

## INTRODUCTION

In any legal system of succession the fundamental consideration is the extent to which an individual has the personal right to determine the devolution of his property after his death. Such power was commonly denied in those early forms of society where the individual was wholly subordinate to the group. Instead, the law imposed compulsory rules of succession of general application; for the security of the group required that property should, on the decease of its owner, be transmitted in a foreseeable way to those held by the law as best entitled to it rather than to those whom the deceased might personally prefer. By contrast, most modern systems of succession rest firmly upon the freedom of the individual to determine the devolution of his property upon his decease. Under English law, for example, the wishes of the deceased as expressed in his will are paramount, and basically the law only intervenes to specify the manner in which the property shall devolve when a person has died wholly or partially intestate – that is to say, when he has not made a valid will, or when such testamentary dispositions as he has made do not exhaust the whole of his estate.

### 1. The general nature of the Islamic law of succession

It is from the way in which it resolves this fundamental question that the Islamic law of succession derives its most distinctive characteristics. The supreme purpose of the Islamic system is material provision for surviving dependants and relatives, for the family group bound to the deceased by the mutual ties and responsibilities which stem from blood relationship. The manner in which this provision is to be made is prescribed by the law in rigid and uncompromising terms. Relatives are marshalled into a strict and comprehensive order of priorities and the amount, or *quantum*, of their entitlement is meticulously defined. “Legal heir”, in the Islamic context, is a term which is properly applied only to those relatives upon whom property devolves, after the decease of its owner, by operation of law; and it is the rights of the legal heirs which are the keynote of the whole system of succession, for they are fundamentally indefeasible. The power of the deceased to dispose of his property by will is recognised but is basically restricted to one-third of his net assets. Only where the legal heirs are prepared voluntarily to forgo their rights will testamentary disposition

## 2 Introduction

---

in excess of this limit be operative. Accordingly, the transmission of property by way of bequest, or in accordance with the wishes of the deceased, is of secondary importance, and the central core of the system of succession is formed by the compulsory rules of inheritance designed for the material benefit of the family group.

This approach stands in sharp contrast, for example, with that of English law, where it is only under the comparatively recent and limited terms of the Inheritance (Family Provisions) Act, 1938, that the court may vary or override the will of the deceased in order to make reasonable provision for the maintenance of family dependents. “Intestacy” may be used as a term of convenience to describe the Islamic law of inheritance, but it should certainly not carry with it any notion of a necessary recourse to a scheme of succession invoked only because the deceased has failed in his duty personally to arrange the devolution of his property. In Islamic legal philosophy the rules of inheritance propound the ideal way for the deceased to fulfil his duty to his surviving family.

### 2. The heirs’ rights in the estate

For the purposes of the law of succession the estate of a deceased Muslim comprises all the property that he owns, whether his ownership is of the substance or corpus of a thing or merely of its usufruct or income. Nor is any distinction made, as regards the rights of the different legal heirs, between the various types of property. Moveables and immoveables, realty and personalty, make up the single entity of the estate in which each entitled heir is given a quantitative or fractional share. The right of a legal heir, therefore, is that of a defined quota share in each and every item of property that comprises the estate. Settlement or composition between the heirs, of whom there will normally be a considerable number, may result in the distribution of the various properties among them in accordance with the value of their quantitative entitlement. But in practice the system must inevitably produce, particularly in regard to land, either an extensive incidence of joint ownership or an excessive fragmentation of property, according as to whether the heirs insist upon division or not.

### 3. The importance of succession law in Islam

Within the framework of the Islamic legal system as a whole the laws of succession occupy a particularly prominent and important position. Historically they provide an excellent example of the general process of legal

Cambridge University Press

978-0-521-08807-7 - Succession in the Muslim Family

N. J. Coulson

Excerpt

[More information](#)

## Importance of succession law in Islam 3

development in Islam, under which new standards and precepts introduced by the religion were superimposed upon existing customary law and the two heterogenous elements gradually fused and welded together into a composite and cohesive system. From a sociological standpoint, the laws of inheritance reflect the structure of family ties and the accepted social values and responsibilities within the Islamic community. For in the eyes of the law rights of inheritance are generally regarded as the consideration for duties of protection and support owed to the deceased during his lifetime; so that the stronger the family bond, the greater the right of inheritance. There is also the particular rule that the duty of a person to maintain his needy collateral relative is dependent upon, and proportionate to, his right to inherit from that relative. Juristically, the law of succession is a solid technical achievement, and Muslim scholarship takes a justifiable pride in the mathematical precision with which the rights of the various heirs, in any given situation, can be calculated.

