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Divergent Interpretations of Section 4 of the Muslim Family Laws Ordinance 1961 by the Superior Judiciary of Pakistan

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Abstract

Representational succession under Section 4 of the Muslim Family Laws Ordinance 1961 was introduced to reduce the economic sufferings of orphaned grandchildren. The superior courts of Pakistan have interpreted it divergently, showing confusion about the law on the part of the legislature and judiciary. This article analyses different interpretations of Section 4 by the superior judiciary. It shows that courts initially interpreted Section 4 on technical grounds and declined to grant any share to orphaned grandchildren. Later, courts interpreted it literally and awarded the entire share of a deceased child to his orphaned children. In other instances, courts presented a restricted interpretation. The binary interpretation of Section 4 has worsened the matter and further puzzled the distribution of shares to grandchildren. Therefore, the judiciary needs to develop a consistent approach in constructing and applying Section 4 for clarity in the distribution of shares to grandchildren.

Keywords

orphaned grandchildren, inheritance rights, superior courts, Pakistan, interpretation, section 4, share.

Introduction

The Islamic law of inheritance shows the divine balance of the *sharīʿah*.[1] The shares of the heirs are ascertained by Allah, and human beings cannot perfectly comprehend His logic.[2] There are two fundamental principles of Islamic law of inheritance. The first is "nearer in degree

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[1] J. N. D. Anderson, "Recent Reforms in the Islamic Law of Inheritance," *The International and Comparative Law Quarterly* 14, no. 2 (1965): 349-65, at 349.

[2] Haseeb Fatima, "Inheritance Rights of Orphaned Grandchildren under Section 4 of Muslim Family Law Ordinance, 1961 and its Alternative Solutions," *Law and Policy Review* 3, no. 2 (2024): 21-42, at 22, https://doi.org/10.32350/lpr.32.02, accessed on December 17, 2024.

excludes the remoter in degree."[3] In the presence of a nearer relation (son), the remoter relation (grandson) will not receive a share of the inheritance.[4] The second principle is "exclusion (*ḥajb*)," which means that nearer relatives fully or partially exclude other legal heirs.[5]

Inheritance rights of grandchildren whose parents died before their grandparents are an issue of debate in legal circles.[6] Under the classical inheritance law, paternal grandchildren are sometimes considered heirs.[7] However, the children of the predeceased daughter are always distant kindred, and they can only inherit in the absence of other heirs.[8] In contemporary societies, with the progressive decay of family solidarity, much emphasis is placed on the rights of the nuclear family, which includes parents and a person's lineal descendants.[9] To protect the interests of the nuclear family, Muslim countries have introduced different reforms.[10]

In Pakistan, the government appointed the Commission on Marriage and Family Laws in 1955, which recommended the protection of the inheritance rights of orphaned grandchildren.[11] During the government of General Muhammad Ayub Khan, the Muslim Family Laws Ordinance 1961 (MFLO) was passed. The recommendations of the Commission appeared in Section 4 of the MFLO.[12] The rule of representational succession under Section 4 made additions and subtractions to the traditional list of Qur'ānic heirs and introduced radical changes in the

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[3] Inaam Ullah, "Muslim Family Law Ordinance Section 4, Inheritance of Grandson in the Light of Islamic Teachings," *Islamabad Islamicus* 1, no. 1 (2018): 81-105, at 85.

[4] Muhammad Taqi Usmani, *Hamārē 'Ā'ilī Masā'il* (Our Family Issues) (Karachi: Dār al-Ishā'at, 1963), 34.

[5] Inaam Ullah, "Muslim Family Law," 85-87.

[6] Muhammad Munir, "The Share of Orphaned Grandchildren under Islamic Law and Pakistani Legal System: A Re-evaluation of Representational Succession in Section 4 and Its (Mis)interpretation by Courts," *The Asian Yearbook of Human Rights and Humanitarian Law* 2 (2018): 95-116, at 95.

[7] Nabeel Ahmad, "A Research Review of Orphan Grandson's Inheritance in the Light of Sharia and Pakistani Law," *al-Absar* 1, no. 1 (2022): 69-86, at 77-79.

[8] Inaam Ullah, "Muslim Family Law," 96-97.

[9] N. J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 135.

[10] Ibid., 136.

[11] Khurshid Ahmad, *Marriage Commission Report X-Rayed* (Karachi: Chiragh-e-Rah Publications, 1959), 80.

[12] For the sake of convenience Section 4 of Muslim Family Laws Ordinance (VII of) 1961 (MFLO) is reproduced here: "In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive."

classical inheritance structure.[13] In particular, it suspended the rule of classical law that nearer in degree excludes the remoter relation.[14]

Scholars have examined the provisions of Section 4 from many perspectives, such as its Islamic nature, un-Islamic nature, judicial interpretation, etc. However, the present article analyses Section 4 through its judicial constructions, using leading and rare cases. This article elaborates on the variant approaches of the superior judiciary in the construction of Section 4.

This article is divided into six sections. The first section enunciates the debate on representational succession under Section 4, and it is technical and liberal. The second section analyses textual and supplementary interpretations of Section 4. The third section critically examines the restricted interpretation of Section 4 regarding *Mst. Zainab v. Kamal Khan*.[15] The fourth section describes cases that are decided according to and against the ratio of Mst. Zainab case.[16] Finally, the fifth section probes into remote and binary interpretations of Section 4, discussing its alleged repugnancy to Islamic law.

Debates on the Reform of Representational Succession under Section 4

According to Coulson, Pakistani reform represents a complete break with classical *sharīʿah* doctrine. He argues that in the classical law of inheritance, when the father predeceased his son, the grandfather inherits from the latter's estate not in representation but in substitution. This is simply because the grandfather is the nearest ascendant in the absence of a father. In the absence of all sons, grandsons are the closest descendants.[17]

Habibur Rahman argues that all the children of the predeceased son or daughter are beneficiaries irrespective of whether they inherit any share under the traditional inheritance law. For the protection of the interests of orphaned grandchildren, Pakistani reform is much more liberal than the reform of obligatory bequest as prevalent in some Arab countries, where orphaned grandchildren, excluded under the Islamic law of inheritance, benefit from an obligatory bequest.[18] These grandchildren inherit the share of their predeceased parent within the bequeathable

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[13] Coulson, *Succession in the Muslim,* 152; Anderson, "Recent Reforms," 357.

