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Reforming the Prosecution Service in the Subordinate Courts of Bangladesh

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ইসলামী আইনে রোমান আইনের প্রভাব : একটি তুলনামূলক পর্যালোচনা



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Daughter's Preferential Right of Inheritance: *Kalala* Revisited

Begum Asma Siddiqua *

Sayeeda Anju **

Abstract: *Islamic law of inheritance has developed with the interpretations of the jurists based on the verses of the Quran and Sunna of the Prophet (pbuh). The entitlement of a daughter in inheritance in families devoid of son has become a concern for such families in Bangladesh. Muslim Countries like Tunisia, Iraq and Indonesia have enhanced the position of daughter in families where there is no son. The research has examined the term kalala and its interpretation by jurists to understand the differences in allotment of daughter's share in the three countries mentioned and the rest of the world. The study, thus aims to explore possible reform for daughters right of inheritance in absence of sons in Bangladesh. An initiative was taken by the Law Commission of Bangladesh to enhance the status of daughters through the statutory law of the country. Neither Bangladesh Government, nor the Law Commission have so far taken any further steps to execute their plan.*

Keywords: *Kalala, Walad, Inheritance, Daughter*

1. Introduction

Daughter's share in Islamic law has been very specific in the Quran. A daughter may inherit her specific portion prescribed by the Quran or unspecified portion along with a son conforming to the principle of *tasib* the male taking two shares and the female one share. The status of the daughter and the status of the praepositus is a grey area against Sura Nisa verse 176 read with juristic interpretations. The word *walad* in Sura Nisa verse 176 meaning child has been interpreted by the jurists as a son whereas Hazrat Ibn Abbas, clarified it to mean both a son and a daughter. He is a renowned *sahaba* and was highly regarded for his knowledge of traditions and his critical interpretation of the Quran. The jurists upheld the view that a praepositus can be contemplated as a *kalala* in the absence of a son and not a daughter. Indonesia following Hazrat Abdullah Ibn Abbas' explanation adjudged that collaterals cannot inherit in the presence of a daughter. Earlier same explanation has been enunciated in the statutory laws of Tunisia and

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Iraq. The Law Commission of Bangladesh in 2012 in its 113 Report recommended to grant a daughter similar status of a son in his absence. Except for these three countries and the Law Commission Report of Bangladesh the Muslim world follows the juristic interpretation. The present article aims to explore whether a praepositus is not a *kalala* in the presence of a daughter. For that purpose the paper presents various arguments, delves into the theory of *Sharia* law and examines the term *kalala* to value daughter's right to inherit similar to a son.

Islamic law is the most widely religious legal system thus forming one of the most common world legal system. The researchers have examined the statutory laws applicable to Muslims in Tunisia, and Iraq and case laws in Indonesia to find out the situation of daughters' inheritance right. The researchers have selected the term *kalala* to find out the various interpretations made by scholars of different countries at different period of history to increase the share of a daughter in the absence of a son. The study conveys the necessity for rethinking of the share of daughters in the Islamic law of inheritance.

2. *Shariah* the Divine Law

Shariah, the Islamic law is a revealed law. *Shariah* is embodied in three dimensions of *Din*, they are *Iman*, Islam and *Ihsan*. *Din* in general sense incorporates judgment, custom and religion. *Iman* is belief or faith in the existence of, oneness of God, angels, revealed books, the prophets, day of judgment and divine decree. Islam is submission to the will of Allah and *Ihsan* is the act of doing good or performing one's duties or any lawful/productive task in the best possible way, with excellence and perfection. These three dimensions of *Din* are qualitatively different from each other and not hierarchical layers. Outwardly, while performing the actions named Islam, the person will inwardly be characterised by having a trust in the unseen matters, and will be working towards the perfection of these two outward and inward realms in the process.¹

¹ 'Abd ar-Rahman I. Doi, *Shari'ah Islamic Law* (Ta-Ha publishers, Second Revised Edition, London, 2013), pp. 4-16.

