

TITLE PAGE

**APPRAISAL OF THE IMPEDIMENTS TO INHERITANCE UNDER
ISLAMIC LAW**

BY

MUSA OTHMAN ANGULU

LLM/LAW/ 9895/2009-2010

**A THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL,
AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT
FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LLM)**

**DEPARTMENT OF ISLAMIC LAW
FACULTY OF LAW
AHMADU BELLO UNIVERSITY,
ZARIA**

2011.

DECLARATION

I hereby declare that this thesis entitled, “Appraisal of the impediments to inheritance under Islamic law” has been written by me in the department of Islamic law under the supervision of Prof. Sani Idris and Dr. M. B. Uthman and that it is my own research work, no part of this thesis was previously presented for another Degree at any university. The information derived from the literatures has been duly acknowledged in the text and the list of references provided.

Musa, Othman Angulu
(Student)

CERTIFICATION

This Thesis entitled, '*appraisal of The Impediments to Inheritance Under Islamic Law*' by Musa Othman Angulu meets the regulations governing the award of Master of Laws (LL,M) Degree of Ahmadu Bello University, Zaria and is approved for its contribution to legal knowledge and literary presentation.

Prof. Sani Idris

Chairman

Supervisory Committee

Date.

Dr. Muhammad Bello Uthman

Member, Supervisory Committee

Date.

Dr. B. Babaji

HOD Islamic Law

Date.

Prof. A.A. Joshua

Dean, Postgraduate School

Date.

DEDICATION

With sincere gratitude to Almighty *Allah Subhanahu Wa-Ta-Ala* the most High and Exalted, who gave me life, strength, means and ample opportunity up to this moment, I dedicated this thesis to my late parents, Ustaz Musa Muhammad and Hajiya Fatima Musa (Late). May ALLAH in His infinite Mercy Shower his Blessings on them and grant them Al-Jannatul fir Daus, Amin.

MUSA, OTHMAN ANGULU

(Student)

ACKNOWLEDGEMENT

In the course of my study up to this level there are many important personalities that helped me in no small measure whom I must regard and show my sincere appreciation.

Firstly, with all my heart and all my strength I give the Almighty ALLAH (SWT) all my thanks that always guide and protect me.

Secondly, my gratitude goes to my able and humble Lecturer and Supervisor, Prof. Sani Idris, a mentor and a very kind taught gentleman who assisted me in no small measure and contributed immensely towards the accomplishment of this thesis. I once again say thank you, Sir.

Thirdly, profound gratitude goes to all my family, especially my wife and children, both living and dead, Abubakar Sadiq Musa, Musa Babangida Musa, Jamila Musa, Adamu Musa, Ibrahim Musa, Ummal Khayr Fatima Musa, Nana Firdaus Abayi Musa and their beloved mother, Hajiya Balaraba Usman Musa. The entire Muslim Ummah and S well-wishers who helped me in one way or another throughout my life. I thank them for the much more care and loving regards.

Lastly, I wish to mention all Lecturers of the Faculty of Law, Ahmadu Bello University, Zaria and their supporting staffs for the kind consideration they gave me towards the successful accomplishment of my course work and this research, thank you all.

LIST OF CASES

1. Abdul Ghaffar v. Maphaushi (1921) 98 IL 155 (Rang)
2. Akkinubi v. Akkinubi (1997) 2 NWLR p. 144
3. Beguman v. Saroo (1964) PLD Lah. P. 451
4. Chandrashekharappa V. Government of Misore (1955) AIR Misore 26
5. Dawodu v. Danmole (1962) 1 ALL NLR 702
6. Uwaifo v. Uwaifo (2004) ALL FWLR pt. 229 pp. 808-813

TABLE OF STATUTES

1. Indian Penal Code 1860
2. The Laws of Matrimonial Causes Act Cap. L8, L.F.N. 2004
3. The 1999 Constitution of Nigeria, Cap. C20, L.F.N. 2004

TABLE OF ABBREVIATIONS

S.W.T.	-	Subhanahu Wa Ta'ala
S.A.W.	-	Sallallahu Alayhi Wa Sallama
A.S.	-	Alayhis Salam
R.A.	-	Radhiyal Lahu Anhu
LL.M	-	Master of Laws
NWLR	-	Nigerian Weekly Law Report
AIR	-	All Indian Report
ALL NLR	-	All Nigerian Law Report
ALL FWLR	-	All Federation Weekly Law Report
L.F.N.	-	Laws of the Federation of Nigeria
A.B.U.	-	Ahmadu Bello University
A.B.J.I.L.	-	ABU Journal of International Law
VOL.	-	volume
Ltd.	-	Limited
Ibid	-	Ibidem
Op cit.	-	Op cited
Ch.	-	Chapter
HIV/AIDS	-	Human immune Virus/ Acquired Immune Deficiency Syndrome
Ed.	-	edited
Co.	-	Company
Pp.	-	Pages

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CHAPTER ONE

APPRAISAL OF THE IMPEDIMENTS TO INHERITANCE UNDER ISLAMIC LAW

1.1 GENERAL BACKGROUND

There are some obstacles and impediments which prevent an inheritor to benefit from the assets left by his/her deceased relation. Broadly, there are four cases consisting of the obstacles, bar or impediment to inheritance, they include Homicide (*Qatl*), difference of religion, Apostasy (*Riddah*), and Slavery. Some jurists, however, includes difference of domicile as an impediment to inheritance¹. Each one of them functions independently from another and bars the beneficiary from materializing his right of inheritance².

There are divergent views from different schools of Islamic Jurisprudence over the concept or rather what constitute impediments to inheritance under Islamic Law, despite the fact that some of these impediments are clearly contained in the primary sources as explained by the Prophet (S.A.W).

Impediments to inheritance are the personal acts or attributes of a person which disqualifies him from succession who would otherwise be an entitled heir on grounds of blood or marital relationship with the *praepositus*³.

¹ Qadri, A. A. J Islamic Jurisprudence in Modern World, Taj Company, Delhi, (1981); Pg. 425-427i

² Ibid at 426

³ Coulson, N. J. Succession in the Muslim Family Cambridge University Press, Great Britain, (1971), P. 172.

For those relatives of the deceased person 'who are debarred from inheritance by reason stated above, do not adversely affect the right of other heirs from inheritance, neither do they exclude nor restrict their respective shares⁴. In essence, disqualified heirs are deemed, in law, to be non-existing at all for the purpose of Islamic law of inheritance. For example, where a deceased person left behind two or more agnate brothers who, if not disqualified, would have restricted the mother's Qur'anic share from one-third ($\frac{1}{3}$) to one-sixth ($\frac{1}{6}$) even when they are excluded by the father of the deceased person, but for the disqualification which befalls them, would not affect or restrict the mother's Quranic share. This is because, for that impediment, they are not recognized in the eyes of the law.

1.2 STATEMENT OF PROBLEM

The provision of the Holy Qur'an and the Sunnah of the Prophet (SAW) has specifically and unambiguously state those that are debarred from inheritance. This debarment is either partial or complete.

But the problem lies on the arguments forwarded by each school of Islamic Jurisprudence or jurists with respect to a particular bar on inheritance. It will not be feasible for the Muslim world if these arguments can go on without careful regard being had to the fundamental provision of Qur'an and Sunnah.

⁴ Coulson, O.N. op cit p. 172

The second problem is in respect of the research work itself. This topic i.e. “An Analysis of the Impediments to Inheritance under Islamic Law” is a vital topic that concerns every aspect of the distribution of estate of a Muslim, particularly where there is a marriage relationship between a Muslim man and non-Muslim woman and it give rise to protracted litigation especially where the legitimacy of one of the potential heirs is in dispute.

Thirdly, with respect to apostasy, many writers or Islamic law jurists undermined a situation where, for example, a man renounces his religion but his wife or children remain Muslims or vice versa. This is a controversial area that needs a thorough research and clear explanation but has been neglected.

Finally, the issue of killing as an impediment to inheritance under Islamic law is also an area that is very vital under the principles of Islamic law but not much has always been said about it. And, most writers limits, themselves on basically only four or to some extent five elements that constitutes impediment to succession under Islamic laws. However, the present researcher suggests that it is more than that, for there are other elements that debar a person from inheriting a deceased estate either temporally or permanently.

1.3 AIMS AND OBJECTIVES OF THE RESEARCH WORK

It is the object of this work to;

- a. Trace the history of inheritance prior to and after the advent of Islam to identify what constitute impediments to inheritance prior to and after the inception of Islam.
- b. Look into the provision of the Qur'an and Sunnah and see how the heirs are categorized.
- c. Analyze what constitute permanent and temporary bar to inheritance.
- d. Look into different arguments provided by different Islamic schools of thought in respect to those impediments; and
- e. Propound workable solutions to the problems relating to those impediments in the Muslim community.

1.4 JUSTIFICATION

This research work will,

- i. Provide reading materials for undergraduate students of inheritance;
- ii. Educate the generality of Muslim community on impediments to inheritance and its factors;
- iii. Help other scholars and researchers to improve their work by including the new areas which they overlooked or neglected.
- iv. Benefit judges, lawyers as well as student of Islamic law to understand in a broader sense what constitute impediments to inheritance under Islamic law.

1.5 SCOPE AND LIMITATION OF THE STUDY

The scope of this research will be limited to Islamic law of inheritance. But some reference may be made to other legal systems whenever there is a need to do that. The work will first consider the nature of inheritance prior to Islam and then after the advent of Islam, then deal with the issue of impediments under the subsequent chapters.

1.6 RESEARCH METHODOLOGY

The research methodology adopted for this thesis is essentially doctrinal approach. Reliance is placed on textbooks, journals, seminar papers as well as conference papers which were accessed both from the libraries and outside sources.

1.7 LITERATURE REVIEW

This research comprises the ideas, views, as well as argument of many renowned Islamic law jurists. They have immensely made great contribution in the field of inheritance under Islamic law and they have done their utmost best, particularly on the topic: “Impediments to inheritance under Islamic Law”. This researcher found their existing literatures very resourceful.

Law of inheritance is a very important phenomenon in Islamic Law and, it plays a very significant role in the Islamic legal system. It is believed to be closely

allied to and strongly indicative of society's normative system, social structure, and principles of family organization.

This being so, many writers should attempt to write much voluminous books and papers on the topic. In fact, there is no author of Islamic law book that finishes his writing or research without touching on the topic. The knowledge of inheritance is $\frac{9}{10}$ of the Islamic knowledge. This is because the Prophet (SAW) says the knowledge of Islamic law of inheritance is nine-tenth of the entire Islam. But then much books, articles, journals researches, etc have not been written to deal exhaustively with the impediments to inheritance. Therefore, impediments to inheritance under Islamic law are a very vital area that needs a lot of research in Islamic jurisprudence because of its complex nature.

However, several authors like Coulson N. J.⁵, A.A. Qadri⁶, Gurin, M.A⁷, Danladi Keffi⁸, A. I Doi⁹, and Naseef O. A¹⁰, to mention but the least have, in their own way, touched on the topic, restricting themselves on only four broad categories of impediment, i.e. murder, slavery, difference of religion and apostasy. This is not enough because there are some other impediments to inheritance under Islamic laws that are worthy of noting that were, at the same time abandoned by

⁵ Coulson, N.J. op cit at p. 172

⁶ Qadri, A.A. op cit at p.424

⁷ Gurin, M.A. An Introduction to Islamic Law of Succession, Tamaza Publishing Company, Kano-Zaria (1998) p. 23

⁸ Keffi, S.U.D. Some Aspects of Islamic Law of Succession, Rukhsa Publication, Kano (1990) p. ix

⁹ Doi, A.I. op cit at p. 437

¹⁰ Naseef, O.A. Encyclopedia for Seerah, vol. II, Dares Salam, London, (1972), p. 1054

many of the Islamic jurists. This prompted the present author to make a research and come out with a fruitful result and lay a foundation so that subsequent researchers may continue from where he stops.

Amongst the other that attempted in no small measure are Nassef, N. O; Macnaughten, W. H¹¹.; Aminu Mohammed Gurin; Qadri, A. A. Abdur-Rahman I. Doi; Muhammad Bello Uthman, Prof. Sani Idris¹², Hammuda Abdul-Ati, Sheikh U.D. Keffi, Colson N. J to mention but few. I found their works were resourceful for the development of the jurisprudence of Islamic law of inheritance.

Naseef A. O (1982) in his work entitled “Encyclopedia for Seerah, particularly in volume II, concentrate more on general discussion on the entire field of inheritance thereby bringing out verses of the Holy Qur’an and the Hadith of Prophet (SAW) that deals with the issues of inheritance rather than breaking his work into topics. In fact, if you want to gather his view or ideas on a particular topic not even precisely law of inheritance you have to go through all the volumes, which is absurd. A work of such importance need to be reviewed so that each field of study will be discussed separately and exhaustively either on a particular volume or chapter instead of scattering a single topic all round the volumes of the work.

¹¹ Macnaughten, W. H. Principles and Precedents on the Moohoomnedan law, law Pub. Co., Katchey Road, Lahore, (1978), P. 1

¹² Idris, S. An Appraisal of Women’s Right of Inheritance under Islamic Law; in A. B. U. J. I. L., vol. iv-v, Faith Printers International, R/Tsiwa Estate, Kongo, Zaria, (2007); p. 8.

Coulson N. J's work is contemporary and more ambitious in the Islamic jurisprudence. He analyses the issues of inheritance. He brought out vital issues and discussed them extensively; he brought forth the views of the four fundamental Islamic schools of jurisprudence, all in relation to inheritance. Besides, still the present author need to bring out some things and issues that did not reflect in the literature which ought to be e.g. whether the impediment is permanent or temporary. Nonetheless, while Naseef, work was done randomly, so to say, his work is more systematic and contains views of many scholars rather than confining himself to the primary texts.

Likewise Qadri, A. A., a renowned jurist on Islamic law surprisingly pays less attention on issues relating to inheritance. His book contains more than 700 pages but he dedicated only a small section of not more than 10 pages (section 7) to inheritance which he discussed in brief. A work of that nature needs to deal with the issue of inheritance not in a negligible form but rather extensively.

With profound respect to this scholar, in his section 7 which he titled "inheritance (*Fara'id*)" at page 44 of his book and under the sub topic he titled "impediments", he maintained three types of impediments, viz: Slavery, homicide and difference of religion but there is no where he discuss slavery and how it constitutes a bar or impediment to inheritance. Secondly, under the difference of religion he only discusses apostasy which is independent from difference of

religion. Thirdly, he discussed the issue of difference of Dar, i.e. nationality even though he did not put it as among the impediments; this is a great lapse on his work which needs to be reviewed. Furthermore, a topic of this nature that touches the socio-economic and religious part of the Muslim world needs to be highlighted more in his work.

Sheikh Danlandi Keffi and Coulson mentioned above attempted to standardize their work by breaking their work into chapters, thereby dealing with each issue separately and explaining each term by giving illustrations and bringing out where all jurists and Islamic schools concur in a particular issues as well as where they took a different view in a particular matter. Despite that, when he come to discuss the issues of impediments to inheritance, Sheikh Danladi Keffi mentioned only the four impediments to inheritance under Islamic law and did not mention the remaining ones i.e. Even with that effort he did not categorize impediments but, instead he lumped them together and discuss them generally. In fact, the only place he laid more emphasis on whether the murder is intentional or not intentional.

The researcher was oppertune to use the work of Muhammad Aminu Gurin, a renowned jurist on Islamic law of succession at centre of Islamic legal studies, faculty of law, Ahmadu Bello University, Zaria- Nigeria and found the work very

resourceful. He tries to categories impediments into total and partial impediments which were found very interesting.

But then many things need to be included in the work to reflect the divergent views of renowned contemporary jurists. This will help tremendously in the development of Islamic law and jurisprudence. For example, where he put Apostasy under difference of religion after it was agreed by the majority of the scholars that Apostasy is independent of Difference of religion. Furthermore, he needs to explain further as to how a partial or permanent exclusion of the inheritor to the deceased's estate become an impediment which, going by its determination, is an act of a person which will bar him from inheriting the assets of his/her deceased person. Because, according to this author's view and understanding of these terminologies i.e. "impediment" and "exclusion" are two separate or distinct words with different meaning all together, while the former is caused by an individual act of inheritors to their respective shares, the latter is in respect of the heir's proximity with the deceased person.

There are many books, articles, journal and pamphlets worthy of mention in this regard that needs to be reviewed. This work is therefore aimed at paving the way for more research to follow.

Thus, the choice of this work is fundamentally to further explore the present or rather current developments in the effort of the modern contemporary Islamic

jurists with respect to improve and air out the Islamic views on the issue of inheritance with particular emphasis on impediments to inheritance under Islamic law.

It is, therefore, the contribution of this research to knowledge and literary presentation that the Muslim Jurists should not allow any review or reform of Islamic law of inheritance because Islamic law is a divine law and a good practicing Muslim is enjoined to abide by it wholly. Any provision of the Holy Qur'an which has not been abrogated by another revelation during the period of the Prophet (SAW) cannot be changed or modified. The provisions of section 38(1) of the 1999 Constitution is clear and provides for every Nigerian citizen the freedom to practice his religion. Therefore, it is the teaching, practice, act of worship and observation of Islamic rules that itemized impediments to inheritance that precludes a person from inheriting should any of them befalls him.

