

Application of the Doctrine of Representation relating to the Inheritance Right of the Orphaned Grandchildren in Bangladesh and Pakistan: A Critical Review of the Reforms of Islamic Law of Succession

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Abstract

In this modern period the issue of inheritance right of the orphaned grandchildren has assumed prominence in the Muslim world to protect them from the total exclusion under the Islamic principle the nearer in degree excludes the remote. For this object many changes of the existing principles of Islamic law of succession have been taken place in many countries including Syria, Morocco, Egypt, Tunisia, Pakistan and Bangladesh. Among these countries, the most vital change was taken in Pakistan in 1961 by section 4 of the Muslim Family Law Ordinance which is also applied in Bangladesh. This change was taken without considering the effects of it on the other heirs and on the basic structure of the Islamic law of succession. The doctrine inserted in section 4 of MFLO 1961 which is absent in Muslim law has unnecessarily reduced the share of some heirs, unreasonably excluded some heirs and totally destroyed the basic structure of the Islamic law of succession. This article is an attempt to draw the attention of the proper authority for taking steps to ensure the right of orphaned grandchildren and other heirs not violating the Islamic law of succession. For this purpose the author firstly: analyses the section 4 of MFLO and tries to clarify and show the injustices caused by this provision to some heirs, secondly: to identify the provisions of Islamic law of succession which have been violated by this new rule and lastly: to set up a method that ensures the right of the orphaned grandchildren neither violating the Islamic rule nor excluding any heir.

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Introduction

In the words of Anderson, among many defects and controversial issues in the Muslim law the most serious defect is the rule against representation of a deceased heir- at least where the children of such heir would be excluded on the principle that the nearer in degree excludes the more remote.¹ Not only Anderson but many modernists think that this principle causes much hardship to the orphaned grandchildren. On the basis of the strong supports of modernists and considering the situations of orphaned grandchildren, many Muslim states have made provisions to ensure the inheritance rights of the orphaned grandchildren. Egypt in 1946, inserted the principle of obligatory bequest in the bequest law. This provision has encouraged many Muslim countries to enact law inserting the provision of the obligatory bequest to ensure the right of the orphaned grandchildren. As a result in 1953 in Syria, in 1956 Tunisia and in 1959 Iraq the device of obligatory bequest system has been introduced. But Bangladesh and Pakistan have introduced totally a new system of succession that is the rule of representational succession which clearly violates the traditional Islamic law of succession. Therefore, the views of Islamic jurists that law which is necessary for ensuring the rights of orphaned grandchildren, must be made complying with the undoubted excellencies of Islamic law of succession. So, before and after the adoption of The Muslim Family Laws Ordinance 1961 inserting the doctrine of representation, all the Islamic scholars, ulama and even a member of the commission strongly opposed this law. Even many non Muslim scholars including Herbert J. Liebesny,² Anderson³ and Coulson⁴ think that section 4 of MFLO is absolute violation of the Shariah law of succession. This individual rule not only violates the classical shariah law of succession but also causes severe injustice to some heirs and undermines the Quran, Hadiths and Ijma.

The Inheritance right of orphaned grandchildren under Shariah law:
Where a person dies leaving his/her children either female or male in the

¹ J.N.D. Anderson, *Islamic Law in the Modern World*, New York, New York University Press (1959) p. 78.

² Serajuddin Alamgir Muhammad, *Shari Law and Society Tradition and Change in the Indian Sub-Continent*, Dhaka, Asiatic Society of Bangladesh, 1999, pp. 89-90.

³ J.N.D. Anderson, 'Recent Reforms in The Islamic Law of Inheritance', *International and Comparative Law Quarterly*, Vol. 14, No. 2, (1965), p. 357

⁴ N.J Coulson, *Succession in the Muslim Family*, Cambridge, Cambridge University Press, (1971) p. 150.

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life time of his/her father or mother those children are the grand children of that father or mother. So the grandchildren may be following types:

1. Female through female link .i.e. Daughter's daughter
2. Male through female link .i.e. Daughter's son
3. Female through male link .i.e. Son's daughter
4. Male through male link .i.e. Son's son

These four types of orphaned grandchildren don't belong to the same class but they belong to different classes of heirs.