Above all, however, the great esteem which this branch of legal science enjoys among Muslim peoples stems from its particularly strong religious significance. True knowledge, or *'ilm*, in the Islamic view, stems from divine revelation, and in a statement attributed to the Prophet Muḥammad the laws of inheritance are said to constitute “half the sum of *'ilm*”. Nowhere is the fundamental Islamic ideology of law as the manifestation of the divine will more clearly demonstrated than in the laws of inheritance. The skeleton scheme of priorities and, in particular, the fixed fractional shares of the estate to which various relatives are entitled were laid down in the Qur'ān itself. Thus the system is firmly based on what is, to the Muslim, the very word of Allāh himself, and this is reflected in the terminology of the law.<sup>1</sup> “*Fard*” is the root Arabic term for a duty imposed by divine command, but the word is also used both in the singular and in one of its plural forms, “*farā'id*”, specifically to denote the shares of inheritance allotted to various relatives by the Qur'ān; so that the phrase *'ilm al-farā'id*, or “science of the *farā'id*”, which is commonly used to describe the system of inheritance as a whole, epitomises the notion of religious obligation. In providing for the continuity of the family group as one cell of the universal Islamic community, the laws of inheritance appear as a vital aspect of the individual's supreme duty to the religion of Islam. In

<sup>1</sup> For the non-Arabist the transliteration of the Arabic terms and proper names which appear in the text may be briefly explained. An opening quotation mark represents the Arabic consonant *'ain*, which is a hard glottal stop. In the term *farā'id*, the closing quotation mark represents the Arabic *hamza*, which is a soft glottal stop; the point under the letter *ḍ* indicates that it is a hard consonant, and the line over the *ā* indicates a long vowel.

#### 4 Introduction

---

many modern Muslim states whole spheres of traditional Islamic law have been abandoned and replaced by laws of European origin. But the law of succession still continues to be generally applied in practice throughout the world of Islam largely because it constitutes such an integral and deep-rooted part of the religious ethic.

#### 4. The various schools of Islamic law

In order to explain the scope and nature of this book it is necessary to remark briefly upon two particular features of the Islamic legal system. Firstly, traditional Islamic law is not a single uniform legal code. Islamic jurisprudence originated as the attempt to define, in terms of concrete legal provisions, the will of Allāh for Muslim society. It was, in essence, a process of discovery of Allāh's law, or the Shari'a, by speculative reasoning on the part of scholar-jurists. From their work of interpreting, expanding and supplementing the basic precepts of divine revelation embodied in the Qur'an and the precedents, or *sunna*, set by the Prophet Muḥammad, there gradually emerged a comprehensive corpus of legal doctrine. And this corpus, as it is recorded in a succession of manuals dating from early mediaeval times onwards, forms the traditional or classical expression of Shari'a law. But such a process of growth inevitably produced considerable diversity of doctrine. Variant rules arose not only because of controversy on intrinsically juristic issues – such as the authenticity of an alleged text of divine revelation, the canons of interpretation and construction, or the methods of legal reasoning – but also because of the external influences which naturally conditioned the thought and approach of the jurists, as individuals or as groups. Social standards and practices current in a particular locality, different political affiliations and schism on fundamental theological questions were among the factors which helped to shape divergent legal doctrines.

As a result there eventually came into existence several different schools or versions of Shari'a law, each of which possessed its own authoritative legal manuals and each of which represented, for its own exponents and followers, the true interpretation of the Shari'a. Today no less than eight such separate versions of the Shari'a are important from the standpoint of the practical application of law in Islam. The vast majority of Muslims, known from their basically common religious dogma as Sunnis, are divided among the four schools of the Ḥanafis, Mālikis, Shāfi'is and Ḥanbalis, while there are two sectarian minorities who stand apart from the Sunnis on fundamental theological issues – the Ibāḍis and the numerically in-

finitely larger group of the Shī'a, which is itself split into the three distinct branches of Ithnā 'Asharīs, Ismā'ilīs and Zaidīs.