[14] A. W. M. Abdul Huq, "Section 4 of the Muslim Family Laws Ordinance, 1961: A Critic," *The Northern University Journal of Law* 1 (2010): 7-13, at 8, https://www.banglajol.info/index.php/NUJL/article/view/18521/12971, accessed on July 26, 2024.

[15] Mst. Zainab v. Kamal Khan PLD 1990 SC 1050.

[16] Ibid.

[17] Coulson, *Succession in the Muslim*, 150.

[18] M. Habibur Rahman, "Problems for Orphaned Grandchildren in Succession: A Study of Suggestions," *Islamic Studies* 25, no. 2 (1986): 211-26, at 214.

limit of one-third of their grandparents' estate. If the grandparent does not make any bequest in their favour, the court will enforce it.[19] However, the benefit of Section 4 is restricted to the children of predeceased sons or daughters and not extended to their grandchildren.[20]

According to Munir, most scholars opine that representational succession under Section 4 is a rewriting of the Islamic law of inheritance, with the superior courts of Pakistan interpreting the law as if the Ordinance never existed.[21] For Cheema, Section 4 is a benevolent legal provision for the inheritance rights of orphaned grandchildren, subject to multiple interpretive tensions. The foundational tension was created when a class of non-legal heirs was converted into legal heirs and transposed into a classical inheritance scheme. Furthermore, more than six decades have elapsed, and the judiciary has not devised a coherent and consistent formula for its interpretation.[22]

Fatima extensively elaborates on the judicial decisions on the prospective and retrospective applicability of Section 4. She proposes that the plain reading of Section 4 is convincing of its prospective application. However, in cases where the question of the widow's limited estate was involved, courts applied it retrospectively. This was done by the joint reading of the Ordinance and the Muslim Personal Law (Shariat) Application Act, 1962. Therefore, the judicial construction of Section 4 is not concordant but partially consistent.[23] However, Kemal Faruki supports the principle of representational succession under Section 4. He argues that it has rightly identified the position of orphaned grandchildren as close relatives of the propositus.[24]

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[19] Haseeb Fatima, "A Critical Appraisal of Obligatory Bequest as Prevalent in Muslim Countries," *Islamic Studies* 63, no. 2 (2024): 213–40, at 213, https://doi.org/10.52541/isiri.v63i2.3071, accessed on December 16, 2024.

[20] Habibur Rahman, "Problems for Orphaned Grandchildren," 213.

[21] Munir, "Share of Orphaned Grandchildren," 95.

[22] Shahbaz Ahmad Cheema, "Section 4 of Muslim Family Laws Ordinance 1961, Pakistan: An Exploration of Interpretive Tensions," *Manchester Journal of Transnational Islamic Law & Practice* 18, no. 2 (2023): 2-19, at 2, https://doi.org/10.2139/ssrn.4388281.

[23] Haseeb Fatima, "Succession Rights of Orphaned Grandchildren in Pakistan: An Examination of Prospective or Retrospective Application of Section 4 of Muslim Family Laws Ordinance, 1961 by Pakistani Courts," *Legal Transformation in Muslim Societies* 1, no. 2 (2024): 32-50, at 50.

[24] Kemal Faruki, "Orphaned Grandchildren in Islamic Succession Law: A Comparison of Modern Muslim Solutions," *Islamic Studies* 4, no. 3 (1965): 253-74, at 264.

Technical Interpretation of Section 4

In *Saeed Ahmad v. Mahmood Ahmad*, the court gave a technical interpretation[25] of Section 4 and refused to apply it.[26] In this case, the propositus, Ghulam Fatima, died and left behind her son, Mahmood Ahmad. Both the propositus and the surviving son were British citizens. Another son, Basheer Ahmad, predeceased the propositus and left behind four sons, four daughters, and a widow. The legal heirs of the predeceased son were living in Pakistan. However, upon the demise of the propositus, her grandchild Saeed Ahmad (child of a predeceased son) claimed his share under Section 4 of the Muslim Family Laws Ordinance 1961. Learned counsel for the petitioner (Saeed Ahmad) argued that the propositus was a British national and Pakistan had also inherited her legal and judicial systems from Britain. Therefore, according to these systems, the property of the owner/propositus would be distributed under the law of the land. So, Section 4 applies to the petitioner. Counsel for the respondent (Mahmood Ahmad) contended that Section 4 should be read harmoniously with Section 1(2) of MFLO. Counsel further argued that Section 4 is only applicable to Muslim citizens of Pakistan and not to all Muslims residing in Pakistan in general.

The court held that Section 4 is only applicable to Muslim citizens of Pakistan. The court observed that foreign nationals residing in Pakistan will not be governed by Section 4. Instead, their estate will be distributed according to the law of the land, which is the traditional Islamic law of inheritance that applies to all Muslims in general. Therefore, under the traditional inheritance law, only the surviving son, Mahmood Ahmad, would inherit. The court gave its decision in favour of Mahmood Ahmad. In this case, the estate of the propositus was distributed under the classical Islamic law of inheritance, even though Section 4 existed at that time. However, the court did not apply Section 4, and no share was granted to the orphaned children and the widow of a predeceased son. The court decided this case on technical grounds, and no due consideration was given to the purpose behind the enactment of Section 4. Therefore, no share was granted to the orphaned grandchildren, and the surviving son inherited the entire estate.

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[25] Technical interpretation means to construe a provision of law on technical grounds instead of its spirit and logic. In the present case, the technical ground is the point of nationality of the propositus (which the court had taken into consideration). The spirit and logic of Section 4 is the welfare of orphaned grandchildren, which was rejected by the court.

[26] Saeed Ahmad v. Mahmood Ahmad PLD 1968 Lahore 520.

