

**BLOOD RELATIONSHIP AS A BASIS OF INHERITANCE UNDER ISLAMIC  
LAW: A CASE STUDY OF THE INNER AND OUTER CIRCLES OF  
FAMILY**

**BY**

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**BEING A THESIS PRESENTED IN THE FACULTY OF LAW TO  
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## CERTIFICATION

We the undersigned examiners do hereby certify that this thesis titled  
**“BLOOD RELATIONSHIP AS A BASIS OF INHERITANCE UNDER  
ISLAMIC LAW: A CASE STUDY OF THE INNER AND OUTER  
CIRCLES OF FAMILY”** is AHMED, BARKINDO’S independent work for  
meeting the requirements for an award of a Master’s Degree of Laws of the  
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## **DEDICATION**

I dedicate this Research Work to the course of Allah (S.W.T) and for humanity in general. I pray Almighty Allah to give my parents eternal peace and Al-Jannatul firdaus.

## **DECLARATION**

I hereby declare that this thesis titled: “**BLOOD RELATIONSHIP AS A BASIS OF INHERITANCE UNDER ISLAMIC LAW: A CASE STUDY OF THE INNER AND OUTER CIRCLES OF FAMILY**” is my independent research in the Faculty of Law under the supervision of Professor Sani Idris and Professor Y. Y. Bambale, No part of this work has been submitted to any other institution for any academic awards. All references made in the work have been duly acknowledged.

.....

**Ahmed, Barkindo**

.....

**Date**

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## ABSTRACT

*The life on earth depends largely on inheritance from generation to generation for its continuous existence. Without inheritance there would be no meaningful development any where in this world. Thus, human beings have succeeded in building and beautifying this world through inheritance, which today provides an aesthetic value in our cities and towns*

*However, the method and procedure of such inheritance differ from one society to another. Therefore, the past and present societies have their systems of inheritance. For example the Arabs before Islam, Christians and Jews may have things in common but would differ in certain degrees. The people in this world have been struggling to acquire wealth. The tendency to “get” is very strong that they continue to struggle for the whole of their lives. However, man always reminds himself that “life is short” and, therefore, he is also in “need” of somebody who can succeed him in his property and continue with the struggle. Naturally he would prefer his blood relatives and spouse to inherit him. Considering this phenomenon the knowledge of Islamic law of inheritance becomes necessary. The Prophet (S.A.W) said “learn the knowledge of inheritance and teach it to others, because it is half of knowledge and it is easily forgotten and it is first knowledge to be lifted from my Ummah”.*

*This researcher is hoping to be in line with the above Hadith and intends to discuss the topic “Blood Relationship as a Basis of Inheritance under Islamic Law: a case study of the Inner and outer circles of family.” By this topic the researcher will contribute however little to the development of the science of inheritance. In order to provide a solid foundation the research has traced the historical development of succession from the period before Islam to the time when the three verses of inheritance were revealed. It has also considered the inheritance of Jewish and Christian law of inheritance. The research work has classified the heirs into four categories of blood relationship. Under these categories each legal heir inheritance, how he is excluded and excluded others have been considered. The succession right of the heirs of inner and outer circles of family has also been analyzed.*

## TABLE OF CONTENTS

Title page	-	-	-	-	--	-	-	-	-	i
Certification	-	-	-	-	-	--	-	--	-	ii
Dedication	-	-	-		--	-	-	-	-	iii
Declaration	-	-	-	-	--	-	-	-		iv
Acknowledgment	-	-			--	-	-	--		v
Abstract	-	-	-	-	--	-	-	-	-	vi
Table of contents	-	-	-	-	-	--	-	--	-	vii

### Chapter One:

1.0	Introduction-			--	-	-	-	-	-	1
1.1	Statement of the Problem				-	-	--	-	-	7
1.2	Aims and Objective of the Research				-	-	-	-	--	8
1.3	Scope of the Research-				-	-	-	-	-	9
1.4	Methodology-				-	-	-	-	-	10
1.5	Literature Review				-	-	-	-	-	10
1.6	Justification-				-	-	--	-	--	16
1.7	Organizational Layout				-	-	-	-	--	16

### Chapter Two:

#### Historical Development of Islamic Law of Inheritance

2.0	Introduction-				-	-	-	-	-	18
2.1	Jewish Law of inheritance				--			-	--	20
2.2	Christian Law of Inheritance				-	-	-	-	--	25
2.3	Inheritance in Pre-Islamic Arabia							-	-	29
2.4	Inheritance during the Early Period of Islam							-	-	33

2.5.	Inheritance after Migration (Hijrah)	--	-	-	-	34
2.6	The three fundamental Verses on Islamic Law of Inheritance-	-	-	-	-	40

### **Chapter Three**

#### **Blood relationship as a Basis of Inheritance under Islamic Law**

3.0	Introduction -	-	-	-	-	53
3.1	Blood relationship as a basis of inherence					53
3.2	Blood relatives of inner circle of family					55
3.3	The blood relative of outer circle of family					69
3.4	Some Challenges affecting Islamic Law of inheritance					77

### **Chapter Four**

#### **Analysis of the Succession Right of the Heirs of Inner and Outer family**

4.0	Introduction					96
4.1	Heirs of the Inner Circle of Family (Ashabul fara'id wal Asaba)					97
4.2	Inheritance of the Ascendants					104
4.3	Inheritance of the Descendants					120
4.4	Inheritance of the Collateral					135
4.5	Inheritance of the Uncle					152
4.6	Heirs of the Outer Circle of family (Dhawul Arham)					154

### **Chapter Five**

#### **Summary, Observation and Recommendation**

5. 1	Summary					188
5.2	Observation					190
5.3	Recommendation					192
	Bibliography					197



## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.0 INTRODUCTION

NASAB in Arabic terminology means paternity or blood relationship which gives the heirs right to inherit. The heirs include Quranic, agnatic and cognatic heirs who are related to the praepositus by blood both near and remote relations.<sup>1</sup> Under Islamic law of inheritance there are four main grounds of inheritance. They are: *NASAB* or blood relationship, *NIKAH* or marriage, *WALA-AL-ITAG* or a right given to the master of an emancipated slave<sup>2</sup> and *Baitul Mal* or Islamic public treasury<sup>3</sup>. Before distribution of the estate of the praepositus among the legal heirs their relationship must be established. That they are either related by blood relationship or affinity. The relationship in both cases must be legal, that, is the blood relationship must be one which is legitimate and the marriage must be valid and subsisting at the time of

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<sup>1</sup> Khubali, I. A. *Al-Azbul Far'id*, Darul Kutubi Ilmiyya, vol 1., (1121H), P. 26

<sup>2</sup> Al-Jaza'iriyi, A. J. *Minhajul Muslim*, Darul Fikr, (1976), P. 403

<sup>3</sup> Adawi, A. A. *Hashiyatu Al-Adawi*, Darul Fikr, Beirut Lebanon, Vol. 2, P. 325

the death of the praepositus<sup>4</sup>. This research work is concerned with blood relatives of inner and outer circles of family. The former is categorized into four as follows:

- a. **Ascendants:** They are parents and grand parents of the praepositus. They include father, mother, father's father; mother's mother and father's mother how high soever.<sup>5</sup>
- b. **Descendants:** They are the children of the deceased either direct or issues of the male issue of the deceased person. The direct children are: son and daughter. The example of grand children are; son's son and son's daughter how low soever.<sup>6</sup>
- c. **Collaterals:** They are brothers and sisters. They are as follows:
  - i. Germane brothers and sisters, they have the same father and mother with the praepositus. Also, the son of the germane brother, can inherit

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<sup>4</sup> Khubah, I. A. Op. cit, PP. 6-7

<sup>5</sup> Ibid, P. 27

<sup>6</sup> Maliki, U. H. Sirajis – Saliki Sharh Ashalil Masaliki, Vol. 1, Mustafal Babi Alhalabi, Egypt, (N.D), P. 237

and related to the praepositus by blood relationship.

- ii. Consanguine brothers and sisters are related to the praepositus through father only. In addition we have consanguine brother's son.<sup>7</sup>
- iii. Uterine brothers and sisters; they linked to the deceased person through their mother only.<sup>8</sup> This writer has the opinion that the uterine should be classified under the list of the heirs of inner circle of family. Hence, the Holy Quran 4:12 has fixed their shares among the Quranic heirs, thereby giving them special position among the *Dhawul Arham* or heirs of the outer circle of family. It is also, argued that those who are linked to the praepositus through females cannot inherit. However, the uterine are exception to this general rule<sup>9</sup>. Furthermore, the classification of the research topic, heirs of the inner and outer

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<sup>7</sup> Al-Jaza'iriyi A. J. OP. Cit., P. 408

<sup>8</sup> Ashur, M. ilmul Mirath, Maktabatu Quran, (N.D), P. 61

<sup>9</sup> Tijjani, Y. S. A. fathul Jawadi Fi Sharhil Irshad, Fourth Edition, Vol. 2, (N. D), P. 340

circles of family is based on the classification of heirs. Since the Holy Quran classified uterine under Quranic heirs,<sup>10</sup> this research work is justified to do the same.

- iv. Uncles: They are descendants of the grand parents. They are limited to paternal uncle (both germane and consanguine) and their sons' only.<sup>11</sup>

The heirs of the *Dhawul Arham* or outer circle of family are categorized as follows:

- a. **Ascendants of the deceased person:** they are false grandfathers and false grandmothers how high so ever. False grandfather is a male ancestor between whom and the deceased there is female intervention (e.g. MFM), while false grandmother is a Female ancestor between whom and the deceased there is intervention of false grandfather (e.g. MFM).
- b. **Descendants of the deceased:** They include daughter's children and their descendants, children

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<sup>10</sup> Ali, A. Y. The Holy Quran Text, Translation and Commentary, the Islamic University of Al-Imam Mohammad Ibn Sa'ud, Riyadh, (N.D), P. 182

<sup>11</sup> Khabali, I. A. Op. Cit. P.27

of son's daughters and their descendants how low soever.

