons and daughters; children of daughters of brothers by the same father and mother.
6. Children of daughters of brothers and sisters by the same father.

Class IV—

1. Full paternal aunts; full maternal uncles and aunts.
2. Paternal aunts by the same father; maternal uncles and aunts by the same father.
3. Paternal uncles and aunts by the same mother; maternal uncles and aunts by the same mother.

V—Children of Class IV

1. Full paternal uncle's daughter; full maternal uncle's and aunt's children.
2. Daughters of paternal uncles by the same father; children of maternal uncles and aunts by the mother's father's side.
3. Children of full paternal aunts; children of maternal uncles and aunts by the same mother.
4. Children of paternal uncles and aunts by the same mother.

3.5. SHIA LAW OF INHERITANCE

It is interesting here to trace the reasons which led to the formation of Shia and Sunni sects and then the establishment of different schools of law among themselves. The main reason, which gave birth to Shia and Sunni Schools, was the dispute over *Imamat* (leadership of Muslims). Shias do not accept the authority of the *Jamat* (or the universality of the people) to elect a spiritual chief who could supersede the claims of the persons indicated for this purpose by the Prophet himself. Sunnis contend that the Prophet never indicated any person to act as the spiritual chief, and he should be elected. Difference on this point assumed new dimension when immediately after the death of the Prophet it became necessary to elect a Caliph or successor to assume the leadership of Muslims. The kinsmen of Muhammad, who were called Hashimites, asserted that since Ali was a member of the Prophet's family who had also been pointed out by the Prophet as his successor, he should become the Caliph. The other group of Muslims, known as Koreshites, insisted upon election, and elected Abu Bakr to the office of the Caliph. After three years Abu Bakr died and Omar succeeded him. Upon his death the Caliphate was offered to Ali "on condition that he should govern in accordance with the precedents established by the two former Caliphs. Ali declined to accept the office on those terms, declaring that in all cases respecting which he found no positive law or decision of the Prophet, he would rely upon his own judgment". Another companion of the Prophet, Osman, consented to the terms imposed by the electoral body and became the third Caliph. The political events that took place during his Caliphate elucidate the history of the deplorable schism, which divided the Muslim world into two sects⁵⁵.

Again, the question of who should be imam caused the Shias to split amongst themselves, and to form rival sects. The most important of these sects, which cannot be properly called Schools, are:

- (a) The Imamiyah Shia or (Ithna Ashriyah);
- (b) The Zaidiyah Shia; and

(c) The Ismailiya Shia.

The followers of all these sects were in agreement that the post of *imam* should belong to the family of the Prophet. There was no dispute over the first four *imams*: Ali, his two sons Hasan and Husain, and Zainul Abidin, son of Husain. But they split over the succession after the four *Imams*. The Shias became divided into sub-sects on the question of succession after the fourth *imam*, Ali Zainul Abidin. A certain group who were called the Zaidis accepted one of his sons, Zayd as *Imam*. They recognize the principle of election as the basis of succession. The majority of the Shias followed Muhammad al-Baqir and after him Jafar as-Sadiq. After the death of Jafar, another split took place; the majority followed Musa al-Kazim and six *imams* after him, thus making twelve *imams* in all (hence, their name, "Twelvers" or *Ithna Asharis*). The last of these *imams* is believed to have disappeared and to be returning as the *Mehdi* (Messiah). After the death of Jafar, a minority of the Shias did not acknowledge Musa al-Kazim, but followed his elder brother, Ismail, and are now known as Ismailis or "Seveners". The Ismailis believe that the *imam* cannot completely disappear. He is hidden from the sight of those whose vision does not possess the real penetration.

The *Imam* is the central figure in the Shia world. On him are focused the hopes of the world, the love and devotion which is due to the Prophet and the passion and tragedy of Kerbala. He is the "leader" (*imam*), not the *Khalifa* (successor of the Prophet). He is the perfect man (*al-insanu'l Kamil*) and acts as a link between Man and God. He is the final authority in both law and religion.⁵⁶

The Shia sects rejected all such traditions, which were not received from the family of Ali and his descendants. According to them, *Ijma* is "consensus of the infallible imam, not merely the consensus of jurists" and the *Imam* is the final interpreter of law. The *Ijma* could be valid only when it was not possible to consult the *Imam*. The *Ithna Ashariyah Shias* allow *Qiyas*, while others give

⁵⁵ Syed Khalid Rashid, *Muslim Law*, (3rd ed), pp 15-16.

it only a secondary importance. The Shias do not accord recognition to equity, public policy, public goods, or analogy. Literally meaning 'faction', the term *shia* is abbreviation of *Shiat Ali*.