In *Shariah*, Allah is the Lawgiver and *Ummah*, the nation of Islam enjoys a derivative rule making power and not an absolute law-creating prerogative. The Quranic injunctions from which *Shariah* is derived are further explained and translated into practice by the *Sunnah* of the Prophet. Every Muslim who is capable and qualified to give a sound opinion on matters of *Shariah*, is entitled to interpret the law of Allah when such interpretation becomes necessary. *Shariah* gives priority to human welfare over human liberty like each person's equal right to life and to a descent standard of living. Yet there are limits of Allah which are imposed in order to curtail man's ambitions and devices. These limits provide safeguards for the right of people and nations. It gives people a sense of responsibility to Allah and hence to all mankind. These limits stop him from being inhuman, and make him respect the life and property of others, give equality of treatment to all individuals, male and female, before the law. In this backdrop this paper endeavors to understand the status of the praepositus in the presence of a daughter and the relevant questions ensuing it.² The praepositus poses as a *kalala* in the presence of a daughter according to the juristic interpretation followed in all Muslim countries except Tunisia, Iraq and Indonesia where a pareapositus is considered as a *kalala* in the absence of both a son and a daughter. To begin with it is of utmost importance to understand the term *kalala* as mentioned in the Quran.

3. Quranic verse of *Kalala*

The verses pertaining to fixed fraction of inheritance in the Quran are three, they are Sura Nisa verse 11, 12 and 176. Among the three verses 12 and 176 mention the rule of *kalala*. For the purpose of daughter's share verse 176 reads, 'They request from you a [legal] ruling. Say, Allah gives you a ruling concerning one having neither descendants nor ascendants [as heirs]." If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two-thirds of what he left. If there are both brothers and sisters, the male will have the share of two females. Allah makes clear to you [His law], lest you go astray. And Allah is knowing of all things.'

² *Ibid*, pp.16-32.

This verse was revealed long after the revelation of the rest of this Sura. According to certain traditions, this verse was the very last Quranic verse to be revealed.³ This Sura comprises several discourses which were revealed on different occasions during the period ranging probably between the end of 3 AH to the beginning of 5AH. . The instructions about the division of inheritance of the martyrs and for the safeguard of the rights of the orphans were sent down after the Battle of Uhud in which 70 Muslims were killed. Then naturally the question of the division of the inheritance of the martyrs and the safeguard of the rights of their orphans arose in many families at Al-Madinah. From this it is concluded that verses 11 and 12 were revealed on that occasion.⁴ Verse 176 was revealed long after the completion of all other verses in Sura Nisa. Al Bukhari recorded that this verse was the last one to be revealed. Imam Ahmad recorded that Jabir bin Abdullah said “The Messenger of Allah came visiting me when I was so ill that I fell unconscious. He performed ablution and poured the remaining water on me... When I regained consciousness I said, I will only leave inheritance through *kalala*⁵ so what about the inheritance that I leave behind.” Anticipating death Jabir ibn Abdullah al Ansari enquired about distribution of his property. After this event the *kalala* verse was revealed.

The term *kalala* means leaving no parents or children as heirs occurs twice in the Quran. Wide divergences exist regarding its interpretation both in translations of the Quran and amongst scholars, while dictionaries generally pass over its technical meaning. It is essential to juxtapose *kalala* in the *Sunnah* after learning its position in the Quran.

4. *Kalala* in *Sunnah*

The word *kalala* has acquired a different meaning referring to *Sunnah* as opposed to dictionary meaning. Hazrat Jabir bin Abdullah relates that the wife

³ MS Abdul-Rahman, *Tafsir Ibn Kathir's Juz'6 (Part 6): An-Nisaa 148 to Al-Ma'idah 81* (2nd Edition), p. 47.

⁴ Sayyid Abul Ala Maududi, “Surah An-Nisa (The Women),” *Englishtafsir.com* available at: <http://www.englishtafsir.com> accessed on 12 Oct 2023

⁵ Tafheem ul Quran, “Sura 4 An-Nisa, Ayat 176,” *Islamicstudies.info* available at <http://islamicstudies.info> accessed on 12. Oct 2023.

of Hazrat Saad bin Rabi⁶, along with her two daughters, came to see the Prophet (pbuh) and said, "O Messenger of Allah! These two are the daughters of Saad bin Rabi, who fought alongside you in the Battle of Uhud and was martyred. Their paternal uncle has taken all their inheritance"; their uncle had taken all the wealth that was left by Hazrat Saad bin Rabi, leaving them with nothing. "Furthermore, I cannot give them in marriage until they have some money." The Prophet (pbuh) replied, "Allah the Almighty will reveal His verdict regarding this matter."