- c. Those related to the deceased through descendants of his parents' children, they are sister's children, brother's daughters and uterine brother's son how low soever.

- d. **Descendants of grand parents:** They include germane and consanguine paternal Uncle's daughters and their descendants, uterine paternal uncle's sons and daughters how low so ever, all types of paternal aunts, and their children. Maternal uncles and aunts and their children how low soever.<sup>12</sup>

All the above categories of persons are blood relatives of the deceased and their right of inheritance is based on *NASAB* or blood relationship as a ground of inheritance.

Islamic Law of inheritance is defined as a process whereby an estate or right is transferred from the deceased

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<sup>12</sup> Khubali, I. Al-Azbul Fa'id Sharh Umdatatul Farid, Darul Kutub Al-Ilmiyyah Vol. 2, (1999), P. 19

person to his serving relatives, by law voluntarily after his death as ordained by Allah (S.W.T)<sup>13</sup>

The inheritance of blood relatives is based on the following verses of the Holy Quran and Ahadith of the Prophet (S.A.W). The Holy Quran 4:7 says:

“For men is a share of what the parents and close relatives left and for women is a share of what the parent and close relatives left be it little or much, an ordained share (by Allah).”<sup>14</sup>

The Holy Quran also says:

"And for all, we have made heirs to what is left by parents and (blood) relatives."<sup>15</sup>

From the Ahadith:

"The Prophet (S.A.W) said:.... any believer who dies leaving wealth, let those who are his nearest blood relations inherit him; and whomever dies leaving a debt or dependants, let them come to me, because I am their sponsor".<sup>16</sup>

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<sup>13</sup> Arrahili, W. Figihul Islkami'wdadillatuhu. Vo.8, Darul Fikr, (N.D), P. 243

<sup>14</sup> Ali, A. Y. Op. Cit, P. 180

<sup>15</sup> Ibid, P. 189

<sup>16</sup> Siddig, A. H. Sahih Muslim Translated into English, Vol. 13, Darul Arabiyyah, Beirut, Labanon, (N.D), P. 856

Another Hadith said:

"Give the ordained shares to those who are entitled to them (mostly blood relatives) and what remains over goes to the nearest male heir (blood relative).<sup>17</sup>

Consequently, the shares of blood relatives are specified and fixed by the Holy Quran in Chapter 4 verses 11, 12 and 176. The heirs of the blood relationship constitute majority of the heirs of all grounds of inheritance under Islamic Law of inheritance.

### **1.1 Statement Of The Problem**

The problem of this research work is the blood relationship as a basis of inheritance of the inner and outer circles of family which is based on blood relationship as a ground of inheritance. The research work will be concerned with not only the principles of inheritance of the blood relatives but also the work practically illustrates and calculates the shares of the legal heirs which is specified in the Holy Quran Sunnah and Ijma of the jurists. In order to provide a solid foundation the research will trace the

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<sup>17</sup> Al-Selek, M. Bulug Al-Mara'am main AdillatulAhkam, Dar Al-Aker, Beirut Lebanon, (N.D), P. 409

historical development of succession from the period before Islam to the time when the three verses of inherence were revealed. It will also consider the inheritance of Jewish and Christian Law of inheritance. The work will classify the heirs into four categories of blood relationship. Under these categories each heir's inherence, how he is excluded and excludes others will be considered. The work will identify certain problems that are affecting our society. They are, preservation of family house, giving males immovable and females movable properties. Other problems are the adoption of Maliki School alone in our Nigerian judicial system. Furthermore, the women liberation movements' interpreting the verses of the Holy Quran contrary to the traditions of the Prophet (S.A.W) will be considered by this work for future research by those interested to follow and enlighten people on such problems.

## **1.2 Aims And Objectives Of The Research**

The main objective of this research work is to examine the existing blood relationship as a ground of inheritance and with a view to identify the legal heirs who inherit under this ground. The research work is also proposing to bring to



limelight the problems associated with women libations, preservation of family house and how customary law interfering with Islamic law. Inspite of the efforts made by the Islamic jurists and writers it is hoped that the contribution of this research will make good understanding of the topic under discussion. This research area will also make recommendations on how to solve such problems.

### **1.3 Scope Of The Research**

The scope of this research area deals with the topic "Blood relationship as a basis of inheritance under Islamic law". However, references will be made to inheritance right of the heirs of inner and outer circle of family. This will come after tracing the historical background of the law of inheritance as the basis under which such legal heirs can inherit. An appraisal will also be made on the principle of distribution of the estate of the praepositus and exclusion among the legal heirs. The research work also covers the customary practices and women libations that interfere with the Islamic law. The ground of inheritance in

this work will therefore be limited to the relevant authorities related to the inheritance of the heirs of inner and outer circles of family.

#### **1.4 Methodology**

The method to be used in conducting the research work is doctrinal research. The research will involve reading and analyzing textbooks written in both Arabic and English. The writer will constantly visit and read in libraries.

#### **1.5 Literature Review**

The research work will attempt a review of earlier works on the area of research. The literature review includes Islamic law of inheritance books which are written in Arabic and English Languages. Many writers wrote on the topic of this research in Arabic but very few scholars attempted it in English. Both types of writers tried their best. For example Aliyu<sup>18</sup> in his book "Hashiyatul Adawi" the author identified some legal heirs under the ground of blood relationship. He enumerated the members of the inner circle of family and

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<sup>18</sup> Aliyu, A. Al-Hashiyatul Adawi, Darul Fikr, Beirut Lebanon, Vol. 2, (N.D), P. 328

pointed out those who are eligible to inherit. But did not mention the heirs of the outer circle of family as legal heirs. The work, nevertheless very relevant and useful in the preparation of this research work.

Hussain (2005)<sup>19</sup> in his book. "The Islamic Law of succession" for instance. The book is very relevant and useful in the preparation of this research work as it touches on some salient points this research work is particularly interested in and will dwell on.

Survival of heirs and their inheritance is essential under Islamic law of inheritance. Athur, M.<sup>20</sup> (N.D) in his book "Ilmul Mirath" discussed the topics concerning various legal heirs but has not gone deep into analytical and practical distribution of estate among the legal heirs.

Abu Zahra, M.<sup>21</sup> (1963) the issues of inheritance in his book titled "Ahkam Attarika wa Almawarith" are found most relevant and some are shared in this work area. While the book seems to dwell on issues of estate of the praepositus

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<sup>19</sup> Hussain, A. The Islamic Law of Succession, Darussalam Riyadh, (2005)

<sup>20</sup> Athur, M. Ilmul Mirath, Maktabatul, Quran, (N.D), P. 36

<sup>21</sup> Abu-Zahra, M. Ahkamu Tarika wa Almawarith, Darul Fikrul Arabi, (1963), P. 142

and the legal heirs, as can be seen in the book, this research work will attempt to emphasize on the Quranic, agnatic and cognatic heir's right to inherit and practical distribution of the estate of the praepositus to the legal heirs.

Assabunni, M. A. (1388H)<sup>22</sup> in his book titled "Almawarith fi sharia al-islamiyyah ala-Daw'il kitab wa *Sunnah*" has made a good presentation for the understanding of a researcher and very interesting reading because it touches various issues relating to gender inequality and basis of inheritance of the legal heirs of inner and outer circles of family which this research work will build on and develop the topics in order to have a more up to date analysis and conclusion.

Ambali, M. A.<sup>23</sup> wrote a chapter in his book "The practice of Muslim family in Nigeria" on Islamic law of succession. He exerted effort to cover all the topics under Islamic law of succession but the shares of the Quranic, agnatic and

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<sup>22</sup> Assabani, M. A. Al-Mawarith Fi-Shariati Islamiyyah, Ala Dau'il Kitabi Wassumah), Darul Kutubil Ilmiyyah, (1388H)

<sup>23</sup> Ambali, M. A. The Practice of Muslims Family in Nigeria, Tamaza, Zaria, (1998), PP. 269-294

cognatic heirs are not made clear by showing how their shares are distributed.

Al-Jibaly M. (N.D.)<sup>24</sup> wrote a book titled "Inheritance Regulations and Exhortation". It is very nice book for the beginners because it gives skeleton framework of the subject for a researcher to build on. It has various topics, diagrams, glossary, index and very good paper work. However, the inheritance of the inner and outer circles of heirs is not logically followed to the end of the distribution of their shares.

Al-Obeidy A. M. (2004)<sup>25</sup> in his book "Treatise on Inheritance in Islam", he gives many unfinished examples. It is in fact supposed to be a guide to the distribution of estate. He has not attended to the practical problems in the administration of estate of the deceased person. He should have solved the problems he has created by way of examples to a definite conclusion.

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<sup>24</sup> Al-Jibaly, M. Inheritance Regulations and Exhortations, Second Edition, Alkitab and Assunnah Pub. (N.D)

<sup>25</sup> Al-Obeidy, a. m. Treatise on Inheritance in Islam, Bukhari, Madina, (2004)

Khalifah, M.T.A. (2007)<sup>26</sup> his book "Al-Ahkam Al-Mawarith," is a contemporary book. In it he tried to bring principles and practice of the law of succession, by giving about one thousand four hundred (N1,400.00) problems and their solutions. However, in all these problems he would stop midway to the final solution. It is left to the reader's imagination as to what will be the final answer to the problems. Definitely, it is a great concern for a layman or a beginner to know how the problems are solved to the logical conclusion.