The Shias changed the pre-Islamic law by altogether abolishing the difference between the agnates and cognates as also males and females. The Shia system (unlike the Hanafi) shuffled all the heirs, cognates and agnates, males and females, and then classified them for order of succession. According to Sunni, the daughter's son (being cognate) was relegated to the last class of heirs distant kindred. The Shias belonged to the party of Ali. He being son-in-law of Muhammad, the daughter's sons were entitled to a much higher position.

3.5. (i). HEIRS

The Shias base the right of succession to the property on two principles: (a) *Nasab*, or blood relationship, and (b) *Sahab*, or special cause. The *Nasab* is sub-divided into (i) *dhu fard* (the Quranic heirs or Sharers), and (ii) *dhu qarabat*, or blood relations. The *sahab* is also sub-divided into two, (a) *zawjiyyat* or status of a spouse, and (b) *wala*, special legal relationship. Under *wala* comes right on emancipation, obligation for delicts committed by the deceased, and *wala of immanate*. Of these first two have become obsolete in India and the law of escheat has replaced the third.

The heirs naturally fell into the following classes—

- (1) Descendants how low so ever, whether through males or females.
- (2) Ascendants—(a) immediate (i.e., parents) and (b) higher (i.e., grandparents how high so ever).
- (3) Collaterals—(a) brothers and sisters (b) uncles and aunts or their descendants.

The heirs were classified on following principles for determining the order of succession:

⁵⁶ Fyzee, "Shii Legal Theories", in L.M.E., 114-15 quoted by Syed Khalid Rashid in Muslim Law, (3rd ed), at 20-21.

- (1) The descendants (through males or females) were given primary position. Only parents succeeded with them—The first group.
- (2) Higher ascendants succeeded with nearest collaterals (i.e., brothers and sisters)—The second group. The rest of the collaterals were in the last class of heirs—The third group.
- (3) The rule of proximity was observed within each class.⁵⁷

In modern India, according to the Shia law, there are only two groups of heirs:

- I. Heirs by consanguinity or *nasab*
- II. Heirs by marriage or by virtue of *sabab*.

Heirs by consanguinity or *nasab*

Heirs by consanguinity are dividing into three classes and each class is sub-divided into two sections:

- I. (i) Parents.
(ii) Children and other lineal descendants, how low so ever.
- II. (i) Grandparents (true as well as false) how high so ever.
(ii) Brothers and sisters and their descendants, how low so ever.
- III. (i) Paternal, and
(ii) Maternal, uncles and aunts of the deceased, and of his parents and grandparents how high so ever and their descendants how low so ever.

Of these three classes of heirs, the first excludes the second from inheritance and the second excludes the third.

But the heirs of the two sections of each class succeed together, the nearer in degree in each section excluding the more remote in that section.

The parents do not exclude children, but inherit with them. If there be no children, parents inherit with grandchildren. Similarly, in the second class, brothers and sisters do not exclude grandparents, but inherit with them. If there be no brothers or sisters, the grandparents inherit with the children of brothers

⁵⁷ Verma, p.417.

and sisters. In the same way in the third class paternal uncles and aunts do not exclude maternal uncles and aunts, but inherit with them.

Heirs by marriage or by virtue of *sabab*.

The right of succession for special cause (*sabab*) is divided into—

- (i) The right of inheritance by virtue of matrimony; and
- (ii) The right of inheritance by virtue of *wala* or special relationship.

Heirs by *wala* under the Shia law are—

- (a) heirs by *wala* of emancipation;
- (b) heirs by *wala* of patronage; and
- (c) heirs by *wala* of *Imamat*.

