ISLAMIC LAW OF SUCCESSION IN CONTEXT OF ESTATE PLANNING

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Introduction

In order to understand the needs of Muslim clients it is helpful to understand something about Islām and Islāmic law. Islām is more than just a religion, it is a complete way of life, providing its adherents, who are called Muslims, guidance on how to conduct their lives on Earth. A Muslim is someone who submits to the Will of the Almighty God, whom Muslims call Allāh (SWT). The holy book of the Muslims is called the Quran which Muslims believe to be the unadulterated literal word of Allāh (SWT). Muslims believe that Muhammad (SAWS) was the last Prophet and Messenger of God Almighty. Sunna of the Prophet Muhammad (SAWS) refers to his actions and statements as well as tacit approval of statements and actions of others. The primary source of Islāmic law is the Quran and the secondary source is the Sunna of the Prophet Muhammad (SAWS). In that sense Islāmic law can be compared in some ways to the Jewish Halakha (הֲלָכָה in Hebrew), the Jewish religious law, which is derived from two sources, namely the Old Testament and the Oral Law.

Islāmic Law is Not Uniform

Islāmic law, often referred to as Shari‘a, is not codified. Shari‘a is an ‘unwritten’ law that does not exist in codified form. Besides the primary sources, Quran and Sunna, other juristic methods are used to formulate a complete body of law. Due to differences in interpretation and understanding, as well as juristic methods used, there are a number of different Islāmic schools of jurisprudence, these are called madhahib (sing. madhhab) or schools of fiqh. Amongst the Sunni Muslims there are 4 such fiqh named after their founders, Hanafi, Malaki, Shafi‘i and Hanbali. The Shia Muslims have their own schools of jurisprudence but the main one is Jafari also called Ithna Ashari.

The Hanafi school is the most widely practiced in the Muslim world and dominant in India, Pakistan, Bangladesh, Turkey, Egypt and central Asia. The Malaki fiqh is practiced in North Africa, West Africa and parts of the Middle East. The Shafi‘i fiqh is practiced in Indonesia, Malaysia, Sri Lanka, eastern Egypt, Somalia and Yemen. The Hanbali fiqh is practiced in Saudi Arabia and Qatar.

To complicate matters further Islāmic succession law has been modified in various ways by Islāmic states around the world, so succession law according to the Hanafi fiqh in Pakistan is different to that applied in India which is different from that applied in Egypt.

Different Meanings of the Same Terms in Different Laws

Another source of confusion can occur because commonly used terms in succession law, such as estate and heir, have different meanings in English law (common law) as compared to Islāmic law.

In common law systems, not all assets of the deceased form part of the estate. Assets which do not form part of the estate can devolve from the deceased by other methods, namely by survivorship, by nomination or via terms of a trust. In Islāmic law the estate (tarika) of the deceased includes property of all kinds whether ancestral or self-acquired, moveable or immovable. However, only “property” which has been acquired by legal means and that which can be legally owned under Islāmic law constitutes the estate of the deceased. Whereas in common law systems property can devolve from the deceased to the beneficiaries in a number of ways in Islāmic law it can only devolve either through inheritance or via a bequest.

Brief Overview of Islāmic Succession law

In Islāmic law, and similarly in Jewish law, upon the death of the propositus the legal heirs (wuratha) become owners of the estate, they are effectively tenants in common of the deceased’s estate. The legal heirs (wuratha) inherit directly from the deceased. In English law the heirs used to take directly from the deceased before 1897, nowadays the beneficiaries do not take directly but through a personal representative (executor or administrator) of the deceased.

The testator has no say in who his/ her heirs (wuratha) are nor what their entitlement is, this is determined according to Islāmic law by a rather complex set of rules. So the testator can neither make someone an heir nor disinherit an heir. Furthermore, the powers of the testator are limited in two ways. Firstly, he cannot bequest more than one-third of his net estate after payment of debts and funeral expenses (the one-third rule), and secondly, according to Sunni Islāmic law, he cannot make a bequest in favour of a legal heir.