Under Hanafi law of succession, all the persons who are entitled to inherit are called heirs who are classified into three groups (1) Sharers (2) Agnatic heirs or residuary. (3) Distant kindred.⁵

Among these four grandchildren, in Sunni law of succession daughter's daughter and daughter's son belong to the group of distant kindred, Son's daughter belongs to the Quranic heir and Son's son belongs to the agnatic heir.

Son's daughter: In the property of deceased grandfather, Son's daughter inherits in six capacities. Under three capacities she inherits as a Quranic heir, in two capacities as agnatic heir and in one case she is excluded from the inheritance of her grandfather.

- a) A single son's daughter takes $\frac{1}{2}$ in absence of son or daughter.
- b) Two or more son's daughters take $\frac{2}{3}$ if there is no son or daughter.
- c) Single or more sons' daughters take $\frac{1}{6}$ in presence of a daughter.

In abovementioned cases she takes as Quranic heir and in the following cases takes as agnatic heir.

- a) If son's daughter comes with one or more son's son or lower son's son then both become agnatic heir.
- b) In presence of two or more daughters, son's daughter is excluded from the inheritance but if she co-exists with equal or lower son's son then she inherits as agnatic heir.

Only in one case, she is excluded from the property of the grandfather that is in the presence of son.⁶In another case she inherits as Quranic

⁵ M Hidayatullah, and Arshad Hidayatullah, *Mulla's Principles of Mahomedan Law*, 19th edition, New Delli, N. M. Tripahi Ltd (1990) 12th reprint (2002) p. 47

heir when son's daughter and sister come together, son's daughter takes as Quranic heir and sister takes as agnatic heir.⁷ Apart from one in all capacities mentioned above, son's daughter inherits from grandfather directly and when more than one from different father take per capita and not per stirpes. The two-thirds is not therefore divided into parts, one for the son's daughter by one son and the other for the other two by another son, but it is divided into as many parts as there are son's daughters.⁸

Son's Son: As an agnatic heir he inherits in 24 capacities. Out of these 24 situations, in 14 cases the grandson inherits the whole property excluding others totally: in 10 capacities he inherits 1/3 or more and only in one case, where there is surviving son, whether his father or uncle, he is excluded.⁹

Daughter's daughter and daughter's son: Both of them are distant kindred and are totally excluded by any Quranic heir save the spouse relict or by any male agnate however distant.¹⁰ Among four classes of distant kindred, they are comprised in group I and they take precedence over other heirs.¹¹

It is a recognized principle of Islamic law of succession that the grandchildren, in presence of male child, will be excluded from the inheritance of grandparents on the ground that nearer in kinship excludes the remote from inheritance. This rule has been accepted by all the schools and sub-schools of law either Sunni or Shia.

The exclusion of the grandchildren from the grandparent's inheritance, in some cases, has become a matter of concern and controversy in this modern world. So different countries of the world have taken many measures to alleviate the sufferings and miseries of the orphaned grandchildren.

In Syria and Morocco the children of a predeceased son or agnatic

⁶ Mohammad Nurul, Amin, *Fatawa and Masail*, Vol.6, Islamic foundation Bangladesh, Dhaka, 2001, p. 541

⁷ Ibid, p. 544

⁸ *Supra note 5*, P. 51

⁹ Serajuddin Alamgir Muhammad has cited it in his "*Shari Law and Society Tradition and Change in the Indian Sub-continent*" Asiatic Society of Bangladesh, 1999, p-88 with reference to F.M. Kulay, "*Grandsons Inheritance at Islamic Law-Much Ado About Nothing*," ICLR 13 (1993), pp. 62-3.

¹⁰ *Supra note 4*, p. 91.

¹¹ A. Asaf Fyzee, A, *Outlines of Muhammadan Law*, 4th edition, Oxford University Press, Delhi, (1974) P-431

grandson who would be excluded from succession under Shariah law, are now entitled to either the share of their father which they would have taken, had he survived the propositus or one third of the net estate, whichever is less, but till now no provision has been made for the children of the deceased's daughter.¹² In Egypt the children of a predeceased son or daughter is entitled to the share of their parent which they would have received, had he or she survived the propositus, but within the maximum limit of one third of net estate.¹³ In Libya, the Will Act 1994 introduced obligatory bequest for orphaned grandchildren through predeceased son. But Bangladesh and Pakistan have accepted the rule of representational succession for the orphaned grandchildren.