Sabig A.<sup>27</sup> (1997) "*Fighussunnah*," the book is given world wide acceptance on various issues. He wrote one chapter on the law of inheritance with the effort to give his best. However, it dose not give comprehensive understanding of the knowledge as required by those interested to learn it. The book discussed various topics of inheritance concerning various legal heirs but has not gone deep in to analytical and practical distribution of estate. The discussion of *Dhawul-*

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<sup>26</sup> Khaliper, M.T.A. Al-Ahkam Al-Mawarith, Darussalam, (2007).

<sup>27</sup> Sabig, A. Fighussunnah, Darul Fikr, Vol. 3, (1971), PP.602-664

*Arham* (distant Kindred) is not well put together for the purpose of distribution of estate among the heirs of this category. The sources and the supporters of the right of distant kindred are not considered for the reader's good understanding of the subject. Furthermore, there is need to talk about various schools of law that classified the modes of inheritance of the Dhawul Arham. That will, of course, touch the hot debate between Abu Yusuf and Muhammad Shaybani of Hanafi School.

Azahiriyyi, S. A. (N.D.)<sup>28</sup> in his book "Jawahirul Iklil", which is based on Maliki School of law, wrote on Islamic law of inheritance in volume two of the book. The writer has not categorized the legal heirs of inner and outer circle of family and discussed how they can inherit. He mentioned the shares of each legal heir as prescribed in the Holy Quran and *Sunnah*. However, the work will give a researcher good foundation to study the topic blood relationship as a ground of inheritance.

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<sup>28</sup> Al-Azhari, S.A. Jawahirul Iklil Sharh mukhtasar Khalil, Cairo, Vol. 2 (N.D)

Al-Qayrawani, I. (1939)<sup>29</sup> in his book "Risala" wrote very little on the topic under discussion. However, the book provided the basis of development of the subject of inheritance. Many books and commentaries were made on the book over the years. Hence, the book is one of the foundations to Islamic jurisprudence in Maliki School.

Thus, notwithstanding the contribution of the various writers on the topic research this work area will try to improve on the literature in order to have a more up to date analysis and conclusions.

## **1.6 Justification**

This research work is justified in view of the problems associated with the ground of inheritance of the legal heirs and women libations. The research area will be beneficial to judges, legal practitioners, academics, students and all those who are interested in it.

## **1.7 Organizational Layout:**

This research work has been divided into five chapters, as follows:

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<sup>29</sup> Al-Aqyrawani, I.I. Risala, Attijjani Al-Muhammadi, (1939)



Chapter one general introduction of the topic of the research work, statement of problem, aims and objectives, literature review, justification of the research and organizational layout will be discussed.

In chapter two the sub-topic historical development of Islamic law of inheritance and Jewish and Christian law of inheritance will be discussed.

Chapter three deals with blood relationship As a basis of inheritance under Islamic law by considering the ground of inheritance of the heirs of inner and outer circle of family.

Chapter four will discuss the succession right of the heirs of inner and outer family where the shares of the individual heirs are analyzed.

Under chapter five summary, observations and recommendation will be discussed.

## **CHAPTER TWO**

### **HISTORICAL DEVELOPMENT OF ISLAMIC LAW OF INHERITANCE**

#### **2.0 Introduction**

Islamic law of inheritance has its historical development as any field of knowledge. It's historical background can be traced to the period of pre-Islamic era, otherwise, known as *JAHILIYYA* (Ignorance) up to the time when the law was standardized by Muslim jurists.<sup>1</sup>

In this chapter the research will consider the Jewish, Christian and Arabian customary law of inheritance. In Madinah, Muslims came in contact with Jews and Christians. Thus a number of Madinan verses of the Holy Quran tackled questions which were raised by the Jews.

The Holy Quran Chapter 4: Verse 153 says:

“The people of the Book ask thee to cause a book to descend to them from heaven; indeed they asked Moses for an even greater miracle,” for they said “show us God in public.”<sup>2</sup>

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<sup>1</sup> Hussaini A. The Islamic Law of Succession, Darussalam Riyadi'h (1999), P. 31

<sup>2</sup> Ali, A. Y. The Holy Quran, text Translation and Commentary, The Islamic University of Al-Imam Mohammad Ibn Sa'ad, Riyadi's P. 228

The verses also outlined laws concerning political alliances with Christians and Jews.

The Holy Quran Chapter 5: Verse 85 says:

“The strongest among men in enmity to the believers wilt thou find the Jews and pagans and nearest among them in love to the believers wilt thou find those who say “we are Christians,” because amongst these are men devoted to learning and men who have renounced the world and they are not arrogant.”<sup>3</sup> As well as laws permitting marriage with them and their food.

The Holy Quran Chapter 5: Verse 6 says:

“..... The food of the people of the Book is lawful unto you and yours is lawful unto them. (Lawful unto you in marriage) are not only chaste women who are believers but chaste women among the people of the Book revealed before your time....”<sup>4</sup>

It is therefore, necessary to discuss their law of inheritance which preceded Islamic law of inheritance.

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<sup>3</sup> Ibid, P. 268

<sup>4</sup> Ibid, P. 241

The discussion on the historical development will show the most favored ground of inheritance of the legal heirs in the Jewish, Christian and Arabian customary law of inheritance is blood relationship.

The Holy Quran 33:6 says:

“..... Blood relations among each other have closer personal ties, in the Decree of God, than (The Brotherhood of believers *Muhajirs* .....”<sup>5</sup> Islamic law of inheritance is not an offshoot of the previous laws of the revealed religions and Arabian customary law. However, there were some modifications, limitations, prohibitions and standardization of certain elements and terminologies. For instance classification of heirs, gender differences and concept of Asabah (agnatic) heirs<sup>6</sup>.

## **2.1 Jewish Law Of Inheritance**

According to the Old Testament the inheritance of the heirs are stated in order of priority as follows:

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<sup>5</sup> Ibid, P. 1103

<sup>6</sup> Ashur, M. Ilmul Mirath, Maktabatul Qur'an, (N.D), PP. 22-24

A son and his descendants come before the daughter. The daughter and her descendants come before the brothers. The brothers of the deceased and their descendants come before the sisters. The sisters and their descendants come before the uncles and their descendants. The general rule is that whoever is preferred in order of inheritance his descendants are also preferred and father precedes any of his descendants.<sup>7</sup>

A man inherits from his mother and the husband from the wife. The cognates or the kindred on the mother's side cannot inherit.<sup>8</sup>

The Jewish law set for the procedure for distribution of estate; the Attaurah gives women no rights of inheritance as long as there are male heirs in the same class. This means daughters do not inherit if there are sons, nor sisters if there are brothers. Also only paternal relatives can be considered as heirs.<sup>9</sup>

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<sup>7</sup> Lakhvi, S. H. *Almirath Justice of Islam in the Rules of Inheritance*, kano Nigeria, (2003), P. 1

<sup>8</sup> Sebastine, C. *Christian Law of Succession*, India, Southern Law publishers, Retrieved April 28, 2008 from <http://www.jlaw.com>

<sup>9</sup> Judah, D. *The Inheritance and Jewish*, Retrieved April 28, 2008 from <http://www.jlaw.com>

Therefore, when male children exist, they are the exclusive heirs of their deceased father's estate. Furthermore, when the first born is a male he is entitled to two shares of the estate.<sup>10</sup> For example, where the praepositus died leaving an estate of N450,000.00. He was also survived by a wife, daughter and three sons, one of whom is the first child of the deceased. In this case the exclusive heirs are the three sons and the first son takes double shares to the share of one. Thus:

<b>P</b>		
<b>W</b>	<b>D</b>	<b>3 S Residue</b>
1.	For each son 450,000/3 which becomes 4	$4 = 450,000/4$
		$= 112,500$
2.	First son has double share	$= 225,000$
3.	Second son has one share	$= 112,500$
4.	Third son has one portion	$= \underline{112,500}$
<b>Total</b>		<b><math>= \underline{450,000}</math></b>

In the absence of sons, daughters and then their descendants are exclusive heirs. When the deceased leaves no

<sup>10</sup> Ashur, M. Ilmul Mirath, Maktabatul Quran, Cairo (N.D) P. 11

children his father is the sole heir. In his absence the paternal brothers or their descendants. The sisters and their off springs are exclusive heirs in the estate, in the absence of the above. Originally, a widow was only entitled to her dowry, estimated to be two hundred silver pieces.<sup>11</sup> Her needs and living maintenance must be provided for from her husband's estate until the time that she claims the lump sum due under the marriage or until she remarries. The law also made provision for support and maintenance of unmarried daughters, up to maturity age of twelve and a half years and for a dowry at their time of marriage which may be ten percent of the total assets left by the deceased. Where there were several daughters they divided equally. So did the several sons aside from the double share of the first born, which however, attached only to and inheritance from the father, in which his eldest son, irrespective of the situation of the mother, has a double share.<sup>12</sup> Double share is allowed only of such estate as the father is in possession of at the time of his death. For example,

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<sup>11</sup> Sebastine, C. Chrisitan Law of Succession in India, Southern Law publishers, Retrieved April 12, 2008 from <http://www.askmoss.com>

<sup>12</sup> Deuteronomy 21:15-17

if the father's brother died after him the first son will not receive a double share of the estate which comes to the sons from this source through the father. Likewise where a loan or other claim owing to the father at the time of death, when collected is divisible equally. When a first born son has died before his father, his own children take the double share in the grand father's estate.

