Interpretive Possibilities in Islamic Inheritance Law: Rethinking Daughters' Shares

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SHORT BIO

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Mufti Muneer Abduroaf's article "An Analysis of the Status of a Transgender Beneficiary for the Purposes of Islamic Will within the South African Context" is of much import in our times, not just in South Africa but throughout the Muslim world. Inter alia, it raises two important issues regarding inheritance laws in Islam: surgical change of sex and its possible impact on inheritance and a daughter's inheritance rights in contrast to that of a son. This paper will focus on a response to the second issue by delving into viewpoints of a contemporary US-based Islamic scholar from Pakistan, Javed Ahmad Ghamidi (born 1952). This paper argues that if a philological revisiting of texts like the Qur'an can offer interpretations in such manner as would, based on benefits received from a daughter or based on her needs, afford her the right to shares equal to or greater than those of the son, there might be no need to argue for the inheritance right of a legatee based on the assertion of newly established identity on the grounds of surgical changes in anatomy. The question of identity of such a person may be of great import but to argue for greater inheritance rights on those grounds might be far more complex and challenging in Islamic discursive tradition. In other words, based on a philological reading of Quranic text, I raise questions regarding the possibility of bequeathing additional property to an heir as a legatee, regardless of gender, based on that heir's needs or the benefit s/he afforded the legator.

Assertions about Islamic law in Abduroaf's article seem to be based on an understanding of a few *madhāhib* (schools of law) in Islamic legal and intellectual traditions. Since the paper has a normative part, it does suggest possible stratagems (*ḥiyyal*) to resolve issues that women and transgender people face in Islamic law in modern times. One of the problems with these approaches is that much modernism in Islamic intellectual traditions relies on "hermeneutics of recovery" to gain credibility in the Muslim world, which, for most part, has traditionally been logocentrically deontological.[1] As Wael Hallaq also argues, primary reliance on utilitarianism in contrast to *Hadith* and *Akhbār* (reports) based traditionalist approaches has never been quite successful in gaining credibility in Muslim intellectual traditions.[2] Even the much talked about and often appropriated "teleological approach", as in 14th century *Shatibi*'s "*Maqāṣid al-Shariah",* induces philological arguments from texts like the Qur'an and the *Hadith* to establish its credentials.[3]

With primary emphasis on philology in his hermeneutics, Ghamidi argues that the basis for difference in shares in the Qur'an (4:11) is "who among them is closer to you [to the legator] in benefit" (*ayyuhum aqrab lakum al-naf'ā*) and that "Allah enjoins you regarding your children" (*yuṣīkum Allah fī awlādikum*) is in effect "*after* the will has been executed" (*min ba'd waṣīyyah*). It cannot be determined which "relationship" in itself (male or female) is more beneficial to the legator (*lā tadrūn ayyuhum aqrab lakum al-naf'ā*) just as after the deceased legator society cannot determine which

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1 For a brief description of "the hermeneutics of recovery," see Jonathan Culler, *Literary Theory: A Very Short Introduction* (Oxford: Oxford University Press, 1997), 64. By Logocentric deontology, I mean an approach to ethics and morality that is based on the notion that the "rules" are given in the text and "good" is following them regardless of what might seem beneficial otherwise in utilitarian terms.

2 Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh*. (Cambridge: Cambridge University Press, 1997), 231-254.

3 For a concise survey of Shāṭibī's approach, see Hallaq, *A History of Islamic Legal Theories*, 163-206; see also Muhammad Khalid Masud, *Islamic Legal Philosophy: A Study of Abū Isḥāq al-Shāṭibī's Life and Thought* (Islamabad: Islamic Research Institute, 1995). For an excellent commentary on some recent trends among Muslim intellectuals and scholars to deal with the crises of modernity, see Hallaq, *A History of Islamic Legal Theories*, 207-262. *Ḥadīth* as a collection refers to records of the sayings, teachings, and tacit approvals attributed to Prophet Muḥammad in historical reports judged for authenticity by Muslim scholars in varying degrees of strength of transmission. *Ḥadīth* may also include stories and narrations regarding the Prophet that might not have anything related to religion as such.