The Inheritance right of orphaned grandchildren under section 4 of MFLO 1961: In order to remove the sufferings of the orphaned grandchildren, the Commission on Marriage and Family Laws¹⁴ reported for enacting law ensuring the doctrine of representation. On the basis of the report of the commission the section 4 of the Muslim Family Laws Ordinance 1961 was adopted in Pakistan and after independence it has identically been accepted in Bangladesh. The section 4 of the MFLO says-

“In the event of death of any son or daughter of the propositus before opening of succession, the children of such son or daughter, if any, living at the time of succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive”¹⁵

This law instead of identifying the actual cases of exclusion generalized all such cases and provided a new scheme of distribution of the property importing the concept of the doctrine of representation into the corpus of Islamic law of succession. Thus, according to section 4 it is not a matter of consideration whether an orphaned grandchild is excluded under the

¹² *Supra note 4*, P. 144

¹³ *Ibid-8*

¹⁴ On 4th August 1955 the then Government of Pakistan formed the Commission on Marriage and Family Laws consisting of seven members including Dr. Khalifa Shuja-uddin (president) Dr. Khalifa Abdul Hakim (Member Secretary) Maulana Ihtisham-ul-Haq, Mr. Enayet-ur-Rahman, Begam Shah Nawaz, Begum Anwar G. Ahmad and Begum Shamsunnahar Mahmood. On the sudden death of the president of the commission, former chief Justice of the Supreme Court of Pakistan., Mian Abdur Rashid was appointed as the president of the commission. Only religious scholar, Maulana Ihtisham-ul-Haq disagreed with almost everything of the report submitted by the commission.

¹⁵ Sec. 4, *The Muslim Family Law Ordinance 1961*, Ordinance no.vii of 1961

Shariah law or given any share, he/s will get the property under this new scheme. According to this innovative system, such a grandchild will get the portion of his/ her deceased father/ mother what he/ she would have received if alive.¹⁶

The Doctrine of Representation: This new concept named the doctrine of representation is quite unknown in the Islamic law of succession. Representation means a more distant relative steps into the shoes of a nearer relative (e.g. a son representing his father) and inherits in an identical manner to the represented person. According to the doctrine of representation, the son or daughter of a deceased person shall represent such person even if he/she died before his/her father or mother. He shall stand in the same place as the deceased would have done had he been living. So the children as the representatives of predeceased father get per stripes the share of the father from the grandfather which they under the traditional shariah law would not have got. This doctrine can be illustrated by taking a simple example; A dies leaving his son, son's son and daughter's daughter. In this case the grandson and granddaughter will get that share what their respective father and mother would have got if alive at the time of death of their grandfather. So the property of A will be distributed among his son, predeceased son and predeceased daughter and the share of predeceased son will go to his son (son's son) and the share of predeceased daughter will go to her daughter (daughter's daughter). So son inherits from his father 2/5 of his total property, son's son inherits 2/5 from his grandfather's property and daughter's daughter inherits 1/5 from her maternal grandfather's property.

An Analysis and Plain Comebacks to the Justifications made by the Commission for this Reform: The commission and those who strongly support the doctrine of representation have substantiated it depending on mainly logic and some erroneous interpretation of Hadiths. All except one members of the commission rested their case on the following grounds¹⁷:

1. There is no Quranic verse or authoritative hadith excluding orphaned grandchildren from inheriting the property of the grandfather. This statement of the commission is not acceptable,

¹⁶ Muhammad Ekramul Haque, 'Inheritance of Orphaned Grandchildren under Islamic Law of Succession: A Study of the Impact of Section 4 of the Muslim Family Law Ordinance 1961' Vol.3, *Rajshahi University Law journal*, (2006) p. 115.

¹⁷ Report of Pakistan Commission on Marriage and Family Laws, 20th June, 1956.

because there are some verses of the Quran and Hadiths of Hazrat Muhammad (Sm) regarding the exclusion of remoter in presence of nearer which will be discussed in the next sub-heading.