It is further the contribution of this work that whenever the principles of Islamic Law of inheritance are clear cut and unambiguous, there is no way they can be altered, reformed or modified just to suit the interests or aspirations of a particular group, countries like Sudan, Syria, Egypt, Libya, India, Pakistan, etc. attempted to reform the traditional principles of Islamic law of inheritance particularly in respect of Homicide offences and an attribute of difference of religion or even an act of apostasy which according to their personal opinion were

unsuited to the developing social and political order of the emergent modern Muslim States, in so far as they want to relate with the Western States. These seriously affects the principles of Islamic criminal justice system and particularly as it relate to inheritance and therefore should be ignored. It is also recommended that Islamic should create awareness for both Muslim that does not have the necessary knowledge of Islamic Law, and the non-Muslims that misconceived the clear principles of Islamic law, particularly the knowledge of Islamic of inheritance that the principles of Islamic law are not obsolete and always meets the demand of the modern society, and is always in conformity with the novel instances that may arise in any given situation. Islamic Law of inheritance does not in any way deprived women of their rights of inheritance nor does it discriminate against the rights of women in terms of women in terms of inheritance. In fact, there is no system of law that is just and equitable to women whenever it comes to the issue of inheritance than Islamic law. Even the non-Muslims women married to Muslim men were also not deprived of their rights to inheritance because Islamic law has provided for a person to bequeaths not more than 1/3 of his net assets to any one who could not benefit from his estate after his death. Here, a Muslim husband may create a will of not more than 1/3 of his net assets to his non-Muslim wife, which is by far more than her entitled share in his estate even if he dies without any issue

that will reduce her share from $\frac{1}{4}$ to $\frac{1}{8}$, had she been a Muslim wife of the deceased Muslim husband.

It is also its contribution that the so called view of the orientalist and the human rights activists as it affects inheritance of the deceased estate the principles of Islamic Law should be ignored, hence it has no basis whatsoever.

Finally, it is the contribution of this work that there are other impediments that were kept silence by Islamic jurists explored by this work like *li'an* couples, illegitimate children, and marriage by a dying person. All these ought to be included as impediments to inheritance under Islamic law.

1.8 ORGANIZATIONAL LAYOUT

The structure of the work is anchored on five chapter format. The first chapter contains a general background of the study highlighting the introduction of the topic, aims and objectives of the work, significance and justification, literature review, as well as methods adopted during the research work and the organizational layout.

Chapter two of this work will provide the historical development of Islamic law of inheritance in its general perspective. Under it, inheritance prior as well as after the advent of Islam would be discussed. Still under that chapter, inheritance based on brotherhood in Islam will be highlighted as a prelude to the Qur'anic

principles of inheritance. Then lastly in that chapter, it would be shown how it was abrogated and replaced by the guidance from the Holy Qur'an.

Chapter three was framed to talk on the grounds and conditions of inheritance under Islamic law. Under it, essentials of inheritance would be itemized and discussed. Also grounds of inheritance such as marriage, blood relationship and clientage would be itemized and highlighted. Some guidance on the administration of the deceased property will also be discussed still in this chapter, i.e. payment of debt, funeral expenses, satisfaction of wills, etc.

Chapter four will discuss on the general concept of impediments under Islamic law as well as types of impediments i.e. temporary and permanent impediments i.e. temporary and permanent impediments and their causes. After discussing the general concept of impediments, the chapter will as well supply the divergent views of Islamic schools of thought in relation to what constitutes impediments under Islamic law, i.e. Homicide (*Qatl*), Difference of Religion, Apostacy (*Riddah*), Slavery, etc. Under this, views of scholars like Imams Maliki, Shafi'i, Hanbali and Hannafi will be considered. Impediment according to Shi'ah view would also be discussed still under this chapter.

The final chapter, which is chapter five, will provide the summary of the entire work, observation made by the writer of the work and recommendations provided to solve the enumerated problems of the work and then final conclusion.

CHAPTER TWO

THE DEVELOPMENT OF ISLAMIC LAW OF INHERITANCE

2.0 INTRODUCTION

Historically, the idea of succession is as old as the history of mankind. This is because from time immemorial people inherited certain things from their predecessors and this paved the way for the continuity of property and civilization.¹ Man by nature struggle hard to acquire wealth for his well-being and the well-being of his family and irrespective of how much he was able to accumulate he ultimately die and leave most of it behind, hence the need for the law or custom of the deceased to determine what happen to the wealth left behind by the deceased. As such, the rule of inheritance, whether religious or customary, historically came up with a view to make material provision for how the deceased estate is to be shared among his surviving relations that are tied to him by a special relationship determined by his cultural or religious factors, depending on the practice or legal system followed or agreed to be adopted by the deceased during his lifetime².

¹ Pindiga, U.E.H. Practical Guide to the Law of Succession (*Mira'th*) in the Shariah, Tamaza Pub. Co. Ltd., Kongo-Zaria, (2001), p. 4.

² Idris, S. op cit p.8

The idea of inheritance has featured well in the history of Jews, Romans, Israelite, Egyptians, Caledonians, pre-Islamic Arabians as well as most African customs long before the Advent of Islam.

According to Prof. Sani Idris,

“In all the schemes/system of inheritance that existed in the history of mankind prior to the advent of Islam and to some extent even thereafter up to today, women have been placed in a very disadvantaged position. In some systems they are not only deprived from inheriting any portion but they themselves are considered chattels capable of being inherited.”³

The law of inheritance in Islam developed as a result of the inadequacies and inequalities in the distribution of the deceased’s estate amongst the heirs prior to Islam in different communities of the world. For instance, the rules and customs of Arabia on inheritance before the advent of Islam, the pagan African customs, as well as, the Hebrews are to the effect that only the senior male child of the deceased person can inherit him to the exclusion of all other heirs.⁴

Before Islam, inheritance among the Arabs was confined only to able male relations. Daughter, widows, mothers, minors, and incapable persons have

³ Idris, S. An Appraisal of Women’s Right of Inheritance under Islamic Law; in A. B. U. J. I. L., vol. iv-v, Faith Printers International, R/Tsiwa Estate, Kongo, Zaria, (2007); p. 8.

⁴ Qadri, A. A; Islamic Jurisprudence In The Modern World, Taj Company, Delhi, (1986); p.424

no share in the inheritance. The basic principle was that one must be capable of defending the honour of the family or the tribe.⁵

In Jews law, daughters were excluded by sons also widows and other female get nothing from the inheritance. Illegitimate children had the same right as the legitimate children over the property of their deceased parents. This was the position under the Hindu.⁶

In Roman, as well as, in the ancient Greek law, where the daughter was considered incapable of participating in or continuing the domestic religion, she would be deprived of the right of inheritance or she will not even inherit at all, neither before nor after marriage⁷.

Under the African custom, particularly the old Yoruba system of inheritance, the eldest son inherited the property of the deceased father to the exclusion of all heirs, including the co-wives of his mother.⁸

In the Mosaic Law, there is no room or rule for the several heirs to inherit at the same time. It was in the changing times of Moses that daughters were even recognized to inherit but in default of sons and in preference to the agnates.⁹

⁵ Aliyu, I. A. Legal Basis and Principles of Marriage under Islamic Law, PHD dissertation (unpublished) Faculty of Law, A. B. U. Zaria, (1990) P. vii.

⁶ Ibid p. viii

⁷ Ibid p. viii

⁸ Ati, H.A. Family Structure In Islam, Academy Press Ltd, Lagos, (1982); P. 250; case of Dawodu Vs. Danmole (1962) I ALL NLR, 702

⁹ Ibid P. 251

The contemporary practice in Europe was inclined towards giving an individual wider discretion to determine what should happen to his property after death, the discretion permits him to divest property even to animal, such as cats, dogs, etc. if he so wished.¹⁰

Succession as practiced among many of those ancient customs and religions is discussed below. Then it would be against that background we will discuss the historical development of Islamic law of succession.

2.1 INHERITANCE UNDER THE JEWISH LAW

As far as the Jewish law of inheritance is concerned therefore, there are four grounds of inheritance, viz;

- a. Male descendant: He is son of the deceased and the son of his son, how low so ever;
- b. Male ascendant: he is the deceased father and his father's father, how high so ever.
- c. Male descendant of the deceased's father: He is full brother and his half brother from father's side.
- d. Male descendant of deceased's grand-father: He is full uncle and half uncle of the Deceased.¹¹

¹⁰ Idris, S. "Some Aspects Of Islamic Law Of Inheritance And The Principles Of Ta'asib"; In Journal Of Islamic And Comparative Law, Vol. 28, A. B. U., Zaria, Nigeria, (2007) P. 48.

¹¹ Lakhvi, S.B.H. Almirath: Justice Of Islam In The Rules Of Inheritance, Ghullah Mahdi, Remala Khurd-okara, Pakistan, (2003); p. 2.

Thus, as stated above, there is only one reason of inheritance under the Jewish law, that is blood relationship which is also limited within the males only. The Females whether daughter, mother, sister or wife are completely neglected from the deceased's property.¹²

The Jewish law of inheritance also provides that;

- i. If a father died and is survived by his sons and other relatives, it is only the sons who will inherit him, also among them, the first born son is entitled to double share of others, according to the rule of primogeniture. But if the first born son agreed with his junior brothers upon equal distribution, he is allowed to do so. And there is no difference either first born son is a legal child or an illegitimate one.¹³
- ii. If any person died and is survived by his male and female children, only the male issue is entitled to inherit him, the female children are only entitled to maintenance up to the time when they are married or reached the maturity stage.¹⁴
- iii. If a Jewess wife died all her property is for her husband and no one can also inherit along with him whether she has issues from him or

¹² Idris S, op cit p. 9.

¹³ ibid

¹⁴ Al-ahkam Al-shar'iyyah, v. 2, Pp. 171-172.

- from previous husband. Conversely, if her husband died before her, she will not inherit him at all.¹⁵
- iv. If a widow died, her property is for her sons; in their absence it will go to her daughters (in fact the only place where females are allowed to inherit); and if she died childless her father will inherit her; in his absence to the grandfather. On the other hand, if her son or daughter died she will not inherit him or her.¹⁶
- v. If a person died and did not leave behind any descendant or ascendant then his collaterals kinship will inherit him. Up to their fifth issues, they will inherit according to the principle that the closest will exclude the remoter but after their fifth issue they will all share.
- vi. In the absence of deceased's ascendants, descendants or collaterals, a member of the outer family will inherit the deceased's property, i.e. any person who puts his hands first will take the deceased's property for the period of five years, if any legal heir appears within the period, he will take the property, otherwise the first possessor will enjoy with the property.¹⁷

These are some important rules of inheritance among the Jews, the followers of Musa (A.S). However, in the changing times of Prophet Musa (A.S.),

¹⁵ ibid

¹⁶ ibid

¹⁷ Al-muqaranat wal-muqabalat P. 253; as quoted in Lakhvi op cit P. 4

daughters were permitted, with certain conditions, to inherit in default of sons and in preference to the agnates. It was stated under the Mosaic law thus,

“And thou shall speak unto the children of Israel saying if a man dies and have no son, then ye shall cause his inheritance to pass unto his daughter, and if he has no daughter, And if he has no brethren, then and if his father has no brethren, then ye shall give his inheritance to his father’s brethren, and if his father has no brethren, then ye shall give his inheritance unto his kinsmen that is next to him of his family and he shall possess it”.¹⁸

From the above discussion, we can conclude that there is no equitable and just distribution of the deceased estate under the Jews law of inheritance when a husband is allowed to inherit his deceased wife’s estate and not vice-versa. Also where a son inherits his deceased mother but the mother does not or where male children inherit their father but the father but the father is excluded to inherit them in the presence of their children.

The role of the eldest son and the influence of the levirate are seen in various regulations of inheritance among the Jews. The Jewish laws are believed to have been patterned to suit agricultural sedentary society, more significant, perhaps, is the notion of the relationship between the doctrines of God’s chosen people and the inheritance rights. As stated above, under the

¹⁸ Mosaic Law, as quoted in Macnaughten, W. H. Principles and Precedents on the Moohoomnedan law, law Pub. Co., Katchey Road, Lahore, (1978), P. 1

Jews law daughters were excluded by sons and also widows and other females would have nothing from the property left by their deceased relation. It also gives the right of inheritance to an illegitimate child the same way it gives to a legitimate child.¹⁹

2.2 INHERITANCE UNDER THE HEBREW/CHRISTIAN LAW

When it comes to the issue of inheritance, the Hebrews and the Christians shares the same system because Prophet Jesus (A. S.) was given both the Old Testament (Torah) which was the nine parables of prophet Moses (A.S) and the New Testament which together constitute the Bible and Biblical laws of prophet (Jesus). As such, the present writer will refer to the Old Testament of prophet Moses (A.S) in respect of the system of inheritance among the Hebrews and Christians.

Inheritance among the Hebrews largely follows the lines of descent within the family, from the rule, it follows that males are preferred to females as heirs since the line of descent is patrilineal. On the other hand, it may also index the inter-family relations and the direction of social change. As stated above, the role of the oldest son under the Hebrews law of inheritance and the influence of the levirate are seen in various regulations of inheritance.

In the beginning the eldest son almost inherited the entire property of his deceased father. But at a later stage, he was given only a double share and

¹⁹ Ibid, at P. 1

sons living within the father's house hold were allowed to inherit from him, whereas those who had moved out of the house would not be allowed to inherit. While husbands maintained the right to inherit their deceased wives are not allowed to inherit from their deceased husbands. It seems, therefore, probably that wives did not inherit because it was unnecessary, they were cared for by their children or through the levirate rules. Moreover, it was in the changing times of Moses (A.S) that daughters were permitted, with certain conditions, to inherit in default of sons and in preference to the agnates. It was stated under the Mosaic Law thus;

*“And thou shall speak unto the children of Israel saying if a man dies and have no son, then ye shall cause his inheritance to pass unto his daughter, and if he has no daughter, then ye shall give his inheritance to his brethren. And if he has no brethren, then ye shall give his inheritance to his father's brethren, and if his father has no brethren, then ye shall give his inheritance unto his kinsmen that is next to him of this family and he shall posses it”.*²⁰

After the death of Prophet Musa (A.S), prophet Isah (A. S) was sent to the children of Israel with the Holy Bible which basically contains only moral and spiritual rules and does not contain any rule concerning legal issues of inheritance.²¹This is mentioned in the Holy Bible,

²⁰ Mosaic law as quoted in Macnaughten, W. H. op cit p.1

²¹ Lakhvi op cit, p.4.

“Do not mis-under stand why I have come, it is not to cancel the Law of Moses and the warning of the prophet. Now I come to fulfill them, and to make every law in the Book will continue until its purposed is achieved.”²²

Dr. Suleiman Marqus also states,

“That a man came to prophet Isah (A.S) and requested to him that he (the prophet) should order to his brother to give him half of the estate of their deceased father. The prophet (A.S) replied, “No body sent me as a Judge to distribute your estate among you”.”²³

However, by the provisions of the Holy Bible, Numbers 27:8-11, if there are sons they should inherit every thing and the daughters get nothing. The daughters only have the opportunity of inheriting their deceased parents in the absence of son and, even then, she is required to marry into a family or her father’s tribe.²⁴ Hence, under the Christian law, it is clear that there is no express provision of just and equitable rule of inheritance because they have to rely on the Mosaic law, which law appears to be inadequate and unjust for its discriminatory nature.²⁵

2.3 INHERITANCE AMONG THE HINDUS

²² Matthew 5 v 17-18.

²³ Marqus, S. “Al-Mudkhalil Al-qanoniyyah”, Jordan, p. 238; as quoted in Lakhvi op cit, p.5.

²⁴ In Idris S. op cit at p. 10.

²⁵ Pindiga op cit p. 4.

Under the Hindu laws/customs, only sons have the right of inheritance excluding daughters.²⁶ Even among the sons the rule of primogeniture is applied, meaning where the deceased have many sons, the eldest son have preferential claim over the estate of their deceased father, excluding the younger sons.²⁷

2.4 INHERITANCE UNDER THE AFRICAN CUSTOMS WITH PARTICULAR REFERENCE TO YORUBA AND IGBOS

With reference to Nigerian Customary Laws, there is still a full of outcry of inadequacies and injustice with respect to inheritance.²⁸ Particularly, the outdated norms of discrimination against women in their scheme of inheritance. It is beyond dispute that in Nigeria save for the Muslim women, there is no any religion or custom that gives women a definite share of inheritance in her deceased father's, husband or even child's estate talk less of treating them on equal footing with their male counterpart. At best under some customs they are given the right to care, maintenance and accommodation in their deceased relation's estate. Where their right to inherit is recognized, they are subjected to discrimination and inequality in favour of their male counterpart.²⁹ For example, under the Binin customary law the eldest

²⁶ Idris S. op cit, p.10

²⁷ Primitive laws, pp. 88-89; as quoted in Lakhvi op cit at p.5.

²⁸ Idris S. op cit at p. 10

²⁹ ibid

surviving male child is given the exclusive right to inherit his father's Igiogbe-the house in which he lived, died and was buried.³⁰

Whereas in most part of the Northern Nigeria the traditional position in most of the non-Muslim customary rules of inheritance upon the demise of her husband, the wife(s) may be allowed to use the portion of land which she had been cultivating and is only entitled to continue to live in the room or hut which she was living at the lifetime of her husband, of course, with a condition that she must remain there as a member of the family, she may re-marry a member of the family where she is still young or she may just stay to look after her children. Whichever, is the case once she decides to stick to the family of the husband, she retains the right to continue to stay in matrimonial home and also continue to cultivate the portion allotted to her.³¹ However, she is not allowed to sell or transfer it to strangers and, where she decides not to remain in the husband's family, she loses all her rights of inheritance.³²

On the other hand, in all circumstances, the husband who survives his wife is entitled to inherit whatever his wife acquired through her efforts³³ when she was alive, to some extent and in some customs, to the exclusion of her family or even her children.