Subsequently the Sura Nisa verse 11 and 12 regarding inheritance were revealed. The Holy Prophet then called their uncle and instructed him to give one third of the wealth of Saad to his daughters and to give one eighth to their mother and the remainder will be his share. (Sunan al-Tirmidhi, Kitabul Fara'id, Bab Maa Ja'a fi Mirath al-Banaat, Hadith 2092).

Hazrat Saad bin Rabi al Ansari participated in the battles of Badr and Uhud and was martyred during the Battle of Uhud. The Battle of Uhud was fought on 23 March 625 (3 Shawwal 3 AH of the Islamic calendar) at Mount Uhud, in what is now north-western Saudi Arabia.

Regarding Sura Nisa verse 176 it is claimed by some that it was the last verse of the Quran and some others maintain that it is among the last few verses of the Quran.⁷ Abu Ishaq narrated, "*I heard al-Bara' b. 'Azib RA say: 'The last verse revealed (in the Holy Quran) is that pertaining to kalala.'*"⁸ Imam 'Izz Ibn Abd Salam also holds this opinion, however, this opinion is rejected by Imam Ibn Hajar, for he states the Prophet (pbuh) was alive for the next 50

⁶ Saad Ibn Rabi Al-Ansari was a Sahaba as well as an Ansaar. His full name was Saad ibn Rabi bin Imra Il-Qais bin Malik bin al Aghar bin Thalabah bin Kaab bin Al-Harith bin Al-Khazraj Al-Ansari. He was one of the people who embraced Islam in the hands of Musa'b bin 'Umair, a Sahaba. He was a tribal leader of Banu Al-Harith. Sa'd was generous even before he became an Ansaar.

⁷ The final verse of the Quran was revealed on the 18th of the Islamic month of Dhu al-Hijjah in the year 10 A.H., a date that roughly corresponds to February or March 632. The verse was revealed after the Prophet(pbuh) finished delivering his sermon at Ghadir Khumm. Jabir bin Abdallah He died in 78 AH (697) in Medina, Saudi Arabia.

⁸ *Sahih Muslim*, Islamic Foundation, Hadith no.1618

days after this verse is revealed.⁹ It seems that even if Sura Nisa the verse 176 is not the last verse but it is among the last few among the revealed verses.

The question on understanding *kalala* was asked repeatedly or probably appeared in public attention many a time. Umar ibn al-Khattab RA with much curiosity asked Prophet (pbuh) on the topic of *kalala*, until he patted his shoulder and said “It is sufficient enough for you on *kalala* stated in the last verse of Sura Nisa’¹⁰

Jarir bin Abdullah, a Yemeni tribal leader and *sahaba* (companion of the Prophet) and others mentioned that, Ibn Abbas, cousin of Prophet (pbuh) and *sahaba*, and Abdallah Ibn Zubayr, grandson of first Khalifa Hazrat Abu Bakr Siddique used to judge that if a person dies and leaves behind a daughter and a sister, the sister does not inherit anything.¹¹

Al Bukhari recorded that Abd Allah ibn Masud, *sahaba* and a great interpreter of Islam gave a ruling on verse 176 that a sister inherits with a daughter and also son’s daughter. Majority of scholars agrees to this interpretation making a sister an accompanying residuary in the presence of a daughter and/or son’s daughter. The majority of the scholars have deviated from the popular meaning of *kalala*. This interpretation makes a person *kalala* only in the absence of a son and daughter’s presence or absence is immaterial. Daughter is therefore not considered as a child by majority of jurists for the purpose of inheritance.¹²

Prophet Muhammad (pbuh) passed away on 8 June 632 (11 AH) (aged 61–62) in Medina, Hejaz, Arabia. Hazrat Ibn Abbas (619 AD–687 AD) passed away at the age of 68 years. Abd Allah ibn al-Zubayr ibn al-Awwam (May 624 – October/November 692) also passed away at the age of 68 years. Both the *sahabas* mentioned here outlived Prophet (pbuh) and both are famous

⁹ *Fath al-Bari Syarh Sahih al-Bukhari* Vol 8 hadith no 317 is bn Hajar-al-Asqalani's Hady al-Sari which is a commentary on Sahih al Bukhari.