2. The commission argued that the exclusion of the orphaned grandchildren was based on the pre Islamic practice, when women and grandchildren were not treated as legal heirs and as at present grandchildren are excluded depending on the pre-Islamic rule so it can't continue. It is true that in pre-Islamic time, this principle was applied and after the advent of Islam it was recognized by the Quran and hadith, so it is incumbent upon the followers of Islam to comply with this principle not depending on the pre-Islamic customs but resting on the provisions of Islam. In pre-Islamic era there was provision for the payment of dower by the husband to his wife, Hazrat Muhammad (Sm) at the time of marrying Khadija ® paid her five hundred dirhams as dower money.¹⁸ The pre-Islamic system of payment of dower money as marriage gift to the wife has been introduced in Islamic Law and it is absolutely maintained in the Muslim world by every Muslim and none says that I am not bound to obey this provision of Islam as it was practised in pre-Islamic era.
3. Where the father of the propositus has predeceased him, the grandfather gets the share what the father of the propositus would have got if alive. It means the doctrine of representation is applied in the ascending line by the classical shariah law, so there is no problem to apply it in the lineal descending line .i.e. A person dies leaving behind his daughter and father`s father. Now daughter will get ½ as sharer and father`s father will get that what the father of the deceased would have received if alive. In this case grandfather represents his son, so the doctrine of representation is applied in the ascending line and it is accepted in Islam. In response to the argument of the commission I want to say that there is no alternative way without applying the doctrine of representation in ascending line because a person does not have more than one father, so it cannot be said that the nearer father excludes the remote father. So if a person would have two or more father then the nearer father would have

¹⁸ Begum Asma Siddiqua, 'Dower in History and its Significance in Islamic Law', Vol.3, *Rajshahi University Law journal*, (2006) p. 6.

excluded the remoter father by applying this doctrine. But a person may have more than one child and it is usual, so the principle nearer excludes remote is applied in the descending line not in the ascending line.

4. The commission contended that as the Quran has time and again expressed great solicitude for the protection and welfare of the orphans and their property so the Quran can't deprive them from the right of inheritance . So any law depriving them of inheriting from their grandfather's property would go entirely against the spirit of the Quran. The Islamic scholars also agree with the commission that the Quran has absolutely ensured the welfare of the orphaned grandchildren and revealed many verses for the protection of their body and property but it does not mean that, that welfare will be ensured by violating another verse of the Quran.

An Examination and Responses to the Justifications of the Supporters of this Doctrine

Many traditionalists strongly support this reform resting on the different reasons. Among them Kemal Faruki is a prominent person who states that the traditional rule that the nearer in degree excludes more remote does not apply even in all cases under the Islamic law of inheritance namely (i) a maternal grandmother is not excluded by father; (ii) a daughter does not exclude a son's daughter; (iii) a uterine brother or sister is not excluded by a full brother or full sister.¹⁹ It is true that in all these cases nearer does not exclude the remote but we must keep in mind that the rule 'nearer excludes remote' applies only in respect of agnatic heirs under the traditional law but all the persons mentioned here, maternal grandmother, son's daughter and uterine brother and sister, are sharers whose shares have been fixed by Quran or hadith earlier. The rule that the nearer in degree excludes the more remote is applied among the agnatic heirs; it is supported by a hadith narrated by Ibn Abbas ®: "pay the fixed shares to the Quranic heirs and the remains thereafter to the nearest male person." For example, a son excludes a son's son and a brother excludes a brother's son etc. The second ground of Faruki is the Hanafi law of succession that recognizes the doctrine of representation for the distribution among the distant kindred. It is true that In Islamic law the doctrine of representation is applied for distribution

¹⁹ *Supra Note 4*, p.150.