'*Wala*', says the Hedaya, "literally means friendship and assistance, but in the language of the law it signifies that assistance which is a cause of inheritance". It means, in fact, the peculiar and artificial relationship, which, in a state of society like that of the Arabs, came into existence when the master freed his slave, or when one person made himself the client of another, in both of which cases it was the duty of the parties to help each other; the master, in one case, and the patron, in the other, continuing liable for the Diat (blood-money, *wehr-geld*) of the freeman or client.

Since the passing of the Slavery Act, V of 1843, heirs by *wala* by emancipation and heirs by *wala* of patronage are non-existent. In default of heirs by marriage and *nasab*, the estate vests in the *Imam* for the benefit of the poor or community. The law of escheat prevails as against the claims of the community.

In case of heirs by marriage, under no circumstances the husband or wife may be excluded. They inherit together with the nearest consanguine heirs.

3.5. (ii). TABLE OF HEIRS: SHARERS AND RESIDUARIES

For determining the share of heirs the Shias classify heirs into sharers and residuaries. There is no separate class of heirs corresponding to 'Distant Kindred' of Sunni law.

Sharers:

The sharers are nine in number. They are—(1) Husband, (2) Wife, (3) Father, (4) Mother, (5) Daughter, (6) Full sister, (7) Consanguine sister, (8) Uterine brother, and (9) Uterine sister.

Of the nine sharers mentioned above, the first two are heirs by affinity. The next three belong to the first class of heirs by consanguinity, and the remaining four, namely, full sister; consanguine sister and uterine brother or sister belongs to the second class. There are no sharers in the third class of heirs at all.

The descendants how low so ever of sharers are also sharers.

Residuaries:

All heirs other than sharers are residuaries.

The descendants how low so ever of residuaries are also residuaries. Sons, brothers, uncles and aunts are all residuaries. Their descendants, therefore, are also residuaries.

The Sharers and their specified shares may be explained in tabular form in the following table:

Sharers	Normal share		Conditions under which the share is inherited	Share as varied by special circumstances
	Of one	Of two or more collectively		
1. Husband	1/4	--	When there is a lineal descendant.	1/2 in the absence of a lineal descendant.
2. Wife	1/8	1/8	When there is a lineal descendant.	1/4 in the absence of a

				lineal descendant.
3. Father	1/6	--	When there is a lineal descendant.	(If there be no lineal descendant the father inherits as a residuary.)
4. Mother	1/6	--	(a) when there is a lineal descendant; or (b) when there are two or more full or consanguine brothers, or one such brother and two such sisters, of four such sisters, with the father.	1/3 in other cases.
5. Daughter	1/2	2/3	When no son.	(with the son she takes as a residuary.)
6. Full sister	1/2	2/3	When there is no parent, or lineal descendant, or full brother or father's father.	(she takes as a residuary with the full brother and also with the father's father.)
7. Consanguine sister	1/2	2/3	When there is no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father.	(she takes as a residuary with the consanguine brother and also with father's father.)

8 & 9. Uterine brother or sister	1/6	1/3	When there is no parent or lineal descendant and no maternal grandparent.	--
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3.5. (iii). DISTRIBUTION OF ASSETS

Principles of distribution of property—

- (i) If the deceased leaves only one heir, the whole of property goes to him. (The older view was that if the sole heir was wife, she would take her normal share and the rest would escheat to the *Imam*. But this view is not now followed in Indian Courts; wife is equally entitled to inherit the whole of property).
- (ii) If the deceased leaves more than one heir, then the first step is to assign shares to the heirs belonging to sharer class.

It should be noted that under the Shia law all shares are not Class I heirs. They are called sharers, since the Quran allots them a specified share. All sharers do not have priority over the residuaries. It should also be noted that the husband and wife always inherit, and inherit with all classes of heirs.

Besides the husband / wife (who always inherit), the heirs for the purpose of determining priority, are placed into three classes:

I. (i) Parents, and

(ii) Children and other lineal descendants how low so ever: among them the nearer excludes the remoter. Thus son and daughter exclude son's children and daughter's children.

II. (i) Grandparents how high so ever (true or false), among them nearer grandparents excludes the remoter, and

(ii) Brothers and sisters (among them brothers and sisters of full blood are preferred over brother and sister by consanguinity), and failing them their descendants how low so ever, nearer excluding the remoter (children of full brother and sister are preferred over the children of the consanguine brother and sister).