¹⁰ Abur Hamdi Usman, Mazlan Ibrahim and Mohd Akil Muhamed Ali, “How Do Singular and Plural Methods Applied? Review of Shihab's Exegesis,” *World Applied Sciences Journal*, (2014)

¹¹ MS Abdul-Rahman, *Tafsir Ibn Kathir's Juz'6 (Part 6): An-Nisaa 148 to Al-Ma'idah 81* (2nd Edition), p.47.

¹² Ibid, pp.47-48.

sahabas. It seems that the other *sahabas* hold on to the fact of Hazrat Saad bin Rabi without paying attention to the fact that Sura Nisa verse 176 was revealed long after Sura Nisa verses 11 and 12. In addition looking into the meaning of the word *walad* which has been translated as both a boy and a girl as mentioned in the Quran many times, the same word in a single verse of the Quran cannot be translated otherwise. The linguistic facts show that the Quran uses several words to express the meaning of the word child; namely: *al-walad*, *al-thifl*, *al-ibn*, *al-bint*, *al-dzurriyat*, *hafadah*, *al-shabiy*, *al-ghulam*. The Quran often uses the word *al-walad* to refer to children. The word *al-walad* in all its derivations is used in the Quran sixty-five times. The word *walad*, whose plural form is *awlad* in Arabic, means a child born to his parents, whether he is male or female, whether he is big or still small.¹³ The revelation period of interval of the two verses of Sura Nisa, verse 12 and verse 176 are of considerable significance for the scholars.

5. *Kalala* Discourse of Scholars

D Powers¹⁴ has argued that the meaning of the word *kalala* remained unknown for a long time or bore different meanings like it meant a person without descendants or both ascendants and descendants etc. The discourse on *kalala* circulated from 50 AH to 2nd century AH which gave ample time to define and redefine the word.¹⁵ He mentioned that the question on understanding *kalala* was asked repeatedly by Umar ibn al-Khattab RA with much curiosity. Pavel Pavlovitch¹⁶ made an extensive comparison of *isnad*

¹³ Ruslan Wahab and Mardyawati, "Term of Child in Analysis of Languages Various By The Quran", *Journal of Research and Multidisciplinary* ISSN: 2622-9536 Print ISSN: 2622-9544 Volume 4, Issue 1, (March 2021), pp. 393-400, available at: <http://journal.alhikam.net/index.php/jrm> accessed on 10 Nov, 2023.

¹⁴ David Powers is an outstanding scholar of classical Islamic law and legal system.

¹⁵ Pavel Pavlovitch, "Some Sunni Hadith on the Qur'anic Term *Kalāla*: An Attempt at Historical Reconstruction", *Islamic Law and Society* 19 (2012), pp. 86-159, available at Brill <https://brill.com>

¹⁶ Pavel Pavlovitch is professor in Medieval Islamic Civilization at the Department of Arabic and Semitic Studies, Sofia University, St. Kliment Ohridski, Bulgaria. He holds a BA degree in history from Baghdad University, Iraq, and MA and PhD degrees from the University of Sofia.

with *matn*¹⁷ of numerous Hadiths on *kalala* to show the differences and the claim made by D Powers. It appears that the crystal clear Sura Nisa verse 176 being among the last verses gave rise to extensive discourse for the majority of the jurists to entwine themselves around the decision of Prophet (pbuh) given in the case of Saad bin Rabi's family immediately after the revelation of Sura Nisa verse 11 and 12 ignoring the fact that verse 176 is revealed after a long interval.

There are a few jurists who agree with Hazrat Ibn Abbas and Hazrat Abdallah Ibn Zubayr. According to Hazairin,¹⁸ the Indonesian scholar *kalala* is a person who dies not leaving an heir of children in general. The definition of a *walad* denotes a boy as well as a girl. According to Hamka,¹⁹ *al-walad* includes boys and girls as well as descendants through the male line. Muhammad Syahrur²⁰ explains that *kalala* is someone who dies without leaving heirs to children, both sons and daughters, as well as grandchildren, both grandsons and granddaughters, and also does not have a father and mother, grandfather or grandmother, so that he does not distinguish between a boy and a girl.²¹ Accepting the differences of opinion based on the said Hadith it can also be argued from the Quranic verse as interpreted by Hazrat Ibn Abbas that the sisters of the testator cannot inherit if the testator leaves son or daughter. He (Hazrat Ibn Abbas) made an analogy with the condition of the mother's

¹⁷ Prophet (pbuh) sayings consists of two parts: *isnad* which is the series of persons/narrators who report/ narrate) and *matn* which is the saying or the narration itself.

