

## **Introduction:**

Article 27 (2) of the United Nations Convention on the Rights of the Child (CRC) imposes a direct and explicit responsibility on the parents to secure a standard of living adequate for the child's development.

“2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development”

The aim of this paper is to examine one aspect of this responsibility, namely, the right of the child to inheritance. I will argue that the financial responsibility of the parents to secure an adequate standard of living for the development of their natural child should continue even after their death. The paper is divided into three headings. The first one examines the concept of parental responsibility under article 27 taken in conjunction with the other relevant articles of the CRC. It also includes analysis of the repercussions of article 27 as an economic right of the child. The second heading discusses the main aspects of the Islamic law of inheritance in general, and the right of the child to inheritance in particular. The third and final one examines the compatibility between the right of the child to inheritance under Islamic law and the general principles of the CRC.

## **Understanding article 27(2):**

- *Responsibility of Individuals*

Since the adoption of the Universal Declaration of Human Rights in 1948 the core principle of the entire concept of “human rights” has been viewed as to guarantee the rights of the individual vis-à-vis the State to which the individual belongs.

This core principle has not been clearly inspired into the wording of article 27(2) of the CRC, which adopts the concept of primary parental financial responsibility.

This is in contrast to its counterpart article in the International Covenant on Economic and Social Rights (ICESCR) i.e. article 11. According to article 11 the State holds the primary responsibility to ensure the adequate standard of living for the Individuals. Whereas in article 27 (2) the State Steps in only when the parents are unable to fulfil their financial duty of securing the adequate standard of living necessary for their child's development.

“Parents have primary responsibility for securing this right; States must if necessary assist parents in doing so”<sup>1</sup>

It is very important, in the context of article 27, to distinguish between two levels of the State's responsibility, one is primary and the other is secondary:

1. The primary responsibility of the State:

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<sup>1</sup> Unicef, **Implementation Handbook for the Convention on the Rights of the Child**, 1998, p. 355.

This level of responsibility is guaranteed by article 4 of the CRC:

“State Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.”

Article 4 is a general article of the CRC that is concerned with the implementation of the rights guaranteed in the convention. It clearly promotes the primary responsibility of the State with regard to the implementation of all the articles in the CRC. Although article 27(2) places the primary financial responsibility to secure the adequate standard of living on the parents, this does not exempt the State from securing, for instance, the legislations necessary for supporting the parents in fulfilling their obligations. The existence of such appropriate legislations is considered a primary responsibility of the State.

## 2. The secondary responsibility of the State:

This level of responsibility is guaranteed in article 27(3),

Here the responsibility takes the form of providing material and financial assistance, within the means of the State, after the failure of the parents to provide it.

“State parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents or others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

In comparison to the other articles in the convention, particularly, those with an economic nature, this division of responsibility is unique to article 27(2). For instance, the State is primarily responsible for providing the legislation as well as the required health services, according to article 24 on the right to health standards

- *Parental responsibility under the CRC*

The concept of parental primary responsibility was also mentioned in articles 3(2), 5 and 18(1) of the CRC. During the drafting of article 18 some States argued that placing responsibility on parents is contrary to the norm in International human rights law. Therefore, the wording of article 18(1) was changed so as to convey the meaning that the State holds the primary responsibility<sup>2</sup>.

However, it is essential to distinguish between the concept of “parental responsibilities” under article 3(2), 5 and 18(1) on one hand and the same concept under article 27(2) on the other hand. It has been argued that under article 3(2), 5 and 18 the concept of parental responsibility in fact means the protection of “parents’ rights” for the upbringing of their children vis-à-vis the State.

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<sup>2</sup> Detrick, S., **United Nations Convention on the Rights of the Child: A guide to the “Travaux Préparatoires”**, 1992, p. 270.

“Article 3(2) outlines an active overall obligation of States, ensuring the necessary protection and care for the child’s well-being in all circumstances, while respecting the rights and duties of parents.”<sup>3</sup>

Articles 5 and 18 are concerned with the protection of the family.