"relationship" among the legatees or shareholders was more beneficial to them or to what extent it was beneficial.[4] It is, therefore, for God to decide the shares. However, in this understanding and interpretation a female legatee, as a beneficiary of the will, could receive equal or greater share than her brother depending on her need or "the benefit" received by the legator-testator, which would include love and affection inter alia.[5]

Below is the full text of the pertinent Quranic verse and has been translated with Ghamidi's view in consideration:

> Allah enjoins you regarding your children that a male heir's share is equal to that of two female heirs. And if there are only female heirs among the children and they are more than two, they shall receive two-thirds of the inheritance; and if there is only one female, her share is half. And if the deceased has children, the parents shall inherit a sixth each; and if [s/]he has no children and only the parents are his [or her] heirs, his [or her] mother shall receive a third [and the rest, the father]; and if [s/]he has brothers and sisters, the mother's share is the same one-sixth [and father's too, the same one-sixth]. These shares are to be given after the will has been executed and after discharging any debts [s/]he left behind. You know not who among them is closer to you in benefit. [On this basis] This division is God's decree. Indeed, God is All-Knowing and Wise (4:11).[6]

To appreciate the argumentation behind this view, Islamic law or ***fiqh*** must be seen as a human attempt at understanding the *Shariah* as contained in the foundational religious sources of the Qur'an and the teachings of Prophet Muḥammad.[7] Certainty of "content(s)" of religion (as opposed to its interpretation or application) is established in Islamic legal traditions through concurrent transmission and perpetual agreement *(tawātur* and *ijmā'*) since the Prophet's time. *Sunnah* (the Prophet's way), therefore, in a strictly

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4 Which is to say "the relationship" not a particular person with that relationship to the legator. Javed Ahmad Ghamidi, *Mizān* (Lahore: al-Mawrid, 2018), 524.

5 Ghamidi, *Mizān,* 524-525.

6 Author's translation.

7 In contrast to *fiqh* (human understanding of Divine guidance to derive and enact law), *Shariah* is seen by jurists as the infallible Divine guidance itself.

religious sense may be seen as those Abrahamic practices and rituals of religion that the Prophet accepted or modified and then instituted and established in his community.[8] This *Sunnah* was transmitted generation after generation through concurrence (*tawātur*). The Prophet's way transmitted through individual historical reports or a combination of such reports (*akhbār aḥād*) in *Hadith* and, therefore, do not belong to this category on their own. Indeed, they are seen by most schools of Islamic law as singular reports of probable attribution to the Prophet.[9] Hence, unlike the Qurʾān and the *Sunnah*, *akhbār aḥād* may not always be regarded as foundations of law in their independent capacity. Rather, they remain significant as historical sources that reflect interpretations and applications in the Prophet's times.[10] Scholarly approaches in the study of *akhbār aḥād* entail taking into account specificity and generality of a particular narration among aspects.[11] Many modernist Muslim scholars rejected the notion of infallibility granted in traditionalist epistemology to the consensus (*ijmāʿ)* of early scholarly opinions and interpretations.[12] On the one hand, to such scholars the approaches in hermeneutics that focus more on sources extraneous to the text itself (as *akhbār aḥād*) than on the Qur'an, its language, and its literary aspects remain ancillary and peripheral in attempts to decipher authorial intentionality. On the other hand, Quranic text is assumed to be univocal and equivocal even though human faculty of understanding might remain flawed in instances of interpretation. The *hadith* in reference, which we take up below, is:

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8 Ghamidi, *Mizān,* 14.

9 Attribution in varying degrees of strength of transmission, which strength is then used to gauge the level of authenticity. The criteria for estimating the strength are varied and may be based on the number or reliability of narrators as well as on corroborating chains of transmission. Textual and inter-textual analyses are also sometimes used to determine the level of authenticity.

10 Wael B. Hallaq, "The Authenticity of Prophetic *Ḥadīth*: A Pseudo-Problem", *Studia Islamica*, No. 89 (1999), 75-90.

11 See for example, Shāh Walī Allāh, *The Conclusive Argument from God: Shāh Walī Allāh of Delhi's Ḥujjat Allāh al-Bālighah*, trans. Marcia K. Hermansen (Leiden: E.J. Brill, 2003), 472-478.

12 See Asif Iftikhar, "A Note on *Ijmāʿ*," *Renaissance* 21, no.5 (May, 2011), 5-7.

> *"*No bequeathing whatsoever for an heir [who has already been given his or her share in Divinely decreed distribution] *"Lā waṣiyata liwārith."*[13]

Based on hermeneutical approaches delineated above, Ghamidi published his first work on Islamic law of inheritance in Arabic around 50 years ago and challenged some long-held notions, particularly those related to the adjustment of proportions in mathematical anomalies that traditional interpretations had caused.[14] The doctrine of proportionate reduction (*'awl*) was applied in various ways to resolve this issue of over-subscription of property.[15] Ghamidi's reinterpretation, therefore, offered a philological critique to these aspects of traditional interpretations. His reinterpretation of the verses of the Qur'an pertinent to shares (or possible shares) of daughters is, in a sense, a by-product of his critique. To get a sense of where he parts from tradition, one may take a general look at his views on inheritance law as he understands them from the Qur'an. These views may be summarized as follows: first, outstanding debts from the deceased's property are to be paid. Second, whatever she or he has bequeathed in his or her will, which should be based on justice but (as opposed to the opinions of traditionalists) may be more than one third. Third, shares to his or her heirs are to be paid. Again, in stark contrast to the opinions of traditionalists, Ghamidi asserts that, "owing to any extra need of an heir or because of any additional