¹⁸ Prof. Dr. Mr. Hazairin (28 November 1906 – 11 Desember 1975) was the Indonesia's Minister of Home Affairs from 30 July 1953 to 18 November 1954, serving in the First Ali Sastroamidjojo Cabinet, Indonesia.

¹⁹ Abdul Malik Karim Amrullah, better known by his pen name Hamka (17 February 1908 – 24 July 1981) was an Indonesian Alim, philosopher, writer, lecturer.

²⁰ Shahrour was an Emeritus Professor of Civil Engineering at the University of Damascus who wrote extensively about Islam. He was trained as an engineer in Syria, the former Soviet Union and Ireland (11 April 1938-21 December 2019).

²¹ Isnina, "The Position of the Daughter Hinders Full Siblings" refers to-Hazairin, (1967) *Hukum Kewarisan Bilareral Menurut Qur'an dan Hadits*. Tintamas. Hamka. (1984). *Tafsir al-Azhar* (vol. IV, p. 318). Yayasan Nurul Islam. Syahrur, M. (2004). *Metodologi Fiqih Islam Kontempore Judul Asli: Nawh usul Jadidah Li al-Fiqih al-Islami*. eLSAQ Press.

nuqsan (barrier) for having children. Mother gets 1/3 (one-third) to 1/6 (one sixth) because the testator has children, the children are not distinguished whether they are male or female; the husband is restricted from 1/2 (half) to 1/4 (quarter) and the barrier of wife from 1/4 (quarter) to 1/8 (one-eighth) because of the child irrespective of the gender. This understanding was also followed by Ibn Hazm²² who states that there is no difference between sons and daughters when placing the husband or wife's share with regard to the presence of children. The construction of thinking used by Ibn Hazm is followed by Shia who state that, sons and daughter will hinder the full siblings of the testator brothers and sisters.²³ The countries which interpreted *kalala* to be a person in presence of both a son and a daughter conform to the explanation addressed by the two *sahabas* and followed by a number of modern day jurists.

6. Reforms in the three Muslim Countries

The Personal Status Code of Tunisia was presented by Habib Bourguiba, President of the Council, in August 1956. This suite of legislation profoundly transformed the legislative status of Tunisian women, the reworking of the rules of devolution of the inheritance to the benefit of the only daughter or daughters.²⁴ Bourguiba consulted with the Ḥanafī *mufī* Habib Belkhouja²⁵ and

²² Abū Muḥammad 'Alī ibn Aḥmad ibn Sa'īd ibn Ḥazm also sometimes known as al-Andalusi az-Zāhiri; (7 November 994 – 15 August 1064 corresponding to 456 AH) was an Andalusian Muslim polymath, historian, muhaddith, jurist, philosopher, and theologian, born in the Caliphate of Cordoba, present-day Spain. Described as one of the strictest hadith interpreters, Ibn Hazm was a leading proponent and codifier of the Zāhiri school of Islamic thought and produced a reported 400 works, of which only 40 still survive. In all, his written works amounted to some 80,000 pages. Described as one of the fathers of comparative religion, the *Encyclopaedia of Islam* refers to him as having been one of the leading thinkers of the Muslim world.

²³ Isnina, 'The Position of the Daughter Hinders Full Siblings' *Atlantis Press* available at: <https://www.atlantis-press.com> › accessed on 12 Oct 2023.

²⁴ M Morel, 'The Tunisian revolution under the gender lens: 10 years ...' available at Institut du Genre en Géopolitique - <https://igg-geo.org> › ... accessed on 12 Oct 2023.

others²⁶ on the reforms he wanted to enact. Bourguiba presented the Code as a fresh return to the true spirit of Islam through the reform of matters related to women's status. Habib Bourguiba, although said to have accomplished secularization of Tunisian law but he had not wished to make a clean break with the reference to religion. He had on the contrary opted in favour of a normative ambivalence and made himself a *mujtahid* to justify changes in the Code. Bourguiba's perception of the religious authority, underpinning policy and practice, to justify his actions and institutions as legitimate can be inferred from a letter of May 1951.²⁷ Bourguiba was not given permission by the clerics to propound for equal distribution of property to sons and daughters but he was allowed to enact in the Personal Status Code, 1956 a provision for preferential right of a daughter against collaterals in the absence of sons.