Thus, when A has two sons; B and C, who died before him and A dies later, B's daughter, if he has no son receives two thirds of A's estate, and C's children one third of A's estate.<sup>13</sup>

Illegitimates inherit in the same manner as those born in wedlock even a child begotten in incest or adultery has the same standing as a legitimate child. Therefore, there is no difference between legitimate and illegitimate heirs. Where the deceased has no legal heir, his property becomes dormant.<sup>14</sup> Whoever is in possession of it, it is held as a trust for the heirs. A grace of three years is given for the heirs to appear and claim it. After the expiration of the time it becomes the

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<sup>13</sup> Sebastine, C. Chrisitan Law of Succession in India, southern Law Publsiher, <http://www.askmoss.com>

<sup>14</sup> Ashur, M. Ilmul Mirath, Cairo, (N.D), P.11



property of one of those who possessed it, and they share it equally.<sup>15</sup> Difference of religion is a bar to inheritance among Jews. But the impediment operates on one side only. A Jew can inherit a non-Jew but not vice versa. A Jew who renounced his Jewish faith cannot inherit his Jewish relatives, but the latter can inherit him.

Homicide is also an impediment to inheritance among Jews. One who killed a relative or injured him and subsequently died the killer in both cases cannot inherit. Jewish law of inheritance has grounds of inheritance but it is based on blood relationship. Moreover, the law does not provide any room for change or deviation. For instance it does not allow testamentary right for any testator to make a will in favour of any beneficiary; hence, bequest has no provision in the Old Testament.<sup>16</sup>

## **2.2 Christian Law Of Inheritance**

One would appreciate the problems involved concerning the trend of events at the inception of Christianity and its

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<sup>15</sup> Ibid, P. 22

<sup>16</sup> Ibid, P. 11-22

development. Christianity started between the then two super powers, hence, Jews and Romans.<sup>17</sup> The two forces could not make it easy for the new religion to flourish and spread throughout the Middle East. However, Christianity being revealed religion adopted *Attaura* which was revealed to Prophet Musa (A.S). It has become part of the Holy Bible to form the Old Testament which constitutes the law for both the Christian and the Jews. But the former do not give the Old Testament prominent position in their religion because the laws are not given valid application. Therefore, the Jewish Law of inheritance as it is in the *Attaura* is said to be not binding on Christians. Perhaps because of constancy of the revealed religion from Adam (AS) to the last Prophet (S.A.W) is regarded as one religion<sup>18</sup> and Christianity incorporated Judaism as it relates to law.

The Jewish Law of inheritance as it is in the *Attaura* or and Old Testament would not meet the wish and desire of a modern Christian. There is a rule under Jewish law of inheritance that a person cannot change the order of

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<sup>17</sup> Haykal, M.S. The Life of Muhammad, (1982), P. 6

<sup>18</sup> Ibid, P. 7

inheritance described in the Attaura. That is he cannot bequeath property to a person not entitled to inherit. The only modification permitted by the law is to provide a greater share, or complete estate to any of the persons entitled to inherit, even though this would disinherit others in the same class, provided that a first born is not deprived of his right to a double share.<sup>19</sup> Considering this hard rule and early practices in church making it very difficult for one to determine the distribution of his estate after death there will be a way out. During the medieval period when the West started experiencing industrial revolution people started to think that there was desire to exercise one's free will by making the law secular based on the maxim give unto Caesar what is Caesar's and unto God what is for God.<sup>20</sup>

The focus was as to how can a man direct the way his estate will be distributed after he has died at a time when he no longer 'owns' his possession. Because of this wish or desire to freely determine what to do with one's property after death

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<sup>19</sup> Hazan, Y. M. The Jewish Law of Inheritance, (1850), P. 7

<sup>20</sup> Holy Bible, Mathew 22:21

people started to make wills or bequest in favour of persons of their choice.

Consequently, Christians have had different laws on succession. The British and other governments based on Jewish law enacted various Acts on the law of succession. But the provisions of such Acts were to apply in the cases of Christians who have conducted themselves and shown to be governed by such Acts.<sup>21</sup> For example the Indian succession Act of 1865 which was amended by Indian succession Act of 1925. In Nigeria we have English Wills Act 1837 which is statute of general application in Nigeria, Wills Amended Act 1852, Wills Laws Cap 133 of 1959 laws of western Nigeria all applicable to persons of Christian marriages. The received English law, whether locally enacted or a statute of general application is universally applicable throughout the country in the sense that it applies fully to persons subject to Christian faith and those who are willing to adopt it.

The factor as to which law is applicable to an intestate person in Nigeria is the type of marriage he contracted during

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<sup>21</sup> Sagay, i. Nigerian Law of Successions, Malthouse Press Limited, (2006), P. 79

his life time. Thus if a person contracts a Christian marriage in Nigeria, then, if he dies domiciled in Lagos or in any of the states comprising the old Western Region then the administration of estates law will govern<sup>22</sup>. If he contracts a statutory marriage but dies domiciled in any of the states comprising the former Northern or Eastern regions then the common law will also govern the distribution of his estates.<sup>23</sup> Lastly, if he did not contract a Christian or an Act marriage or even if he did and no issue or spouse of such a marriage survived, his estate will be distributed in accordance with the relevant customary law.

### **2.3 Inheritance In Pre-Islamic Arabia**

Before, the advent of Islam, inheritance among the Arabs had been *ASABAH* in practice.<sup>24</sup> The common principle, then, was that a male member of a family or tribe alone was entitled to succeed the deceased member of such a family or tribe. That was because he could use the sword in defense of the tribe against the enemy. Consequently, only males who were

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<sup>22</sup> Cap 1,9559, Law of Western Nigeria

<sup>23</sup> See *Administrator General v. Egbuna and others* (1945) 18 NLR 1

<sup>24</sup> Siddigi, A. Sahih Muslim Translated into English, Vol. 3 (N.D) P. 849

strong and able to defend or protect the honor of the family or clan had the right to inherit. Under that principle, women had been completely denied the right of inheritance.<sup>25</sup> They were even regarded as property<sup>26</sup> added to the subject matter of inheritance and as such could also be used for the settlement of debts. Not only women were deprived of their right of inheritance but also weak, old, sick and minor persons were given no share<sup>27</sup> However, adopted persons and patrons who were regarded as the family leaders after the death of the deceased were allowed to inherit to the detriment of the young children and other near relative of the deceased person.<sup>28</sup> Consequently, the grounds of inheritance during the period included *Nasab* (blood relationship), *Attabanni* (adoption), *Wala* (defence pact) and *Nikah* (marriage) which favoured men only.<sup>29</sup>

Before the inception of Islam, there were many customary practices by the Arabs concerning inheritance of women. The

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<sup>25</sup> Assabuni, M.A. Al-Mawarith Fi Shariatil islamiyyati Fi Dau'il Kitabi Wassunnah, Darul Kutubil Ilmiyyah, (1388H.) P. 20

<sup>26</sup> Ramhimi, A. Islamic History, I.P.B Lagos Nigeria, (1987), P.7

<sup>27</sup> Lakhvi, S.H. Op. Cit. P. 6

<sup>28</sup> Kaeffi, S. D. Some Aspects of Islam i.e. Law of Succession, Rukhsa Publication, 1990) PP. IX-X

<sup>29</sup> Ibid

Arabs then used to ill-treat women especially the widows and female orphans who were left with property by the deceased relatives. For instance, a widow could be inherited by her deceased husband's representative or by her stepson or her husband's brother. If she is beautiful or rich, the heir either makes her his wife or marries her off to somebody and receives her dowry. He might decide to keep her in suspension, thus, he would not marry and would not allow another man to marry her. He would just leave her in the house as a "hanging bag on the wall" until when he desired to free her either by accepting ransom or otherwise.<sup>30</sup> In another situation, the man in question would throw his garment on the widow indicating that she was reduced under his control; he could decide what to do with her to the exclusion of any one in the whole world<sup>31</sup>. However, if she managed to escape to her parents or relatives before the garment was thrown on her, she becomes a free woman and she could marry a man of her choice just like any other free woman. Where the man inherited rich female orphan he might decide to keep her for

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<sup>30</sup> Gudub, M. Fizilalil Qur'an, Dauru Shurug, Vol. 1, (1971) P. 284

<sup>31</sup> Ibid, P.285

his son until he grows up to marry her. The purpose here is to preserve both the girl and her property for the son. Thus, the circulation of wealth was curtailed and maintained within the family.<sup>32</sup> That was the position of succession during *Jahiliyyah* period, that they would not allow the heirs of the deceased person inherit except those that can defend the family or clan and the stronger person takes the greater share.

The above were some of the practices, which were obtained during *JAHILIYYAH* which tended to degrade human beings especially women and the weak persons. Their integrity, chastity and status were highly tempered with, impeded and they were regarded just like chattels which could be sold or disposed off at will by the owner. Islam came to stop those practices of the *JAHILIYYAH* period in order to make people avoid maltreatment of fellow human beings. It came to establish human rights, dignity, love, kindness, affection and mutual help within the Muslim *Ummah*.<sup>33</sup>

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<sup>32</sup> Ibid

<sup>33</sup> Assabuni, M. A. Op. cit. P. 21



## 2.4 Inheritance During The Early Period Of Islam

The pre-Islamic customary rules of inheritance as highlighted above continued to be in practice in the early time of Islam. It followed the gradual process as other areas of *SHARIA*. For instance, the prohibition of drinking alcohol<sup>34</sup> the punishment of *Zina* (Adultery)<sup>35</sup> came gradually; the verses of the Quran introduced new set of heirs in addition to heirs known under customary law of the Arabs especially in line of the relatives of the blood relationship. For example, the daughter, son's daughter, grandparents and all other females. Islamic law adopted the concept of *ASABAH* of the *jahiliyyah* period and the rule of priority of the agnates which determines who inherits to the exclusion of others. The rule is modified by Islamic law and it is called *AL-JABARIS* which determines the exclusion of agnatic heirs either by class to which the agnates belong or the one nearer excluded one who is too remote. Formerly, the shares of the legal heirs were not specified in fractions. Islamic law not only added more heirs entitled to inherit but also specified, fixed and distributed the shares to

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<sup>34</sup> Holy Quran 2:219 and 5:90