III. (i) Paternal uncles and aunts of the deceased, and of his or her parents and grandparents how high so ever, and their descendants, and

(ii) Maternal uncles and aunts of the deceased, and his or her parents and grandparents how high so ever and their descendants.

(A) Distribution of Assets among Class I heirs—

The persons who are first entitled to succeed to the estate of a deceased Shia Muslim are the heirs of Class I along with the husband or wife, if present. Among the heirs of Class I, nearer in degree will exclude more remote.

In case the heirs of Class I include grandchildren of pre-deceased children, then—

—the children of each son take the portion which their father, if living, would have taken.

—the children of each daughter take the portion which their mother, if living, would have taken.

(The same rule applies for remoter lineal descendants).

Mode of Distribution

Step-I—Assign share to the husband or wife.

Step-II—Assign shares to those who can inherit as sharer only (i.e., mother and uterine brother or sister).

Step-III—Divide the residue, if any, among the residuaries.

Step-IV—When there is no residuary, and the sum total of shares is less than unity, apply Doctrine of Return, and if it is greater than unity, apply Doctrine of Increase.

Illustrations

- (a) P dies leaving behind her husband, H, father, F, and mother, M. H will take $\frac{1}{2}$ as sharer, M will take $\frac{1}{3}$ as sharer F will take remaining $\frac{1}{6}$ as residuary.
- (b) P dies leaving behind two daughters, D and D1, father, F, and mother, M. F will take $\frac{1}{6}$ as sharer (because of daughters), M will take $\frac{1}{6}$ as sharer, and D and D1 will take $\frac{2}{3}$ as sharer.
- (c) P dies leaving behind a grandson DS (from a predeceased daughter), a grandson DS1 and a granddaughter DD (from another predeceased daughter), a granddaughter SD (from a predeceased son), and a granddaughter SD1 and a grandson SS (from another predeceased son). If D, D1, S and S1 would have been alive, their respective sharers would have been; $\frac{1}{6}$, $\frac{1}{6}$, $\frac{2}{6}$, $\frac{2}{6}$. These shares will be transmitted to their children, and among them it will be distributed on the basis of rule of double portion to males. Thus S1's $\frac{2}{6}$ will go to his daughter SD (since she is the only heir); S1's $\frac{2}{6}$ will go to his daughter SD1 who will take $\frac{1}{9}$ and to his son-SS who will take $\frac{2}{9}$; D1's $\frac{1}{6}$ will go to his daughter DD who will take $\frac{1}{18}$ and her son DS1 who will take $\frac{1}{9}$, D's $\frac{1}{6}$ will go to DS (since he is the only heir in this line).

(B) Distribution of Assets among Class II heirs—

If there are no heirs of Class I, the estate will devolve upon the heirs of Class II after deducting the share of husband or wife, if any. The rules of succession among the heirs of Class II are different according as to the surviving relations are:

- (1) Ascendants, without collaterals;
- (2) Collaterals, without ascendants;
- (3) Both ascendants and collaterals.

1. **Ascendants, without collaterals**—After assigning the share of the husband and wife, divide the residue according to the following rules:

- (i) Assign $\frac{1}{3}$ of the estate to the maternal side, and the residue to the paternal side.
- (ii) Maternal side—The maternal grandparents take their portion, the $\frac{1}{3}$, and divide it between themselves, male and female sharing equally.
- (iii) Paternal side—Then take the paternal side; the residue is to be divided according to the rule double share to the male.

Illustrations

Father's father }----- $\frac{2}{3}$ of $\frac{2}{3} = \frac{4}{9} = \frac{8}{18}$.
 Father's mother }-----($\frac{2}{3}$)----- $\frac{1}{3}$ of $\frac{2}{3} = \frac{2}{9} = \frac{1}{13}$.
 Mother's father }----- $\frac{1}{2}$ of $\frac{1}{3} = \frac{1}{6} = \frac{3}{18}$.
 Mother's mother }-----($\frac{1}{3}$) ----- $\frac{1}{2}$ of $\frac{1}{3} = \frac{1}{6} = \frac{3}{18}$.