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among the outer family but such recognition does not undermine in any way the rule of exclusion by nearer in degree. Imam Muhammad-Al-Shaybani's doctrine of per stirpes distribution, the general Shia doctrine of representational entitlement, the Shafi and Hambali doctrine of tanzil²⁰ and imam Cadi Abu Yusuf's doctrine of per capita distribution among the relatives of the outer family²¹ which are the most extreme examples of the doctrine of representation strictly and consistently follow the rule that nearer in degree excludes the more remote. It can be clarified by an example, **A** dies leaving a son's daughter's son, a daughter's son and a daughter's daughter. The first one is three degree removed and last two are two degrees removed from the deceased. So son's daughter's son is excluded. Thirdly: Faruki says that there is no Quranic statement excluding such grandchildren.²² Another prominent supporter of the reform, Malvi Mohammad Usmani states some strong arguments²³ supporting the doctrine of representation. Firstly: he argues that the word *awlad* in verse iv: ii²⁴ means not only son and daughter but also grandson and granddaughter (H.L.S). As *awlad* includes grandson and daughter so they will inherit with son and daughter of propositus what their respective father or mother would have inherited if alive.²⁵ This statement of Usmani is strongly supported by Maulana Sayed Zillur Rahman who in support of his statement mentions a hadith that Hazrat Muhammad (Sm) says: my son Hasan is a leader, perhaps Allah through Hasan ® will make a contract between two groups of Muslims.²⁶ Here Muhammad (Sm) described the son of his daughter as his own son. It means child includes grandchild also. Usually it was a common practice of Arab to describe the grandchildren as children. On the other hand, the grandchildren are also treated as children which is the views of the Ulema but they are not the real child but metaphorical child and the metaphorical child is excluded by a real male child resting on the verse viii:75& iv:6 and some Hadiths, a hadith narrated by Ibn Abbas ®: "pay the fixed shares to the Quranic heirs and the remains thereafter the

²⁰ *Ibid*

²¹ Shaukat Mahmood, Shaukat Nadeem, *Principles and Digest of Muslim Law*, 4th Edition. Legal Research Centre, Noor villa, 5, Lahore, (1993) p.78

²² *Supra note.12*, p.151.

²³ *Supra note.8*, pp. 79-80.

²⁴ "Allah ordains you in respect of your children that the share of one male is equivalent to that of two females"

²⁵ *Supra note. 21*, p. 79

²⁶ Maulana Zillur Rahman, *The Law of Islamic Inheritance*, 1st Edition,(2008) p.182

nearest male person”²⁷ So where there is nearer male child there giving inheritance to the remote grandchild is apparent violation of the injunction of Allah and order of Hazrat Muhammad (Sm).

The most of the supporters including Usmani, Kemal Faruki, Zillur Rahman and many other persons and the commission contended on a common ground that there is no bar in Islamic law of inheritance to provide inheritance to the orphaned grandchildren. This statement is prima facie violation of Quran, Hadith, Izma and over all the whole Islamic law of succession. As Allah ordains that in presence of male and female of the same degree and status, the share of a male is equivalent to that of two females²⁸ and Hazrat Muhammad (Sm) states that the male should be given the equivalent of the portion of two females.²⁹ According to the language of the Quran if a person dies leaving a son’s son and a son’s daughter, the distribution will be son’s son receives two-thirds and son’s daughter gets one-third but under this reform son’s son gets half and son’s daughter gets half. Again it also violates the verse viii: 75 which clearly declares that the nearer male relatives will get priority over the remote but under the doctrine of representation both come in the same status i.e. distribution between son and son’s son. And Allah, after describing the respective portion to the heirs, declares that this is the boundary of distribution which has been imposed by Allah, so the person who obeys Allah and his messenger Hazrat Muhammad (sm) will go to the heaven and who disobeys with this distribution he/she will enter into the hell.³⁰ Therefore we say that as Allah did not give any share to grandchildren in presence of male child so giving any portion to them as inheritance will amount to violation of the distribution of Allah. Secondly it violates the hadith of Hazrat Muhammad (Sm) who says that after giving the fixed portion to the Quranic heirs the remains go to the nearer male person. Therefore if a person dies leaving a son, wife and a son’s son. Then under Shariah Law the wife will get one-eighth and the remains will go to the son excluding son’s son. On the other hand, under the reform, after giving one-eighth to wife the remains will be equally distributed between son and son’s son. So it is a vivid violation of the Quran and hadith. Thirdly

²⁷ Bukhari: Book:8: vol:80 hadithr 724 ,727,729&738, see also Chapter Faraid in Muslim Sharif, Abu daud Sharif, Jamy at tirmijy, Ibna maja and Muskatul Masabi

²⁸ Sura- 4, Verse- 11, The Quran

²⁹ Bukhari : Book:8 vol:80 hadith # 731

³⁰ Sura- 4, Verses-13&14, The Quran

during the period of Asaba, tabeye, taba tabeyen and till this reform, there was a practice that the grandchildren were excluded in the presence of male child. Imam Abu Bakar al-jassag says that it is the unanimous decision of all Ummah that grandchild is excluded in presence of son.³¹ It becomes more clear by the speech of Zayd ibn thabit ®, who was the great scholar among the companions of Muhammad (Sm) on the Islamic Law of Succession, said that a grandchild would not get inheritance from the grandparent where the son of that grandparent is alive.³² However it is clear to us that all the arguments submitted by the supporters of the reform is baseless and meaningless.