³⁰ Uwaifo v. Uwaifo (2004) all FWRL pt. 229, at p. 808-813; as quoted in Idris S. op cit

³¹ Idris S. op cit at p. 11.

³² Ibid p.11.

³³ Ibid, p.11

By most African customary rules of inheritance, the tribal feeling provided an individual member of the family to accumulate wealth and form united family with the exclusion of females in inheritance and power of disposition of the deceased's estate. For instance, under the old Yoruba rules of inheritance, the elder son inherits the whole estate of the deceased father to the exclusion of others; and he inherits including all wives of his father but excluding his own mother. This is called the ancient Yoruba rule of inheritance of "Idi-Igi".³⁴ Under the Yoruba customs, the two recognized types of inheritance i.e. Idi-igi and Ori Ojori are the distinct traditional rules of inheritance. The former is to the effect that the estate of the deceased is shared equally per the number of the wives he possessed, while under the later rule the deceased's estate is shared equally per the number of children. In fact this is the refined and reformed customary rule of inheritance among the Yorubas because the ancient rule is that the eldest son inherits the property including his late father's wives, but excluding only his own biological mother, to the exclusion of all the remaining heirs. In respect of the two aforementioned customary rules of inheritance among the Yorubas therefore the Supreme Court held in the case of Akinnubi Vs Akinnubi thus,

"It is a well settled rule of native law and customs of the Yoruba that a wife could not inherit her husband's property. Indeed, under Yoruba customary law, a

³⁴ ibid

widow under intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased's family".³⁵

And under the ancient Igbo rules of inheritance, females neither inherit from their parent's side nor from their husband's side. Under the Igbo customary rule of inheritance (Oli-ekpe) the male child inherits the deceased's property to the exclusion of females, whether wives or daughters. Furthermore, Igbo women were not allowed to inherit from their deceased father's estate, according to their ancient custom.³⁶

It has been observed that in the Hausa customs of Northern Nigeria, females were allowed to inherit but are restricted not to inherit any landed property because they were deemed not to belong to the families of the father's side. They are deemed as the property of another family, i.e. they more belong to the husband's side than of their parent's family side.³⁷ We however submit that with growing enlightenment in Islamic legal provisions with regard to inheritance this is no more the practice.

For women married under the Matrimonial causes Act, it has been submitted that either of the spouse can inherit from each other even where no will is made. The author was however, quick to point out that it is better for the

³⁵ (1997) 2 NWLR p.144

³⁶ Akinrimisi B. Women's Inheritance Rights, the Nigerian Situation and Options available at all levels, Shelter Rights Initiative, 2001; as quoted in Idris S. op cit at p.11

³⁷ Pindiga op cit at p. ix

couples to write their will in order to avoid a situation where the law has to interfere with their affairs. He further pointed out that a testator can disinherit his/her spouse depending on how he or she feels at the time of preparing his/her will.³⁸ This still left the position of women highly fluid and uncertain since her husband has the discretion of bequeathing something or not bequeathing anything in her favour; moreover it is clear that the matrimonial causes act does not contain any specific provision on the inheritance right of the spouse. Such right is derived under the respective administration of estate laws of the states.³⁹

Whereas for women married under the Act whose husband did not make a will; their position has been described as complex and indefinite as the position varies from state to state. Issues such as the customary law of the husband, area where the property is situated and whether there are other relations such as children, parents and siblings are taken into consideration in deciding what happens to the property of the deceased and ultimately what the wife gets.⁴⁰ In such circumstances the laws on administration of estate for each state applies.⁴¹ For example the Administration and Succession (Estate of Deceased Persons) Law, 1987 for Enugu, Ebonyi and Anambra states provides thus:-

³⁸ Akinrimisi B. at p.2

³⁹ Idris S. op cit at p.12

⁴⁰ ibid

⁴¹ Ibid p. 12

- (i) If a man dies leaving a wife without children, parents, brothers or sisters, such a wife inherit his estate after all debts, funeral expenses as well as all other charges have been settled. Where the deceased person leaves brothers and sisters of the half blood, the wife interest in the estate only last until her death or when she remarries, whichever comes first? Thereafter the half brothers and sisters take over the estate.
- (ii) Where wife and children are left, the wives takes $\frac{1}{3}$ and the children take $\frac{2}{3}$ of the estate, however, the wife's interest in the estate only last until her death or when she remarries, whichever comes first. Thereafter the children take over the wife's share.
- (iii) Where the deceased left a wife and parents, brother and sisters, the wife takes $\frac{2}{3}$ and the other dependants take $\frac{1}{3}$. The wife's interest in the estate only last until her death or when she remarries, whichever comes first. Thereafter the other dependants take over the wife's share.

Under the administration of estate law 1959 applicable to Ogun, Ondo, Oyo and the old Bendel states the position is virtually the same reproduced under different phrases. It provides thus:-

- (i) Where a man dies leaving a wife without children, parents, brothers or sisters, his property will be inherited by the wife absolutely. The same is the situation where a woman dies leaving a husband without an issue and other blood relations.
- (ii) Where a man dies leaving a wife and children (without parents, brothers or sisters) the wife will take all his personal belongings absolutely. The remaining assets will be shared between the wife and the children. The wife will take $\frac{1}{3}$ and the children will take $\frac{2}{3}$. The wife's $\frac{1}{3}$ share only last until her death. Thereafter the children take over the wife's share.
- (iii.) Where a man dies leaving a wife, parents, brothers, sisters but no children, the wife inherit $\frac{1}{2}$ of the man's estate absolutely. The other half is for the parents or brothers and sisters.
- (iv) If a man dies leaving children but no wife, the children take everything absolutely (but after all charges, debts and expenses must have been settled).

With all due respect these laws are far from perfect and do not resolutely solve the problems of women's right of inheritance. It seems more focused towards ensuring the right of a wife while neglecting the rights of other categories of female relations. Even where provision is stated, it is done in a general manner, specific shares were not provided neither does the laws

provision regarding the specific shares for mother and father, brother and sisters (both of full and half blood). Likewise there is no clear rule on priority where so many relations survived the deceased. More importantly even the effort to guarantee to the wife is not absolute, her power to own and dispose the property is restricted and whatever happens at the end of the day the property revert back to the family of her deceased husband. Such is the deplorable condition the non Muslim woman finds herself regarding inheritance. With all the criticism put forward against the Islamic law of inheritance provision for women we are yet to see any system or devise that comes close to Islam in defining a clear cut position for women's right of inheritance.⁴²

2.5 INHERITANCE UNDER PRE-ISLAMIC ARABIA

The rules of inheritance in pre-Islamic Arabia are said to have been basically determined by the war-like mode of life.⁴³ Their rules and customs of inheritance were similar to the pagan African customs prevalent even at the contemporary level in countries south of the Sahara.⁴⁴

Therefore, inheritance among the Arabs during that period of Dark Age was confined only to able male relations. Daughters, Widows, Mothers, Minors and incapable persons had no share in the inheritance of their deceased

⁴² Idris S. op cit, pp.13-14

⁴³ Ati H.A. op cit, P. 251

⁴⁴ Qadri, A. A. op cit P. 424

relations. Women were regarded as among the chattels capable of being inherited. As such the basic principle of inheritance among the pre-Islamic Arabians was that one must be capable of defending the honour and integrity of the family and the entire tribe.⁴⁵ In an unqualified patriarchal despotism, there was no distinction between ancestral and self-acquired property and the females were used as property to be bought and sold, mortgaged, owned or inherited or assigned as payment of debts. Inheritance at that time descended exclusively on males tracing kindred entirely through males and the women and young ones could not inherit because they could not wield swords to protect the family or the tribes¹⁵. During that time also, fictitious relationship by adoption, oath of brotherhood and patronage for the protection of family or the tribes were common.

Under the pre-Islamic Arabian custom women were not entitled to any share in the property of their deceased relation. Inheritance was based on blood relationship (*nasab*), defence pact (*al-halaf*), adoption (*al-tabanni*). Under the blood relationship right of inheritance was confined to the paternal male descendants, even among them only those who have the ability to hold arms can inherit other heirs such as minors, incapable and old people were impeded from inheritance.⁴⁶

⁴⁵ Ibrahim A. A. op cit P. p. vii

⁴⁶ Lakhvi S.B.H. op cit at ,p.7

It has been submitted that among the pre-Islamic Arabian custom, inheritance was exclusively based on patriarchal descent among blood relations. A person is however, free to make personal arrangement to confer right of inheritance on some other persons outside the family cycle.⁴⁷ Consequently the grounds of inheritance known among the pre-Islamic Arabs ranges as follows:-

a) Blood relationship – Nasab: - This is a form of inheritance on account of blood relationship. It was only confined to the paternal male relations and even among them, only those who had the ability to hold arms and had actually fought along with the deceased were competent to inherit out of the estate left behind by the deceased. Hence, female and those male descendants that lack the ability to hold arms, such as minors, incapable and old people were impeded from sharing in the estate on account of their inability to wage war and bear arms in defense of the family or tribe.⁴⁸

Under this ground of inheritance it is clear that there is no share for wife(s), mothers, daughters, sisters etc and beside the female category even among the male, the weaker ones such as the aged and minors are also deprived of a share. It is worthy to note that it was against the background of this injustice

⁴⁷ Idris S. op cit ,p.14

⁴⁸ Muhammad A. S. Mawarith Fish Shariatil Islamiyyati ala Dhau'il Kitab was Sunnah, Meccah, (1979) PP. 17-18

that the verses relating to inheritance were revealed directing clearly how the estate of a deceased is to be shared among his relations.⁴⁹

b) Adoption- Al-tabanni: - Another ground of inheritance known to pre – Islamic Arabian custom was by way of adoption. This is a method by which a person adopts another as his biological descendant and by so doing the paternity of the adopted son would be linked to the person that adopted him rather than his real biological parents and such action confer on the adopted him. This adopted son will inherit the whole property of the person that adopted him should such a person die without a son and if such a person is survived with a son then the adopted son as a matter of right was allowed to claim his share from the estate of the deceased like any of his biological sons.⁵⁰ Here again the right of women to inherit has been neglected since the concept of adoption is that of a male child not female. In fact during the period under consideration the birth of a baby girl was seen as a disgrace and a lot prefer to bury their female babies alive than to leave with the disgrace of keeping them. In such circumstances the issue of adopting a baby girl does arise.⁵¹

c) Military Compact- Al-halaf: - Another important ground of inheritance during this period was the military compact between members of different

⁴⁹ Idris S. op cit ,p. 114

⁵⁰ Keffi, S. U. D. Some aspect of Islamic Law of Succession, Rukhsa Publications, Kano, Nigeria, (1989), P. ix

⁵¹ Idris S. op cit at ,p.15

families. It is a defense pact by which parties, strange to each other by blood relationship, enter into an agreement that they should in return for a consideration of defending each other in cases of war be entitled to a share in each other's estate. By this agreement whoever among them pre-deceased the other is entitled to inherit 1/6 of the estate of the other. The pact is made in the following terms: "My blood is your blood and my avenge murder is you're avenging murder. You will have the right to inherit me and I shall have the right to inherit you. You shall owe for my blood". If this was accepted by the other party the pact was deemed completed.⁵²

It is observed here again the women are excluded since the issue of defense pact simply has to do with war for which women are not engaged hence they cannot inherit under this ground.⁵³

d) Marriage – Nikah: – Another important means and ground of inheritance that clearly portrays injustice and discrimination against women is inheritance on the basis of marital relationship. It only favours the husband; he has the sole right to take the whole estate of his deceased wife to the exclusion of her blood relations. On the other hand the wife has no reciprocal right to inherit her husband, to say the least the wife was considered as part of the deceased estate capable of being inherited. In the

⁵² Ibid P. ix

⁵³ Idris S. op cit ,p.16

absence of any arrangement by the deceased, the estate is shared among the able male relations of the deceased per capita where they were of equal strength in relationship with the deceased.⁵⁴

Females were further disentitled out of the Arabs desire to limit the circulation of estate within the family cycle, to which women were not believed to belong. More so they were in their own right considered as heritable property forming part of the estate.⁵⁵

Therefore, Islamic law of inheritance developed to make a reform of those ancient rules and customs by repealing and amending them to reflect the quality among the heirs in accordance with their natural positions as stipulated in the Holy Qur'an. The pre-Islamic system of inheritance continued at the beginning of Islam for sometime, until when a major reform took place.

2.6 INHERITANCE DURING THE EARLY PERIOD OF ISLAM

It was in the midst of the above uncertain and discriminatory system of inheritance that Islam came. Islam felt and realized the need for revolutionary changes in the affairs of mankind, which *inter alia* includes the law of inheritance.⁵⁶ The pre-Islamic system of inheritance of facilitations, relationship, adoption and oath of brotherhood and patron

⁵⁴ Gibb H. A. R. et al Shorter Encyclopedia of Islam, (1953), p.

⁵⁵ Idris S. op cit ,p.16; Qadri A. A. Islamic Jurisprudence in the Modern World, Taj Company, Delhi, (1986), p. 8

⁵⁶ Qadri A.A. op cit at p. 424

continued even at the beginning of Islam until when a major reform took place by the Prophet (SAW). The Prophet (SWA) initiated a temporary system of inheritance based on Islamic fraternity called, "mu' akhah".

Mu'akah is inheritance based on brotherhood and, in effect, means that when a Makkah immigrant died having no blood relatives in Madinah to inherit him, his Madinise brother in faith will inherit him.

However, the military compact was allowed to continue as a ground of inheritance but was later abolished by the provision of the Holy Qur'an relating to inheritance.

After the verses of inheritance were revealed the prophet (SAW) added a great deal of information and knowledge by his explanations and interpretations of those verses, which leads to the development of Islamic law of inheritance.

During the advent of Islam, the Islamic rules of inheritance were introduced through a divine revelation to remedy the apparently unjust and unequal treatments of the entitled heirs are supposed to be accorded with the right to inherit from the deceased. By virtue of their relationship have been removed and in some areas have been modified by Islamic law of inheritance.⁵⁷

⁵⁷ Coulson, N. J; op cit pp. 31-32

The main object of Islamic law of inheritance is therefore the material provided for surviving dependents and deceased relatives for the family group bound to the deceased by mutual ties and responsibilities stems from blood relationship, marriage and clientage. And a more equitable and fair principles of inheritance has been introduced and adopted by Islamic law, thereby ensuring the absolute right of women in different capacities as mothers, sisters, daughters and wives(s) and all those categories of persons that were excluded by the pre-Islamic rules of inheritance, to inherit and benefit from the property of their deceased relatives. Initially all the above stated grounds of inheritance continue to apply in the distribution of the estate of a deceased person. Islam however introduced reform in a transitory manner.

The first phase of the transition was introduced after *hijrah* (migration of the Holy Prophet from Mecca to Medina); this period witnessed introduction of inheritance on the basis of religious brotherhood referred to as *Mu'akhah*. Muslims that emigrated from Mecca to Medina in other words known as *Muhajirun* established a link of brotherhood with the people of Medina who are referred to as the helpers in other words known as *Ansar* to the extent

that they became like blood brothers and they started to inherit each other's property if one of the two died.⁵⁸

In fact, this period was a period when the emigrants were indeed cut off and stopped from dealing with their blood relations that believed but did not emigrate.⁵⁹ To this end the holy Qur'an provides thus:

“Those who believed and adopted exile, and fought for the faith, with their property and their persons, in the cause of God as well as those who gave (them) asylum and aid, these are (all) friend and protectors one of another. As to those who believe but came not into exile, ye owe no duty of protection to them until they come into exile.”⁶⁰

Consequently by virtue of the above verse, Abdallah Y. A. in his commentary stated that the Emigrants and the helpers became like blood brothers and were so treated in matters of inheritance during the period when they were cut from their kith and kin.⁶¹

It has been submitted that the wisdom of this legislation was to encourage Muslims to migrate with a view to foster and inject in them a sense of unity, love, compassion and to transform them into one solid force.⁶² Here again

⁵⁸ Ibid P. 11 As quoted from Tafsir al-Tabri vol. 8 PP.277-288

⁵⁹ Idris S. op cit at ,p.17

⁶⁰ Abdallah Y. A. The Holy Qur'an Text, Translation and Commentary, Dar-al Arabia, Beirut Lebanon, chapter 8 verse 72, (1968), PP. 433 – 434

⁶¹ Ibid P. 434

⁶² Keffi S. U. D. op. cit. P. x.

one can hardly see where the women right to inherit is recognized or become relevant.⁶³

The second phase of the transition witnessed the abrogation of inheritance on the basis of Islam brotherhood. This was perhaps on account of the cessation of the circumstances of prevailing hospitalities meted on Muslims which subsided on account of Islam gaining more ground and recognition as a force reckoned with leading to mutual pacts entered into with the Mecca's rulers, the effect of which was to allow Muslims resident in Mecca that did not migrate to Medina to deal with their Muslims brethren that migrated to Medina. This stage crystallized with the liberation of Mecca.⁶⁴

The first revelation in this regard upholds the strength and priority of blood relationship without making reference to the relationship established between the *Muhajirun* and the *Ansar*.⁶⁵ The Holy Qur'an provides thus:

“Kindred by blood have prior rights against each other in the book of Allah.”⁶⁶

Thereafter, inheritance on the basis of Islamic brotherhood among the *muhajirun* and the *ansar* was abrogated.⁶⁷ In its abrogation the Holy Qur'an provides;

⁶³ Idris S. op cit ,p.17

⁶⁴ Ibid at p.17

⁶⁵ ibid

⁶⁶ Qur'an ch.8 : 75

⁶⁷ Qur'an ch.8 : 75; as quoted by Idris S. op cit p.17

“Blood relations among each other have closer personal ties in the Decree of Allah (regarding inheritance) than (the brotherhood of the believers and muhajirun).⁶⁸

The abrogation of the Islamic fraternity as a basic of inheritance was followed by the abrogation of adoption and defense pact as ground of inheritance and in their place definite rules were ordained to govern inheritance.⁶⁹

2.7 THE REVELATION OF VERSES ON INHERITANCE

The Islamic reforms repealed or rather amended the rules of inheritance and introduced the principles of equality among the sexes in accordance with their natural position. The rules which regulated the law of inheritance in relation to the estate of the deceased should devolved on those who, by reason of consanguinity or affinity, have the strongest claim to be benefited by it and in proportion to the strength of such claim, with harmonious distribution of estate among the dominants, in natural strengths of their claim. The elaborate provision under Islamic law, were made, where relations entitled to inherit and the shares they are inheriting have been categorically specified in the holy Qur’an. These provisions are contained in three verses of the Holy Qur’an viz; 4:11, 12 and 176.