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13 For example, in Abū ʿAbd Allāh Muḥammad ibn Yazīd ibn Mājah al-Rabʿī al-Qazwīnī (d. 887), *Sunan ibn Mājah*, vol. 4, eds. Shu 'ayb al-Arnu'ūṭ, 'Ādil Murshid, Muḥammad Kāmil Qurrah Balalī, & 'Abd al-Laṭīf Ḥirz Allāh (Dār al-Rislālah al-'Ālamiyyah, 2009), 18, "*Kitāb al-Waṣāyā*", no. 2714. Several jurists regard Q.2:180 (directing those nearing death to bequeath for parents among others) as abrogated through this *khabar wāḥid*. Ghamidi also regards the verse as abrogated albeit through Q. 4:11. Javed Ahmad Ghamidi, al-*Bayān* vol. 1 (Lahore: al-Mawrid, 2018a), 188-191. Even though discussion on the chain of narrators will not be appropriate for an article of this length and nature, it might be pointed out that, despite corroboration of the narration through other routes (*ṭuruq*), the chain of narrators of this report is deemed as weak owing to ambiguity in a narrator's identity. Furthermore, since some schools do not accept the notion of *khabar wāḥid* having the capacity to abrogate *mutawātir* Quranic text, the whole argumentation on abrogation in this case might be reviewed. Perhaps, what has happened here is specification (*takhṣīṣ*) not abrogation (*tansīkh*). In other words, one might ask if the "Divine decree" is actually for post-*waṣīyah* property left over.

14 Shehzad Saleem, "Ghamidi's Life and Work," al-Mawrid Archives, 22.

15 See for example, N.J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 47-51.

services rendered by him or her, the legator can also include such an heir in his or her will (in addition to the legatee's share as a son or daughter or parent or spouse)." Fourth, this will is executed, spouses and parents shall receive their shares.[16] Finally, the primary legatees, the children, shall receive their shares as decreed by Allah.[17]

It is this part regarding shares of "legatees" that, according to Ghāmidī (and most Muslim scholars), cannot be changed by *ijtihād* (juristic reasoning).[18] Ghamidi asserts that the distribution as he understands it from the Qur'an is primarily based on the idea of the "benefit of relationship in kinship" rather than on "the actual benefit from or need of an heir". He believes that this benefit in a daughter's case is quite often transferred to her husband after her marriage. Similarly, a wife gives companionship and care to her husband, but the husband not only provides companionship but also takes up the financial responsibility of providing for her needs. For this reason the share of a son is twice of a daughter and the share of a husband is twice that of a wife.[19]

Whether one agrees with Ghamidi's understanding of the wisdom (*ḥikmah*) of what he regards as Divinely decreed distribution, certain aspects of his deviation from traditionalist interpretations allows for considering the possibilities of significant changes in Islamic law. Two of these aspects that pertain to our points of focus are as follows: one, as opposed to the opinions

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16 Emphasis mine

17 Ghamidi, *Mizān*, 518-533

18 In this part, he infers from the Qur'an that if there are only two or more girls among the children, they shall receive two-thirds of the inheritance, and, if there is only one girl, her share is one-half. If the deceased has only male children, all his/her wealth shall be distributed among them. If she or he has boys and girls, the share of each boy shall be equal to that of two girls in his or her full property. If there are no children, the deceased's brothers and sisters shall take their place. Parents shall receive a sixth each. If parents are the only heirs, one-third of the whole property shall be the mother's and two-thirds the father's. The deceased's wife shall receive one-eighth of what he leaves behind if he has children; if he does not have children, his wife's shall have one-fourth. If the deceased is a woman, her husband shall receive one-half of what she leaves if she does not have any children; if she has, her husband's share shall be one-fourth. If there are no heirs, the legator may decree someone an heir. If this person is a relative and has one brother or one sister, they shall be given a sixth of his share and he himself shall receive the remaining five-sixth. If he has more than one brother or sister, they shall be given a third of his share and he himself shall receive the remaining two-thirds.