The then President Ayub Khan, depending on the report of the commission, promulgated the Ordinance named "The Muslim Family Laws Ordinance 1961, inserting the doctrine of representation in section

4. This reform was taken to ensure the right of inheritance of the orphaned grandchildren, without considering the impact of it on the other heirs. It has caused some caustic injustice to some heirs which will be discussed in the next sub-heading.

Caustic Impacts of the Reform on the Other Heirs: Without thinking the result of the doctrine on the other heirs, it was introduced in the Muslim personal law for the distribution of the property of grandparents to the grandchildren. So this new rule in many cases creates severe injustice to some heirs which can be explained through the following examples:

- (1) Where the propositus dies leaving a son's daughter and a daughter, under Islamic law the daughter receives half plus one-fourth total three-fourth and son's daughter gets one-sixth plus one-twelfth total one-fourth but under the MFLO the nearer of the deceased the daughter gets one-third and the remoter son's daughter takes two-thirds. In a distribution among two females one is nearer and other is remoter and remoter gets more share than that of nearer. It cannot be a justice in true sense?³³

³¹ Maulana Muhammad Abdur Rahman, *Islamic Inheritance Law*, 1st edition, Research Paper collection-6, Research department, Bangladesh Islamic Centre, Dhaka (2009) p. 47.

³² Ibid

³³ Supra note 3, p. 357.

- (2) Secondly: suppose a person dies leaving a son's daughter and a full brother. Under Islamic law of succession son's daughter gets half and brother gets half but according to the MFLO, son's daughter takes whole excluding the full brother.³⁴
- (3) Thirdly: where a person is survived by a son's daughter and a wife of that son. Under the MFLO the property of the son is totally taken by daughter completely depriving her mother.
- (4) Fourthly: where a person has a son and a son's daughter, on basis of Islamic law, the son is legally bound to supply maintenance to the parents in all situations, he has either any means or not but the son's daughter has no obligation of maintenance to the grandparents, yet under the MFLO the son's daughter will take equal to the share of son which is absolute injustice to the son's son.
- (5) Fifthly: where a person dies leaving three son's sons from a pre-deceased son and one son's son from another pre-deceased son. The MFLO distributes the property to the grandsons in such a way that the first three grandsons from a son will jointly get half individually 1/6 and then grandson by another pre-deceased son will get half. Apparently the MFLO has become discriminatory towards the son's son of same grade under the similar circumstances.³⁵

Impacts of the Doctrine on the Islamic Law of Succession: The majestic unquestionable provision of Islamic law of succession has drastically been attacked by innovating a new provision named the doctrine of representation in Muslim world for the distribution of the property of the propositus. Only this single rule upsets the whole Sunni law of succession which will be vivid to us after reading the following matters:

- (a) The holy Quran declares that male takes the share equal to that of two females but under the MFLO in some cases both male and female take equal share i.e. son's son with son's daughter.

³⁴ *Ibid*

³⁵ *Supra note*.16, p.120.

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- (b) For the proper distribution of the property of the propositus among the heirs, the Sunni law of succession classifies the heirs into three classes in order of priority. They are Sharers, Agnatic and distant kindred. So after the death of a person, firstly: the Quranic heirs will take their respective portions as per the rule of Quran and if anything remaining that goes to the agnatic heirs and the distant kindred inherits only if there is no Quranic and agnatic heirs except husband and wife. This order of priority is totally destroyed by section 4 of the MFLO 1961. Under the MFLO daughter's daughter and daughter's son have been included in the first and second groups i.e. a person dies leaving a son and a daughter's daughter. Here son inherits two-thirds and DD inherits one-third. But under Sharia law, DD is excluded by Son.
- (c) It has abolished the well established principle of succession law that the nearer excludes the remote. The holy Quran, the traditions, all the Sunni sub-schools, the Shia school and the renowned Maulanas opine that the nearer in degree excludes the remote.
- (d) If a person is survived by a daughter and a son's son then under the Islamic law of succession daughter inherits as a Quranic heir and son's son as an agnatic heir. But under this doctrine both of them inherit as agnatic heirs.
- (e) Islamic law prescribes shares only for those heirs who are alive at the time of the death of the propositus but the ordinance provides shares to those also who have predeceased the propositus.
- (f) If a person leaves two daughters and a son's daughter, according to Islamic law the son's daughter will be excluded from the right of inheritance but the MFLO distributes in such way that two daughters get half and son's daughter gets half. This new system is absolute violation of the hadith of Hazrat Muhammad (Sm) who says: do not exceed more than two-thirds for females of same class.³⁶ According to this rule two daughters exclude SD because the Quran declares that the share of two or