2. Collaterals, without ascendants— (a) assign the share of husband and wife, if any;

(b) Divide the residue according to these rules:

- (i) Brothers and sisters of the full blood exclude consanguine brothers and sisters;
- (ii) Uterine brothers and sisters are not excluded by full or consanguine brothers and sisters; they take $\frac{1}{6}$ or $\frac{1}{3}$ according to their number;
- (iii) Full, and in their absence, consanguine brothers take the residue;
- (iv) Full sisters (without full brothers); or, failing them, consanguine sisters (without consanguine brothers) take the Quranic share of $\frac{1}{2}$ or $\frac{2}{3}$ according to their number;
- (v) The full of consanguine brother takes double the share of the sister; the uterine brothers and sisters take equally, brother and sister sharing alike.

Illustrations

- (1) One full brother (or in his absence, consanguine brother), there being no other claimant, takes the whole estate.

- (2) Two such brothers divide the estate equally.
- (3) Two full sisters and one full brother. Estate divided into four shares—full brother = $1/2$, two full sisters = $1/4$ each.
- (4) One single sister, full or consanguine. $1/2$ as Quranic heir, $1/2$ by return.

Descendants of brothers and sisters only—If there are no brothers or sisters or ancestors, assign the share of husband or wife and divide the residue as follows:

- (i) The principle of stirpital succession must be followed. The share of a full or consanguine brother is allotted to his descendants, and is divided according to the rule of double share to the male.
- (ii) The share of each uterine brother or sister must be allotted to his or her descendants, and is divided so that male and female share alike.
- (iii) If there are no children of brothers or sisters, remote descendants take according to the above principles.

Illustrations

- (a) Husband = $1/2$, Quranic heir.
- (b) Uterine brother's daughter = $1/6$, Quranic share of her father.
- (c) Full brother's daughter = $1/3$, residual portion of the father.
- (d) Consanguine brother's son = Excluded by full brother's daughter.

3. Ancestors plus collaterals—If the deceased leaves grandparents, in addition to brothers and sisters or their descendants, first, assign the share of the husband or wife, if any, and then divide the residue in the following manner:

- (i) A paternal grandfather counts as a full or consanguine brother; and a paternal grandmother as a full or consanguine sister.
- (ii) A maternal grandfather counts as a uterine brother; and a maternal grandmother as a uterine sister.

On failure of the grandparents, remoter ascendants inherit on the same principles; and on the failure of brothers and sisters, their descendants take per stripes and inherit on similar principles.

Illustrations

(a) Paternal grandfather = $2/3$

(=Full brother)

Full sister = $1/3$.

(b) Uterine brother

Maternal grandmother | = $1/3$ Quranic share, each takes $1/6$.

(=Uterine sister)

Two Full sisters = $2/3$ Quranic share.

(c) Mother's father (=Uterine brother) $1/6 = 3/18$ }

Mother's mother (=Uterine sister) $1/6 = 3/18$ } $1/3$ as Quranic heirs.

(C) Distribution of Assets among Class III heirs—

In the absence of the heirs of the first or second class, the estate devolves upon the heirs of the third class, after allotment of the share of husband or wife, if existing, in the following order: -

1. Paternal and maternal uncles and aunts of the deceased.
2. Their descendants how low so ever, the nearer in degree excluding the more remote.
3. Paternal and maternal uncles and aunts of the parents.
4. Their descendants how low so ever, the nearer in the degree excluding the more remote.
5. Paternal and maternal uncles and aunts of the grandparents.
6. Their descendants how low so ever, the nearer in degree excluding the more remote.
7. Remoter uncles and aunts and their descendants in like order.

The members of each group must be exhausted before any members of the next group can succeed to the inheritance.

Exception—If the only claimants be the son of a full paternal uncle and a consanguine paternal uncle, the former, though he belongs to group (2), excludes the latter who is nearer and belongs to group (1).

This exception has a historical background. On the death of Prophet Muhammad, there were two heirs, namely, Abbas, his consanguine paternal uncle, and Ali, a cousin of the Prophet. The Shias were the supporters of Ali but could succeed only if a cousin was preferred to the consanguine paternal uncle. Therefore, to uphold the cause of Ali, the Shias had to hold that the son of a paternal uncle was entitled to succeed in preference to a consanguine paternal uncle.