“Article 5, together with article 18 in particular, provides a framework for the relationship between the child, his or her parents and family, and the State.”<sup>4</sup>

For some, children’s rights are viewed as opposing to adults rights or “independence from parental power”<sup>5</sup>. In this context, article 18 is concerned with the protection of parents’ rights

“In this sense, article 18 is an assertion of parents’ rights rather than children’s right. However the assertion is made in relation to the State’s powers, not the child’s, and the rights themselves are termed responsibilities.”<sup>6</sup>

- *Degree and extent of the parents’ financial responsibility under article 27(2)*

Article 27(2) states that the parents should “secure” an adequate standard of living for the children. The word “secure” conveys a high degree of responsibility. From a linguistic point of view the word “secure” means “not likely to be lost or to fail; certain; guaranteed”<sup>7</sup>. This requires the parent to guarantee this adequate standard of living for his child during his life and after his death. Accordingly, under article 27(2) the responsibility of the parents involves two elements:

1. The supply element of the responsibility that is concerned with the primary financial responsibility
2. The guarantee element of the responsibility, which is implied by the use of the word “Secure”.

Accordingly, it can be argued that in some countries, where the law gives the parent the choice of excluding his child from his wealth, the law is supporting the parent not to fulfil his duty of securing the adequate standard of living for his children after his death.

Article 27(4), which is concerned with a specific element of the parental financial responsibilities i.e. the issue of maintenance, extends the responsibility of the parents to cases where the parents live in a State different from that of the child. Therefore, the parents cannot get away from their financial responsibilities when they live in a different State from that where their children live. Similarly, the exclusion of a child from inheritance, when the parents do not include the child in the will, can be viewed as a way of getting away from their responsibilities according to article 27(2). Therefore, parents’ financial responsibility under article 27(2) need to be extended to cover even after the death of the parent so that the State need not pay to secure the

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<sup>3</sup> UNICEF, op. cit. p. 38.

<sup>4</sup> Ibid. p. 75.

<sup>5</sup> Detrick, op. cit. p. 20.

<sup>6</sup> Ibid. p.227.

<sup>7</sup> **Oxford Advanced Learner’s Dictionary**, Fifth edition, 1995, p. 1062.

adequate standard of living if the parent decides to disinherit any of his children. This implies that the parents should take measures through their wills and the *bona fide* disposition of their property to secure a standard of living necessary for their child's adequate standard of living.

In some countries the law supports the examples of parents disinheriting their child/children by their will. For instance, in England and some American<sup>8</sup> States the law allows the parent to disinherit his child by simply not mentioning him in his will whether intentionally or not<sup>9</sup>. The disinherited child can raise a claim against the estate, but it is left to the discretion of the court to grant him any payment or not<sup>10</sup>. The extreme case of disinheritance can be seen in some situations where the customary law dominates. In some African States the customary law does not allow the father to leave inheritance for his girl child. The basis for this concept is that when the girl child marries, her property will go to her husband and his family, therefore, in order to protect the property of the family the girl child should have no right to inheritance. In Nigeria for instance, there are provisions for inheritance at birth, but in some States of the Federation, tradition still deprives the girl child of her right of inheritance. For instance, the Ibo culture allows only male children to inherit while in some parts of the south; girls do not inherit, they being objects of inheritance themselves<sup>11</sup>. Another extreme case of disinheritance can be found in the arguments of some libertarians who claim that there is nothing called "disinheritance" because disinheritance requires that the person had the right to his parent's property and that nobody has a right over someone else's property, therefore, if the parent leaves the child penniless after his death the parent did not disinherit his child<sup>12</sup>. There are also some arguments against the inheritance right as a whole on the basis that inheritance will make children rich simply because they are lucky, and this means that they will not contribute to the building of the society because they were born rich<sup>13</sup>. Another opposing idea against inheritance is found in the argument of Ascher, who argues that inheritance prevents the concept of equal opportunities, therefore, the child should earn only what is enough for his/her education.<sup>14</sup>

These examples do not share the same justifications as bases for their arguments, but they all share one result, namely to free the parent from his responsibilities under article 27(2).