The Iraqi legislature enacted in December 1959 the *Qanun al-Ahwal al-Shakhsiya* (Law of Personal Status). It arranged the heirs into three classes identical to Shia School of classification. In 1963 the Law of Personal Status 1959 was amended mentioning that the traditional Islamic law in accordance with the school to which the parties to a case may belong will be followed for distribution of property.²⁸ It denotes that within the framework of Shia school

²⁵ Sari Hanafi, and Azzam Tomeh, "Gender Equality in the Inheritance Debate in Tunisia and the Formation of Non-Authoritarian Reasoning," *Journal of Islamic Ethics*, (27 Dec, 2019).

²⁶ Habib Bourguiba consulted with Muḥammad al-Ṭahir ibn Muḥammad ibn Muḥammad al-Ṭahir ibn Ashur (1879 – August 1973). He was a graduate of University of Ez-Zitouna and a well-known Islamic scholar. He studied classical Islamic scholarship with reform-minded scholars. He became a judge then Shaykh al-Islam in 1932. Neither Ḥanafī *mufī* Habib Belkhouja or Muḥammad al-Ṭahir ibn Ashhur agreed to all the propositions of Habib Bourguiba for which Tunisia is known to have reformed Islam with modern thoughts and did not straightaway opt for western modernization like Turkey.

²⁷ For details see, Mahmoud Sami Nabi, "Habib Bourguiba's approach to the modernization of Tunisia," available at LinkedIn <https://www.linkedin.com › pulse › habib-bourguibas-ap>. accessed on 12 Oct, 2023.

²⁸ Iraqi Law of Personal Status, 1959 Article 89. Heirs by relation and their position as to right of inheritance are:

(i) parents, children, children's descendants, according to the rule of a male taking a share double than that of a female.

of classification daughters belonging to class I will always exclude the collaterals in class II in property distribution. In 1978 another amendment was made in the Iraqi Law of Personal Status 1959 among others where it empowered a daughter to collect the entire property in the absence of sons after satisfying the spouse relict and the parents.²⁹ It demonstrates that in the absence of sons, a daughter along with other primary heirs in Sunni law or the class I heirs in Shia law will inherit similar to a son.

Indonesia affirmed preferential right of a daughter by precedent in two cases. The first of the two cases arose in the Islamic court for Mataram (a city) on the island of Lombok, West Nusa Tenggara, and involved a dispute between the descendants of two brothers, Amaq Itrawan and Amaq Nawiyah.³⁰ The second case involved the estate of a man named Haji Asrori who died in East Java in 1989. In both the cases the right of the only daughter in the absence of a son in the family raised the question of entitlement of the siblings along with the only daughter of the *parepositus*. In both cases, the trial court and appeal to high court confirmed that while the deceased's siblings are totally excluded from inheritance by a son or other agnatic descendant, siblings are not disqualified by the presence of a daughter. The Supreme Court reversed the

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- (ii) grandparents, brothers and sisters, children of brothers and sisters and
 - (iii) paternal and maternal uncles and aunts; and the uterine heirs.

The Law of 1959 as amended in 1963 added article 90. It reads as follows 'Subject to the foregoing provisions, the distribution property among the heirs by relationship shall be made in accordance with the rules of the *Sharia* which were followed before the enactment of the Law of Personal Status No. 188 of 1959, as shall also be the case in regard to the rest of the provisions relating to inheritance.

²⁹ The Iraqi Law of Personal Status, 1959 added article 91 by an amendment in 1978. The relevant portion of 91.2 reads as follows, Article 91.2 the daughter or daughters, in case there is no son, are entitled to the remaining part of the legacy, after the two parents and the spouse collect their entitlements; and they would be entitled to the entire legacy if none of the said parties exists.

³⁰ The decision by the Supreme Court is designated as *H Hikmah alia Imaq Putrahimah binti Amaq Nawiyah et al v H Nur Said bin Amaq Mu'minah*, MANo 86K/AG/1.994. For details on the arguments see, Ana Amalia Furqan et al, 'The Difference Of A Child (Walad) Concept In Islamic Inheritance Law And Its Implications On The Decisions Of The Religious Courts In Indonesia' in *Mazahib*, Vol 17, No.2 (December 2018).

decisions of the lower courts. In the first case the Court cited as authority the views of one of the companions of the Prophet (pbuh), Ibn Abbas and stated that 'so long as the deceased is survived by children, either male or female, the rights of inheritance of the deceased's blood relations, except for parents and spouse, are foreclosed'.