⁶⁸ Ibid as quoted by Idris S. op cit ,p.17

⁶⁹ Idris S. op cit p. 18

The right to inherit the deceased property have been recognized and guaranteed by the provision of the Qur'an and the Sunnah of the Prophet (S. A. W.), therefore adding a great deal of information and knowledge to the Qur'anic verses, dealing with principles of inheritance by his explanations and interpretations. The turning point in the history of women's right of inheritance begins with the revelation of the Holy Qur'an chapter 4:7 which provides:

“From what is left by parents and those nearest related there is a share for men and a share for women whether, the property be small or large – a determinate share.”⁷⁰

The reason for the revelation of the above verse was complaint lodged with the Holy Prophet after the death of Aus Bin Thabit Al-Ansari who left behind his wife and two daughters. The two sons of his paternal uncle named Suwaid and Arfaja and in another report Qatadah and Arfaja took all his property leaving nothing to his widow and daughters. The widow complained to the Holy Prophet, who called them and enquire about the matter. They replied how we can give them when they do not fight against the enemies and defend our family. The Holy Prophet said to them go and wait I hope Allah will send a revelation about them, thereafter the verse was revealed. The Holy Prophet sent to them not to distribute the estate of Aus

⁷⁰ Qur'an Chap. 4 : 7

because Allah had given his daughters a part from his property. Later on the verses on inheritance were revealed. The Holy Prophet asked them to give the widow 1/8 and the daughters 2/3 and the remaining for them.⁷¹

It was also narrated that at this point in the history of the development of Islam and particularly after the battle of Uhud a lady who was the widow of one of the companions of the Holy Prophet by name Sa'ad bin Rabia who was killed at the battle of Uhud came to the Holy Prophet with her two daughters born to Sa'ad and said to him:

*“Oh Allah’s messenger these are daughters of Sa’ad bin Rabia their father Sa’ad Martyred with you in one of the battles, but their uncle seized their wealth and left nothing with them and there was no way they could be married without wealth. The Holy Prophet said to her ‘Allah shall pass verdict on this’ thereafter Allah revealed chapter 4 verse 11, the Holy Prophet sent to their uncle and ordered him to give two third to the daughters and one eighth to the mother and retain the residue”.*⁷²

According to another report the verse were said to have been revealed in respect of the case of Abdurrahaman bin Thabit whose brother Hassan Sha'ir died and was survived by a wife called Ummu Kahhata and his five other sisters. His surviving male relations seized the entire estate. His wife complained to the Holy Prophet and the three verses on inheritance were

⁷¹ Idris S. op cit, at p.19

⁷² Lakhvi S.B.H. op. cit. PP. 8-9 As quoted from Tafsir al-Qurdubi vol. 5 p. 57 and Al-bukhari, Muslim, Abu Dawud and Al Tirmidhi.

revealed.⁷³ The fundamental reforms were, as a result introduced in the Islamic law of inheritance.⁷⁴

The revelation of the three verses marked a turning point in history of inheritance and more especially in the women's right of inheritance. It introduced fundamental reforms to the existing practices of inheritance. Marriage and patronage were introduced as additional grounds of inheritance in addition to blood relationship. Spouses, female, cognates, ancestors, master of manumitted slave etc were all conferred with the right to inherit the deceased. Ability to bear arms was no longer a basis of inheritance. Females were no longer considered as forming part of the heritable estate, rather they were as well considered part of the family, and not alien element that should be denied inheritance out of the desire to limit the estate within the family circle. Presence of able male beneficiary was no longer an impediment that deprived other female, weak children and elderly male members from inheritance. No preference is accorded on account of seniority. Right of the deceased to make personal arrangement to incorporate or expand the beneficiaries is abrogated. Save for bequest which is now limited to the maximum of 1/3 of the net estate.⁷⁵

⁷³ Idris S. op cit, at p.19

⁷⁴ Muhammad A. S. Op. Cit. PP. 14-15

⁷⁵ Idris S. op cit, p.19

The Hadith of the Holy Prophet being the next primary source after the Holy Qur'an further shed more light on these injunctions relating to the sharing of the estate among legal heirs. After the death of the Holy Prophet, many complicated problems related to inheritance of the father's father in competition with collateral, the donkey case (*al-himariyyah*) and the inheritance of parents along with a spouse relict all of which significantly affects the shares of women. Consequently the companions resort to the use of *ijtihad*.⁷⁶

Sociologically, Islamic law of inheritance reflects the structure of the family ties and the accepted social values and responsibilities within the Islamic community. Islamic law regards the right of inheritance as the consideration for duties of protection and support owed to the deceased during his lifetime, so that the greater the bond, the greater the right of inheritance. There is also a rule that the duty of a person to maintain his needy collaterals depends upon his right to inherit from them.

Furthermore, under the religious perspective, Islamic law of inheritance enjoys the highest stage of inheritance between the Muslim *ummah* from its strong religious significance. This is where the Prophet (SAW) says; the law of inheritance constitutes half sum of knowledge, thereby, putting the

⁷⁶ Ibid, p. 20

principles of Islamic law of inheritance firmly as the divine guidance of Allah (SWT).

Therefore, the principle of Islamic law of inheritance as a whole is more comprehensive, fearful and just and it is more consistent with time and reason and good sense when compared with other ideologies. This is so because it gives right to those one that are excluded in other customs and ideologies to inherit from their deceased relatives property and not only that it has given them priority over other ones that are recognized more before by fixing specific share for them. As we have seen in various customs and ideologies, the nearest agnate male inherits the deceased's property to the exclusion of others including wives(s), daughter, younger male children, parents etc. but Islam transformed it to such an extent that it now mirrors and emphasized more on the immediate family of the deceased. The Holy Qur'an establishes mutual right of inheritance between a husband and his wife, his parents, his children whether male or females and whether matured or young even if they survived few minutes after the deceased death to the extent that when they were born, they just breath and cried and then died. Each of these heirs was prescribed fixed fractional shares.⁷⁷

The relations mentioned by the Holy Qur'an and the male agnates are the ordinary legal heirs recognized under Islamic law of inheritance. Because, in

⁷⁷ Coulson, N. J op cit P. 31

case the deceased may usually be survived by member of the above mentioned group to whom his property may devolved. These heirs are, as well categorized by Islamic law of inheritance into inner and outer family.⁷⁸ The inner family constitutes all male agnates from the deceased person, whatever their degree of removal along with those particular relatives mentioned in the Holy Qur'an.

Apart from these ones, all other ones that can inherit the deceased constitute the outer family and they can only inherit in the absence of the blood relations of the inner family.⁷⁹

⁷⁸ Ibid P. 31

⁷⁹ Coulson N. J op cit P. 31-2

CHAPTER THREE:

GROUND AND CONDITIONS OF INHERITANCE UNDER ISLAMIC LAW

3.0 INTRODUCTION

Inheritance prescribed by the law comes into operation when some grounds and conditions exist. These include the essential that comes by reason of three causes Nasab (relationship), Nikah (Marriage) and Wila.¹ Nasab means consanguinity or relationship existing between relatives such as exists between father, mother, children, brothers and paternal uncles. Nikah is relationship by marriage that of husband and wife inherits from one another. Wila, on the other hand, is the relationship that exists between an emancipated slave and his emancipator.² Despite this, however, there will never be a valid right of inheritance without a person being deceased. And even if deceased, there must be properties left by the deceased person capable of being inherited and, of course, there must be warithun (Heirs) who inherits the property of the deceased.³ They are called the grounds and condition of inheritance which shall be discussed below.

3.1 GROUND OF INHERITANCE

According to Anwar Qadri, the grounds of inheritance are Nasab

¹ Khan, S.A. How to Calculate Inheritance, Goodwoods Books, New Delhi, (2005); p.21

² Qadri, A.A., op cit p.8

³.Keffi, S.U D., (1990) op cit, at p.10

(Blood and relationship), *Nikah* (marriage), and *wila* (patronage).⁴

These are legal bases on which a heir may be legally justified to inherit from the deceased property. Right of inheritance rest upon the two principal grounds of blood relationship and marriage. But there is a secondary ground as well, which can only be regarded in the absence of the above ones i.e. by Patronage (*wada'a*) or the relationship between a freed slave and his former master. By virtue of his act of manumission, the master acquired the right to inherit from his freedom if the latter died without any heir by blood.⁵ These are going to be discussed one after the other below;

3.1.2 BLOOD RELATIONSHIP (NASAB)

Where the heir inherits either as a child, parent, collateral, uncle or any member of the outer family, he is said to be inheriting as a blood-relative of the deceased person.⁶ Thus the right of inheritance through blood relationship is the one existing between relatives of the deceased – according to Coulson the family group Knitted together by the web of social rights and obligations was the extended agnatic family of males linked through males to a common ancestor. Hence, although maternal relatives do have rights of inheritance, the main emphasis lies on the paternal connection and that the

⁴ Coulson, N.J., op cit p.10

⁵ Doi, A.I. op cit P.437

⁶Keffi, S.U.D., op cit, p.40

primary significance of *nasab* (blood relationship) is that of paternity.⁷ According to Lakhvi,⁸ blood relations are the descendants and the ascendants of the deceased person that includes his upspring, both male and female, parents, brothers and uncles.

3.1.1 MARRIAGE (*NIKAH*)

For the marriage to create a right of inheritance between spouses in a Muslim family, it must be valid and must exist actually or constructively at the time of the death of a spouse. A marriage is said to be valid when it conform to the requirements of validity i.e. guardians, witness, dowry, and that one of the spouses does not falls within the prohibited degree of marriage.⁹

A valid marriage contract makes the spouses eligible to inherit the other.¹⁰

The Qur'an has established this right thus,

“In what your wives leave, your share is a half; ye get a fourth;..... in what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eight;.....”¹¹

⁷ Coulson, N. J. op cit, p. 22

⁸ ibid

⁹ Keffi, S.U.D., op cit p.40

¹⁰ Lakhvi op cit p. 20

¹¹ Qur'an Chap. 4:12

This does not however include their parent or other relations. ¹²Therefore, either of the spouses is a legal heir to one another so far their marriage is subsisting at the time when one of them dies. It has also been unanimously agreed by the Muslim jurists that if a man divorced his wife by a revocable divorce and died, she will inherit him if her *Iddah* period did not expire at the time of his death.¹³ But if the divorce was irrevocable, then she can not inherit him, whether her *Iddah* has expired or not.

However, Muslim Jurists held differing opinions where the irrevocable divorce was pronounced during the death sickness, and the deceased person died due to the same sickness. According to Shafi'i school if the divorce is irrevocable one it does not matter whether it is pronounced during death sickness or during his health time, she is not entitled to inherit him at all.

The Hannafis School held a view that if an irrevocable divorce is pronounced during death sickness and the *Iddah* period did not expire, it is only them; the wife is allowed to inherit her late husband. However, if the irrevocable divorce was pronounced due to her own request against any amount during his death sickness, then she has no right to inherit him.

The Hambali school is of the view that if an irrevocable divorce was pronounced during death sickness, the wife has the right to inherit her

¹² Pindiga U.E. op cit, p. 26

¹³ Lakhvi, H S.B., op cit p. 21.

husband whether her *Iddah* expire or not. However, if she had married another person before the death sickness of her ex-husband, whether her *Iddah* had expired or not, or where it was pronounced on her own request, she loses her right of inheritance. However, the current researcher is of the view that if a man divorces his wife irrevocable and subsequently dies, she is not entitled to inherit him at all because an irrevocable divorce debarred him from returning her as his legitimate wife until she marries another husband who must cohabit with her and divorce her on his own volition. And the idea of marriage being a ground of inheritance is that there must be a legal tie which is missing in this present scenario.

Yusuf Ali has this to say;

*... sacred are family relationships that rise through marriage and woman bearing children, orphans need special loving care, in trust is held all property; with duties well defined; and after death, due distribution should be made in equitable shares to all whose affection, duty, and trust shed light and joy on this our life below”.*¹⁴

According to Coulson, N. J.,¹⁵ a spouse relict in succession law is one whose marriage with the praepositus is valid and existing, actually or constructively, at the time of the deceased.

¹⁴ Abdallah Y A; the Glorious Qur'an Translation and commentary, Dar-el Fikr, Bienit, Lebanon, (1938), p. 177.

¹⁵ Coulson, N. J. op cit, p. 10.

Another point worthy of noting is that since the right of inheritance under marriage relationship arises directly from the marriage contract itself and does not depend upon consummation; even minors who have been validly contracted in marriage by their guardians have mutual rights of inheritance.

Mutual rights of inheritance between spouses, however, ceases the moment their marriage finally terminated, although if it is a revocable divorce, the marriage may be deemed to have been constructively in existence, hence as long as the wife is in her *Iddah* period there are mutual rights of succession. But where the divorce is an irrevocable one, then the right of inheritance ceased immediately and do not persist during the wife's *Iddah* period,¹⁶ because an irrevocable divorce is a final severance of the marital tie which is the basis of right of inheritance through marriage relationship.

There is however a reform in some Islamic Law Jurisdictions to the effect that polygamy is declared invalid and hence seriously affects the Islamic law of inheritance, e.g. under the Tunisian Laws¹⁷ relating to marriage. While the position in Iraq is that the permission of the court has to be obtained first¹⁸. However the amended Iraqi code deliberately removed marriage with more than one wife without the permission of the court from the list of the impediments to a valid marriage. In Pakistan, the permission is to be given

¹⁶ Ibid p. 17

¹⁷ The Tunisian law of personal status, 1959 amended in 1964.

¹⁸ Iraqi code of 1959 as amended in 1963

by an arbitrators constituting of chairman of the council or local government and a representative of the husband and representative of the wife. So also in some jurisdiction irrevocable forms of divorce are abolished, which also seriously affects the issue of inheritance.

Under the Indian Law, the right of inheritance ceases upon the grant of a judicial decree for termination of marriage. This is because a judicial decree granted under the Indian Act is always final and absolute and, therefore, the right of inheritance between the spouses ceases to continue during the wife's *Iddah* period.

Another point worthy of noting is that even though a Muslim man is Islamically allowed to marry a non-Muslim woman of Christian or Jewish faith, and that the right of inheritance ensures during the subsistence of a legally valid marriage, yet a non-Muslim wife of a Muslim husband is not entitled to inherit her Muslim husband. This is because it is a settled principle of Islamic law that a non-Muslim can not inherit from a Muslim and vice versa. Some non-Muslims may view this as a harsh law that run against the right of the woman, but there is yet another side of Islamic law that puts an antidote to their perceived injustice. This is where the Islamic law allows a person to make a will of not more one-third (1/3) of his net estate. Therefore, a Muslim man who marries any woman who is not a

Muslim may will out one-third of his net estate to his wife which is more than her fractional share of inheritance which is 1/8 if he has children and 1/4 if he has no child.

3.1.3 CLIENTAGE (WALA)

Under this sub-heading, the Prophet (SAW) said “the clientage is the exclusive right of him who set a slave free”. That is to say the master or his child may inherit the deceased person but only to such an extent that the deceased is not survived by an heir or relation.¹⁹ Thus, a third ground of inheritance lay in the institution of patronage (*Wala*), or the relationship between a freed slave and his former master. By virtue of his act of manumission, the master acquired the right to inherit from his freed slave if the freed slave died without any heir(s) by blood.²⁰ As such, if a master emancipates his slave, he is entitled to inherit the free slave in the absence of any other heir of the deceased (free slave). And Islamic jurists are unanimous that the right is not reciprocal.²¹ Hence, a freed slave can not inherit his master, even if the master died without heirs.²² This view is in conformity with the Hadith of the prophet (SAW) which says,

¹⁹ Keffi, S.U.D. op cit , p.41

²⁰ Coulson, N. J. op cit, p. 10

²¹ Haider, S.B. op cit, p. 22

²² Bidayatul Mujtahid, Vol. 2, Pp. 364 – 365

*“Al-wala’a is for those who set him free”.*²³

3.1.4 MUSLIM TREASURY (BAITAL-MAL)

According to Maliki School, there is yet another ground of inheritance which is *baital-mal* (Muslim treasury). But this can only be a ground where a deceased is not survived by any body who could come under any of the above mentioned grounds, hence the deceased’s estate passed to the Muslim treasury for the benefit of the Muslim *Ummah*²⁴.