19 Ghamidi, *Mizān*, 525.

of traditionalists, a legator's will may be for more than one third (albeit based on justice) as the *hadith* (which is also *khabar wāḥid*) in this regard may be read as a specific example of application (of the principle of justice) rather than a universal principle of the *Shariah,* bearing in mind that a *khabar wāḥid* (as a probable source of history) cannot be placed in a position where it abrogates what has been generalized unequivocally in a concurrent and established (*mutāwatir*) religious source as the Qur'an. Two, Ghāmidī's assertion that, owing to any extra need of an heir or because of any additional services rendered by them, the legator can also include such an heir in their will, an interpretation that would place the *hadith "*No bequeathing whatsoever for an heir [who has already been given his or her share in Divinely decreed distribution]" in consonance with Qura'nic "Allah enjoins you regarding your children*".* In other words, as "heirs", they would have no right to receive anything further from the shares already bequeathed to them in Divine decree. However, someone from whom the deceased received additional benefit or service or someone in greater need than the rest is in an entirely different category and, as such, could be the beneficiary of the legator's will beyond his or her share. This addition would be in compliance with the directive "*after* the will has been executed*"*.[20] As corroborative (not primary) evidence for his view that the Divinely decreed distribution is based on who "closer to you [the deceased] is in benefit [of relationship rather than of actual service]" (*aqrab lakum al-nafʿā*), Ghāmidī adduces the *hadith* "A Muslim cannot be an heir of an deliberate denier of faith nor can such denier[21] be a Muslim's" (*La yarith al-Muslim al-kāfir wa lā kāfir al-Muslim*)[22] as, in Ghāmidī's thought, it is the benefit of relationship not of service that is necessarily severed.

The implications of these interpretive views open the possibility of bequeathing a share beyond the "Divinely decreed" one for a daughter that

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20 Emphasis mine.

21 In Ghamidi's thought, "*kāfir*" as a specific Quranic term refers to deliberate denier of Islam even after the truth of this religion becomes evident to him or her. See Ghamidi, *Mizān*, 600-602. In the context of inheritance inter alia, Ghamidi keeps the term specific to the "deniers" (*kāfirs; Arabic plural: kuffār)* during the times of the Prophet as only they, on the authority of the Qur'an, could be said to have denied Islam this way. (Ghamidi, *Mizān*, 525).

22 Muḥammad ibn Ismāʿīl Abū ʻAbd Allāh al-Bukhārī, *al-Jāmiʿ al-Ṣaḥīḥ*, ed. Muḥammad Zuhayr ibn Nāṣir al-Nāṣir, 1st ed., vol.8 (al-Najāh: Dār Ṭawq, 2001), 156, "*Kitāb al-Farāʾiḍ*", no. 6764.

might bring her share equal to or greater than that of her brother based on her additional need or service. The interpretations also raise certain questions vis-à-vis Ghamidi own approaches. A basic question would be whether "closest to you in benefit" be regarded as "wisdom [of Divine decree]" (*ḥikmah*) or *ratio legis*: the underlying principle in legislation (*'illāh)* for the "Divine decree". Thus, it would be valid to ask if it might be this principle in *Hadith* that is the foundation for bequeathing the remainders to beneficiaries or relatives. For example, the *hadith* advises giving the remainder to the male relative (instead of a female relative): "Give the heirs their share and whatever remains is for the closest male [relative]" (*alḥiqū al-farā'iḍ li-ahlihā fa-mā tarakat al-farā'iḍ fali-awlā rajul dhakar*).[23] If this principle of benefit had been applied to the two cases mentioned above, why is it not *ratio legis* instead of just "underlying wisdom" of a universal decree for all times?

Again, if "closest to you in benefit" is *ratio legis*, in societal setups where norms and mores have altered tribal patriarchy to the extent that daughters take up the primary role of responsibility for their parents, would there be any possibility of change in Islamic law regarding distribution of shares to the heirs as well? Discourse within circles of Muslim scholars may yet respond to some of these questions. Nevertheless, Ghamidi's approach has already opened the possibility of interpreting the verses in a way that might result in equal or greater property afforded to the daughter in comparison to the son's share.

To conclude, modernist scholarship in Islamic intellectual traditions have attempted to revisit texts and look for newer philological interpretations with the objective of recovering what is considered the actual authorial intention. Regardless of whether this objective is always achievable, most of these modernist scholars have also circumvented the confines of scholarly consensus in matters pertaining to interpretation and *ijtihād*. The strength of these scholars in gaining credibility depends on the strength of their philological argumentation. Ghamidi's philological argumentation allows for the possibility for a legator to give their daughter a total share equal to or greater than that of their son. Furthermore, this response also investigates the possibility of creating exceptions to the general principle of "Divinely

[23] al-Bukhari, *al-Jāmi' al-Ṣaḥīḥ,* 153, 6746.

decreed" shares to the heirs themselves if the *ratio legis* in a modern setup has effectively changed. In both cases, these interpretations also open the logically necessary possibility of equal or greater share to a transgender heir, regardless of whether their preferred identity is legally accepted.

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