- *Article 27(2) as an economic right of the child*

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<sup>8</sup>[http://www.americawills.com/legal\\_considerations](http://www.americawills.com/legal_considerations).

<sup>9</sup> [http://www.bambooweb.com/articles/w/i/Will\\_\(law\)\\_\\_legal\\_history.html](http://www.bambooweb.com/articles/w/i/Will_(law)__legal_history.html)

<sup>10</sup> Garsia M., **How to Write Your Will**, 2004, p.22.

<sup>11</sup> CRC/C/70/Add.24, 17 September 2004, p. 17.

<sup>12</sup> [www.alanmacfarlane.com/TEXTS/property](http://www.alanmacfarlane.com/TEXTS/property)

<sup>13</sup> Draughn, J., Between Anarchism and Libertarianism: Defining a New Movement

<http://www.geocities.com>

<sup>14</sup> Mark L. Ascher; **Michigan Law Review**, curtailing Inherited Wealth, Vol. 89, 1990, p.127.

During the drafting of article 27 the Permanent Representative of Bangladesh submitted the following comment with regard to the adoption of economic and social rights of the child into the body of the convention:

“Articles sponsored by the NGO, Defence of Children International, are broadly acceptable. However, such Articles as “health” “standard of living” “compulsory free education” should be subject to a clause on the economic feasibility in particular countries....Some recognition of the economic problems faced by developing countries is essential if the draft is to enjoy the support of the vast majority of developing countries including the least developed countries.”<sup>15</sup>

Article 4 of the CRC gives special consideration to the financial circumstances of developing countries. It states that with regard to economic rights of the child, the State party is obliged to implement the right to the maximum extent of its available resources and that, if it is necessary within the framework of international cooperation. Despite that, article 27(3) raised some concerns by some developing countries. Interestingly, not only some developing countries were concerned about the inclusion of the financial responsibility of the State in article 27(3), but also some developed countries expressed the same concern<sup>16</sup>.

Considering that the parents have the primary responsibility for securing an adequate standard of living for the development of their children and that some States lack interest towards adding any financial obligations on them, the existence of laws which limit the discretion of parents in the disposition of money through their wills in a manner, which will contradict the best interest of their children, should be absolute. For this reason, and for the convention on the right of the child to prove a long duration and validity such interpretations to article 27(2) as to grant the child a right to inheritance over his natural parent’s property should be thought of.

The right to inheritance is an important economic right of the child. This right is well documented and secured in the Islamic law of Inheritance. It is a right that the child enjoys in most of the Islamic countries, which are members to the CRC.

“40. The economic rights of the child include the right to have amounts of money at his disposal, the right of inheritance, and the right to receive property as a gift. These rights have been codified in various laws. The right of inheritance and the right of the child to have amounts of money at his disposal are included in the Civil Status of Muslims Act of 1991 (the chapters dealing with inheritance and provisions regarding money);”<sup>17</sup>

This right is governed and organised by the Islamic *Shariah* as stated for instance, in the report of Pakistan to the Committee on the Rights of the Child:

“However, certain subjects such as maintenance, guardianship, custody of children and inheritance are enforced by the Family Courts on the basis of the Islamic laws”<sup>18</sup>

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<sup>15</sup> Detrick, op. cit, p. 376.

<sup>16</sup> Ibid. pp. 374-375.

<sup>17</sup> CRC/C/3/Add.3.16 December 1992.

<sup>18</sup> CRC/C/3/Add.13.28 May 1993.

## **Inheritance In Islamic Shariah**

Inheritance in Islam is a huge and very detailed subject. These details were mentioned in the Koran, *Sunnah* and the Consensus of Muslim Scholars.

In the following paragraphs I will briefly discuss the general aspects of inheritance in Islam, particularly those related to the right of the child to inheritance.

- *Definition of Islamic Shariah*

The word *Shariah* means what Allah set for his worshippers<sup>19</sup>. The Islamic *Shariah* sets out the rules for the entire aspect of life, for instance, politics, social relations, economics etc. The two main sources for the *Shariah* are the *Koran* and the *Sunnah*, which, in simple terms, means the sayings and acts of the Prophet Mohammed (PBUH).