In principle it is the duty of the court to apply that school of law to which the individual litigants concerned have personally chosen to give allegiance. Rules exist to regulate cases of conflict between the different schools, and in matters of succession it will generally be the school of the praepositus which will apply. In practice, however, owing to factors connected with the historical spread of Islam and political developments, the populations in fairly well-defined geographical areas of the Muslim world have embraced a particular school and the courts in that area have become wedded to the application of the doctrine of that school. Thus, throughout the Middle East and the Indian sub-continent, it is the Ḥanafī school which is generally applied by the courts administering Shari'a law. In North, West and Central Africa Mālikī law prevails. Shāfi'ī law obtains in South Yemen, in the Muslim communities of East Africa and in Ceylon, Malaysia and Indonesia. The courts of Saudi Arabia apply the Ḥanbalī doctrine. Iran is the stronghold of Ithnā 'Asharī law and the Yemen of Zaidī law. The communities of Ismā'ilīs in East Africa observe their own version of the Shari'a. Finally, Ibādī law is today confined to Uman and small groups of Muslims in Algeria, although until very recent times it had official status in Zanzibar.

In substantive law generally, and certainly in the law of succession at death, the differences between these various schools are often not merely variations in detail but matters of a fundamentally different approach. Furthermore, the authoritative texts of each particular school embody variant shades of opinion as between individual jurists subscribing to that school. From all this it will be apparent that diversity of doctrine is of the essence of traditional Shari'a law. As a doctrinal system which is constantly searching through the various accepted criteria of juristic method to ascertain the most proper definition of Allāh's law, the Shari'a appears, on a universal plane, as a comparative system in its own right.

##### 5. Modern reform of Shari'a law

The second feature of the Islamic legal system which must command attention is the process of modern reform of the law which has taken root in many Muslim countries and communities over the last few decades. Because of the problems of principle inherent in the reform of a religious law, the far-reaching changes which have been introduced into the terms of the traditional law – in the field of family law in general and succession

## 6 Introduction

law in particular – have been effected in a variety of ways. In the Indian sub-continent, for example, statute law has in many respects directly superceded the traditional Ḥanafī doctrine and become an integral part of the body of succession law applied by the courts. In the Ḥanafī countries of the Middle East, on the other hand, there has been a particular concern to ensure that reforms should rest on a juristic basis for which support can be found in the principles of traditional Islamic jurisprudence. Thus, for example, the codification of parts of the family law, including the law of succession, which have recently appeared in the Middle East include rules and doctrines which are derived from schools other than the Ḥanafī school – on the principle that all are equally legitimate expressions of the Shari‘a. This is a process which has naturally accentuated the comparative aspect of Shari‘a law and led to a breaking down of the barriers between the different schools. In more extreme cases reforms are openly based on what is claimed to be a novel and valid interpretation of the basic precepts of the Qur’ān or the *sunna* of the Prophet.

But whatever the principles upon which reforms have been based, their purpose is clear enough. It is to align the terms of Islamic law to the present needs and circumstances of Muslim society. This constitutes a radical break with past tradition under which Shari‘a law, as the eternally valid and immutable will of Allāh, was regarded as a rigid and static system. Today Islamic law is a living and developing system which, within the accepted limits imposed by the divine command, is conditioned by and grows out of the phenomena of social change.

### 6. The scope of this book

Because, therefore, of the existence of the different schools of law and the further variations which have been introduced into the traditional legal practice of a given area under the recent process of reform, modern Islamic law, when viewed on a world-wide basis, is an extremely complex and variegated phenomenon.

Taking, for example, the simple case of a deceased who dies intestate, survived by his daughter, the daughter of his predeceased son and his brother, the distribution of the inheritance will vary according as to whether the deceased is a Pakistani, Egyptian, Tunisian or Iranian Muslim as shown on page 7. Such diversity poses considerable problems as regards the composition of a text book on the subject.