The rules of distribution of the deceased are as follows:

1. The paternal side is assigned $\frac{2}{3}$ of the estate and the maternal side $\frac{1}{3}$.
2. The uterine paternal and maternal uncles and aunts take $\frac{1}{3}$, but if only one, then $\frac{1}{6}$.
3. In the absence of the maternal side, the paternal side is entitled to the whole and *vice versa*.
4. The rule of the double share to the male members is applied on the paternal side alone.
5. The doctrine of Representation is applied to the descendants of the uncles and aunts, and the heirs take their parents' share, and the distribution among them is *per stirpes*.

Illustrations

| Full paternal uncle --- $\frac{5}{6} \times \frac{2}{3} = \frac{5}{9}$.
 $\frac{2}{3}$ { Consanguine paternal uncle — $\frac{1}{6} \times \frac{2}{3} = \frac{1}{9}$.
 | Uterine paternal uncle— $\frac{1}{6} \times \frac{2}{3} = \frac{1}{9}$.

| Full maternal uncle— $\frac{5}{6} \times \frac{1}{3} = \frac{5}{18}$
 $\frac{1}{3}$ { Consanguine maternal uncle—excluded by full maternal uncle.
 | Uterine maternal uncle — $\frac{1}{6} \times \frac{1}{3} = \frac{1}{18}$.

3.5. (iv).DOCTRINE OF “RETURN” OR “RADD”

If there is a residue left after satisfying the claims of the sharers, but there are no residuaries in the class to which the sharers belong, the residue reverts to the sharers in proportion to their respective share. This rule is, however, subject to the following three exceptions: -

1. Neither the husband nor the wife is entitled to the return if there is any other heir. If the husband is the only heir, the residue will go to him. If the deceased left a wife, but no other heir, the older view was that the wife will take her 1/4 share and the residue will escheat to the Crown. But the Oudh Chief Court in *Abdul Hamid Khan vs. Peare Mirza*⁵⁸ holding that the widow is entitled to take by return has overruled this view.
2. If the deceased left a mother, a father, and one daughter, and also
 - (i) two or more full or consanguine brothers, or
 - (ii) one such brother and two such sisters, or
 - (iii) four such sisters,
 the brothers and sisters, though themselves excluded from inheritance as being heirs of the second class, prevent the mother from participating in the return, and the surplus reverts to the father and the daughter in proportion to their respective shares.
3. If there are uterine brothers or sisters, and also full sisters, the uterine brothers and sisters are not entitled to return, and the residue goes entirely to the full sister. But this rule is not applied to consanguine sisters. Consanguine sisters and uterine brothers and sisters divide the return in proportion to their shares.

Wilson referring to the application to the doctrine of ‘return’ observes that whereas by Hanafi law the principle of the ‘return’ only applies where

there is a surplus remaining after setting apart the fractions regularly belonging to all the unexcluded shares, and there are no residuaries, it applies by Shia law in favour of sharers belonging to the first class of successors by consanguinity, notwithstanding the existence of residuaries of the second or third class; and in favour of sharers belonging to the second class notwithstanding the existence of residuaries of the third class.⁵⁹

Illustrations

(a) Uterine sister	$1/6$ increased to $1/4$.
Consanguine sister	$1/2 = 3/6$ increased to $3/4$.
(b) Mother	$1/6$ increased to $1/4$.
Daughter	$1/2 = 3/6$ increased to $1/4$.
Brother	(excluded, as being an heir of the second class)
(c) Husband	$1/4$.
Father	$1/6$ increased to $1/4$ of $3/4 = 3/16$.
Daughter	$1/2 = 3/6$ increased to $3/4$ of $3/4 = 9/16$.
(d) Mother	$1/6$.
Father	$1/6$ increased to $1/4$ of $5/6 = 5/24$.
Daughter	$1/2 = 3/6$ increased to $3/4$ of $5/6 = 15/24$.
Two full brothers	(excluded).
(e) Uterine brother	$1/6$.
Full sisters	$1/2$ (as sharer) + $1/3$ (by Return) = $5/6$.
(f) Wife	$1/4 = 3/12$.
Uterine sister	$1/6 = 2/12$.
Full sister	$1/2$ (as sharer) + $1/12$ (by Return) = $7/12$.