<sup>35</sup> Holy Quran 17:32 and 24:2-3

the respective heirs. By so doing, most of the heirs are females whose position is now elevated and their social and economic interests are safeguarded. Thus Islamic law has broken up the system of concentration of wealth amongst few hands as created by Arabs of jahiliyyah.<sup>36</sup>

## **2.5. Inheritance After Migration (Hijrah)**

The *Hijrah* marks the beginning of Madinah period and the death of the Prophet (S.A.W) in 632 C.E. marks the end. After the Prophets Hijrah to Madinah, he was appointed the ruler and the Muslim community became full fledged state.<sup>37</sup> It is a divine state. The Prophet (S. A. W.) not only receives revelation but also governs the Islamic state. The first problem, he faced in Madinah was to unite the different peoples and consolidate the society. In relation to Islamic law of inheritance and in order to stop pre-Islamic practices, gradually, at the early stage of Islam the Prophet (S.A.W) introduced a system of inheritance, temporary for a special circumstance, known as Akhwiyya (brotherhood in Islam) in

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<sup>36</sup> Hussanin, A. The Islamic Law of Succession, Darussalam, P. 26

<sup>37</sup> Philips, A. A. B. The Evolution of Figh, I. I. P House, P. 9

order to encourage Makkan Muslims to migrate to Medina and to establish brotherhood, unity, love and affection among Muslims, especially the *Muhajirun* (The migrants from Mecca to Medina) and *Ansar* (helpers or hosts in Medina). This means a *Muhajir* can inherit his *Ansar* brother in early phase of the development of Islam and vice-versa. Some jurists interpreted the action of the prophet to be in accordance with the following verse where Allah (S.W.T) says: in 33:6

“Those that have embraced the faith and migrated (from Mecca) and fought for the cause of Allah with their wealth and their persons; and those sheltered them and helped them, shall be friends to each other”<sup>38</sup>

The *Muhajir* and *Ansar* were allowed to inherit each other when natural relations of *Muhajir* had not immigrated to Medina. But this practice was discontinued when normal relations were re-established between Mecca and Medina. Allah (S.W.T) abolished pre-Islamic practices of inheritance, such as *Attabanni* (adoption) as a ground of inheritance during *Jihiliyyah*. The Holy Quran 33:4

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<sup>38</sup> Ali, A. Y. OP. Cit, P. 1104

“.....nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. However, God tells (you) the truth and He shows the (right) way”<sup>39</sup>

This means the pagan customs, which are inhuman practices, should be abandoned; good human relationship among men and women should be maintained in accordance with natural relationship and spiritual position. Allah (S.W.T) also prohibited inheriting women after the death of their husbands, the Holy Quran 4:19 says:

“O ye who believe! Ye are forbidden to inherit women against their will”<sup>40</sup>

Furthermore, Allah (S.W.T) discouraged inheritance introduced by the Prophet (S.A.W) in early Islamic era by way of *Akhwiyya* hence it had outlived its necessity. The Holy Quran 8:75 says:

“And those who accept faith subsequently, and adopted exile, and fight for the faith in your company they are of you, but kindred by blood have prior, rights against each other in the Book

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<sup>39</sup> Ibid, P. 1102

<sup>40</sup> Ibid P. 184

of Allah, verily Allah is well acquainted with all things”.<sup>41</sup>

Similarly, the following verse 33:6 states that:

“Blood relations are closer to one another in the book of Allah than to other believers of Muhajir’s (the emigrants to Medina)”<sup>42</sup>

By virtue of the above two verses the temporary rights of mutual inheritance established among the early Muslims was henceforth discouraged. However, to date some jurists interpreted these verses to be authorities for inheritance of *Dhawul-Arham* (The relations of the outer family).<sup>43</sup> There is also no consensus of opinion concerning the right of inheritance of those who entered agreement with the deceased under the ground of *Wala* (compact). Hanafi School of law held that by the last part of 4:33 the right to inherit by way of *Wala* still exists.

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<sup>41</sup> Ibid, P. 435

<sup>42</sup> Holy Quran Surah 33: Ayah 6

<sup>43</sup> Abu – Zahra, M. Ahikamu – Tarikat wal – Mawarith, Darul – Fikri – Arabiyi (1963) P. 17 and Quran

The verse reads:

“As for those with whom you have entered into agreements let them, too, have their due. Allah bears witness to all things.”<sup>44</sup>

Ibn Abbas comments on this verse and said the people before Islam used to make agreements that whoever died first the survivor would inherit the deceased. However, he said, such inheritance was abolished except where the deceased made bequest in favour of the person, which would not exceed 1/3 of the net estate. One jurist Al-jassas also agreed with this opinion and said in his book *Ah-kamul-qur'an* that one of the grounds of inheritance of pre-Islamic era was *Wala* (compact), which was modified and adopted by the early Muslims.<sup>45</sup> The three Sunni jurists (Maliki, Shafi'i and Hanbali) said *Wala* as a ground of inheritance is abrogated by verses of inheritance.<sup>46</sup> However, Hanafi School maintained that it was not abrogated, but that the inheritor through *Wala* cannot inherit in the presence of Quranic or agnatic (*Asabah*) or *Dhawul Arham* Heirs.

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<sup>44</sup> Ali, A. Y. *The Holy Quran, Text Translation and commentary*, Lahore, (1954), P. 189

<sup>45</sup> Abdul-Nasir, M. *fill-figh- Al- Islam*, Vol. 4 (N.D), P. 278

<sup>46</sup> Keffi, S. D. *Some Aspect of Islam Law of Succession*, Rukhsa Publication (1990), P. IX

Another mode of succession introduced by Islam at the early development of the law of succession was *Wasiyyah* (Bequest). Whereas Chapter 2 Verse 180 – refers to the bequest made in favour of parents and kindred chapter 2:240 enjoined husbands to make *Wasiyyah* in favour of their widows. The verses related to *Wasiyyah* were abrogated by chapter 4 verses 11,12 and 176,<sup>47</sup> Nasa'i and Ibn Majah narrated in their books that the Prophet (S.A.W) made sermon while on his camel and said:

“Allah (S.W.T) has rightly given every heir his or her share from the inheritance; it is not right for them to take bequest from the person they inherit.”<sup>48</sup> From another chain of narration, Alusi narrated that the Prophet (S.A.W) said this during the farewell pilgrimage in the same words. In conclusion, we should not forget where the Holy Quran 4:33 says:

“To every one we have appointed heirs who (will inherit part) of what parents and kinsmen leave.”<sup>49</sup>

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<sup>47</sup> Lakhvi, S.H.A. *Al-Almirath, Justice of islam in the Rules of Inheritance*, Kano-Nigeria, P. 198

<sup>48</sup> Rushdi A. *Bidayatul Mujtahid Wa Nihayatul-Mugtasid*, Vol. 2, Darul Fikr, (1975), P. 251

<sup>49</sup> Ali, A.Y. *Op. Cit*, P. 189

At this stage of law development after abolishment, reformation and abrogation, Allah (S.W.T) Legislated in a general form giving right of inheritance to the heirs without specification. Thus, the Almighty Allah says, in 4:7

“Men shall have a share in what their parents and kinsmen leave, and women shall have a share in what their parents and kinsmen leave, whether it be little or much it is legally theirs.”<sup>50</sup>

This verse marked the beginning of giving right of inheritance to both males’ and females irrespective of their capacity whether young or old, weak or strong, shares are given to them.

## **2.6 The Three Fundamental Verses On Islamic Law Of**

### **Inheritance**

They are verses related to the Islamic law of inheritance. The verses are chapter 4:11-12 and 176 of the Holy Quran. They have revolutionized the *Jahiliyyah* practices and reformed its customary law of inheritance to a well systematic, dynamic and rational method of distribution whereby children

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<sup>50</sup> Ibid, P. 180



of the deceased how low so-ever, parents how high soever, all brothers and sister of the deceased, husband, wife, uncles are given right to inherit by virtue of the verses of the Quran, *Sunnah* of the prophet (S.W.A) and *Ijma* of the jurists. In this regard, the Holy Quran Chapter 4:11 says:

“Allah has thus enjoined you concerning your children; a male shall inherit twice as much as a female. If thee be more than two daughters, they shall have two thirds of the inheritance but if there be only one she shall inherit half”<sup>51</sup>

The above verse is part of the verse, which fixed the shares of the children of the deceased. The word ‘children’ in the verse by *ijma* (juristic consensus of opinion) refers to both his direct children and issues of his male child how low so ever. Also by *ijma* the term “if there be more than two” is interpreted to mean “two or more daughters” not as it is literally understood by minority interpretation to mean “three or more.”<sup>52</sup> The second part of the verse refers to the shares of the parents.

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<sup>51</sup> Ibid, P. 181

<sup>52</sup> Assabuni, M.A. Al-Mawarith Fi Shariatil Islamiyyah Fi Dau'il Kitabi Wassunnati, Darul kutubil Ilmiyyah, Lebanon, (N.D), P. 53

“.....For parents, a sixth share of the inheritance to each, if the deceased left children, if no children, and the parents are the (only) heirs the mother has a third, if the deceased left brothers (or sisters) the mother has a sixth...”<sup>53</sup>

By virtue of the above verses the share of inheritance of the descendants and ascendants of the deceased are fixed for them, no matter what capacity they may have whether minors or adults, males or females, sane or insane they can inherit without any dispute, provided their relationship is established according to the law. Allah (S.W.T) legislates further, in 4:12

In what your wives leave, your share is a half, if they leave no child, but if they leave a child ye get a fourth, after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child, but if ye leave a child thy get an eighth; after payment of legacies and debts”<sup>54</sup>

This part of the verse, fixed the shares of the husband and wife. They can inherit each other by virtue of this verse. This is a modification made by *Al-sharia* to the customary law of the Arabs before Islam, where women were totally denied of

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<sup>53</sup> Ali A.Y.OP. Cit, Op. P.181

<sup>54</sup> Ibid. P. 182

inheritance. The second part of the verse states the shares of uterine brother and sisters:

.....If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each of the two gets a sixth, but if more than two, they share a third, after payment of legacies and debts, so that no loss is caused (to anyone), thus, it is ordained by Allah; is all knowing most forbearing<sup>55</sup>

The *Ulama* (Islamic jurists) called this type of inheritance as *kalala* which gives uterine brother and sister right to inherit as Quranic heirs.