Ideally, perhaps, the legal practitioner whose purpose is to ascertain current law would require a comprehensive account of the law of succes-

Cambridge University Press

978-0-521-08807-7 - Succession in the Muslim Family

N. J. Coulson

Excerpt

[More information](#)

## Scope of this book 7

sion as it is actually applied today, country by country and community by community, throughout Islam. But this would entail innumerable volumes and a great deal of unnecessary repetition; it would unduly emphasise the diversity in a system which is basically and fundamentally a unity, and it would in any case be a somewhat barren and superficial exercise as far as the study of Islamic law is concerned. For the study of law generally, if it is to be a discipline of depth and significance, is not confined to a grasp of technical rules and principles, but involves the understanding of the place that those rules occupy, in terms of their genesis and purpose, within the society which supports them. And such an understanding of Islamic law, as a whole, necessarily includes an appreciation of both the phenomenon of diversity of doctrine and the process of modern reform.

	Pakistan	Egypt	Tunisia	Iran
Daughter	$\frac{1}{3}$	$\frac{1}{2}$	$\frac{3}{4}$	All
Granddaughter	$\frac{2}{3}$	$\frac{1}{6}$	$\frac{1}{4}$	—
Brother	—	$\frac{1}{3}$	—	—

Within the limits of a single volume, therefore, perhaps the scheme adopted in this book is the best way to achieve these various purposes. In each major division of the subject the traditional Shari'a law will first be described with an explanation of the principal divergencies among the several schools, although for reasons of space Ibāḍī law will be omitted and only the Ithnā 'Ashari version of Shī'ī law will be dealt with in any detail. This will be followed by a consideration of the outstanding changes introduced into the law in modern times in the two principal areas of the Indian sub-continent and the Middle East. In most other parts of the Muslim world the traditional law of the school applicable in the area remains of general validity.

As regards the scope of its subject matter this book is confined to the substantive law of inheritance, bequests and ancillary matters. It deals only with solvent estates, taking up the law from the point where funeral expenses and debts have been paid and a net estate is available for succession. For all the preliminary issues which form the subject of the administration of estates the student is referred to the excellent book of Dr I. Mahmud, *Muslim Law of Succession and Administration* (Karachi, 1958).

The arrangement of the subject matter of the book is as follows. As preliminary and essential background, the first chapter deals with the principal institutions of Islamic family law, traditional and modern, which are rele-

## 8 Introduction

vant to rights of succession. Chapters 2–7, pp. 29–107, are concerned with the traditional Sunnī law of inheritance, and Chapter 8, pp. 108–34, with the fundamentally different scheme of intestate succession adopted by traditional Shī‘ī law. This is followed, in Chapter 9, pp. 135–63, by a consolidated review of the major reforms which have recently been introduced in the law of inheritance in various Muslim countries. Chapter 10, pp. 164–71, is devoted to the particular problem of the rights of inheritance of persons who have a dual relationship with the deceased. Impediments to inheritance (i.e. the circumstances in which a surviving relative is disqualified from inheritance) are the subject of Chapter 11, pp. 172–94, and the conditions of inheritance (i.e. the establishment of the death of the praepositus and the survival of the heir) the subject of Chapter 12, pp. 195–212. Chapter 13, pp. 213–34, considers the legal incidents of the transaction of bequest. Finally, Chapters 14 and 15, pp. 235–79, are devoted to the subject of the protection afforded by the law to the rights of the legal heirs through the *ultra vires* doctrine, which imposes limits upon the power of the praepositus to dispose of his property by will or to interfere with the due devolution of his estate by transactions undertaken during his death sickness.

This order of topics is dictated primarily by the consideration that a comprehension of the various aspects of Islamic succession law requires as its basis a knowledge of the rights of the legal heirs, in terms of the priorities that obtain among them and the quantum of their individual entitlement. It may appear, in fact, that the arrangement of this book is almost precisely the opposite of the chronological sequence of events and problems involved in the actual administration of an estate. For the first step is to ascertain the gross estate, upon which funeral expenses and debts are a first charge, and this involves the application of the *ultra vires* rule to the deceased’s acts and transactions during his death sickness. The next step is to give such effect out of the net estate to bequests as the *ultra vires* doctrine and the rules relating to the validity of bequests allow; then to ascertain who are potentially the heirs of the praepositus by taking into account the circumstances upon which the rights of the heirs depend – i.e. applying the rules regarding the conditions of, and impediments to, inheritance; and finally to distribute the inheritance among the entitled claimants. At the same time, a knowledge of who the entitled legal heirs are and what the *quantum* of their entitlement is must be the practical starting point for the administrator, since it is the legal heirs who, by their consent or otherwise, determine the effect of any *ultra vires* disposition of the praepositus.