Liberal Interpretation of Section 4

In *Yousaf Abbas v. Mst. Ismat Mustafa,* the court gave a liberal interpretation of Section 4.[27] In this case, the propositus died in 1964. At the time of his death, he was a Pakistani national and domiciled in Karachi. He left behind several legal heirs. His only daughter (Mariam) died in 1922 in Bombay during his lifetime. The children of the predeceased daughter claimed their share of the propositus's estate under Section 4. Several issues were framed in this case, including: 1) The propositus left behind both movable and immovable properties in Pakistan and foreign countries. Then, the question arose: Which law would regulate foreign immovable properties? 2) Would the nationality or domicile of the propositus affect the application of Section 4? 3) Would the nationality of the children of the predeceased daughter affect the applicability of Section 4?

Concerning the first issue, the court remarked that the British legal system recognized the distinction between movable and immovable property. According to this system, movable property is administered under the law of the deceased's domicile. In contrast, immovable property is managed under the law of the country where the property is situated. Later, British courts developed certain exceptions under the principle of equitable jurisdiction. Courts began to administer the foreign immovable property of a deceased person under one limitation. That limitation was the enforcement of judgment either by the defendant's personal obedience or by confiscating his property. Pakistan inherited the British judicial system, and Pakistani courts also followed the principles and practices of British courts of equity for exercising jurisdiction over foreign immovable properties.[28] Islamic inheritance law does not distinguish between a deceased person's movable and immovable property. Therefore, all kinds of property are regulated under the personal law of the propositus or by its slightly modified form in Section 4. It depends on one condition, that is, the effectiveness of the court's judgment through the party's acceptance.

The MFLO does not distinguish between movable and immovable property for succession. Section 1(2) states that it applies to all Muslim citizens of Pakistan, wherever they may be. The words "wherever they

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[27] Yousaf Abbas v. Mst. Ismat Mustafa PLD 1968 Karachi 480. A liberal interpretation means to interpret a provision of law sensibly and according to its very spirit of enactment. Hence under this interpretation share was granted to grandchildren and technicalities (objections on the ground of nationality) were overruled by the court.

[28] The Court further noticed that Pakistani courts can also exercise jurisdiction over foreign immovable properties under Section 20 of the Code of Civil Procedure 1908.

may be" are paramount because they imply that the domicile of the propositus does not matter.[29] So, if a Muslim citizen of Pakistan, who has a domicile in a foreign country, dies, the law of his domicile country cannot be applied to the administration of his estate located in Pakistan, according to Section 1(2) and Section 4. Similarly, if a Muslim citizen of Pakistan who is also domiciled in Pakistan dies and leaves behind both movable and immovable properties in a foreign state. Even then, his estate will be administered according to Islamic law as modified by Section 4.

For issues 2 and 3 of the case, the defendant's counsel argued that a combined reading of Section 4 and Section 1(2) envisaged that an Ordinance would only be applied when both the propositus and the children of the predeceased daughter are Pakistani citizens. The court remarked that the proper construction of Section 4 reveals that it applies to all persons, whether Pakistani nationals or foreign citizens. Islamic inheritance law does not discriminate among legal heirs based on their nationality. Similarly, Section 4, a slightly modified Islamic law, prohibits any distinction among legal heirs.

The court perceived that, during the interpretation of Section 4, due consideration must be given to the purpose of its enactment. Its main objective is to redress the economic grievances of unfortunate children whose parents died during the lifetime of their grandparents. Therefore, the liberal and sensible construction of Section 4 is needed to fulfil the very purpose of its enactment. In this case, the court gave a verdict in favour of the plaintiff and granted them their due share following Section 4.

Interestingly, *Yousaf Abbas v. Mst. Ismat Mustafa* was decided on January 10, 1968, only a few months after the Saeed Ahmad case, which was decided on May 29, 1967.[30] In the Saeed Ahmad case, the court considered the nationality or domicile of both the propositus and her children. The court refused to apply Section 4. However, in the present case, the court applied Section 4 irrespective of the nationality or domicile of the propositus and children of a predeceased daughter. The court granted a share to the orphaned grandchildren by a liberal and reasonable interpretation of Section 4. The judgment of *Yousaf Abbas* was in sheer contrast with that of *Saeed Ahmad*. The *Yousaf Abbas* judgment seems to reflect the correct viewpoint of Section 4 and Section 1(2) of the Ordinance.

[29] The court figured out, "The rule of succession laid down in the Ordinance would apply to every propositus, irrespective of his domicile or the place of his ordinary residence."

[30] Saeed Ahmad v. Mahmood Ahmad PLD 1968 Lahore 520.

Textual Interpretation of Section 4

In textual interpretation, the court relied upon the verbatim text of Section 4 instead of its spirit.[31] The first textual interpretation of Section 4 was offered in *Mst. Zarina Jan v. Mst. Akbar Jan*.[32] In this case, the propositus Shah Zaman died after the Ordinance was promulgated. He left behind one daughter, Mst. Akbar Jan and one granddaughter, Mst. Zarina Jan from his predeceased son Mir Afzal. The civil court granted Mst. Zarina Jan a share equivalent to the share of her predeceased father. However, the lower appellate court set aside the decree of the civil court and held that Section 4 has given the right to the children of a predeceased son to inherit from the estate of the proponent's share. However, it never implied the exclusion of the application of *sharīʿah* law. Therefore, Mst. Zarina Jan inherited one-half of Mir Afzal's estate, while the other half was inherited by his sister, Mst. Akbar Jan. The Peshawar High Court held that under Section 4, children of a predeceased son or daughter inherit a per stirpes share equivalent to the share their father would have received if he were alive. Likewise, any other interpretation of Section 4 was not the lawmakers' intention. Therefore, Mst. Zarina Jan inherits two-thirds of the total estate (the share of her predeceased father), while Mst. Akbar Jan inherits a one-third share from the estate of the propositus.

Section 4 was enacted to compensate for the economic loss suffered by orphaned grandchildren. If the interpretation of Section 4 offered in the Mst. Zarina Jan case is followed, the orphaned grandchild will be in a more advantageous position. She will receive more shares than the actual loss she suffered. As a result, the granddaughter may even want her parents to die before her grandparents![33] Thus, one of the most important principles of Islamic law, which is to protect the life of the propositus, is violated.[34] Section 4 is like insurance for the orphaned grandchild, guaranteeing that the insured person will only receive the benefit equivalent to the loss suffered by them. If they are allowed more

[31] Textual interpretation means the construction of any provision of law according to its clear text only, and courts are not influenced by any other approach. It is usually known as "the strict interpretation" of Section 4. This term was used by Lucy Carroll in her work. Lucy Carroll, "Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan," *Islamic Law and Society* 5, no. 3 (1998): 409-47, at 420.