- *General aspects of Inheritance in Islam*

The Islamic jurisprudence recognizes the right to property and the freedoms that are related to this right. In addition, it regulates in a very detailed way the transference of the inheritance or the deceased's property to his heirs. The word property includes, money, real property and legal rights. A number of rights are attached to the Inheritance. These rights include

1. The enshrouding of the deceased and the burial.
2. The payment of debts. The inheritance will not be divided among the beneficiaries unless these debts have been paid.
3. The implementation of the will.<sup>20</sup> It is noteworthy to point out that the will is made by the deceased to give him the chance to dispose of part of his property but not all. This should never prevent the heirs to receive their shares. The deceased has the right to dispose of one third of his property in his will to any beneficiary other than the stated heirs, for instance a friend. He can also dispose of more than one third of his wealth, on the condition that the heirs approve that.<sup>21</sup>
4. The rest of the Inheritance will be divided among the heirs according to their stated shares in the *Shariah*. These shares are regarded as rights. They are absolute and justiciable and it is under the discretion of nobody to violate them.

- *The right of the child to inheritance in Islam*

Children, among others, have an absolute right to inherit from their natural parents<sup>22</sup>. Their parents have no right to deny or obstruct the implementation of this right. Therefore, a parent cannot leave a will in which he disinherits one of his children. Whether the deceased dies intestate or not does not affect the right of the child to inheritance.

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<sup>19</sup> Alfayrouzabadi, **Algamous Almoheet**, 1998, 6<sup>th</sup> edition, p. 732.

<sup>20</sup> Alsaboni, **The Inheritance in Islamic Shariah on the Basis of the Koran and the Sunnah**, pp. 33-36.

<sup>21</sup> Ibid. P.36.

<sup>22</sup> Children have rights to inherit from others as well.

The freedom of the parent to have the right to dispose of his property in his will is not prohibited but it is organized in a way that will respect the best interest of his child. The parents are entitled to leave their wills and they can dispose of one third of the inheritance only<sup>23</sup>. The rest should be divided between those who own the right to the inheritance, including children.

This finds its roots at the time of the prophet Mohammed (PBUH). As it is narrated that the Prophet (PBUH) visited one of his companions (Saad Ibn Abi Waqqas), who was ill. Saad asked the prophet (PBUH) about his wealth and how to dispose of it, as Saad was a very wealthy man. He asked the prophet (PBUH) whether he could dispose of (in the form of a will) two thirds of his wealth? And the prophet (PBUH) said no. Then Saad asked whether it could be a half? And the prophet (PUBH) said no. Then Saad said one third? And the prophet (PUBH) said one third and the third is too much. Then the prophet (PBUH) said to Saad that if you leave your heirs rich is better than leaving them dependants and begging people<sup>24</sup>.

The parent is allowed to dispose of only one third of his property so as to protect the children from being financially dependant whether on the State or on somebody else. In this context it might be argued that if the child is receiving financial assistance from the State then he is not doing this in his capacity as a financial dependant on the State but that he is receiving it because of his right to a standard of living adequate for his development. Therefore, if the parent disinherits any of his children he will guarantee that the child will receive his right from the State. From a reality point of view, there is no guarantee that the child will receive this financial support, particularly, in the developing and least developed countries. Additionally, article 27(3) imposes limited financial obligations on the State.

Is there a possibility for the parents to dispose of more than one third? There are some schools in the Islamic jurisprudence (*Fiqh*), which allow the owner of the property to dispose of more than one third, but this is conditioned upon the approval of the heirs. For example, the Civil Status of Muslims Act of 1991 in Sudan adopted this opinion in article 287, which allows the disposition of more than one third through the will on the condition that the heir(s) approve it.

The child holds the right to inheritance for the simple fact of his humanity. Accordingly, the consensus among Muslim scholars is that the unborn has a right to inherit<sup>25</sup>. The distribution of the inheritance may or may not be delayed until the time of the birth of the baby<sup>26</sup>. Each case is taken in its own merits. However, the best interest of the unborn child should always be considered. In case of distribution of the inheritance before the birth of the child the amount to be reserved for the unborn child should be based on the highest possible share. The Egyptian law<sup>27</sup> and the 1991 Personal Status act in Sudan in articles 403 and 404 adopted this opinion.