³⁶ Sirajuddin Muhammad ibn Abdur Rashid (Hanafi), *Shirazi* translated by Mawlana Bashir Uddin (2005) *Shirazi*, Shirazee Publication, Dhaka, p. 30.

more than two daughters is two-thirds. So after taking 2/3 by two daughters, nothing remaining for the SD. In another hadith, Hazrat Ibn Masud ® was asked; if a person dies leaving a daughter, a SD and a sister then what would be the distribution among the heirs. He replied that I would tell that what has been told by Hazrat Muhammad (Sm). So daughter would get half, SD one-six to complete the maximum share of daughters and sister one-third as agnatic heir.³⁷ By these two Hadiths it is clear that the maximum share for daughters is two-thirds and giving more than two-thirds to daughters is the violation of Islamic law of succession. But in an exceptional case the maximum limit of two-thirds for daughters is exceeded by application of radd.i.e where there is neither sharers save to spouse, nor agnatic heirs nor distant kindred there the daughters, after taking their fixed share, the remaining share will also take as per the rule of radd.

- (g) Among the twelve Quranic heirs, the shares of nine persons have been fixed by the Quran³⁸ and the share of true grandfather has been specified by Izma³⁹ and the share of SD has been determined by hadith. All these persons are Zabil Fruz or Quranic heirs who have a fixed portion. So the total number of Quranic heirs is twelve which is reduced to eleven by converting the Quranic heir SD into agnatic heir forever.⁴⁰ It is undoubtedly absolute violation of the Islamic law.
- (h) Only in presence of a child or a child of son or two or more brothers or sisters and with father and husband, mother gets 1/6⁴¹ but under the MFLO even with the presence of daughter's daughter or daughter's son, mother inherits one-six.
- (i) With female issue father inherits in dual capacities, as Sharer and agnatic heir.⁴² For example, a person dies leaving a son's daughter and father. In this condition, Son's daughter receives half as Sharer and father takes one-six as sharer and the remaining one-third as an agnatic heir. This provision of Islamic

³⁷ Mohammad Nurul Amin, *Fatawa and Masail*, Vol.6 , Islamic foundation Bangladesh, Dhaka, 2001, p. 540.

³⁸ *Ibid*, p. 530

³⁹ *Ibid*, p. 536

⁴⁰ *Supra note*.16, p. 122

⁴¹ *Supra note*.34, p. 45

⁴² *Supra note*.11, p. 427

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law no longer is practiced in those countries where the doctrine of representation has been accepted. Under the doctrine, in this case, father inherits one-six and son's daughter takes five-six. So the rule of Islamic law of succession the dual capacities of father has been abolished by the MFLO.

- (j) An established principle of Islamic law of succession is that sister and consanguine sister are not excluded by the son's daughter. Unfortunately the new rule in Islam inserted by section 4 of the MFLO excludes all collaterals by SD.
- (k) Uterine brother and sister who are the Quranic heirs are excluded by (i) child or (ii) child of son or (iii) father or (iv) true grandfather (h.h.s) but under the MFLO, child of daughter also excludes the uterine brother and sister.

This new system of distribution causes a caustic vicious injustice to some heirs and violates the Islamic law of succession. So it is clear to us that this single rule in various ways has completely destroyed the pillar of Islamic law of succession.