[32] Mst. Zarina Jan v. Mst. Akbar Jan PLD 1975 Peshawar 252.

[33] Abdul Huq, "Section 4 of the Muslim Family," 12-13.

[34] Ibid., 13.

benefits, then, under temptation, they will desire the insured event to happen soon to get the advantage of an insurance policy.[35]

In *Abdul Ghafoor v. Mst. Anwar*,[36] the court followed the textual construction of Section 4 as offered in Mst. Zarina Jan case[37] and granted the entire share of a predeceased son to his only daughter. No share was given to the collaterals. Legal counsel for the petitioners produced the *Kamal Khan v. Mst. Zainab* in support.[38] They argued that in that case, the court held that the legislature only intended to give an Islamic share to a grandchild from the estate of his/her predeceased parent and not the whole share. However, the court rejected this argument. The court remarked that if the legislature intended to grant only one-half share to a daughter of a predeceased son under Islamic law and not a whole share according to Section 4, it could have easily been expressly mentioned. The plain language of Section 4 warranted that the entire share of the predeceased son would be granted to his daughter and not her Islamic share, irrespective of consequences. The court regarded that though the word "children" was used under Section 4, it included both singular and plural according to Section 13(2) of the General Clauses Act, 1987.

Supplementary Interpretation of Section 4

In *Muhammad Fikree v. Fikree Development*, the court gave a supplementary interpretation of Section 4.[39] In this case, the propositus Ibrahim Muhammad Aqil Fikree died and left behind six daughters, one grandson, and one granddaughter from his predeceased son. The petitioner argued that all legal heirs were entitled to shares under Islamic inheritance law. Therefore, the daughters would jointly inherit two-thirds of the estate while the grandchildren would get one-half. For further clarification, 1/9 share would be inherited by each daughter, 1/9 share by the granddaughter, and 2/9 share by the grandson. It was contended that

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[35] Ibid., 12. He cited M. C. Kuchchal, *Mercantile Law*, 6th ed. (Lucknow: Vikas Publishing House, 2006), 438; Abdul Huq, "Section 4 of the Muslim Family," 12-13.

[36] Abdul Ghafoor v. Mst. Anwar CLC 1985 Peshawar 818.

[37] Mst. Zarina Jan v. Mst. Akbar Jan PLD 1975 Peshawar 252.

[38] Kamal Khan v. Mst. Zainab PLD 1983 Lahore 546.

[39] Muhammad Fikree v. Fikree Development Corporation Ltd. PLD 1988 Karachi 446. Supplementary Interpretation means that the court has construed Section 4 by adding up *sharīʿah* law or classical Islamic law of inheritance. The court figured out that Section 4 is only applicable for the benefit of orphaned grandchildren when they are excluded under *sharīʿah* law. However, when orphaned grandchildren are entitled under *sharīʿah* law then Section 4 is not applicable. It implies that *sharīʿah* law and Section 4 are not simultaneously applicable for the benefit of orphaned grandchildren. However, Lucy Carroll had termed it a "very loose construction" of Section 4. Carroll, "Orphaned Grandchildren," 424.

Section 4 did not apply to the instant case because grandchildren were otherwise entitled to inherit from their grandfather's estate. Respondents argued that Section 4 applied to the present case, and grandchildren would inherit 1/4 shares jointly, in which the grandson's share would be 1/6 and the granddaughter's share would be 1/12.

The court held that Section 4 only applies in cases where grandchildren would have been excluded because of the presence of other male legal heirs, and that is not the situation in the present case. It was clear from the preamble of the Ordinance that it came into force to give effect to the recommendations of the Commission. The Commission was not intended to deviate from *sharīʿah* law. It was only meant to redress the sufferings of grandchildren when they were deprived of inheritance. Therefore, when they were otherwise entitled to inherit under *sharīʿah* law, Section 4 should not be applied.[40]

In *Muhammad Fikree*, the court gave a supplementary interpretation of Section 4 by referring to the questionnaire and the Commission's illustration.[41] This interpretation of the court will only be correct when the lawmaker categorically restricts the application of Section 4 to orphaned grandchildren who are deprived under traditional law. Furthermore, it is not expressly enunciated in the recommendations, as well as Section 4, that only orphaned grandchildren who are otherwise excluded under the traditional law of inheritance will get the advantage of reform. The plain and unambiguous language of Section 4 warrants its applicability in all those cases where grandchildren are present, and their parent/s predeceased the propositus. Its applicability does not consider whether the intended beneficiary of Section 4 is also entitled to inherit under classical Islamic law. It is an ambiguous area that the legislature needs to clarify. Where orphaned grandchildren routinely benefit under Islamic inheritance law, there is no need to grant additional benefits under Section 4. In this case, the court gave such a meaning to the terms of Section 4, which might not be in the minds of lawmakers or the members of the Commission. However, the courts did not follow this interpretation in subsequent cases.

[40] The court explained this point by referring to the question of inheritance rights of grandchildren framed by the Commission and its illustration by the latter.

[41] Muhammad Fikree v. Fikree Development Corporation Ltd. PLD 1988 Karachi 446.

Restricted Interpretation of Section 4

The superior courts have given a restricted interpretation of Section 4 in *Mst. Zainab v. Kamal Khan.*[42] In this case, the propositus, Sufaid Khan, died in 1972 and left behind his granddaughter from his predeceased son Raju, who died in 1953. The entire estate of the propositus was transferred to Mst. Zainab, who was considered Sufaid Khan's sole legal heir. Kamal Khan was the nephew of the propositus. He filed a suit for a declaration that he was the sole owner of the entire property, as the propositus had left him the only legal heir. The trial court dismissed Kamal Khan's claim and granted the whole estate to Mst. Zainab under Section 4. The lower appellate court confirmed the same decision. Respondent challenged both these decisions before the High Court. The High Court reversed both lower courts' findings and restricted Mst. Zainab to her Islamic share. The rest of the estate was granted to Kamal Khan. Mst. Zainab was aggrieved by that decision and preferred an appeal to the Supreme Court. Likewise, the following issues were framed before the Supreme Court: 1) Is Section 4 to be construed literally or loosely? 2) What is meant by per stirpes and per capita? 3) Whether lawmakers intended to grant orphaned grandchildren their Islamic shares or to give them the whole share of their predeceased parent. 4) Does Section 4 of the MFLO override the Muslim Personal Law Shariat Application Act, 1962?