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<sup>23</sup> As regard having a will with more than one third there is a debate on this between the Muslim Scholars.

<sup>24</sup> Algabbori, **Rules of Inheritance in Islamic Shariah**, 2<sup>nd</sup> edition, 1986, op. cit., p.73.

<sup>25</sup> UNICEF, **The Rights of the Sudanese Child**, 1992, 1<sup>st</sup> edition, p. 25

<sup>26</sup> Algabbori, op. cit., p.177.

<sup>27</sup> Ibid., p. 178.

## **Compatibility between the Islamic Law of Inheritance and the CRC,.**

Both the Islamic *Shariah* and the convention on the rights of the child place the primary responsibility to secure the adequate standard of living on the parents<sup>28</sup> and when they fail to fulfil their duties the responsibility of the State comes to the surface.

The Committee on the Rights of the Child identified articles 2,3,6 and 12 of the CRC as general principles of the convention<sup>29</sup>. The concept of “general principle” requires the “general principle to be applied and duly integrated into the implementation of all articles in the convention. All general principles should be guaranteed by legislation and can be challenged in court<sup>30</sup>”.

### *1. “Non-discrimination”*

This principle is guaranteed in article 2 of the CRC. Nevertheless, discrimination for the benefit of some groups is sometimes required. The Committee on the rights of the Child has emphasized that vulnerable groups of children need special attention. children are an easy target for discrimination therefore; the concept of “legitimate discrimination” is highly required to protect the right of the child to inheritance from being violated by his parents or any other party.

The right of the child to inheritance in Islam sets an example of an Inheritance law, which recognizes the rights of a special vulnerable group of children i.e. the unborn, who can easily be discriminated against.

In the context of the non-discrimination principle, it has been argued that Islamic *Shariah* discriminates between the boy child and the girl child when it states that the girl will inherit the half of her brother’s share. It is very important to look at the full picture. In Islamic *Shariah* the male have the primary and sole responsibility for the provision of financial support for his family. This responsibility is taken off the female’s shoulder. This fundamental concept in Islam could be viewed as one of the rationales behind this difference in the shares of males and females.

### *2. The best interest of the child to be the primary consideration*

This principle is guaranteed in article 3 of the CRC. The concept of the best interest of the child entails building of a child-friendly society, which includes child-friendly legislations. In addition, the article adopts the concept of protecting the child from the mal actions of his natural parents<sup>31</sup>. Both of these concepts find their place in the Islamic law of inheritance.

### *3. The right to survival and development:*

Article 6(2) enjoys a special relationship with article 27.

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<sup>28</sup> Algazali, M., **Human Rights Between the Teachings of Islam and the United Nations Declaration**, 2002, p.182.

<sup>29</sup> Unicef, op. cit., pp. 606-607.

<sup>30</sup> Ibid. pp.19-35.

<sup>31</sup> Unicef, op. cit., pp. 37-45.

“Many of the obligations of the convention, including in particular those related to health, adequate standard of living.....are relevant to ensuring the maximum development of the child”.

The main focus of article 6(2) is on the obligations of State parties to create the environment conducive to ensuring, to the maximum extent possible, the development of the child and in a manner compatible with human dignity of the child<sup>32</sup>.

The right of the child to inheritance in Islam guarantees the existence of the financial resources that are necessary for the development of the child. The child, particularly the unborn, enjoys the right to inheritance by virtue of his humanity, which represents recognition of his human dignity.

**Conclusion:**

The right of the child to inheritance in Islam is compatible with the CRC. The right of the child to inheritance in Islam is absolute and inalienable. It is a very important economic right of the child that respects his/her human dignity, specially the unborn. For this reason, and for the convention on the right of the child to prove a long duration and validity such interpretation to article 27(2) as to grant the child a right to inheritance over his natural parent's property should be supported.



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<sup>32</sup> Ibid. p. 94.