3.5. (v). DOCTRINE OF 'AUL' OR INCREASE

⁵⁸ 10 Luck. 550.

⁵⁹ Supra no. 49 at 363.

The Sunni doctrine of increase has no place in the Shia law. According to Shia law, if the sum of the portions which would regularly accrue to different persons as 'sharers' exceeds unity, they do not abate rateably but the fraction in excess is always deducted from the share of the following heirs and of no others—

- (a) the daughter or daughters; or
- (b) full or consanguine sister or sisters.

Illustrations

(a) Daughter	$1/2 = 6/12$ reduced to $(6/12 - 1/12) = 5/12$.	
Father	$1/6 = 2/12$	$2/12$
Husband	$1/4 = 3/12$	$3/12$
Mother	$1/6 = 2/12$	$2/12$
	-----	-----
	$13/12$	$12/12$
 (b) Full sister	$1/2$ reduced to $(1/2 - 1/6) = 1/3$.	
Husband	$1/2$.	
Uterine brother	$1/6$.	

3.6. RESUME

There can be no doubt that the basic reason for the differences between the Shia and Sunni systems was political rather than juristic. This political tinge may be found in the special case where full uncle's son co-exists with a consanguine uncle. Shias give precedence to the full uncle's son, directly contrary to the general rule that preference of full blood over half blood is necessary only when the claimants are equal in degree. This solitary exception can be explained only in terms of their allegiance to *Ali* (the Prophet's full uncle's son) in preference to *Abbas* (his consanguine uncle).

The basis of both the systems is the customary law of pre-Islamic Arabs. Both systems alter the customary law in accordance with the Quranic injunctions. But, whereas the Hanafis interpret the Quran strictly, keeping the

substratum of the customary law intact, and super-imposing thereon the provisions of the Quran, the Shias interpret the Quran in a wider sense: they interpret it as altering the old principles themselves, and as giving rise to a new set of principles.

In the contemplation of Sunnis, where the Quran did not expressly reject a customary rule, it tacitly ratified it. The result of this approach was—that the Sunni law of succession gave pride of place to the tribal heirs of the deceased. The women to whom the Quran gave rights of inheritance for the first time are entitled, in appropriate circumstances, to the fractional portion of the estate, which the Quran allots to them. But where a male agnate relative of the deceased survives, this will be the limit of their entitlement. The male agnate, however distant a relative he might be, will step in and claim the residue of the estate; for the female, however close a relative she might be, she does not have the status to exclude him from succession. Hence, if a Sunni Muslim dies intestate, survived by a daughter and a distant male agnatic cousin, the daughter will be restricted to a portion of one-half of her father's estate, and the cousin will inherit the remaining one-half as residuary heir.

For the Shia, however, the Quranic legislation was far from being merely a series of piecemeal reforms. They maintained that the Quran laid down the basic elements of an entirely novel legal system, including a system of succession. It obliterated completely the pre-existing customary law. Any rule of the customary law, which was not expressly ratified by the Quran, was tacitly rejected. And, therefore, because the Quran nowhere expressly ratifies the pre-eminent claims of the male agnates, as such to inheritance, they have no privileged position in the Shii scheme of succession. One of the Shii leaders is supposed to have expressed this principle in no uncertain terms. 'As for the male agnates,' he declared, 'dust in their teeth'. On this basis Shii law marshals all relatives, male or female, agnate and otherwise, into a single comprehensive scheme of priorities based exclusively upon the nearness of their relationship with the deceased. Within this scheme any descendant of the deceased, male or female, has absolute priority over any collateral; so that the daughter of a

deceased Shii Muslim will totally exclude his brother, and a fortiori, any more distant male agnate such as a cousin, from succession and will inherit the whole of her father's estate.⁶⁰

The Quranic provision that the daughter is entitled to succeed with the son is interpreted by the Shiites as applicable to all female heirs. The Shiite jurists take the provision of the Quran as not restricted to the individual instances of the daughter or sister, as establishing a new principle for the benefit of females.

⁶⁰ N.J.Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, (1969), PP 32-33.