Learned counsel for the appellant argued that the language of Section 4 is clear and Mst. Zainab, the only daughter of the predeceased son of the propositus, is entitled to the entire estate. He further submitted that the High Court had wrongly interpreted Section 4. The Ordinance, being a special enactment, is to be construed in the light of its own provisions. Therefore, whatever property Raju inherited upon the demise of his father, Sufaid Khan, would entirely be transferred to Mst. Zainab on Raju's death. The learned counsel also relied upon *Mst. Zarina Jan v. Akbar Jan.*[43] The learned counsel of the respondent referred to *Iqbal Mai v. Falak Sher*[44] and the Muhammad Fikree case.

The Supreme Court held that the High Court correctly interpreted Section 4. Section 4 must be construed reasonably and equitably to obtain the maximum advantage. The court further affirmed the judgment of *Muhammad Fikree*.

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[42] Mst. Zainab v. Kamal Khan PLD 1990 SC 1050. Restricted interpretation means that the court has limited the share of the granddaughter to her Islamic shares and declined to grant her the full share of her predeceased mother/father. Carroll coined the term "loose construction" of Section 4 for it. Carroll, "Orphaned Grandchildren," 422.

[43] Mst. Zarina Jan v. Mst. Akbar Jan PLD 1975 Peshawar 252.

[44] Iqbal Mai v. Falak Sher PLD 1986 SC 228.

In paragraph no. 12 of the present judgment, the court observed, "On the opening of the succession, each group of children of the deceased sons/daughters would inherit the share of their father/mother, and each individual would not get the share in his/her individual capacity." The court concluded that while enacting the provision of Section 4, the lawgiver intended to overcome the sufferings of orphaned grandchildren. Before Section 4, the children of the predeceased son were not given any share. The legislator did not intend to grant shares to orphaned grandchildren above their Islamic shares (which they would inherit if their parents were alive). It was not meant to decrease the share of other legal heirs or to exclude them from the estate of the propositus. In the present case, upon the propositus, Sufaid Khan's demise, his succession opened, and his predeceased son Raju was assumed alive and notionally received his share. After that, he was considered dead, and his share would be distributed among his legal heirs according to Muslim personal law. Section 4 is to be read harmoniously with Section 2 of the Shariat Application Act, 1962. Therefore, Mst. Zainab, being the only daughter of the deceased son, should inherit one-half of his estate. The remaining half would be inherited by the collaterals and other legal heirs, that is, Kamal Khan. A grandchild is only entitled to inherit the share which he/she would inherit under Islamic law from the estate of his/her predeceased parents (if the latter are alive at the opening of the succession of the propositus).

When the Mst. Zainab case is critically analysed, it becomes evident that the Supreme Court restrictively construed Section 4. The court deviated from the textual construction of Mst. Zarina Jan case and upheld the supplementary interpretation offered by the Muhammad Fikree case to some extent. The court introduced the concept of the dual death of the predeceased son of the propositus. The first death is natural. Later, upon the demise of the propositus and at the time of the opening of the succession, he is considered alive and notionally receives his share. After that, he hypothetically dies for the second time, and his share is distributed among his children according to traditional Islamic law. Such a notion of dual death is unknown under classical Islamic law. Once a person dies, they die forever, and a dead person cannot inherit anything upon the opening of succession. Now, the question arises, how could the share of the dead person be transferred to his legal heirs, his children?

To solve this question, the court further used the golden principle of giving effect to apparently divergent texts by reading Section 2-A of the

Shariat Act 1962 with Section 3(1) of the MFLO, 1961.[45] If only Section 4 applied, Mst. Zainab would inherit the entire estate, and no share would be granted to Kamal Khan. However, through the harmonious interpretation of Section 4 and Section 2-A of the Shariat Act V of 1962, the court applied the principles of traditional Islamic law. Resultantly, Mst. Zainab only gets the share from her grandfather's estate, which she could have inherited from her predeceased father if he had survived. Kamal Khan and other legal heirs would inherit the rest of the estate.

Section 4, already an exception to Islamic law, is further modified by its restricted interpretation (granting a half share to the granddaughter instead of the whole estate). At this juncture, further questions arise: What was the purpose of enacting section 4? What is the difference between the classical law of inheritance and Section 4, as both have given the same share to the predeceased son's daughter? Is the application of Section 4 gender specific and beneficial for male grandchild only, and harmful for female grandchild?

Pakistani courts have attributed divergent meanings to the phrase "per stirpes." Paragraphs 7 and 8 of the High Court judgment discussed the per stirpes and per capita, and the Supreme Court confirmed these findings. Paragraph 7 is reproduced below:

> Per stirpes referred to in section 4 is the antithesis of per capita. This means a share according to the stock or the root of the family, as against per capita, which means share per head. This assumes greater importance only where the propositus leaves behind a number of grandchildren whose parents died during the lifetime of the propositus. The principle of succession in such cases will not be inheritance per capita but per stirpes, i.e. in accordance with the root or stock to which the grandchild belongs and will only get the share to which the grandchild is entitled through his parent. In the event of there being a single surviving grandchild, the principle of per stirpes is pushed to the background but cannot be employed to support a principle which militates against the Islamic Law of Inheritance.