I have endeavoured throughout to deal with the subject as a living aspect



Cambridge University Press

978-0-521-08807-7 - Succession in the Muslim Family

N. J. Coulson

Excerpt

[More information](#)

of contemporary jurisprudence and in a manner which will be intelligible to the modern student of law. For this reason I have omitted almost completely any reference to the institution of slavery, which is no longer relevant to present day Muslim society but which is the subject of a massive corpus of law in the traditional authorities. It gives rise there, for example, to such complex problems as the effect of a testamentary gift of freedom to a slave who becomes the legal heir of the testator upon his emancipation. Similarly, I have not included in the text any discussion of some of the rather extraordinary situations which attracted the attention of the mediaeval scholars, such as the case of the deceased whose sole surviving relatives are his thirty-two great-great grandparents, or the problem as to whether a person with two heads counts as one or two persons for the purpose of inheritance. (The solution proposed for this last problem is that the two-headed person, when asleep, should be touched on one of his heads. If both heads wake up together he is to be counted as one, but if only the head touched awakes he is to be counted as two.) Nor have I followed the particular techniques and methods of exposition adopted by the traditional Arabic authorities where these appear to place an unnecessary strain upon the powers of comprehension of the modern lawyer who is not also an Arabist. This is the case, for example, with the whole subject of the fractional shares in the estate which are the entitlement of certain relatives. While the Arabic texts deal with this topic essentially as an arithmetical discipline, I have tried as far as possible to consider the problem in terms of the legal principles involved. There are sufficient complexities for the lawyer here without him being also required to don the mantle of the mathematician.

No doubt this approach loses something of the spirit in which the mediaeval jurists worked and expounded the law. But today Shari'a doctrine – in the spheres of family law in general and succession law in particular – is more and more coming to be applied, not in the manner visualised by the traditional authorities, but as part of a modern legal system. The modern Muslim legal system is in fact an amalgamation of aspects of the Shari'a and other laws which follow Western models in their form and substance. And the proper integration of Shari'a law within this system requires the revision of the techniques and methodology of education in the law no less than of the application of the law through the courts. The aim of this book is simply to present, in a spirit which is in conformity with the present trends of legal education, a subject which Muslim jurists of the past and the present have fashioned into one of the most illuminating and distinctive features of the Islamic legal system.

## 1. FAMILY TIES AS GROUNDS OF INHERITANCE

Rights of inheritance rest upon the two principal grounds of marriage and blood relationship with the *praepositus*.<sup>1</sup> In both cases, obviously, the tie with the *praepositus* must be a legal tie, that is to say the marriage must be one which is valid, and the blood relationship must be one which is legitimate, in the eyes of the law. The primary purpose of this first chapter, then, is to deal with these preliminary issues of precisely what constitutes a marital or a blood-tie for the purposes of inheritance. At the same time, the broad review of the basic institutions of Islamic family law which this entails will provide the general background necessary for a proper understanding of the scheme of succession law as a whole.

### 1. Marriage (*nikāḥ*)

A spouse relict in succession law is one whose marriage with the *praepositus* is (i) valid, and (ii) existing, actually or constructively, at the time of the decease.

#### 1.1. The validity of marriage

For a marriage to be valid, the two principal requirements are the proper conclusion of the marriage contract and the absence of any impediment to marriage between the parties.

##### 1.1.1. Proper conclusion of the marriage contract

###### 1.1.1.1. Formalities

Like any other private contract, a marriage under traditional Shari'a law is validly concluded simply by the mutual agreement, oral or written, of the parties – the bride and bridegroom or their respective representatives. The only formality required by the law is the presence of two witnesses at the conclusion of the contract to ensure its due publication, and even this is not necessary under Shi'i law. Further, Mālikī law does not insist upon

<sup>1</sup> Under traditional Shari'a law a third ground for rights of inheritance lay in the institution of patronage (*walā'*), or the relationship between a freed slave and his former master. By virtue of his act of manumission, the master acquired the right to inherit from his freedman if the latter died without any heirs by blood.