3.2 ESSENTIALS OF INHERITANCE

There are three elements upon which the Islamic law of succession is built, that is the deceased person, the presence of the estate capable of inheritance, and the legally recognized sharers. Thus, there can be no valid inheritance under Islamic law, for example, where a person whose estate is to be distributed is alive, or where a person dies but did not left behind any property and to some extent, there could be no valid succession where there are no inheritors to succeed the deceased person. As such the presence of these elements of succession is very essential.²⁵

3.2.2 THE DECEASED PERSON (AL-MAYYIT)

There must be a deceased person for a valid inheritance according to all the Muslim jurists and for the purpose of this subject, the deceased person must

²³ Al Bukhari & Muslim

²⁴ Naseef, O. A. op cit p. 456

²⁵ Keffi, S.U. D. op cit, p.10

either die in fact (*al mautu-haqiqatan*) or die in law (*al-mautu-shar'an*). A deceased person is one who is no longer living in this world. He is a dead person whose property is transferred to those who are entitled to inherit him. Such transfer must be effected according to the laid down principles of Islamic law of succession and not according to the customary rules of deceased if he is a Muslim, and the property must be transferred to those legal heirs who are entitled to benefit from his estate by virtue of a special relationships that subsist between them – that is either through blood, marriage or clientage.

Whenever a person dies the right of four kinds relates to his estate of which three are related to him and one relates to his heirs. The death of person to be inherited is the first and fundamental factor to warrant inheritance. However, for the death to be material it must be actual and real or be legally presumed.²⁶ This must be ascertained because the right to inherit accrues to the eligible heirs immediately with the death of the *praepositus* and such a right need not be pronounced or declared by anyone else. Where the death is not actual but rather presumed the right to inherit accrues only to the surviving heirs with effect from the date when the deceased's death was

²⁶ Khalid, S.H. & Najah, A. *Al-Mawarith*, 2nd edition, Dar. Cebaiou, Beirut, (1980), p. 28.

declared by the Court. The death of a person may also be circumstantial,²⁷ for example, a destructed fetus in the womb as a result of a criminal injury to the mother. In such a case the person who injures the mother which injury leads to the destruction of the child shall pay some compensation commensurate to his criminal act in a form of five camels legally known as “al-ghurrah”. If the culprit is among the legal heirs he will be debarred from inheriting the compensated money. The compensation by ghurrah represent half of one-tenth ½ of 1/10 of a full diyyah (expiation) of a hundred (100) camels. This is the least compensation payable for life.²⁸ With regard to this the Hannafi school is of the view that ghurrah is an exclusive entitlement of the praepositus fetus which is to be inherited by his heirs.²⁹

There must be a deceased person for a valid inheritance according to all the Muslim jurists and for the purpose of this subject, the deceased person must either die in fact (al mautu-haqiqatan)³⁰ or die in law (al-mautu-shar’an)³¹ Though the latter was not known during the time of the prophet (SAW) as it was only known during Caliph Umar (A.S) when he was confronted with the case of a missing person.³²

²⁷ Prindiga, U.A. Practical Guide To The Law Of Succession (Mirath) In The Shariah, Tamaza Publishing Co. Ltd, Zaria, (2001), p. 11.

²⁸ *ibid*

²⁹ Prindiga, U.A. *op cit* p. 11.

³⁰ Sahih Muslim, 3077

³¹ *ibid*

³² *Ibid*, p.12

A question may be asked in the case of those who die in a common disaster as to who pre-deceases the other? In such a situation, if it cannot be clearly ascertained as to who died first, then there is no inheritance. This is because ascertainment of death as a condition of inheritance is a condition precedent under Islamic law of succession.³³

There is, however an exception to this rule on geographical location. For instance, the survivor of the deceased who dies in a distanced area, say of Kano state will be entitled to claim the right of inheritance from the survivor of the deceased who dies in Lagos at the same time, but this exception is among the conflicting issues which we are going to consider in our chapter four of this research work as there are divergent views on it.³⁴

3.2.3 ESTATE (TARIKAH)

Therefore, before determining who is a legal heir and what will be his fractional share in the deceased's estate, the praepoistus must have left estate itself capable of being inherited. In this case, the jurists have classified what constitute estate of a praepositus into four as follows:-

- i. Money and money worth:- Jurists are unanimous that any denomination of money, be it coins or currency notes considered to be legal tender, is inheritable. Similarly all transferable money worth

³³ Keffi, S.U.D. op cit, p.13-14

³⁴ Ibid, p.15

- documents such as cheques, share certificates, etc., moveable and immovable properties, are all brought under money worth, and are subject of inheritance.
- ii. Usufruct: - majority of the jurists agree that manfa'ah is considered as a property and is therefore inheritable. If consist of any benefit or enjoyment derivable from hire, mortgage, pledge, loan or debt. It is an intangible property which flows from tangible property. However, according to Hannafi school manfa'ah is not a tangible property therefore it does not consist an estate capable of being inherited.
 - iii. Rights (Huquq):- As regards rights, the majority of the jurists have agreed that legal rights are inheritable. Jurists have however gone further to classify legal rights into two broad rights, viz (i) monetary rights and personal rights. Monetary rights are those rights attached to monetary interest such as securities, etc. personal rights are those rights exclusively reserved to the deceased of the deceased person.
 - iv. Permission:- This is a kind of gesture, so to say, to enjoy some property for an undefined duration granted to one person by another. This right or permission according to majority view is not inheritable because it ceased with the demise of the person who initially granted it.

The estate of the deceased person, according to Lakhvi, consists of either moveable (*manqool*) or immovable (*A'aqar*). It also includes the *Qiyami* or the *mithli*. *Qiyami* are those things that are dissimilar and are not interchangeable like land, animals, house, etc. while *Mithli* are those properties whose unites or parts are similar to each other and are interchangeable without much difference, e.g. oranges, coins, books, etc.³⁵

Tarikah or estate means what a deceased person left behind after death. The estate of the deceased person may consist of properties and other financial rights along with the liabilities that may be attached to it, and whether or not they are incumbent. The estate of the deceased person may include things which are in the person's possession and those that are not in his possession, for instance his share of inheritance in the property of his relation that pre-deceased him, which has not yet been distributed.³⁶

The estate of the deceased capable of being inherited must legally be pure under the Islamic law whatever is declared unlawful by the rules of Islamic law is also prohibited and outside the purview of Islamic law of succession, i.e. wine, pig etc- this includes their value in monetary term. Musical instrument are also regarded as outside those things that are allowed to be

³⁵ Lakhvi, S.B.H.A. op cit, p. 17.

³⁶ Ibid, p.18

inherited under Islamic law.³⁷

3.2.3 THE BURIAL EXPENSES

This is the first charge over a deceased person's property, Ibrahim Nakha'i once said,

*“It shall be commenced with the Kafan (i.e. funeral and burial expenses) then pay the debts, and next the legacies”.*³⁸

As such, immediately after the death of a person, certain obligations as to his funeral service becomes due and these have to be from his estate unless if somebody have taken the responsibility. These include the bath of his remains, the shrouding which is three pieces of clothes for man and five for woman³⁹ the transportation of his bier to the cemetery, the grave where the land has to be bought, and any other reasonable expenses in connection to his burial activities. All these have to be done from what has been left by the deceased person within the legal requirement and the accepted customs.⁴⁰

Where the deceased person dies and did not left behind any estate (property), these enumerated burial expenses should be done by his closest relations (heirs).⁴¹ But the jurists differ as to whether a husband shall bear the

³⁷ Doi, A.I. pp.436-9

³⁸ Doi, A.I. p.436-9

³⁹ Lakhvi, S. B.H.A. op cit P. 20

⁴⁰ Pindiga U.A., op cit, p. 15

⁴¹ Ibid p. 15

expenses; Imam Abu Hanifa held the view that the husband is always bound to bear the cost regardless of his wife's financial status. This is deduced by way of analogy from the legal duty imposed upon him to maintain his wife. But Muhammad bin al-Shaybani, has dissented from this view even though a disciple of Hanafi School. He opines that the wife's burial expenses should be borne from her estate and in the absence of any, the burden shifts to her relations who should have maintained her had she been unmarried. Death, according to him, is an automatic natural divorce which absolves the husband from any further responsibility on his deceased wife. The view of the Malikis is that no dead person should be held responsible towards others, except a husband who is legally responsible to bear the burial expenses of his wife that pre-deceased him.

The current researcher is of the majority view that if a person dies and did not left behind any property; his legal heirs should take the responsibility of his funeral expenses, so also to the current researcher the view of Muhammad bin Al-shaybani sound illogical because he is taking a situation where the woman is not married. Therefore, in so for the husband will inherit his wife after her death, he should shoulder her funeral expenses whether or not she left behind property.

3.2.4 THE PAYMENT OF DEBT

This is the second charge over the deceased property; his debt must be paid from his assets. For example, where a person dies and left a debt of ₦ 50, 000.00 but his net estate is only ₦30, 000.00, his estate cannot pay off the debt even if it is used to settle the debt and his heirs will get nothing out of the estate because nothing will remain. This is because of the provision of the Holy Qur'an that says;

“Allah (thus) directs you as regards your children’s (inheritance)... (the distribution in all cases) ... after the payment of legacies and debts so that no loss is caused (to any one)”⁴²

There are also many traditions of the prophet (SAW) that are to the effect that whenever a person dies, and after his funeral expenses are satisfied, the next is the payment of his debts from his estate. Salama Ibn al-Akwa Narrates;

Once, while we were sitting in the company of the prophet (SAW), a dead man was brought , the prophet (SAW) was requested to lead the funeral prayer for the deceased. He said, is he in debt? The people replied in the negative. He said, “Has he left wealth? They said, “no” so he led the funeral prayer. Another dead man was brought and the people said, “o! Allah’s messenger led his funeral prayer”. The prophet (SAW) said, is he in debt? They said “yes” He said, has he left wealth? They said, “Dinars”. So, he led the prayer, then a third

⁴² Qur'an ch.4:12

dead man was brought and the people said, please lead his funeral prayer. He said, “has he left any wealth? They said “No” He asked “is he indebt? They said “yes” he has to pay three “Dinars”. He refused to pray and said, “Then pray for your dead companion”. Abu Qatadah said, “O Allah’s messenger! Lead his funeral prayer, and I will pay his debt. So he led the prayer.”⁴³

In another Hadith of the prophet (SAW), Abud Hurayarah narrates,

Whenever a dead man in debt was brought to Allah’s Messenger he would ask, “Has he left anything to repay his debt? If he was informed that he had left something to repay his debts, he would utter his funeral prayer, otherwise he would tell the people to offer their friends funeral prayer. When Allah rightful than other believers to be the guardian of the believers, so if a Muslim dies while in debt, I am responsible for the payment of his debt, and whoever leaves wealth, it will belong to his heirs.”⁴⁴

It is settled principle of Islamic law that a formal acknowledgement (*iqrar*) of a debt is binding and irrevocable. This, acknowledgement of debts by dying person might be the only means by which he/she could establish a debt which he in fact owned and thereby avoid the serious sin of failing to provide for payment of his debts. As such, the payment of deceased debts would be first to be solved, prior to wills, gifts, etc.

⁴³ al-Bukhari, M. B.I.Sahih al- Bukhari, Arabic-English, Ankara-Turkey, Hilal Yymlari, (1076)

⁴⁴ Ibid, 2133

The debts which are the concern of the rules of Islamic law of succession are not only debts arising from loan or sale but also include any financial responsibility. And where a debt is established it ranks as true debt in the administration of estate. The Prophet (S.A.W.) is said to have judged that the debt should be paid before the execution of the will, and regarding the verse, “ Allah commands you to return your trusts to their owners” he judged that returning the trust must take precedence over the execution of the voluntary will.

Settlement of debt is given priority over the settlement of bequest (*Wasiyyah*). For this purpose, debts are classified into two broad senses, i.e. debts of Allah and debts of people. Debts of Allah are those debts which were to be settled by the deceased during his life time but had failed to do so. These debts must be settled after his death from his property, e.g. payment of *Zakkat* expiation or performance of obligatory *Hajj*, etc.⁴⁵ Debts of people on the other hand were also sub-divided into secured and unsecured debts. Secured debts are those debts which attached to a part or whole of the estate, while unsecured debts are taken by the deceased personally without attaching his property.

⁴⁵Lakhvi, S.B.H. op cit, p. 17.

Muslim jurists have different opinions in respect of settlement of debts. But before discussing the different opinions of the Islamic Jurists we will elaborate more on debt itself as it relates to the deceased's estate with respect to the settlement of the deceased's debt out of his estate, there are debts that are related to the estate, there are debts that are not related to the deceased's estate which includes all debts attached to the deceased's estate such as loan, mortgage, pledge, etc. These debts take precedence over bequest and all other debts unrelated directly to the estate. Any unpaid balance in a sale agreement or contract is also considered a debt related to the deceased's estate.

Debts that are unrelated to the estate include borrowed money, medical bills, school fees, etc. These categories of debts are further classified thus;

- i. Debts incurred in good health. They are debts personally incurred by the deceased while in good health. Here the law requires that such debts must have been acknowledged by the deceased before it can be entertained after his death.
- ii. Debts incurred during death sickness:- This can only be proved by the deceased orally or in writing before his death. All other means of proof are not admissible out rightly on the legal presumption that he might have been induced to provide it.

iii. There are also religious debts which are due to Allah like Zakkat, Kaffarah, etc. which were left unpaid.⁴⁶ Opinions differ between the Hannafi School and the Malikis over this debt. The Malikis viewed that the debt becomes bad immediately after the death of the praepositus; while the Hannafis on the other hand held that since all religious debts require intention such debts are un-enforcement unless they were contained in a will or bequest.⁴⁷

Another contrary view of the Malikis is that all debts should be treated equally regardless of their nature and should be settled. They say since Zakkat is compulsory in the property of the minor, insane or imbecile, the issue of intention raised by the Hannafis is irrelevant.

As to the different views of Islamic schools of jurisprudence as regard to the settlement of debts of the deceased person,⁴⁸ Imam Ahmad Bin Hambal said that all debts must be paid after burial expenses. But the secured debts have preference over the debts of Allah.⁴⁹ Imam Abu Hanifa was of the view that the secured debts must be paid before funeral expenses and after funeral expenses unsecured debts be paid. According to this view, as far as the debts

⁴⁶ Sabiq, S. Fiqh – at- Sunnah, vol. 2, p. 427.

⁴⁷ Khalid, S.H. & Najah, A. op cit, p. 31.

⁴⁸ Al dasuki, vol. 4, pp.471-472

⁴⁹ Lakhvi, S.B.H. op cit, p. 18.

of Allah are concerned, they have lapsed after the deceased person's death.⁵⁰

They based their argument that these debts were spiritual obligations upon him; the intention is an essential element for the performance, which is impossible from a dead person. But if the deceased bequeathed for their payment, then they will take the form of a will and might be carried out up to one-third of the remaining estate after payment of burial expenses and debts.

Imams Shafi'i and Maliki opined that the secured debts must be paid first even before funeral expenses. But that debts of Allah and unsecured debts should be paid after funeral expenses without any preference. However, the researcher is of the view that the debts of whatever class should be paid after the funeral expenses.

Though Abu Huraiyrah narrates,

*“That the prophet (SAW) said, “a believer’s soul remains suspended until his debt is cleared”.*⁵¹

Another Hadith from Muhammad Ibn Jaysh says;

One day while we were sitting with the prophet (SAW) he raised his head towards the sky, then he put his palm on his forehead, then said “Glory be to Allah how sternly it has been revealed! We remained salient and

⁵⁰ Ibid

⁵¹ Sahih al-Bukhari, op cit

terrified. On the next day I asked “O messenger of Allah what is that stern (message) that has been revealed? On this (SAW) said, “By him in whose hand is my soul, even if a man is killed in the way of Allah, then he is under debt, he will never paradise until his debt is cleared”⁵².

Thus, we can see how fundamental is the payment of debt of the deceased person immediately after his death, and in his wealth, But if he dies indebted and does not leave any wealth, either his family or the Muslim community shall pay his debt, otherwise he is left with his debt, Allah is all- knowing and most merciful.

3.2.5 SATISFACTION OF WILLS (WASIYYAH)

The third right of a deceased person over his wealth is to fulfill his will from his estate. This is because of the provision of the Holy Qur’an which says;

*“After the payments of legacies and debts”.*⁵³

Mus’ab Ibn Sa’ad (R.A) narrates from his brother, He said;

“I fell sick and sent someone to the prophet (SAW), when he came, I said ‘permit me to divide my entire wealth as I wish. “He did not agree, I said, “half of it”. He again did not agree. Then I said, “one third of it” The prophet (SAW) remained silent while on hearing of the one-third, and then he said, “After

⁵² Isa, A. M.B. Sunan Tirmidhi, Darul Fikri, Beirut, Lebanon, (1994)

⁵³ Qur’an ch.14:11

*one third (less than one-third) is permissible.*⁵⁴

The extent of Wasiyyah as agreed upon by the jurists should not exceed one-third (1/3) of the deceased's estate. This was understood in line with the above tradition of the prophet (SAW) over the bequest of Sa'ad bin Abi Waqqas.

Bequest should be satisfied before any distribution of the deceased's estate, lest it be overtaken by events whereby the heirs exhaust the whole Estate. Personally at his life time and are never in law inheritable. They include the right to divorce, guardianship, sucking, etc. Jurists viewed them as not heritable because those rights ceased to exist immediately at the death.

Finally, in respect of the deceased estate, after the demise of the deceased, the estate does not pass to the heirs automatically and the heir's right to the possession cannot be due unless all claims and liabilities against the estate or the praepositus personality are settled first. This includes his funeral expenses, debts, will, gifts etc.⁵⁵

3.2.6 HEIRS (WARITHUN)

After the above mentioned rights and obligations are deducted from the deceased's estate, whatever remains thereof becomes the net residue which

⁵⁴ Hajjaj, B. M. al Jami al Sahih, Cxairo, (1349 A.H.)