The Bangladesh Law Commission in 2012 in its Report no. 113 proposed to add the provision of preferential right of a daughter in statutory form as section 4A of the Muslim Family Laws Ordinance, 1961. The Law Commission did not make any exhaustive study or any concrete juristic argument or any extensive field work with the different groups of stakeholders in the society to present a well-fortified doctrine. A good initiative of the Law Commission with weak justification has not been approved by the government as yet.

7. *Kalala* Rationale for Common People

Bangladesh has not included preferential right of a daughter in the statute. The government has not taken any effective initiative in the last eleven years to open a discourse with the stakeholders to find out the merits and demerits of the Law Commission Report of 2012. It appears that the government is oblivious to the situation of daughter's preferential right. It is worth mentioning that in the wake of nuclear family around the world common people worry about their property and the one to enjoy it after their death. The authors have personally experienced many instances in Bangladesh where different persons have come up with different ideas and shared their views to keep the property for their children especially when their children are only daughters. For example,

A couple has written down a bequest of their house property for their daughters. They do not know the legal consequence. If the other heirs meaning the siblings of either parent do not agree to the bequest after his/her death the bequest must fail for all purposes.

A couple has made a gift of their house property to their daughters. A couple has made a document of gift to their daughters followed by a document of power of attorney by which the daughters have given their parents to look after the property.

A Muslim couple in India long after their twenty eight years of conjugal life remarried under Special Marriage Act, 1954 to save the property for their daughters. The husband is a lawyer and the wife is an academician.³¹

The ideas projected in this paragraph are widely followed by many families. There are a few who argue in line with the majority of jurists saying that parents should not circumvent the conditions of *Shariah* by making provisions for daughters. The common people follow and believe what the clerics say without delving into the verses of the Quran and even the clerics either are not equipped or prepared to hunt into the root of the cause of divergence in the society. Had the clerics put their efforts to verify Islam and the society in a broad perspective of Islamic jurisprudence, the scenario for daughters would have been much better in Bangladesh. If the clerics are not endowed with the responsibility towards the society then the government must facilitate a dialogue including all stakeholders with a broad approach to find out and solve the problems of such families where there are only daughters and no son to inherit property of their parents. Whether the indifference of the clerics or the government to clarify the position of daughters against the proposed amendments of the Law Commission is the consequence of misogynistic attitude is not clear but it is highly probable than not.

8. Conclusion

The Quran has generally prescribed a share for the daughter/s and in the presence of her male counterpart she has been allotted half the portion of his allocation. The majority of the jurists have interpreted the status of a praepositus as *kalala* in the presence of a daughter whereas Hazrat Ibn Abbas and Hazrat Abdallah Ibn Zubayr have interpreted praepositus' status as *kalala* in the absence of both a son and a daughter. The orientalist are of the view that the *kalala* debate emerged in 50AH and continued upto 2nd century of Hijri which shows the significance it held, the *kalala* avalanche by which the jurists were swayed away, and the choice made by them to transcribe it with a convenient meaning. With the assistance of a few jurists Tunisia, Iraq and Indonesia concurred with the minority view to the status of *kalala*. The Law

³¹ K R Rajeev, 'Kerala couple to 'remarry' so that daughters get inheritance', *The Times of India*, Mar 8, 2023.

Commission of Bangladesh in 2012 in its 113 Report conforming to the viewpoint of the said three countries recommended to grant a daughter similar status of a son in his absence. The Report is written without discussing the issue with the stakeholders thus making it a weak document. The word *kalala* as it appears in two verses of the Quran, solution given by Prophet (pbuh) in Saad bin Rabis case, the view of the *sahabas* and the modern jurists as against the word *walad* mentioned in sixty five verses of the Quran make it aptly clear that there is a hesitancy of majority of jurists to give recognition to daughters to almost equal to a son. There is a high probability that these hesitancies are the result of misogynistic attitude of those persons who pose themselves as the most appropriate authority. The sooner the government opens a nationwide discourse on preferential right of a daughter, it will be better to settle down the issue.