The practices of the Arabs in *Jahiliyyah* period concerning inheritance were so engraved among the Arabian tribes that they found it very difficult to adopt Islamic type of inheritance.<sup>56</sup> When verse eleven and twelve of *Suratul Nisa* was revealed, Awfiyi commented as reported from Ibn Abbas, that:

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<sup>55</sup> Ibid

<sup>56</sup> Assabuni, M.A. *Al-Mawarith Fi Shariatiz Islamiyyah fi-Dau'il Kitab Wassunnah*, Durul Kutubil Ilmiyyah, (N.D), P.56

The Ayat was revealed fixing the shares of the son, daughter and parents of the deceased person. However, some people were not happy with it and they claimed how could one give  $\frac{1}{4}$  or  $\frac{1}{8}$  to the wife,  $\frac{1}{2}$  to the daughter and give a share to a minor son. Whereas such persons cannot fight the enemy and bring home the booty from the battlefield. They resolved among themselves that the Prophet (S.A.W) should forget the implementation of the new law or change it. Consequently, they called on the Prophet (S.A.W) saying, “oh messenger of Allah you give the daughter  $\frac{1}{2}$  of her fathers estate but she cannot ride the horse, fight the enemy and you make the minor son inherit his father but he cannot bring prosperity to the family. Ibn Ali Hatimu and Ibn Jarir narrated this.<sup>57</sup>

This is clear evidence that the early Muslims and the Arabs generally, could hardly appreciate the change of mode of inheritance made by Islam. The fractional shares fixed for female and shares given to even minor and weak persons was

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<sup>57</sup> Rushdi, A. OP. Cit. 586

not expected by the Arabs during the early period of Islam. To them shares of inheritance are given to agnatic (*Asabah*) heirs only who can defend the family or tribe in the battle field.

The last verse 4:176 says:

They ask thee for a legal decision say Allah directs (thus) about those who leave no descendents or ascendants as heirs. If it is a man, that dies, leaving sister but no child, she shall have half the inheritance; if (such a deceased was) a woman, who left no child her brother take her inheritance; if there are two sisters, they shall have two – third of the inheritance (between them); if there 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.<sup>58</sup>

The word Kalala in this verse is called Kalala number two. The meaning of the word is debatable among the jurists. The second caliph, Sayidina Umar (R.A). Showed his concern about the meaning of the word. The general interpretation given to it is that one who died leaving no son and father.

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<sup>58</sup> Ali A.Y. OP.Cit, P.235

From the Sunnah came the causes of revelation of the above three fundamental verses. Firstly the Sunnah narrated by Jabir Bin Abdulalh (R.A). He said:

I became sick so Allah's Apostle (S.A.W) and Abu Baki (R.A) came on foot to pay me a visit when they came, I was unconscious. Allah's Apostle (S.A.W) performed the ablution and sprinkled over me the water of his ablution. I felt some relief and said Allah's messenger, how I should decide about my property?" he said nothing to me in response until verse pertaining to the law of inheritance was revealed.<sup>59</sup>

In another Hadith that came from Jabir, he said:

The wife of Sa'ad Bin Rabiah came to the Prophet (S.W.A) with her two daughters and said, "Oh messenger of Allah, these two are Sa'd Bin Rabiah's daughters. He was martyred when fighting in the battle of Uhud. Their uncle took all their property and left nothing for them to get married with and they cannot do so without it! Then he said, Allah will judge on this, and then the verse on

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<sup>59</sup> Al-Bukhari, Darul Hayati Kutubil Arsbiyyah Vol. 41, P.163

inherence was revealed. The Prophet (S.W.A) sent for their (daughters) uncle and said to him give  $\frac{2}{3}$  to the daughters of Sa'ad and  $\frac{1}{8}$  to their mother and you take the residue. Five narrators except An-Nasa'I narrated this hadith"<sup>60</sup>

It can be noted that from the above verses the shares of some heirs are specified by the Quran in the following fractions: one-half, one-fourth, one-eighth, one third two-third and one – sixth. However, the Holy Quran is silent about the shares of other heirs especially males. The tradition of the Prophet (S.A.W) explained;

Narrated by Ibn Abbas (R.A) the Prophet (S.A.W) said "Give the *Faraid* (the shares of the inheritance that are prescribed in the Quran) to those who are entitled to receive it. Then whatever remains should be given to the closest male relative of the deceased."<sup>61</sup>

This means that there are two types of heirs; they are *Faraid* or *Quranic* heirs and *Asabah* or agnatic heirs whose

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<sup>60</sup> Sabig, a. Fighu-Sunnah, Darul Kutub Arabiyyah, Vol.3, (1983), P.603

<sup>61</sup> Khan, M. M. The Translation of the Meaning of Sahih Al-Bukhari Arabic-Englis, Darul Al-Arabia, Vol. 8. P. 402

shares are not fixed in the Quran. From the above *Hadith*, it can be understood that in all distribution of the deceased's estate, the shares of the *Quranic* heirs must be satisfied first before considering the shares of the *Asabahs*. Hence, they always wait for the remainder of the estate, where they inherit along with the *Quranic* heirs; otherwise, they take the whole of the estate. It is evident from the *Quranic* verses and the traditions of the Prophet (S.A.W) that the property left by a deceased Muslim should be inherited by his legal heirs. The Prophet (S.A.W) stated

Whoever leaves some property (after his death) then it is for his family (inheritors).<sup>62</sup> Here too the *Sunnah* of the Prophet (S.A.W) made no exception to the physical and mental capacity of the heirs. However, the prophet (S.A.W) warned that they (all prophets) cannot inherit and the property they left cannot be inherited. Thus, *Hadith* of the Prophet (S.A.W):

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<sup>62</sup>Muslim, S. Shaih Muslim, Darul Arabiy, Vol. 3. (N.D), P. 855



“Narrated by Aisha (R.A) the Prophet (S.A.W) said ‘our (Apostles) property is not to be inherited, and whatever we leave is to be spent in charity.”<sup>63</sup>

In conclusion Jewish law of inheritance provided that when male children exist they are exclusive heirs of their deceased parent’s estate. Also, when the first born is a male he is entitled to twice the share of his younger brother(s). The ground of inheritance of the heirs under this law consists of blood relationship and marriage. Christian law of inheritance has deviated from Old Testament but adopted will Acts, by which a testator is given full testamentary power to make a will in favour of any body or any thing of part or whole of his property according to his wish. However, where a Christian died intestate the distribution of his estate depends largely on the type of marriage he contracted during his life time. The inheritance among the Arabs of Jahiliyyah period was that only a capable man in the family or clan was entitled to inherit the deceased person. That was because he could use the sword in defence of the family or clan against their enemy. The

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<sup>63</sup> Al-Bukhari, Sahihul Bukharli, Darul Ahya’I Kutubil Arabiyyah, Vol. 4, P.165

grounds of inheritance during the period included blood relationship, adoption, defence pact and marriage which favoured men only.

Jewish and Christian laws of inheritance have no bearing of influence on the Islamic law of inheritance. Islamic law not only allowed male children to inherit but also females and other Quranic heirs. It has not also allowed double share for the first born male child but rather makes a male child takes twice the share of a female who is totally excluded by the Jewish law. In order to curtail the concentration of wealth in few hands Islamic law of succession put a limit to the testamentary power of a testator. He is not allowed to bequeath more than  $\frac{1}{3}$  of his estate or in favour of his legal heir which is contrary to the Christian will Acts.

The only law that may have any significance to the development of Islamic law of inheritance is Arabian customary law considering the nature and the terminologies of the two laws.

Islamic law modified customary law and prohibited certain terms and wrong practices in pre-Islamic Arabic. For

example Islamic law adopted and modified the concept of Asabah (the inheritance of agnatic heirs) and prohibited men inheriting women or inheritance by adoption (adopted child inheriting adopting parent and vice-versa). It also prohibited all other forms of practices which are repugnant to Islamic law. The verses of the Holy Quran added more heirs to the heirs allowed by pre-Arabian customary law of inheritance. The heirs added include females, children, incapable weak and diseased persons which is contrary to the customary law in Jahiliyyah period. By and large the Sunnah of the Prophet the Ijma added some of the heirs to the heirs specifically mentioned by the Holy Quran, for example true grand father, son's son, son's daughter, uncle's son etc. thus the Quranic verses, the Sunnah of the prophet (S.A.W), Ijma of the jurists and their individual contribution made Islamic law of inheritance so unique and systemic science of distribution of deceased person's estate that no man-made system or law in the whole world would attempt to do the same. Hence the tendency of exploitation and disregard to family relationship

and social unity among the individuals and the society at large is, by implication, paramount in the man made systems.

# **CHAPTER THREE**

## **BLOOD RELATIONSHIP AS A BASIS OF INHERITANCE**

### **UNDER ISLAMIC LAW**

#### **3.0 Introduction**

Heirs of inner<sup>1</sup> and outer<sup>2</sup> circles of family must be related to the praepositus through blood relationship (*NASAB*) as his ascendants, descendants, collaterals and uncles.

In Arabic terminology it is termed as *NASAB* meaning paternity or blood relationship which gives the heirs rights to inherit<sup>3</sup>. In this chapter the above topic will be discussed by considering relatives of inner and outer circle of family. The members of such classification will be treated individually.