Before explaining this paragraph, it is pertinent to mention that though the language of this paragraph seems plain, it is very confusing and contradictory. In several subsequent cases, superior courts have referred to this paragraph, but it appears that courts, while interpreting Section 4, have followed their whims instead of the spirit of the Mst. Zainab case.[46] From the above, it is evident that when a propositus or

[45] "Section 3. Ordinance to override other laws, etc. (1) The provisions of this Ordinance shall have effect notwithstanding any law, custom or usage, and the registration of Muslim marriages shall take place only in accordance with those provisions." https://pakistancode.gov.pk/pdffiles/administratoreecaf3b490e2d43d2e3b50c0c068b5d7.pdf.

[46] Mst. Zainab v. Kamal Khan PLD 1990 SC 1050.

grandparent dies and leaves behind several legal heirs, including surviving sons, daughters, and children of his predeceased sons and daughters, the surviving sons and daughters will receive their shares per capita. The children of his/her predeceased sons and daughters will not receive their shares in individual capacity or per capita. Rather, the predeceased parents of these children will notionally receive their shares, and then their children will represent them and get a share from the root or stock of these predeceased parents. The court further observed that where the propositus or grandparent dies and leaves behind one surviving grandchild (either maternal or paternal), he will receive a share per capita and not per stirpes. At the same time, this distribution cannot be made against Islamic legal principles. Hence, it implies that if the only surviving grandchild is the son's daughter or son's son, then he/she will inherit a share in his/her capacity that is half of or the whole estate, respectively, according to Islamic law. However, when a daughter's daughter or daughter's son is the only surviving grandchild, he/she will not inherit anything in the presence of sons and daughters of the propositus. This is because he/she is distant kindred; if any share is awarded to him/her, it would be against the principles of the Islamic law of inheritance.

However, serious doubts arise about the above observation on the phrase "per stirpes."

1) When the propositus is survived by two granddaughters from his predeceased son, they will represent their predeceased father. They will inherit their shares per stirpes (the whole share of their predeceased father) and not per capita (two-thirds share). Is such a distribution of shares not against Islamic law?
2) When both paternal and maternal grandchildren survive the propositus, they will receive their shares per stirpes. Similarly, when only two or more maternal grandchildren are present, they will receive their shares per stirpes by representing their predeceased mother. Does such a distribution follow Islamic law?
3) When the propositus leaves behind only one grandchild, the per capita rule will apply, and he/she will inherit in his/her capacity. Such a principle is only beneficial for the child of a predeceased son and detrimental to the child of a predeceased daughter. If anything is granted to him/her, it will be against Islamic law.

However, is "per stirpes" a gender-specific phrase? Was Section 4 enacted for the benefit of only the son of a predeceased son and not for the daughter of such predeceased son, as the former will inherit the whole, while the latter only half?

Such interpretation of "per stirpes" is thoroughly opposite to what was offered in Mst. Zarina Jan case.[47] In that case, the Peshawar High Court applied the gender-neutral construction. It awarded the entire share of the predeceased parent to his single surviving daughter and not her Islamic share. The restricted interpretation is only applied to adversely affect the share of maternal or paternal granddaughters on the pretext of Islamic law.[48] "So, the phrase per stirpes, despite its gender neutrality, has been reduced to cause the gendered application of Section 4."[49] Although in the Abdul Ghafoor case,[50] the learned High Court held that the word "children" in Section 4 included both singular and plural, that viewpoint was overlooked by the court in the present case. Furthermore, it appears that Section 4 is interpreted for the benefit of paternal grandson/s only.

Cases Decided in Conformity with the Ratio of Mst. Zainab Case

This section deals with cases decided according to the ratio in Mst. Zainab case or those cases which only partially followed the ratio in Mst. Zainab case.

The following are the cases in which, during the interpretation of Section 4, the superior courts have given decisions that are entirely consistent with the ratio in the Mst. Zainab case. Consequently, the courts only granted an Islamic share to the grandchild of the propositus instead of the entire share of his/her predeceased son/daughter. For instance, in *Mst. Qabal Jan v. Mst. Habab Jan,* the court granted a half share to the son's daughter and the other half to other legal heirs.[51] In *Zamir Muhammad Khan v. Fateh Khan,* the half share was granted to the daughter of a predeceased son.[52] The widow of a predeceased son also received her share along with the residuaries. In *Mst. Tabassam Bibi v. Abdur Rashid Khan,* half of the estate was granted to the son's daughter, and the rest to the full brother's son.[53] In *Mst. Rashida Begum v. Mst. Rehana Nasreen,* half of the estate was granted to the son's daughter, and the other half to the sister.[54] In *Mst. Bhaggay Bibi v. Mst. Razia Bibi*, the court granted a two-thirds share to the daughters of the predeceased son and one-eighth to his widow, while the rest of the estate was granted to his residuaries.[55] In *Mst. Aqsa Sabir v. Dr. Sajjad*

[47] Mst. Zarina Jan v. Mst. Akbar Jan PLD 1975 Peshawar 252.

[48] Cheema, "Section 4 of Muslim Family," 11.

[49] Ibid.

[50] Abdul Ghafoor v. Mst. Anwar CLC 1985 Peshawar 818.

[51] Mst. Qabal Jan v. Mst. Habab Jan 1992 SCMR 935.

[52] Zamir Muhammad Khan v. Fateh Khan CLC 1993 Lahore 133; Sardar Muhammad v. Mst. Jantey YLR 1999 Lahore 1928.

[53] Mst. Tabassam Bibi v. Abdur Rashid Khan CLC 1999 Lahore 1216; Mukhtar Ahmad v. Mst. Rasheeda Bibi 2003 SCMR 1664.

[54] Mst. Rashida Begum v. Mst. Rehana Nasreen MLD 2004 Lahore 1304.

[55] Mst. Bhaggay Bibi v. Mst. Razia Bibi 2005 SCMR 1595.

Hussain, two-thirds were granted to the daughters of the predeceased son, with the rest going to the residuary.[56] In *Abdul Qayyum v. Mst. Asma Ejaz,* the court awarded one-half to the daughter of the predeceased daughter and the rest of the estate to her residuary.[57]

In some cases, courts have partially followed Mst. Zainab case by granting Islamic shares to the children of the predeceased son/daughter. At the same time, courts partially disobeyed it by depriving certain entitled legal heirs from inheriting their shares. In *Haji Gulshan v. Abdul Qayoom,* the entire share of a predeceased son was granted to his only son and no share was granted to the mother of such predeceased son from his estate.[58] In *Ghulam Haider v. Mst. Nizam Khatoon,* a two-thirds share was granted to the daughters of the predeceased son, and one-third to the residuaries.[59] No share was granted to the predeceased son's widow. In *Mst. Saira Yousaf v. Sher Muhammad,* a half share was granted to the son's daughter and the rest one-half to the full brother.[60] No share was granted to the mother of the predeceased son. However, she was also entitled to inherit a one-sixth share from his estate.