Concluding Remarks

After abovementioned discussion it is clear that the doctrine of representation is a quite new system in Muslim law and this single provision damages the whole system of Islamic law of succession. The jurists like Coulson and Anderson who passionately supported this provision yet they did not deny the true fact that the section 4 of MFLO absolutely violates the fundamental principles of Islamic law of succession. If it is evident to us that with the change of the nature of family, the Islamic principle regarding the right of inheritance of orphaned grandchildren causes injustice to them then provisions may be made for the welfare of them on basis of ijtahad; but not violating the injunction of Holy Quran and Sunnah. Islam is not a religion for doing injustice to any one either he/she is poor or rich or healthy or handicapped or Muslim or non-Muslim or black or white or male or female or orphaned child or a child having parent, but it is a religion for doing complete justice to all. It recognizes the right of equality to all human beings and neither discriminates nor concedes any privilege on account of birth, sex, color, race or nationality. Almighty Allah has laid down in the Holy Quran: "O mankind, we have created you from a single pair of male and female and

we have made you into nations and tribes so that you may recognize each other"⁴³. The right of every person has absolutely been maintained in Islam so it cannot make discrimination against the orphaned grandchildren but a great number of verses of Quran and Sunnah explicitly describe the welfare and rights of the orphaned grandchildren. The Quran in 19 verses forbid harsh and oppressive treatment of orphaned grandchildren while urging kindness and justice towards them. Almighty Allah says that the reward is waiting for those who feed orphans, poor and prisoner for the love of Allah.⁴⁴ Allah warns that those who wrongfully consume the property of the orphans will be punished in the hereafter with fire in their own bellies.⁴⁵ The Prophet Hazrat Muhammad (Sm) many times in prophetic statements has absolutely prohibited the Muslims to devour the property of the orphaned children, as he says: avoid seven cardinal sins that cause destruction. The companions asked: "Oh Prophet what are those sins? He said to associate others with the worship in Allah, to practice sorcery, to kill a human soul for no just cause, to deal with interest, to devour the wealth of an orphan, to flee from the battlefield and to accuse the innocent, chaste and believing women with adultery."⁴⁶ So it can undoubtedly be declared that Islam excluding the grand children from inheritance will not throw them in a very miseries life but make such a provision so that the interest of them can be protected in better way. The author recommends the following matters for the protection of the entitlement of the orphaned grandchildren in the estate of the grandparents:

Firstly: In the life time of the grandparent, she/he can make a gift in favor of the orphaned grandchildren so that they are not excluded from the property though they are excluded from the inheritance, that's why a new law can be enacted inserting the provision of obligatory gift by the grandparent, i.e. if a person has a son and son's son then he, before his death, must gift $\frac{1}{2}$ of his property in favor of his grandson which will be effective from the date of his death or if he has a daughter and a son's daughter then $\frac{1}{6}$ will be gifted to his granddaughter and if no gift is made by the grandparents to the grandchildren during his lifetime then it will be deemed that the respective share has been gifted to him or her. The obligatory system of gift is also prevalent in Islamic law of marriage.

⁴³ Sura-49, Verse-13, The Quran

⁴⁴ Sura-76, Verses-8&9, The Quran.

⁴⁵ Sura 4, Verse 10, the Quran

⁴⁶ Imam Al Zahbi Samsuddin, *Al-Kabair*, Darul Hadish, Cairo (2002) p.11 cited from *Bukhari Sharif*, vol: v, Chapter: Babul wasia`a, Hadith No: 2766

Application of the Doctrine of Representation

The Quran in its incomparable elegant style says: "Give to the women a free gift of their marriage portions".⁴⁷ The effect of the rule is that the husband is bound to give dower to his wife either it is mentioned at the time of marriage or not. It is an obligation imposed by law upon the husband to pay the dower money as a mark of respect to the wife, not deemed as consideration.⁴⁸ This is made abundantly clear by the author of Hedaya when he says: The payment of dower is enjoined by the law merely as a token of respect for the women, wherefore mention of it is not absolutely essential for the validity of the marriage.⁴⁹ It is clear that in no case husband can escape himself from the payment of such obligatory gift (dower) to his wife. So the system of obligatory gift can also be introduced for payment of property to the orphaned grandchildren or secondly: a bequest can be made in favor of the grandchild not exceeding one-third of whole property because under shariah law bequest more than one-third will not be effective without the permission of the heirs. Or thirdly: a law can be enacted making provision for the obligatory bequest.

⁴⁷ Sura 4 Verse 4, The Quran

⁴⁸ *Supra note* 11, P. 133

⁴⁹ *Supra note*.11, p. 133 cited from Hamilton`s Hedaya, 2nd edition by Grady, p. 44.