#### **3.1 Blood Relationship As A Basis Of Inheritance**

Blood relationship provides a ground of inheritance for majority of legal heirs. It is the basis under which they inherit because of the importance attached to this ground or relationship. Allah (S.W.T) legislates to abrogate brotherhood

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<sup>1</sup> Arif, M. *Khilasatu Ilmul Fara'id* \_Azhariyyi, (1937), P. 6

<sup>2</sup> Ibid, P. 18

<sup>3</sup> Khubali, I.A *Al-Azbul Fa'id Sharh Umdatul Farid*, Darul Kutubul Ilmiyyah, Vol. 1. P. 26

in favour of blood relationship<sup>4</sup> as a ground of inheritance. The Holy Quran ch.33 verse 6 says:

“Blood relationship among each other have closer personal ties, in the decree of God than (the brotherhood of) believers and Muhajirs; nevertheless do ye what is just to your closest friends such is the writing in the decree (of God)”<sup>5</sup>.

See also ch.8:75 of the Holy Quran:

“And those who accept faith subsequently, and adopt exile, and fight for the faith in your company, they are of you, but kindred by blood have prior rights against each other in the Book of God, verily God is well acquainted with all things”<sup>6</sup>

Immigrants and Madina helpers of Muslims became like blood relatives who can inherit each other until the normal family units of the Muslim families in Madina was formally normalized. The above two verses provided the basis of blood relationship and it becomes the ground of inheritance. The general principles are laid down that female blood relatives inherit as well as males and that blood relatives who have no

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<sup>4</sup> Lakwi, S.B. *Mirath Justice of Islam in the Rules of Inheritance*, Kano , (2003), P. 11

<sup>5</sup> Ali A.Y. *The Holy Qur'an Translation and Commentary*, Lahore, (1954). P. 1104

<sup>6</sup> Ibid, P. 434

legal shares; orphans and incapable people are not to be treated harshly, if present at the division. Their maintenance may be charged to the property as part of the claims before distribution.

Chapter 4: verse 7 provides:

“From what is left, by parents and those nearest related there is a share for men and a share for women and a share for women whether the property be small or large a determinant share”<sup>7</sup>

Under Islamic law of inheritance the main basis of inheritance is blood relationship. Both the Quran and Sunnah of the Prophet (SAW) established rights of inheritance between various blood relatives and prescribed fixed fractional portions of the praepositus estate as their entitlements, in chapter 4, verses: 11, 12, and 176 of the Holy Quran.<sup>8</sup>

### **3.2 Blood Relatives Of Inner Circle Of Family**

Blood relatives may also be categories as conventional and non-conventional. Conventional are relatives of inner

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<sup>7</sup> Ibid P. 180

<sup>8</sup> Ibid PP:181, 182 and 235

circle whereas non-conventional refers, to those of outer circle of family. The concern here is to discuss conventional relatives and their status one by one. Conventional relatives<sup>9</sup> are divided into four categories, that is ascendants, descendants, collaterals and uncles. The research will discuss individuals under each category of the blood relatives of inner circle of family.

## **ASCENDANTS:**

### **3.2.1 Father**

A male parent of a child<sup>10</sup>. For the purpose of inheritance he is a direct parent of the praepositus. He is related to the praepositus by blood and it is the basis of his inheritance as no one can exclude him from the inheritance of his child, totally. This means that he can inherit at any rate and the Holy Quran states “for parents, a sixth share of the inheritance to each, if the decease left children...”

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<sup>10</sup> Quran 4:11



### **3.2.2 True Grand Father (How High Soever)**

The true grand father is a male ancestor between whom and the deceased there is no female interventions.<sup>11</sup> True grandfather, who is sometimes called father's father how high so ever, by *IJMA* of the jurists, steps into the shoes of the father and inherits under two conditions. Firstly, he inherits in the absence of the father of the deceased. Secondly, he inherits when there is no female intervention between him and the deceased person how high so ever.<sup>12</sup>

### **3.2.3 Mother**

She is a relative by blood between whom and the deceased no other person intervening. She is a direct female parent of the deceased person. She can inherit without any condition. The Holy Quran says "...for parents a sixth share of the inheritance to each ... if the deceased left brothers or sisters) the mother has a sixth..."<sup>13</sup>

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<sup>11</sup> Rashid, A. *Iddatul-Bahith Fil Ahkami Tawarith*, (1389), P. 20

<sup>12</sup> Al-Qurdabi, M. *Bidayatul Mujtahid Wa Nihayatul-Magtasid*, Vol. 2, (595 H). P. 346

<sup>13</sup> Ali, A. Y. Op. Cit. P. 181

### 3.2.4 True Grand Mother

The true grand mother is a female ancestor between whom and the deceased no false grand father intervening. For example, mother's mother, father's mother how high soever.<sup>14</sup> She is related to the deceased person by blood relationship. According to *SUNNAH* of the Holy Prophet (SAW) and *IJMA* of the jurists the true grandmother is a Quranic heir and she can inherit her grandchild. During caliph Sayyidina Abubakar a grandmother of a deceased person came to him and claimed inheritance. He told her there is nothing in the Quran and Sunnah entitling her to inheritance but that she should come later after he consulted other companions of the Prophet (SAW). When he asked them Al-Mugira Bin Shu'uba said one true grandmother came to the Prophet (SAW) and he gave her 1/6. Sayyidina Abubakr asked him if he could bring someone who would support what he said. Consequently, Muhammad Bin Musallama Al Ambary confirmed him.<sup>15</sup>

True grandmothers are divided into different types according to the different opinions of the Islamic jurists. Those

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<sup>14</sup> Rumsiyi, A. *Al-Sirajiyah*, 2<sup>nd</sup> Edition (1981), P.15

<sup>15</sup> Sabig. S. *Fiqhus-Sunnah* Darul fikr Vol. 3 (1984), P. 623

who can inherit according to Shafi'i and Hanafi schools as Quranic heirs are: Mother's Mother, father's mother, Mother's Mother's Mother, father's Father's Mother, Mother's, Mother's Mother's Mother, father's Mother's Mother's Mother Father's Father's Mother's Mother and Father's Father's Father's Mother how high so ever.<sup>16</sup>

According to Maliki School only two types of true grandmothers can inherit as Quranic heirs. They are: Mother's Mother and father's Mother how high so ever.<sup>17</sup> Hambali School accepted Maliki's view but added father's father's Mother and father's father's Mother's Mother how high so ever. The mother of the deceased person excludes all types of true grandmothers. Furthermore, she cannot inherit where the false grandfather intervenes. The false grandfather is a male ancestor between whom and the deceased there is female intervention.<sup>18</sup>

In the view of this researcher there is no clear difference between Hanafis/Shafie's and Maliki's view concerning

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<sup>16</sup> Hussain, A. Islamic Law of Inheritance, Wa Nihayal-Mugtasid, Darussalam, (2005), P. 210

<sup>17</sup> Ibid

<sup>18</sup> Al-Quradabiyi, M. Bidayatul Mujtahid, wa Nihayatul Mugtasid, Vol. 2, (5954), P. 262 Vol. 2 P. 350

categories of true grandmother. Perhaps, the only seemingly difference is that Hanafis/Shafie's mentioned more than first category of true grandmothers, while Maliki's mentioned only the first category. However, both views concluded with the phrase "how high soever" which makes the two views overlap, because, phrase included all types of true grandmothers. Therefore, one may say, Maliki's view is more technical and precise than the other views.

## **DESCENDANTS:**

### **3.2.5 Son**

The son is a direct male child<sup>19</sup> of the deceased person and they are related by blood relationship.<sup>20</sup> He inherits as *ASABAH* (Residuary) and no legal heir excludes him from the inheritance of his parents either partially or totally. His share is not fixed or specified in fraction in the Quran. The Holy Quran 4:11 says "Allah instructs you concerning (the inheritance of) your children; a male receives a share equal to that of two females." From the above verse his share is twice the share of the daughter of the *praepositus*.

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<sup>19</sup> Hussain A. The Islamic Law of succession, Darussalam, Biyadh, (2005), P. 176

### **3.2.6 Daughter**

The daughter is a female child<sup>21</sup> of the praepositus and she is related to her parents through blood relationship. She inherits as a Quranic heir. She is also agnatised by the son. Furthermore, she is not excluded by any other legal heir from the inheritance of her parents. Her shares are fixed and specified in the Holy Quran 4:11. Thus: 'But if they (the children) are only women, and are more than (or equal to) two, their share is two thirds of that which he (the deceased) had left. And if there is only one woman, her share is half (of the estate).'<sup>22</sup>

### **3.2.7 Son's Son (How Low Soever)**

That is grandson; he is a son of one's son.<sup>23</sup> For the purpose of inheritance the grandson or son's son is like son. In the absence of son he substitutes the son but he cannot become a representative of the son. He can also inherit in the absence of any female intervention she always inherit something but the son's son may be, in fact, excluded from the

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<sup>21</sup> Hussain, A. Op. Cit. P. 178

<sup>22</sup> Ali, A. Y. Op. Cit, P. 181

<sup>23</sup> Hussain, A. Op. Cit. P. 230

inheritance totally because there is nothing left for him, although, he is a legal heir. For example where the praepositus was survived by both parents two daughters and son's son. Likewise where the deceased was survived by father's father Mother two daughters and a son's son.<sup>24</sup>

### **3.2.8 Son's Daughter (How Low Soever)**

Son's daughter is the daughter of one's son and is related to the deceased person through blood relationship. She can inherit how low soever if there is no female intervention between her and the deceased.<sup>25</sup> In the absence of the son, son's son and two or more daughters she inherits as a Quranic heir. By *IJMA* of the Islamic Jurists the son's daughter inherits the share of the daughter of the praepositus as provided in the Holy Quran, chapter 4 verse 11.<sup>26</sup>