⁵⁵ Ibid, p.415

is to be distributed among his legal heirs. However, before an heir can claim a share from the estate of the deceased he must show that he was alive at the time of the death of the deceased and that there is no any impediment that befalls and debar him from inheriting from the deceased's estate.

This means that the heir must have actually lived for a while. Survival, for the purpose of inheritance, may either be actual or presumed (such as in the case of an unborn child). However, where some people died simultaneously and it is not practicable to determine who dies first, none of them inherits the other even if they are father and son.⁵⁶

The rights of heirs has to be implemented after the above mentioned rights, i.e. rights of the deceased person over his wealth and the estate itself.

Ibn Abbas (RA) narrates;

*“The prophet (SAW) said, “live the “fara'id” to those who are entitled to receive them. Then whatever remains, should be given to the closest male relative of the deceased”.*⁵⁷

Jabair Ibn Abdullah narrates;

“The Prophet (SAW) came to see me. I was unwell while among the descendants of Salamah I said, “O prophet of Allah how shall I distribute my property among my descendants? The prophet (SAW) did not

⁵⁶ Pindiga, U.E. op cit, p. 26

⁵⁷ Sahih AL-Bukhari op cit

reply subsequently the Qur'anic verse relating to inheritance was revealed".⁵⁸

As such, there are verses of the Holy Qur'an specifically dealing with the recognized heirs of a deceased person, i.e. Qur'an Chap. 4:9-13 and Qur'an Chap. 4:117, as well as several traditions of the Prophet (SAW). Therefore, in the light of the two above sources, the heirs are divided into three distinct categories, i.e. *asabah* (residuaries), *ahlal -fara'id* (Qur'anic heirs), and *Dhawu- arham* (distant Kindred), as will be seen below.

Heirs are those to whom the property of a deceased person is transferred. It has to be proved that the heir(s) are surviving at the time of the death of the praepositus, before they are allow inheriting.⁵⁹ The heirs to inherit from the estate of the deceased are categorized into four: viz, heirs by blood, heirs by marriage, heirs by clientage and the Muslim treasury.⁶⁰

3.2.6.1 ASHABUL FARA'ID(FIXED SHARERS)

The *ashabul furud*, otherwise known as Qur'anic heirs are twelve (12) according to Sunni schools of jurisprudence. They includes husbands, wife, daughter, agnatic grand-daughter (the daughter of a son how low so ever), father, agnatic grand father (how high so ever), mother, grandmother

⁵⁸ Hajjaj, B. M. op cit

⁵⁹ Lakhvi, S.B.H., op cit p. 23

⁶⁰ Doi, A. I. op cit, p.420-3

(maternal or paternal, how high so ever),⁶¹ germane sister, consanguine sister, uterine brother, and uterine sister.

Son's daughter, father's father and mother's father were not specifically included as among the Qur'anic heirs but were rather added by analogy by the Sunni schools of jurisprudence as part of *ahl-al-fara'id*.⁶²

It is the basic principle or nature of the Qur'anic heirs that they do not exclude other relatives, but instead, the Qur'anic heirs may be said to have priority over the relatives in so far as the satisfaction of their allotted shares is to be first settled from the estate of the deceased person.⁶³ In essence, it may be that sometime the satisfaction of the Qur'anic heirs may exhaust the whole estate to the extent that the residuary heirs cannot get anything to inherit. Under this situation, the residuary heirs are indirectly excluded. There are certain female relations that may either inherit as Qur'anic heirs or as residuary heirs.

It was obviously not the intention of the provisions of the holy Qur'an in relation to succession that the heirs it mentioned should inherit their allotted shares in all cases but that the quantum may change according to the circumstances of each case. For instance, the spouse relict, the parents and the daughter(s) were given an unqualified right of succession so that they are

⁶¹ Coulson, N.J., op cit p.35

⁶² Ibid, p.32

⁶³ Ibid, p.32

not subject of exclusion by any other relative heir.

Ibn Abbas narrates,

*“The custom (in old days) was that the property of the deceased would be inherited by his offspring, for the parents (of the deceased), they would inherit by the will of the deceased. Then Allah cancelled from that custom whatever He wished and fixed for the male double the amount inherited by the female, and for each parent a sixth, and for the wife a eighth, or a fourth and for the husband a half or a fourth”.*⁶⁴

This Hadith translates the Qur’anic verses ch.4:11-12. Among the Qur’anic heirs, some degree, priority is recognized, but with the exception of two categories of the Qur’anic heirs and the male agnates heirs who were not merged together such that the Qur’anic heirs were given precisely the same position as that of the male agnates in Al-jabari’s rule. One major effect of this Qur’anic provision is to put the ascendants in a status which cuts through the established rule of priority by class.⁶⁵

As stated above, the Qur’anic heirs do not exclude other relations of the inner family. Thus, neither the father nor the mother, nor in their absence, the father’s father or grandmother can be excluded by the descendants of the deceased person, for they are indeed Qur’anic heirs and they also have the

⁶⁴ Al Bukhari, M.B.I. op cit

⁶⁵ Coulson, N.J., op cit p.35

power to exclude other relative.⁶⁶ A husband or a wife does not also exclude other relations nor can they be excluded.⁶⁷ Thus, no rule of priority shall apply to the Qur'anic heirs. But the question is that of which relative do totally excludes others as a matter of law.⁶⁸

But a matter of priority may only arise among them as in some case, the satisfaction of the allotted Qur'anic shares will result in the total de facto exclusion of some of them. But the power to exclude other relations from succession remains essentially the prerogative of the male agnates and apart from the rules that daughter or grand daughter can exclude the uterine brother and sisters, or that mother can exclude grand mother, there is no any other exception at all to the rule that a Qur'anic heir does not exclude any male agnate.⁶⁹

As a general rule of Islamic law of succession, a substitute heir is excluded from succession by the respective primary heir on the principle that the more nearer in degree excludes the more remote. But there are also two exceptions to this rule.⁷⁰ An agnatic grand daughter is not by law excluded by the daughter but is *de jure* excluded by the son. And a paternal grand mother is excluded by the father as well as by the mother of the deceased but this lies

⁶⁶ Khan, S. A., op cit pp.26-29

⁶⁷ ibid

⁶⁸ Coulson, N.J., op cit p.37

⁶⁹ Khan, S.A. op cit pp.25-27

⁷⁰ Gurin, M.A., op cit p.23

on the rule of priority by degree of removal.⁷¹

There is another group among the Qur'anic heirs which is made up of the brothers and sisters of the deceased person and all other male agnates. This group as whole are totally excluded from succession by any male blood relation who is either agnatic descendent or ascendant, but not by any female.⁷²

When this group is to inherit in the absence of any one that can exclude them, then priority, according to al Jabari's rule shall apply to them. However, uterine sister, germane sister, consanguine sister and the uterine brother stand outside this system of internal priority. None of them as a Qur'anic heir, excludes or is excluded by a member of the group, with the exception that germane brother, on the ground of the strength of blood tie can exclude the consanguine sister and consanguine brother.

There are some exceptions also that the uterine brothers and sister are excluded by the daughter or the agnatic grand daughter, or that agnatic brothers and sisters are not excluded by the grandfather as already mentioned above, the heirs are divided into four classes and they are the legal sharers (*dhawil fara'id*) whose shares are fixed, residuary heirs (*asbah*), the heirs in reversion (if there is no residuary heirs, the return

⁷¹ Coulson, N.J., op cit p.37

⁷² Ibid,p.38

devolves to them excluding the husband and wife) and the *dhawil-arham*, otherwise known as uterine kindred but are neither of the above heirs.

3.2.6.2 ASABAH (RESIDUARY)

The residuary (*asaba*) are those relations of the deceased person from the father's side. In the language of the law, it means the heirs related to the deceased by consanguinity as the father, son and the brother. The word '*asbah*' comprises every one who takes what the legal sharers leave from the deceased's estate. If there is only one residuary, as the son and the deceased has left no other heirs other than him (the son), he takes the whole estate as a residuary heir. For example, if a man dies leaving only one daughter and the son of a brother, the daughter obtains the half as her fixed share and the nephew takes the remainder because he is the only residuary heir.

The determining factor of being a residuary heir was propounded by Imam Al-Jabari. He gives three criteria namely priority by blood relations, by class and by nearness by blood. This means that for an heir to qualify as residuary heir, he must have blood relationship with the deceased that is the first rule. The second rule operates among the classes to which an heir belongs. For instance, an heir coming from the descendant's or ascendants class will exclude the one coming from the collaterals or uncles classes. And the third rule is determined by the heir's strength of blood relationship over others

either within the same class or outside it.

The residuary heirs are classified into three. The first class is called residuary by him or no his own right (*al-usba bi Nafsihi*), i.e. every male in whose line of relation to the deceased no female intervenes. The second class is those who are made residuary by others and they are four women, viz the daughter, the daughter of the son, the sister of the whole blood, and the sister by the father's side. They are entitled to a fixed share in the absence of a brother but where they inherit along with the brother he converts them into residuary. These class of residuary get their status through brothers because if they inherit together with their brothers, each one takes half of what her brother takes and then they have no fixed share and thus the male takes the share of two females. The third class is of those who become residuary when inheriting with others as sisters inheriting together with daughters or with daughters of the sons, becoming in this way residuary as they take what the daughter or son's daughters have left. They are preferred to each other according to the proximity to the degree of kindred to the deceased, and in proportion to the strength of their relationship because he who has a double relation with the deceased is more entitled to inheritance than he who is related by one side only, if they are in the same degree. Thus, in the case of a brother by the same father only and the sister

by the father and mother, if she becomes a residuary together with the daughter, the sister is preferred to the brother by the father's side and the son of a brother by the same father and mother is preferred to the son of the brother by the father only, because they are both equal, yet the former is doubly related to the deceased. This rule applies to the paternal uncles and then to the paternal uncles of the deceased's father, and then to the paternal uncles of his grandfather. This is owing to the degree of proximity, in the same way the paternal uncle of the deceased by the same father and mother is preferred to his paternal uncle by the father's side only by reason of double relation.

The basis of residuary (*asbah*) is that it runs in the male line. The only females who can be agnates, therefore, are full sisters or sisters by the same father if there are either brothers or female descendants who inherit daughters or female descendants who inherit daughters and daughters of sons who have sons, or sons of sons to give them agnate status.

When a female becomes a residuary with a male she takes one half of the male's share irrespective of the distance in the degree of relationship on the basis of general principles of Islamic law of inheritance that "the share of a female is one half of that of the male heir" The Prophet (SAW) said;

"what is left over from fixed commitments belongs

to man's relations in the male line"⁷³.

Kalalah as for those who died but leave neither ascendants nor descendants, but has left a brother or a sister, their estate shall be shared amongst their brothers and sisters, as collaterals. In this regard, chapters 4:12 & 176 has cleared their respective shares.

Qur'an provides;

*" ... if the man or a woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth more than two, they share in third... "*⁷⁴

The other verse of the Holy Qur'an provide;

*"They ask therefore a legal decision say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies leaving a sister but no child, she shall have half the inheritances if (such deceased was) a woman, who left no child, her brother takes her inheritance, if there are two sisters, they shall have two-thirds of the inheritance, (between them): If three are brothers and sisters, (they share), the male having twice the share of the female. Thus doth Allah make clear to you (His law), lest ye err. And Allah hath knowledge of all things."*⁷⁵

But for those that dies but also leaves neither ascendants nor descendants nor

⁷³ Naseef, O.A. op cit

⁷⁴ Qur'an Ch. 4: 12

⁷⁵ Qur'an Ch. 4: 176

also collaterals of any degree, the Prophet (SAW) says their property is taken over by the Islamic state for the common good of Islamic community.

The Prophet (SAW) states,

“I am nearer to every believer than his own self, so whoever leaves behind a debt or children to support, it shall be our change and whoever leaves property, it is for his heirs and I am the heir of the person who has no heir. I inherit his property and liberate his captivity”⁷⁶.

In the case of embryo, it will inherit if it is born alive. His/her share should be put aside pending the delivery and the share to be left must be that of male child. In this case the residue 13/24 will not be distributed, till the birth of the child. So also, there is a rule on those who died simultaneously, and there is no way to ascertain who died first and who died later, they shall be inherited by their relatives who are surviving⁷⁷. It has been reported that after the battle of Yamamah, Caliph Abu Bkr (R.A) order Zaid bn Thabit to distribute the estate of those Muslim that died in the battle, and Zaid distributed it among their surviving relatives, thus;

Zaid (bin thabit) said, “Umar ordered me to apportion the shares of victims who suffered from the epidemic of plague. There as a clan whose members had died. I apportioned the

⁷⁶ Quoted in Naseef, O.A. op cit

⁷⁷ Pindiga, U. E. op cit p. 25

*shares of inheritance from the dead for the ones
alive since they do not inherit each other*⁷⁸.

Taken together, therefore, the relatives nominated in the Qur'an and the male agnates are the legal heirs under the Islamic law of succession in the sense that the deceased person will usually be survived by members of his family upon whom succession will devolve. But in an abnormal situation, for instance, where no legally recognized heir survives them the inheritance belongs to the other relatives of the remoter degree to the end when it reaches the Muslim treasury. In the first place it has to be given to those (*adhawul-qurba*) and in their absence to others nearer to them.

3.3.1 GUIDANCE ON THE ADMINISTRATION OF THE DECEASED ESTATE

Before the distribution of the deceased estate takes place, it is required by the rules of Islamic law relating to the inheritance that, all claims of debts, wills and other right of Allah shall first be settled. The Holy Qur'an states;

*“... The distribution in all cases is after the
payment of legacies and debt”*⁷⁹.

Even though the Holy Qur'an mentioned will first, it is agreed by all the companions of the prophet (SAW) and Muslim jurists that the debts should be settle first. But as to the payment of *Zakat* some jurists holds a different

⁷⁸ ibid

⁷⁹ Qur'an Ch. 4:12

view.

The Maliki School is of view that Zakat of crops and animals should be settled first Imam Malik further stipulates that the Zakat is to be paid only if requested by the deceased before his death⁸⁰.

3.3.2 WILLS (WASIYYAH)

After taking out the debts and funeral expenses, the will (wasiyyah) is to be settled before distribution. Before the revelation of the laws of inheritance, will was the only lawful way of leaving property or any other form of wealth to one's descendants or other people. But since the revelation of the laws of inheritance, one can lawfully bequeath only third of one's inheritance to those of his relatives who were not benefiting under the rules of inheritance. And he cannot make a will in favour of his heirs unless it is confirmed and approved by other heirs. The Qur'an mentions this in these words:

“It has been prescribed for you that when death approaches one of you and he is leaving some property behind him, he should bequeath it equitable for his parents and relatives. It is an obligation on those who fear Allah”⁸¹.

Another verse states,

“o believers! When the time of death

⁸⁰ Lakhvi, S.B.H. op cit p.19

⁸¹ Qur'an Vh. 2:180

approaches any of you and he is going to make his will, the principal of evidence is that two just men from among you should act as witnesses. Or, if you are on a journey and the calamity of death befalls you there, then two witnesses may be taken from among then non-Muslims”⁸².

This command of Allah was later modified by the prophet (SAW) in the light of the rules relating to Islamic law of succession as revealed in the Qur’an. In a *Hadith* reported by Bukhari and Muslim⁸³, Sa’ad bin Abu Waqqas said, “Allah’s messenger visited me, and I said “Messenger of Allah, I have a large amount of property and my daughter is only heir. Shall I will away all my property? He replied, No! I suggested two-thirds but he objected, then a half, but he still objected. When I suggested a third, he said, but that is a lot. To leave your heirs rich is better than to leave them poor and begging from people. You will not spend anything, seeking thereby to please Allah, without being rewarded for it, even the mouthful you give to your life⁸⁴.

In conclusion thereof, we were able to understand that before someone can claim to be an heir to the deceased praepositus there must be some grounds and conditions that must exist between him (the claimer) and the deceased

⁸² Qur’an Ch. 5:109

⁸³ Rahimuddin, M. Muwatta Imam Malik, translated with exhaustive notes, (1984)

⁸⁴ *ibid*

person. That is to say, he must be related to the deceased person either by blood (*Nasab*), marriage (*Nikah*), or clientage (*wilah*). Apart from those ties between the deceased and an heir, the heir must also not have any impediment on him that will disqualify him from inheriting the deceased person. Apart from that, the deceased person must have also left a wealth for the heirs to inherit. We were also able to see that before distribution of the deceased estate, some conditions must be fulfilled; i.e. his funeral expenses must be satisfied, as well as his debts and *wasiyyah* (wills), and heirs must be ascertained.

CHAPTER FOUR

IMPEDIMENTS TO INHERITANCE UNDER ISLAMIC LAW

4.1 INTRODUCTION

The mere fact that the heir fulfils or satisfies one or more grounds of succession does not necessarily qualify him or her to inheritance from the estate of the deceased person. However, the law stipulates that the heir must be free from all stains of impediments to succession.¹

Impediments to inheritance are those factors that would prevent an otherwise entitled heir from inheriting his deceased relation. In other words, an impediment to inheritance has been defined as;

*“a personal act or attribute which disqualifies from Succession, an individual who would otherwise be an entitled heir on the ground of either marriage or blood relationship with the praepositus”.*²

The factors that may operate as impediment to inheritance include; homicide, difference of religion, apostasy, difference of domicile, slavery, illegitimacy, and *Li'an* couples.

Pindiga, U.E., in his work entitled “practical Guide to the Law of succession (*mirath*) in the *Sharia*”³ states that,

¹ Abu Zahrah, M. (1404) *al- Mirath indal Ja' afari*, al Jamhuriyyatul Islamiyyah, Iran,p. 84

² Coulson, N. J., op cit, at p. 172.