Cases Decided Against the Ratio of Mst. Zainab Case

Following is the list of those cases in which courts rely upon the textual construction of Section 4 and have violated the precedent set in Mst. Zainab case. In *Zainul Hassan Mian v. Mst. Khuwand Naka,* the Peshawar High Court relied upon the former decision of the same court in *Abdul Ghafoor v. Mst. Anwar* and believed that the decision had a persuasive effect on the court.[61] However, the Supreme Court's decision, in Mst. Zainab case, gave the case a binding effect. Ironically, the court followed the persuasive decision and disobeyed the binding precedent of the Supreme Court. Here, the court granted the entire share of a predeceased son to his daughters instead of a two-thirds share from his estate, and no share was granted to collaterals. Interestingly, the legal heirs in Mst. Zainab case and the present case were similar. In Mst. Zainab case, the legal heirs were one daughter of a predeceased son and one son of a full brother. In the present case, two daughters of the predeceased son and one full brother and his descendants were legal heirs. However, the court relied upon the textual construction of Section 4 and did not follow the ratio of Mst. Zainab case.

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[56] Mst. Aqsa Sabir v. Dr. Sajjad Hussain MLD 2015 Peshawar 652.

[57] Abdul Qayyum v. Mst. Asma Ejaz CLC 2015 Peshawar 162.

[58] Haji Gulshan v. Abdul Qayoom PLD 1991 Peshawar 85.

[59] Ghulam Haider v. Mst. Nizam Khatoon YLR 2002 Lahore 3245.

[60] Mst. Saira Yousaf v. Sher Muhammad CLC 2012 Board of Revenue Punjab 1593.

[61] Zainul Hassan Mian v. Mst. Khuwand Naka MLD 1998 Peshawar 1587.

In *Umar Farooq v. Mst. Shagufta Nasreen,* the court granted the entire share of a predeceased son to his daughters and not a 2/3rd share, and no share was granted to other legal heirs, including widows of such predeceased son from his estate.[62] In this case, the court erroneously noticed that Mst. Zainab case ruled that where a grandchild otherwise got her share, Section 4 would not apply. Indeed, this opinion was held in the Muhammad Fikree case. However, although the Supreme Court confirmed the notion of the Muhammad Fikree case in Mst. Zainab case, it never implied that such a point covered the entire judgment. In Mst. Zainab case, the court concluded that Section 4 should be read harmoniously with the Shariat Application Act, 1962 provisions. In *Karim Bakhsh v. Mst. Zulekhan,* the entire share of a predeceased daughter was granted to her only daughter instead of a half share from her estate, and no share was granted to the residuaries.[63] In *Mst. Kaneezan Bibi v. Muhammad Ramzan*, the court granted the whole share of a predeceased son to his daughters and not a 2/3 share of his estate.[64]

Remote Interpretation of Section 4

In *Manzoor Elahi v. Tahir Masood*, the court construed Section 4 remotely.[65] This case primarily concerned determining the superior right of pre-emption between the pre-emptor and the vendee. Still, the court also determined the scope and extent of the applicability of Section 4. Manzoor Elahi was a pre-emptor and paternal cousin of the vendor. Tahir Masood was the vendor's grandson. Tahir Masood's vendee was the son of the vendor's daughter, and the daughter was not predeceased by her father. She was still alive. The vendor sold his property in favour of his grandson. The pre-emptor challenged the sale and claimed his superior right of pre-emption. Later, the vendor died, and her daughter (the mother of the vendee) was alive. The court held that during the determination of the superior right of pre-emption, the court would consider the vendor's legal heirs. The court remarked that the person

[62] Umar Farooq v. Mst. Shagufta Nasreen MLD 1999 Peshawar 703; Mst. Saabran Bibi v. Muhammad Ibrahim CLC 2005 Lahore 1160.

[63] Karim Bakhsh v. Mst. Zulekhan YLR 2004 Lahore 637.

[64] Mst. Kaneezan Bibi v. Muhammad Ramzan 2005 SCMR 1534; Saeed Ahmad Malik v. Shamim Akhtar 1999 SCMR 1558.

[65] Manzoor Elahi v. Tahir Masood 1987 CLC 297. Remote interpretation means that the court has interpreted Section 4 distantly and illogically. Usually, Section 4 is applied for the benefit of the grandchild when his mother/father predeceased the propositus. However, in the present case court has determined the entitlement of the grandchild even when his mother is alive. This interpretation of the court is obscure and incomprehensible. Additionally, the court has determined the right of pre-emption of parties by considering them heirs of a deceased person. For the determination of said right court has applied Section 4 and established the entitlement of the grandson.

who would inherit the vendor's estate would have a superior right of pre-emption. By relying upon Section 4, the court concluded that both the pre-emptor (being a paternal cousin) and the vendee (being a grandson) were entitled to inherit the vendor's estate. Their right of pre-emption was equal, and the court dismissed the revision petition filed by the pre-emptor Manzoor Elahi.

Generally, Section 4 comes into play only when the son or daughter of the propositus dies during his lifetime and leaves behind orphaned children. Typically, superior courts have granted a share to the orphaned grandchildren under the concept of dual death. Interestingly, in the present case, when the vendor/propositus died, his daughter survived him, so the mother of the grandchild (vendee) was alive. The court assumed the living daughter of the propositus to be dead in determining the entitlement of her son under Section 4. Now, one can question how a court could apply and interpret Section 4 in favour of the grandson when his mother is still alive. Section 4 was enacted with the basic purpose of reducing the grievances of orphaned grandchildren. However, in those cases where grandchildren are not orphaned and their own parents survived the propositus, what principle does the court apply in Section 4? This interpretation of Section 4 is a dramatic innovation by the judiciary. The court reversed the concept of dual death of a predeceased son/daughter of the propositus. If the estate of the propositus was distributed under classical Islamic law, then the daughter would inherit her share, whereas the paternal cousin would receive his share as a residuary. The maternal grandson would inherit no share as a distant kindred. The paternal cousin would have the superior right of pre-emption and win the case. Ironically, by a distant interpretation of Section 4, the court considered the vendee as a legal heir of the vendor and equalized his right of pre-emption with that of the pre-emptor. The court construed Section 4 out of context and determined the other rights of the parties, such as the right of pre-emption.