Inheritance rules in Islāmic law although complex are clearly defined. The two causes of inheritance in Islāmic law are a valid marital tie and a legal blood tie. The two main impediments to inheritance are homocide and difference of religion. What this means in practical terms is that mutual rights of inheritance are established
between the spouses upon a valid marriage, there are no inheritance rights between a man and any of his illegitimate children and there are no inheritance rights between a Muslim and a non-Muslim, so a Muslim man and his non-Muslim wife do not have mutual inheritance rights. Although a non-Muslim wife not inherit from her Muslim husband she can be left a bequest of up to one-third of the net estate, which is greater than the share a Muslim wife would receive under Islāmic law. A woman and any illegitimate child she may have conceived have mutual inheritance rights. A child in utero who is known to exist at the time of death of the propositus is entitled to inherit provided it is born alive within the maximum gestation period allowed under Islāmic law. An adopted child is not entitled to inherit.

Generally speaking a male inherits twice the share of a female of equal footing, so a son inherits twice the share of a daughter. This is because Islāmic law places the financial burden squarely on the shoulders of the male, be he the husband, father, brother, grandfather or uncle. However, under certain circumstances a female can inherit the same amount or even more than her male counterpart, who may be totally exclude him from inheriting.

**Drafting a Will for a Muslim Client**

Since under common law a testator is entitled to leave his/ her estate to whomsoever he/ she chooses it means people of religious minorities may wish to have their wills drafted in accordance with their faith.

During health a Muslim is allowed to do whatever he wishes with his money and property but certain restrictions are placed when he/ she enters in to state of death sickness (mard-ul-maut) to protect the rights of the legal heirs. During the state of death sickness any gifts made by the propositus will be subject to the one-third rule.

Drafting a truly Islāmic will is very challenging since the Muslim client him-/ herself is unaware of Islāmic law concerning wills and the person drafting the will is often unfamiliar with the finer points of the law.

A discretionary testamentary trust accompanied by a letter of wishes is a method often used for drafting an Islāmic will. The will itself is usually a standard English will to which the term Islāmic law is added. The advantage of this approach is one does not need to know much about Islāmic law as the onus to apply the law is left to the discretion of the trustees. Using a discretionary testamentary trust may be objectionable from a Sharia perspective as there is no parallel in Sharia to the common law trust, the nearest equivalent is the waqf (Islāmic endowment), and a testamentary waqf would be subject to the one-third rule in a similar manner to a bequest. A further possible problem is that the distribution of the estate relies on the interpretation of Islāmic law by the trustees since the letter of wishes is not legally enforceable. Avoiding the setting up of a discretionary testamentary trust and merely stating that the estate should be distributed according Islāmic law may lead to conflict due to the different schools of fiqh, even stating which school of fiqh is to be applied may not avoid conflict.

Ideally an Islāmic will itself should contain sufficiently detailed instructions about the distribution of the estate, so that the estate of the deceased is distributed according to Islāmic law without requiring any reference to an external source. For this purpose two schedules of inheritance based on Islāmic law are currently available. Such a schedule of inheritance could form part of a testamentary trust if it is considered to be advantageous.

As many Muslims clients may also have property abroad the practitioner should be aware of it’s implications when drafting a will for such clients. Under the law of England and Wales, the laws of location of property (lex loci rei sitae or lex situs for short, meaning ‘law of the place where the property is situated’) govern the validity of disposition of immoveable property. The disposition of moveable assets is governed by the jurisdiction in which the testator was domiciled (lex domicilli meaning ‘law of the domicile’) at the time of his death.

It is crucial that the Muslim client clearly understands what an Islāmic will entails, this means being aware of the share entitlement of his/ her legal heirs under Islāmic law particularly the spouse relict, any adopted/ illegitimate children will not inherit, how the will may be challenged by local statutes such as those related to provision for dependants, the right of election by the spouse relict, a signed agreement on creating community property, equalization of family property etc. and that the Islāmic will may not be the most tax-efficient method of estate planning. Making the client aware of all these factors and documenting it will help to avoid challenges by the surviving relatives.

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