³ Pindiga, U.E. op cit, at, p. 18

“Some categories of people are barred from inheritance by Sharia on the ground that they are legally incapacitated to do so for some legal impediments, until such impediments are cleared.”⁴

The most essential impediments are three, i.e. Homicide, Slavery and difference of religion, while some are of the view that impediments to inheritance were six.⁵

The present writer is with the majority view that impediments are those acts and or attributes that disqualifies an otherwise potential heir who would have exercised his right of inheritance to his deceased relatives’ estate had those acts and or attributes not befalls and debars him from inheritance. The view of the current researcher is that those impediments to inheritance include homicide, difference of religion, Apostasy, Slavery, illegitimacy/*li’an* couples and irrevocable divorce, uncertainty of simultaneous death, and difference of domicile.

Therefore, the current researcher will consider those types of impediments under Islamic law and revisits the views of the Maliki, Hannafi, Shafi’i and Hanbali Schools of thoughts as well as under the Shi’ites and other *Madhhabs*.

⁴ Ibid

⁵ Doi, A.I op cit at P. 228

4.2 TYPES OF IMPEDIMENTS UNDER ISLAMIC LAW

As noted above, impediments to inheritance may arise as a result of many factors such as homicide, difference of religion, Apostasy, Slavery, difference of domicile, illegitimacy/ *li'an* couples and irrevocable divorce, uncertainty of simultaneous death, and difference of domicile.

4.3 HOMICIDE (*QATL*)

Under Islamic Law, homicide is essentially a private wrong or tort rather than a public wrong or crime.⁶ However, it could be viewed as a crime which the state prosecutes and exacts punishment.⁷ Nonetheless, the current researcher is of the view that homicide is generally a tort in as much as it is the right of the victim's family to decide whether to prosecute or not, and in the event of a successful prosecution, whether to condone or seek for retaliation or compensation, as the case may be.

All schools of Islamic Jurisprudence accept the general principle that a killer does not inherit from his victim for some obvious reasons. It has been observed that the public interest requires that the killer be debarred from inheritance since, if he did inherit, killing would accelerate inheritance and lead to universal chaos⁸.

⁶ Coulson, N. J. op cit at p. 176

⁷ Ibid

⁸ Ibn Qudamah, *Al-Mughni*, vol. vi, Maktabatul Riyadh, Saudi Arabia, P.291; as quoted In Keffi, S.U.D. op cit

This prohibition sounds rationally perfect because if people were allowed by the *Shariah* to inherit from the estate of their victims; unnecessary killings will be encouraged where people will kill their wealthy relatives just to benefit from their wealth. This prohibition is founded upon a *Hadith* reported by Abu Hurairah, to which he quoted the Prophet (S.A.W) as saying,

*“One who kills a man cannot inherit from him”*⁹

It was also reported that the companions of the Prophet (SAW) in their consensus have adopted the above tradition in a case brought before Caliph Umar Ibn Khattab (RA) who debarred a person from inheriting his victim on the advice of the companions.¹⁰

Islam, therefore, has provided rules impeding the killer from inheriting his deceased victims. Hence from the above mentioned *Hadith*, it is clear that a killer can not inherit from the estate of the person he killed. However, there is a considerable difference of opinions among the four Sunni schools of Islamic Jurisprudence as well as the *Shi'ites* as to the precise instances in which homicide (*Qatl*) does constitute an impediment to succession under Islamic Law. Therefore, it is imperative to consider how homicide or killing is classified under Islamic law, at least, for the purpose of considering which

⁹ Tirmidhi & Ibn Majah in; Asqalani, I. H. (N.D) Bulugul Marami min Adillatil Ahkam, Beirut Lebanon. p. 197,

¹⁰ Pindiga U.E., op cit at p. 20

act of a killing constitutes a bar or an impediment to inheritance under Islamic Law. Homicide (*Qatl*) is technically an offence that debars an individual from inheriting the deceased's property even if he be an entitled heir. As such, beside the Prophetic traditions to this effect, the reason behind debarring an heir is that a potential heir may hasten the death of an innocent praepositus for the purpose of premature inheritance. That is why the offender is forbidden to make any valid claims to the property of his victim.¹¹

However, where an heir has been arraigned and convicted for the murder of the deceased under any law other than Islamic law, this will not debar him of his right of inheritance. This may happen where a Muslim is alleged of committing a culpable homicide punishable with death and arraigned and convicted at a high court of a state which we normally knows applies an English system of law. This is because under Islamic law homicide of whatever description must be fully proved under Islamic legal system for it to exclude the person who committed it from inheriting the property of the deceased person. As such, where an accused heir is tried with or without conviction under any legal system other than Islamic law, such trial will not be an evidence against him to debar him from his right of inheritance,

¹¹ Ati, H.A. op cit at P.256

another trial must be conducted under Islamic law to determine whether or not the killing is such that may or not entitle the heir to inherit.¹²

Homicide is classified by the Islamic schools of thought as actionable and non-actionable, as well as, intentional, quasi-intentional and non-intentional.

As to whether a killing is such that may or not debar an heir from inheritance, the Maliki Jurists have provided two categories of homicide; (i) intentional, (ii) Non-intentional homicides. *Qatl amd*¹³ is a deliberate killing, while the acts of a minor or insane are considered neither intentional nor unintentional and according to Malikis, it does not prevent them from inheritance. Other scholars i.e. Hannafi, Hambali and Shi'ite say that it does not prevent them from their right to inheritance. The *Qatl-Khat'a* is an unintentional killing which according to the Maliki School will not prevent the killer from inheriting, but will not inherit from the compensation which he pays to the victim's family.¹⁴ While in the *Shariah* Courts applying Hannafi law, a person was debarred from inheritance if he killed his victim directly, whether his act is accidental or innocent is his intention, while the

¹² Macnaughten, W.H. op cit, P. 87

¹³ Dasuqi, M. *Hashiyatud Dasuqi ala sharhil Kabir* (n.d.), Ihya'u Kutbil Arabiyyah, vol. 4, p. 486; as quoted In Sheikh Keffi, S.U.D. op cit

¹⁴ Fauzan, S (n.d.) Tahqiqat, Imam Muhammad Islamic University, Riyadh, Saudi Arabia, p.51; as quoted In Keffi, S.U.D. Impediments to Inheritance (unpublished)

indirect killer will suffer no such impediment however criminal his intention may have been.¹⁵

Intentional killing is defined as,

Any person of full age who is not an alien enemy (harbi), who strikes a protected person, with an object whether sharp or heavy, or with a light stick or a whip, or even with something of that nature that is not intrinsically likely to kill, and even though he does not intend to kill, or does not even intend to strike the person whom he in fact strikes, nevertheless where (death results and) he acts in anger or with hostile intent, and where his conduct does not amount to lawful chastisement, he commits the offence of intentional homicide.¹⁶

All schools of Islamic Jurisprudence concurred on a distinction between a direct killing (mubasharatan)¹⁷ and indirect killing (ghair mubasharatan) which is based on a theory of causation and which cuts across the actionable and non-actionable and intentional and non-intentional homicide.

Under the Hanafi, Shafi'i and Hambali schools, the presence or absence of intent to kill is determined exclusively by the means used to kill. Therefore, only where the acts or omissions are deliberately directed against a human being and is intrinsically likely to kill will it constitute deliberate homicide. Outside such limits, an actionable homicide is classified as accidental and the offender is not subject to the death penalty. However, for the purpose of

¹⁵ Counlson, N. J. (Supra), p.182

¹⁶ Khalil, S. Jawahirul Iklil, (Arabic Text) vol. 2, p. 256

¹⁷ Abu Zahrah, M., Ahkamut Tariqat Wal Mawarith, Dar al Fikr Arabi, (1963), P. 90; as quoted In Keffi, S.U.D. Impediments to Inheritance (unpublished)

impediment to inheritance, despite agreeing as to the classification, these schools differ.

Under the Shafi'i school, the principle that a killer does not inherit from his victim is of absolute application and covers every case of homicide from willful murder to lawful execution. Therefore, according to this view, whether a killing was legally backed or in self defense, or it was committed by a minor or a lunatic, it constitutes an impediment to the killer.¹⁸ Therefore, Shafi'i did not consider lawful execution as an excuse, like executing a Court order by a Court official.¹⁹

According to Malikis, for homicide to be a bar to inheritance, it must be premeditated irrespective of being carried out with another person or caused by any means or done by a false witness to death penalty²⁰.

The Hannafi and Hambali schools, however held that, all killings that imposes *Qisas*, *diyyah* or *Kaffarah* will bar the killer from exercising his right of inheritance over the estate of his deceased's victim. Though the strict Hanbali view is that in so far as the killing is punishable by *Shariah* either by *Qisas*, *diyyah* or *kaffarah*, it would bar the killer even if committed by a minor or a lunatic. The Hannafis maintains the view that minors and

¹⁸ Ibn Qudamah op cit, p.292

¹⁹ Ibid, p.292

²⁰ Dasuqi op cit, 486

lunatics are not debarred from inheritance on the ground that there is no sin or guilt that is attributable to them under the law.²¹

4.4 DIFFERENCE OF RELIGION

It is unanimous view of the Muslim Jurists that there shall be no inheritance where differences in religion exist between heirs and the praepositus.²²

Difference of religion immediately prevents inheritance subject to certain conditions. According to the majority view the impediments arises, and cannot be removed by any subsequent events, if the difference of religion exists at the moment succession opens, i.e. the time of the deceased 's death.

The majority of Muslim jurists take a view that a Muslim will not inherit from his deceased relative who happens to be a non-Muslim and that non-Muslims shall not inherit from Muslims. Prophet (SAW) says,

“A non-Muslim does not inherit from a Muslim or the Muslim from a non-Muslim”.²³

In another *Hadith* the Prophet (SAW) said,

*“ A Muslim does not inherit from kafir”*²⁴

Mixed marriages are permissible under Islamic Law to the extent that a Muslim male may marry a Jewish or Christian woman. However, a non-

²¹ Ibn Qudamah op cit, P. 292

²² Ibn Qudamah ibid, P. 294

²³ Imam Muslim Kitab al fara'id 12.

²⁴ Imam Malik al- Muwatta, Diwan Press, London, (1979), p. 241

Muslim wife has no right of inheritance from her Muslim husband and vice versa, since the Islamic Law of inheritance is designed to distribute the deceased's property among the surviving relatives who are within the Islamic Community. Though the right of a non-Muslim woman may be deemed protected under bequest, because her Muslim husband is allowed under Islamic Law to bequeath 1/3 out of his property to any one, even if not a Muslim. In that circumstance he may bequeath to his non-Muslim wife, the husband is also not entitled to inherit his wife in such circumstance.

For the purpose of inheritance, Islamic Law distinguishes between different classes of difference of religion, i.e. difference of religion where a person is not Muslim by birth or by conversion from paganism or some religions other than Islam and his relative who is a Muslim cannot inherit from him; a person who renounced Islam, i.e. an apostate, whether praepositus or claimant heir is subject to special consideration and differs from that of one who has never been a Muslim.

According to some Jurists the Jurisdiction of Islamic Law might be invoked to deal with cases of inheritance among non-Muslims belonging to different religions, like Jews and Christians. However, the law relating to non-Muslims has become a matter of more direct concern. *Shi'ites* adopt the same principle where they hold that while non-Muslims do not inherit from

Muslims, Muslims do inherit from non-Muslims and are even given priority over closer non-Muslim relatives of the *praepositus*.²⁵

Yet in another Hadith reported from Imam Malik it was reported that Muhammad ibn al- Ash'ath told Sulayman *ibn* Yasar that he had a Christian or Jewish Paternal Aunt who died and mentioned it to Umar (R.A) who said to him that it was the people of her *deen* that would inherit her.²⁶

However, under the Hanbali School, a relative who is not a Muslim at the time of the Muslim *Praepositus*' death became entitled to inherit if he is converted to Islam at any time before the actual distribution of inheritance.²⁷

Ibn Qudama explained,

That rights and obligations may accrue to a deceased's estate; as where a deceased has set a snare during his life time, animals caught by it after his death belongs to his estate. So, too, the deceased's estate will be liable to pay compensation for the injury or death of a person who falls, after the deceased's death, into a well which the deceased dug during his lifetime. On the same principle, a relative's conversion to Islam after the praepositus death transforms his latent right of succession, existing by virtue of his relationship, into an effective one".²⁸

²⁵ Coulson, N. J. op cit at p. 187.

²⁶ Imam Malik op cit, p.241

²⁷ Coulson, N.J. op cit at P. 187

²⁸ Ibn Qudamah, op cit

4.5 APOSTACY (RIDDAH)

As stated earlier, the position of an apostate both as a praepositus and an heir is subject to special consideration and differs strongly from that of a person who has never been a Muslim, under Islamic Law.

All schools of Islamic Jurisprudence hold it to be part of the punishment for the crime of apostasy that an apostate is barred from inheritance from anyone, whether Muslim, non-Muslim or other apostate. However, the Muslim Jurists differs as to where an apostate can be inherited by his Muslim relatives. The Hannafi School maintains the view that whatever a male apostate might have earned before his act of apostasy will be inherited by his Muslim relations. But with regard to a female apostate whatever she might have earned before or after apostasy, will be inherited by her Muslim relation. According to this school, the basis of this distinction is that male apostate is considered an outlawed enemy whose killing is justified by law; any property which he subsequently acquired is classified as booty and belongs to the public treasury. But a female apostate is never outlawed under the *Shariah* in respect of her act of apostasy.

As far as the inheritance of an apostate is concerned, whether he is executed by Hadd punishment or dies a normal death. Imam Malik and Shafi'i say that his property will go to the Baital-mal (Public treasury). However, the

Hannafis, sufyan at-Thauri, Ibn Mas'ud and Imam Ali (caliph R.A) say that his relatives can inherit from him. They arrived at the logical conclusion that since the public treasury can inherit by virtue of the Islamic connection, his relatives have a stronger claim than the public treasury because there is double relationship between him and his relatives, i.e. he is connected to his relation as a Muslim and as a blood-relation while Islamic treasury has only Islam as the connecting factor.

An apostate wife, on the other hand, can not be deemed to be in her death – sickness by reason of her apostasy because she is not liable to the death penalty. Her husband will not inherit from her if she dies during her *Iddah* period and if she dies after her *Iddah* he cannot inherit her even if he be a Muslim because the basis of inheritance between a husband and wife is marriage relationship, since the marriage terminates at the expiry of *Iddah* the right of inheritance is also extinguished, unless if she qualifies as a dying person on other grounds at the time of her apostasy.

As such, the view of the majority schools is that the Muslim relatives of an apostate do not inherit from him, they based their reasons in accordance with the principle that Muslims do not inherit from non-Muslims and vice-versa. They maintained that all the property of an apostate, whether acquired

before or after the act of apostasy, is classified as booty taken from an alien enemy and belongs to the public treasury,

It seems that the Nigerian constitution is in express conflict with the principles of Islamic law relating to apostasy. Under the Nigerian constitution²⁹ there is unrestricted freedom of religion which extends to changing from one religion to another. This in effect legitimizes apostasy which is a capital offence under Islamic law. Therefore, apostasy is not a crime under the Nigerian constitution, yet an unenforceable capital offence under Islamic law. Nonetheless, it is still the position of Islamic law in Nigeria that a Muslim may marry a non-Muslim but there is no right of inheritance between them since the applicable Islamic law under the Nigerian Constitution is the Maliki law.

4.6 SLAVERY

Slavery literally means weakness or helplessness in the Arabic term. But under the Islamic legal parlance, a slave is a person who is directly under the control of another. This made him to be legally incapacitated, for lack of free will to act as he pleases. All Muslim jurists agree that slavery is a bar to inheritance. Slaves do not inherit and not be inherited. If a slave dies his relatives will not inherit him because he owns nothing, because whatever he

²⁹ Section 38 of the 1999 Nigerian Constitution, CAP C20, L. F. N., 2004.

possesses belongs to his master³⁰ he himself is treated as a property capable of being inherited by his master. But the offspring's of a slave-girl inherits their father.³¹

This is clear from the provisions of the Holy Qur'an which states.

“Allah set forth these parables. On the one hand, there is a helpless slave who is controlled, who lacks free will of any thing, and such attached to his master.....”³²

Since the slave is not capable of any free will to act and is attached to his master, and therefore can not own property of his own, all what he acquired, as a slave, belongs to his master, including himself. Yet in another Hadith it was reported by the Prophet (SAW) that,

” a slave does not posses anything, except the right to divorce”³³.

It should be noted that, for the purpose of inheritance, the Muslim jurists had classified slavery into complete and partial slavery.

1. Complete slavery is where the slave is not wholly or partially freed.

This slave is himself a property of his master and can therefore neither

³¹ Sufi, A.A (n.d.) Nizamul Mawarith Fish Shariatil Islamiyyah Alal Mazahibil Arba'ah, Darul Kuttabil Arabi, Egypt, p. 24;as quoted In Keffi, S.U.D. Impediments to Inheritance (unpublished)

³² Qur'an 16:75.