Binary Interpretation of Section 4

In *Fazeelat Jan v. Sikandar,* the court gave a binary interpretation of Section 4.[66] In this case, the propositus died and left behind a widow, daughter, paternal grandson (Sikandar), and son of a predeceased brother. The paternal grandson claimed his share under Islamic inheritance law as being residuary and had not claimed any share under

[66] Fazeelat Jan v. Sikandar PLD 2003 SC 475. Binary interpretation means to interpret Section 4 dually. Courts leave no clarity whether to construe it according to its own spirit and logic or according to classical Islamic law. Additionally, courts are confused whether to grant share to the orphaned grandchild under Section 4 or under classical Islamic law.

Section 4. Interestingly, the court moved one step further and confirmed the grandchild's entitlement under traditional Islamic law as residuary and Section 4. The court figured that Sikandar was entitled to inherit from the estate of his grandparents as a residuary beneficiary of his own right as well as under Section 4 of MFLO. This judgment further perplexed the distribution of shares to the grandchild.

Equally important is that serious doubts arise about whether double inheritance is to be awarded to the grandson once under classical law and another under Section 4. Such a principle of double inheritance is only beneficial for paternal grandchildren because, in certain circumstances, they could inherit as a sharer or a residuary, even under Section 4. It will adversely affect the inheritance rights of maternal grandchildren who are distant kindred under traditional law. Furthermore, they will not inherit in the presence of sharers and residuaries and can only inherit under Section 4. In this way, they secure a smaller share than paternal grandchildren.[67]

The court has confirmed the grandchild's dual entitlement under classical law and Section 4. This has further confused the distribution of shares, making Section 4's interpretation inconsistent and incoherent.

Section 4 Repugnant to Islamic Law

In *Mst. Farishta v. Federation of Pakistan*, the compatibility of Section 4 with Islamic law was challenged for the first time.[68] However, before pronouncing its verdict on that point, the court had to cross the hurdles of jurisdictional limitation. That limitation was imposed by the Constitution of the Islamic Republic of Pakistan 1973 under Article 203-B. Learned counsel for the defendant argued that Section 4 of MFLO comes under the expression of "Muslim Personal Law"; therefore, it is protected from examination of the Shariat Bench under Article 8(3) b of the Constitution. The court observed that the words "Muslim Personal Law" were meant for Shariat and not for any legislative enactment. Therefore, Section 4 of MFLO was not Shariat but something new that the legislature introduced into Muslim Personal Law. Hence, the bar of Article 203-B did not apply to it, and the Shariat Bench had jurisdiction to check its validity in relation to Islam. After lengthy argumentation of learned counsels, the court declared Section 4 repugnant to the injunctions of Islam. However, such a decision was reversed in the appeal of the *Federation of Pakistan v. Mst. Farishta*.[69] In that case, the court held that "Muslim Personal Law" was meant for a special statutory law applicable to Muslims only and not to all

[67] Cheema, "Section 4 of Muslim Family," 13.

[68] Mst. Farishta v. Federation of Pakistan PLD 1980 Peshawar 47.

[69] Federation of Pakistan v. Mst. Farishta PLD 1981 SC 120.

people of Pakistan in general. Therefore, Section 4 of MFLO applies to Muslims only and falls within its ambit. Hence, it was excluded from the jurisdiction of the Shariat Bench under Article 203-B.

However, Section 4 was again challenged in *Allah Rakha v. Federation of Pakistan.*[70] In this case, the court assumed jurisdiction by relying upon the definition of Muslim Personal Law offered in *Dr. Mahmood ur Rehman Faisal v. Government of Pakistan*.[71] The court held that Section 4 was the product of the "so-called *ijtihād*" of the Commission members and against the clear injunctions of the Qur'ān and the *sunnah.* Therefore, it will cease to have effect on 31 March 2000. However, an appeal against such a decision is pending before the Shariat Bench of the Supreme Court, and until the disposal of such an appeal, Section 4 is an operational part of the law.

Conclusion

Section 4 of the Muslim Family Laws Ordinance 1961, principally enacted to protect the economic interests of orphaned grandchildren, has been interpreted in several different ways by the superior courts of Pakistan. The courts are confused as to which approach is to be preferred in the section's interpretation. However, consistency in the judicial construction of any legal provision is not an absolute rule, and there can be exceptions. These exceptional/inconsistent interpretations are only validated when supported by cogent reasons and circumstances. Although the apparent look of Section 4 testifies to its literal interpretation, the superior courts have swung from one interpretation to another. Sometimes, courts have construed it textually, liberally, regressively, and remotely.

The anomalous interpretation of Section 4 is a clear reflection of the reservations of scholars that if the law were made for orphaned grandchildren, it would upset the whole scheme of inheritance. Furthermore, Section 4 was declared un-Islamic in *Allah Rakha*.[72] Therefore, there is a dire need for the legislator to amend Section 4 and replace it with a better provision. Obligatory bequests are not a classical solution for Section 4. However, the legislator may legally adopt it after addressing the necessary reservations raised on its practicability.[73] Until it is operative, it is the responsibility of the judiciary to develop a consistent approach in the application and construction of Section 4.

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[70] Allah Rakha v. Federation of Pakistan PLD 2000 FSC 01.

[71] Dr. Mahmood ur Rehman Faisal v. Government of Pakistan PLD 1994 SC 607.

[72] Allah Rakha v. Federation of Pakistan PLD 2000 FSC 01.

[73] For details, see Fatima, "Obligatory Bequest in Muslim Countries," 240.