³³ Lakhvi, S.B.H. op cit p.29

inherit nor be inherited by others. The Prophet (SAW) said, “A slave will not own even if he owns”.³⁴

2. Partial slavery is where a slave becomes Mukatab, i. e. he has contracted with his master to pay something agreed upon to buy his freedom, and has made a part payment thereof. Here also, he can not inherit any body because of the saying of the Prophet (SAW) that “The Mukatab is a slave as long as a single dirham remains unpaid in him”.³⁵

Similarly, a Mudabbar is a slave – girl whom the master declares to be free after his death. And Umm-Waladah that is a slave – girl, who bears the master’s child, is in law be free after the death of her master. These categories are all partially slaves, and during that waiting period to regain their freedom, they can not inherit any body.³⁶

In the above mentioned circumstances, Muslim jurists are unanimous that a slave, whether complete or partial, shall not inherit nor will he be inherited. The assumption is probably that there is no likelihood of equal reciprocity between the two. The slave owns practically nothing, and the chance of his

³⁴ Pindiga, U.E., op cit p. 19

³⁵ Ibid, p.19

³⁶ Khalid S.H. & Najah, A. op cit, p. 50

leaving any inheritable property to his free relative is virtually non-existence.³⁷

4.7 DIFFERENCE OF DOMICILE (DAR)

The Islamic international law (*Siyar*) has classified the world into two territories, viz; territory of piece and territory of war. In this scenario, the Muslim jurists differ as to whether a Muslim resident in territory of war will be inherited by his Muslim relations resident at or in territory of piece.

This, according to the majority view, does not constitute an impediment to inheritance among the Muslims. Thus, if a Muslim dies in an alien country, his heirs living in home country can inherit his estate and vice versa.³⁸ The only exception is in Hanafi and Shafi'i schools. On the other hand, the view of Maliki and Hambali schools that difference of domicile is not a bar to inheritance between non-Muslims is adopted in cases where the law of non-Muslim state concerned allows reciprocal treatment, while the Hannafis' view is maintained in cases where the relevant foreign law does not allow reciprocal treatment. As such, according to Sheikh Ziya, *Zimmi* and *Harbi* cannot inherit from each other.³⁹

³⁷ Ati, H. A. op cit p. 256

³⁸ Qadri, A.A. op cit at P.426

³⁹ Ziya, S.Y.K. op cit P.3

4.8 Marriage by a Dying Person

Under the *fiqh* of the Malikis, a dying person is prohibited from taking a new wife for marriage. The Malikis' view this marriage with suspicion, on the part of the dying person,. It is viewed as reducing a quantum of share which the already married wife or wives would have taken in the event of the death of the husband. The presumption of law in this circumstance is that the dying person is reducing the share of the inheritance, which his wife is likely to get when he dies. This impediment is peculiar to the Maliki School only. Questions as to where the Maliki jurists got their authority on this legal issue and who is truly a dying person in the contemplation of law have been discussed here below:

Rabi'ah b. Abi Abd al-Rahman said that it reached him that the Wife of Abd al-Rahman b. Auf asked him to divorce her. He said: When you become clean after menstruation, inform me. She did not get the menses until Abd al-Rahman fell ill. When she got clean, he gave her the option and she obtained divorce or he gave her the last divorce. Abd al-Rahman b. Auf was a sick man at the time of divorce. Uthman b. Affan (the third Khalif) got for her share of inheritance even after the days of Iddah had passed⁴⁰.

The jurisprudence of Maliki School that no divorce shall be pronounced by the sick man had been based on this and similar authorities reported in the

⁴⁰ Ibn Rushid op cit pp. 39-40 ; as quoted in Keffi, S.U.D. Impediments to Inheritance (unpublished), p.173

Muwatta, a book containing Prophetic Hadith. From this authority, we have learnt that apart from the Maliki School, the majority view is that (i) divorce may be pronounced by the sick man, (ii) That where such divorce is so pronounced by the sick man, the divorced woman shall be entitled, as of right, to her share of inheritance if he dies from the sickness; and (iii) that her right to inheritance does not extinguish with the lapse of her Iddah period resulting from such divorce.

It was also a decision of Ali b. Abi Talib, which was based on Itjihad necessitated by public policy that since the prohibition of the divorce by the sick man is primarily aimed at protecting the inheritance right of the divorced woman, by the rule of analogy, it also goes without saying that the same sick man shall not be allowed legally to marry a woman in his very sickness and that any marriage he so contract becomes void *ab initio*.⁴¹

WHO IS A DYING PERSON?

A person is said to be suffering from a death-sickness when that person suffers from a terminal disease or any type of sickness which in spite of the modern and sophisticated medical advancement, or science and technology

⁴¹ Keffi, S.U.D. Impediments to Inheritance (unpublished), P. 157

most patients or victims of these diseases still lose their lives, when they contract the disease and also person with HIV and/or AIDS.⁴²

The Maliki jurists are of the opinion that persons who engaged in hazardous professions, such as soldiers, or sailors, or pilots, or perhaps the coal miners are considered dying or sick-persons legally, at the time of facing their hazardous work. Similarly, an expecting mother whose pregnancy is six months old is also a sick-person. So is a person or prisoner on whom a death sentence is passed on him by a competent Islamic authority. The sick-person, whether male or female, is precluded from entering into a marriage contract.⁴³

4.9 ILLEGITIMACY AND LI'AN

Where married couples engaged in Li'an proceedings, neither of them will inherit from one another.⁴⁴ A Hadith of the Prophet (SAW) reported by Yahya from Malik that he had heard that Urwa ibn Zubayr said about a child of li'an and child of fornication that they cannot inherit their imputed father nor can he inherit them if they dies, but the mother can inherit them.⁴⁵

As regards to illegitimate child, there is no legal blood relationship (Nasab) between him and his adulterous father which would give him the right of

⁴² Ibid, p. 173

⁴³ Ibn Rushd, pp. 39-40 as quoted in Keffi, S.U.D. Impediments to Inheritance (unpublished), p.173

⁴⁴ Qadri, A.A op cit at P.426

⁴⁵ Imam Malik op cit at, p.336

inheritance. Since there is no such a legal ground, the root cause of inheritance does not exist. Therefore, under the Sunni schools, an illegitimate child cannot in any way inherit his/her adulterous or li'an father; he may only inherit from his mother, from her children, i.e. uterine brothers and from her other relatives as a member of the outer family.⁴⁶

Thus, an illegitimate person who is not survived by his own son or son's son will have no agnatic residuary heirs. Hambali School, on the other hand, holds that the male agnate relatives of the mother are to be considered for the ⁴⁷purposes of inheritance, as the male agnate relatives of her illegitimate child. A variant Hambali view, thus, is that the mother herself is residuary heir of her illegitimate child, and such excludes from inheritance all her own male relatives.⁴⁸

Therefore, if an illegitimate person leaves a mother, daughter and a father the daughter will get $\frac{1}{2}$ the mother $\frac{1}{6}$ and the father would be excluded. The same principle applies to a child of a woman who separates her husband by Li'an. The child stands as an illegitimate child and his right of inheritance exists only through his mother but not through the imprecator because their relationship has been cut off by the act of Li'an.⁴⁹

⁴⁶ Coulson, N.J. op cit at P.173

⁴⁸ Ibid P. 174

⁴⁹ Gurin M.A op cit at P. 26

4.10 CONCLUSION

In conclusion, as has been stated above, before a person can claim a right of inheritance over the property of his deceased relations, there must be a relationship between him and the deceased person either by blood, through marriage or clientage. Nevertheless, a situation may arise where an otherwise potential heir may lose his right of inheritance either directly through his act or any other attribute like difference of religion or apostasy, or through the acts or omission of his parents through whom he may claim the right of inheritance i.e. by killing the deceased person. These impediments are agreed upon by the majority of the Islamic jurists. The current writer, therefore, is calling to all Muslim jurists that any attempt to reform or alter the principles of Islamic law will defeat the objectives of Islamic law of inheritance.

CHAPTER FIVE

SUMMARY, OBSERVATION, RECOMMENDATION AND CONCLUSION

5.0 SUMMARY

The introductory chapter of this work comprises the general background of the entire work. It discussed an overview of some obstacles and impediments which will prevent an entitle heir to benefit from the property left by his or her deceased relation. It further states out the reasons why the writer of this work chose and highlight on the topic he entitled, “*APPRAISAL OF IMPEDIMENTS TO INHERITANCE UNDER ISLAMIC LAW.*” This part still discussed on the statement of the research problems where the writer highlighted on the argument forwarded by the Islamic jurists in respect of the impediments. Aims and objective of the research work were also analyzed under this part. The justification, scope and limitation of the study, literature review of the relevant materials used when conducting this work, the method adopted as well as the plan of the thesis were all contained under the introductory part.

Chapter two of this work discussed the development of Islamic law of inheritance, starting from pre-Islamic era up to the time when verses were revealed on how to distribute a deceased property after his death and to whom the properties of the deceased person shall devolve. It highlighted on the mode of inheritance amongst the Jews, the Christians, and Hebrews and how inheritance of a deceased is shared under some customs of the African people. It further discussed on issues of inheritance under the pre-Islamic Arabian customs as well as the Arabian inheritance during the

Advent of Islam but before the verses which were specifically dealing with the inheritance is revealed. Then inheritance according to the Qur'anic provisions and *Hadith* of the Prophet (SAW) was also discussed under this chapter. The history and reason behind the revelation of the verse dealing with inheritance was also highlighted, but before then, inheritance based on brotherhood under Islamic law and abrogation after the revelation, was also discussed.

Chapter three analysis the grounds and conditions upon which right of inheritance can be established under Islamic law, essential of inheritance, that is, the deceased person himself, his property and the heirs of inherit were itemized and discussed. The grounds upon which an heir may claim the right of inheritance, i.e. marriage, blood relationship and clientage were also itemized and discussed under this chapter. The chapter also highlighted on the guidance of distributing the deceased's estate, like issues of debts, funeral expenses and wills of the deceased.

Chapter four deals with the Bar or impediments of inheritance under Islamic law. It highlighted on what constitute a bar or impediment under Islamic law, the types of impediments and how those factors will debar an entitled heir from benefiting from the property left by his deceased relation. Those factors were also itemized to include Homicide, difference of religion, Apostasy, Slavery, illegitimacy amongst others. Still impediments under the *Shi'ah* and the views of other scholars that hold contrary opinions from that of the four Sunni schools of Islamic law were also discussed under chapter four of this work.

Finally, chapter five starts with the summary of the entire work and the observation made by the writer of the thesis and recommendation, solutions to the problems of research and then end with the concluding remarks of the writer of the work.

5.2 OBSERVATIONS

Based on the above discussion, the researcher made the following observations:-

a. It has been observed that while the Islamic law jurists unanimously agreed that difference of religion and apostasy constitutes impediments to inheritance, there is a great agitation from the West and their allies that the position of Islamic Law in this regard is contrary to the position of and situation of the modern world and, therefore, they are strongly calling for the review or reform of the principles of Islamic Law. The Human Rights activists in Nigeria relied so much on the provisions of the constitution and propagates that every person shall be entitled to practice the religion of his choice, including conversion from one religion to another; and that should not oust his or her right to inherit his relations, section 38 of the Constitution of the Federal Republic of Nigeria 1999 provides;

(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom of change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to

manifest and propagate his religion or belief in worship, teaching, practice and observance.¹

Also Section 42 of the 1999 Constitution provides

- (1) A citizen of Nigeria of a particular community, ethnic group, and place of origin, sex, religion or public opinion shall not, by reason only that he is such a person.
 - (a) Be subjected either expressly by, or in the practical application of any law in force in Nigeria or any execution or administration action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
 - (b) Be accorded either expressly by, or in practical application of any law in force in Nigeria or any such executive or administrative action “any privilege or advantage” that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.²
- b. It has also been observed that Islamic Law principles were viewed by non-Muslims and some human rights groups to have deprived the non-Muslims women their right to inherit from their Muslims Husbands, and therefore caused a great hardship on them. The Human Rights Activists

¹ Section 38 (1) of the 1999 Constitution, Cap. C20, L.F.N. 2004

² Section 42 (1) *ibid*

and proponents of gender equality are strongly agitating for the review of the rules relating to Islamic law of inheritance that affects the non-Muslims women that married a Muslim man. In view of this agitation from the Western World, some Islamic states had tempted to reform some part of Islamic law of inheritance for the purpose of conforming to the yearning of those groups. These states include and not limited to Iran, Egypt, Morocco, and Syria. Whereas, in Nigeria, Islamic rules of inheritance are also viewed by non Muslims as gender and religiously discriminatory. But being a divine law it cannot be reviewed. It has been observed that most of the Muslims, especially new converts do not have the necessary knowledge of Islamic Law of inheritance, as well as, those other non-Muslims groups that misconceived the clear principles of Islamic Law, particularly the knowledge of Islamic Law of succession which according to Prophet Muhammed (SAW) constituted the large part of Islamic Law. They viewed some of these rules as conservative, obsolete and even too restrictive,, and does not meet the demand of the modern society and not in conformity with the novel instances. It has been finally observed that some orientalist are supporting the views of non-Muslims on issues relating to impediments to inheritance that even though there are provisions relating to impediments to inheritance as contained in the Qur'an those impediments are discriminatory in nature

and as such they should be discouraged hence is not suited in the modern world because of the interactions and inter-marriages between Muslims and non-Muslims.

c. It has further been observed that the major impediments to inheritance that are recognized by the majority of the scholars of Islamic Jurisprudence are Homicide, difference of religion, apostasy, slavery, and difference of domicile. There are other impediments to inheritance under Islamic Law that includes illegitimacy. The later impediment to inheritance is said to be in contravention to the provisions of the 1999 constitution which is to effect that a person shall not be deprived of his right to inherit merely by reason of the circumstances of his birth. Section 42(2) provides;

(2) No citizens of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.³

This provisions of the constitution has caused serious problem in some communities, ethnic groups, and people of other religions that converted to Islam, as some of these communities and religions recognizes a child begotten out of wedlock as legitimate child but by reason of their conversion to Islam that child has been disregarded as a legitimate child under Islamic Law and therefore could not inherit.

³ Section 42 (2) ibid

- d. It has further been observed that countries like Sudan, Syria, Egypt, Libya, India, Pakistan, etc have attempted a reform to some rules of Islamic Law of inheritance, particularly in respect of Homicide offences, difference of religion and apostasy. To them all these impediments were unsuited to the developing social and political order of the emerging modern Muslim states in so far as they want to interact with the Western States, which seriously affects the Islamic principles of inheritance and criminal justice system.

5.3 RECOMMENDATION

Based on the above observations the researcher made the following recommendation.

- a. It is recommended that the Muslim Jurists should not allow any review or reform of Islamic law of inheritance because Islamic law is a divine law and a good practicing Muslim is enjoined to abide by it wholly. Any provision of the Holy Qur'an which has not been abrogated by another revelation during the period of the Prophet (SAW) cannot be changed or modified. The provisions of section 38(1) of the 1999 constitution is clear and provides for every Nigerian citizen the freedom to practice his religion. Therefore, it is the teaching, practice, act of worship and observation of Islamic rules that itemized impediments to inheritance that precludes a person from inheriting should any of them befalls him.

- b. It is further recommended that whenever the principles of Islamic Law of inheritance are clear cut and unambiguous, there is no way they can be altered, reformed or modified just to suit the interests or aspirations of a particular group, this is because they are *qat'iyyis thubut*. The attempt by some countries like Sudan, Syria, Egypt, Libya, India, Pakistan, etc. attempted to reform the traditional principles of Islamic law of inheritance particularly in respect of Homicide offences and an attribute of difference of religion or even an act of apostasy which according to their personal opinion were unsuited to the developing social and political order of the emergent modern Muslim States, in so far as they want to relate with the Western States. This seriously affects the principles of Islamic criminal justice system and particularly as it relate to inheritance and therefore should be ignored. Islamic should create awareness for both Muslim that does not have the necessary knowledge of Islamic Law, and the non-Muslims that misconceived the clear principles of Islamic law, particularly the knowledge of Islamic of inheritance that the principles of Islamic law are not obsolete and always meets the demand of the modern society, and is always in conformity with the novel instances that may arise in any given situation.
- c. It is also recommended that Islamic Law of inheritance does not in any way deprived women of their rights of inheritance nor does it discriminate against the rights of women in terms of women in terms of inheritance. In fact, there is

no system of law that is just and equitable to women whenever it comes to the issue of inheritance than Islamic law. Even the non-Muslims women married to Muslim men were also not deprived of their rights to inheritance because Islamic law has provided for a person to bequeaths not more than 1/3 of his net assets to any one who could not benefit from his estate after his death. Here, a Muslim husband may create a will of not more than 1/3 of his net assets to his non-Muslim wife, which is by far more than her entitled share in his estate even if he dies without any issue that will reduce her share from 1/4 to 1/8, had she been a Muslim wife of the deceased Muslim husband.

- d. It is strongly recommended that the so called view of the orientalist and the human rights activists as it affects inheritance of the deceased estate the principles of Islamic Law should be ignored, hence it has no basis whatsoever.

5.4 CONCLUSION

In conclusion, as has been stated above, before a person can claim a right of inheritance over the property of his deceased relations, he must established that they are related with the deceased person either by blood, through marriage or clientage and he acquire that right to inherit through those grounds. Nevertheless, a situation may arise where an otherwise potential heir may loose his right of inheritance above either directly through his act or any other attribute like difference of religion or apostasy, illegitimacy, difference of domicile, slavery, homicide, marriage by a dying person or couples of *li'an* or through the acts or omission of his parents through whom

he may claim the right of inheritance i.e. by killing the deceased person. These impediments are agreed unanimously by all the Islamic Jurists. The current writer, therefore, is calling to all Muslim jurists that careful regard must be given to every argument that will be forwarded in respect of these issues and in relation to verses of the Holy *Qur'an* and *Hadith* of the Prophet (SAW) that are unambiguous and does not require further explanation. Any attempt to reform or alter the traditional principles of Islamic law will defeat the objectives of Islamic law of inheritance.

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