### **COLLATERALS:**

### **3.2.9 Germane Brother**

Germane is from the Latin word Germanus meaning having the same father and mother. Therefore, Germane

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<sup>24</sup> Ashiru M. Ilmul Mirath (N.D.) P 67

<sup>25</sup> Abu-zahra, M. Ahkamut Tarikat wal-mawarith, Darul fikril Arabiyi, (1963), P. 134

<sup>26</sup> Ali, A. Y. Op. Cit, P. 181

brother means a full brother or the son of both of ones parents.<sup>27</sup> The germane brother inherits without any condition. However, he is excluded by the son Son's son how low soever Father and true grandfather how high so ever according to Hannafi school of law but according to Maliki school grandfather cannot exclude germane brother but they inherit together. He is related to the praepositus through blood relation and his inheritance is based on the verse of the Holy Quran as in chapter 4, verse 176.<sup>28</sup>

### **3.2.10 Germane Sister**

She is related to the prepositions by blood relationship from both parents. She inherits as a Quranic heir and her shares are specified and fixed in the Holy Quran, she is excluded from the inheritance by the son, the son's son how low soever, father and true grand father how high soever according to Hannafi school of law. According to Maliki School only son, son's son and father can exclude the germane sister.<sup>29</sup>

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<sup>27</sup> Ibid, P. 138

<sup>28</sup> Ali, A. Y. Op. Cit, P. 235

<sup>29</sup> Hussain A. Hussain A. The ISLAMIC Law of Succession, Darussalam, (2005), P. 276

### **3.2.11 Consanguine Brother**

Consanguine brother is a brother who has the same father but a different mother with the praepositus.<sup>30</sup> He is related to the praepositus by blood relationship and he inherits as *ASABAH* (Residuary) and his inheritance is based on the Holy Quran chapter 4 verse 176.<sup>31</sup> But his share is not specified or fixed in the text. He is excluded by son, son's son how low soever, father, Germane brother, Germane sister when she inherits as residuary with another and according to Hannafi school he is also excluded by true grandfather how high soever. On the other hand he excludes sons of brothers how low so ever and all uncles and their children.<sup>32</sup>

### **3.2.12 Consanguine Sister**

Consanguine sister is a sister who has the same father but different mother with the praepositus.<sup>33</sup> She is a Quranic heir, her share is fixed in the Holy Qur'an 34:176. She is related to the praepositus by blood relationship which provided a ground for her right of inheritance. She inherits as

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<sup>30</sup> Abu-Zahra, M. Op. Cit. P. 145

<sup>31</sup> Ali, A. Y. Op. Cit, P. 235

<sup>32</sup> Khalifa M. Y. Ahkamul Muwarith, Darissalam (2007), P. 193

<sup>33</sup> Abu-Zahra, M. Op. Cit. 145



a residuary by another<sup>34</sup> and with another, and in both cases she waits for the residue. She is excluded by son, son's son how low soever, father, Germane brother, Germane sister when inheriting as a residuary, two or more Germane sisters in the case of Lucky kinsman<sup>35</sup> and according to Hanafi School true grandfather can also exclude her.

### **3.2.13 Uterine Brother**

Uterine brother who has the same mother, but a different father.<sup>36</sup> He is related to the praepositus by blood relationship and it provides right of inheritance for him. He is a Quranic heir and his shares are specified in the Holy Qur'an.<sup>37</sup> He is not being elated to the deceased through males so can never be an agnatic heir. His right of inheritance and being one of the heirs of inner circle of family depends entirely on the provision of the Holy Qur'an 4:12. Where he inherits with uterine sister the rule of agnatization will not be applied but they are joined together in one third. He is excluded by direct child of the deceased, son's son how low so ever, son's

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<sup>34</sup> Ali A. Y. Op. Cit. 235

<sup>35</sup> Al-Qurdabi, M. M. bidayatul Mujtahid, Vol. 2 (1975)

<sup>36</sup> Black: Black's Law Dictionary, West Pub (1999)

<sup>37</sup> Ali, A. Y. Op. Cit. P. 182

daughter how low so ever, father and true grandfather how high so ever.<sup>38</sup>

### **3.2.14 Uterine Sister**

Uterine sister is a sister who has the same mother but a different father, with the praepositus, she is a Quranic heir and her share is fixed in the Holy Quran.<sup>39</sup> Chapter 4 verse 12. Blood relationship is a ground of her right of inheritance. Like her brother, uterine brother, her position is specially dependent on the Holy text. Despite the fact that she links to the praepositus through her mother only when they are two or more<sup>40</sup> they exclude their mother, from 1/3 to 1/6, partially. This is an exception to the general rule that when there is link through which another can inherit he or she cannot inherit if that link is present and inheriting<sup>41</sup>. Uterine sister is excluded by a direct child of the praepositus son's son how low soever, son's daughter how low so ever, father and true grandfather how high so ever.

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<sup>38</sup> Abu-Zahra, M. Op. Cit, P. 129

<sup>39</sup> Ali, A. Y. Op. Cit, P. 182

<sup>40</sup> Uterine sisters or brothers or Mixed together

<sup>41</sup> Abu- Zahra, M. Op. Cit. P. 148

### 3.2.15 Germane Brother's Son

Germane brother's son is the son of the full brother he can also inherit by blood relationship. He is also called a nephew (brother's son) and he is like the brother in whose absence he inherits as residuary.<sup>42</sup>

In comparison to brother (his father or uncle) he is at disadvantageous position. He is excluded by a grand father, two or more nephews, will not exclude the mother partially, he cannot create the case of *HAJARIYYAH*, and he may be entirely excluded by combination of other heirs. For example where the deceased left two Germane sisters and two uterine sisters. In this case, the two Germane and two uterine sisters take  $\frac{2}{3}$  and  $\frac{1}{3}$  respectively. In fact the Germane brother's son receives nothing, hence the estate is exhausted.<sup>43</sup> He is excluded by son, son's son how low soever, father, father's father how high soever, Germane brother, consanguine brother, Germane and consanguine sisters inheriting as residuary.<sup>44</sup>

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<sup>42</sup> Al-Maliki, U. Siraju-salik As-habul MUSALIK Vol. 2 (N.D) p. 243

<sup>43</sup> khubali, I. al-Azbul Fa'id Sharh Umdatul Farid, Vol. 2 (1999). P. 104

<sup>44</sup> Ibid

### **3.2.16 Consanguine Brother's Son (How Low Soever)**

He is a son of the consanguine brother and he is related to the praepositus by blood relationship. He inherits, in the absence of consanguine brother, as a residuary.<sup>45</sup> He is excluded by son, son's son how low soever, father, father's father how high soever, Germane brother, consanguine brother Germane and consanguine sister's when inheriting as residuary and Germane brother's son when both are inheriting.<sup>46</sup>

## **UNCLES:**

### **3.2.17 Paternal Uncle**

There are two types of uncles, and they are paternal and maternal uncles. Only paternal uncle can inherit under this category of blood relatives. Paternal uncle can inherit under this category of blood relatives. Paternal uncles are also divided into two and they are Germane and consanguine paternal uncles. He can inherit as a residuary.<sup>47</sup> In the absence of the following heirs, son, son's son how low soever,

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<sup>45</sup> Arif, M. Khilastu Ilmul Afraid (1937), P. 15

<sup>46</sup> Khalifa, M. Ahkamul Muwarith (2007), P. 377

<sup>47</sup> Hussaini, A. The Islamic Law of Succession, Darussalam (2005) P. 303

father, father's father how high soever, Germane brother, consanguine brother, Germane and consanguine sisters inheriting as residuary, Germane and consanguine brother's sons how low soever.

### **3.2.18 Paternal Uncle's Son (How Low Soever)**

The son of both Germane and consanguine paternal uncle can inherit as a residuary. His right of inheritance is based on blood relationship to the *praepositus*.<sup>48</sup> He is excluded by son, son's son, father, father's father, Germane and consanguine brother's Germane and consanguine sisters when inheriting as residuaries, Germane and consanguine paternal uncles.

### **3.3 The Blood Relatives Of Outer Circle Of Family**

The second types of heirs are heirs of outer circle of family who are referred to as *DHAWUL ARHAM* in Arabic terminology.<sup>49</sup> The literal meaning of *DHAWUL* is possessor and *ARHAM*, plural of *RAHIM*, means womb.<sup>50</sup> Heirs in this category are called *DHAWUL ARHAM* because they are either

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<sup>48</sup> Hussain, A. The Islamic Law of Succession, Darussalam, (2005), P. 314

<sup>49</sup> Arif, M. Khilastu Ilmul Fraid (1937), P. 18

<sup>50</sup> Lakvi, S. H. Al-Mirath Justice of Islam in the Rules of Inheritance, Kano-Nigeria, (2003), P. 134

females or linked to the *praepositus* through females who are associated with wombs. Technically, *DHAWUL ARHAM* means those who are neither Quranic nor residuary heirs.<sup>51</sup> Such blood relatives are called *DHAWUL ARHAM* for the purpose of inheritance, not because of their degree of removal or distance from the deceased person but because of the nature of their relationship or sex. Some members of *DHAWUL ARHAM* may be as near to the *praepositus* as ordinary legal heirs. For example father's father, son's son, son's daughter and German brother's son are ordinary legal heirs but mother's father, daughter's son, daughter's daughter and German brother's daughter are members of *DHAWUL ARHAM*.<sup>52</sup>

The definition shows that *DHAWUL ARHAM* includes all relations, whether near or remote who are not Quranic heirs or residuaries. It is necessary to call attention to this point, as some writers have over looked the definition and have thus imagined that only those who are linked to the *praepositus* through females are members of the outer circle of family. They are all blood relatives of the deceased person who, are

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<sup>51</sup> Alfauzzani, S. attahagigat AL-Mardiyyah Fi-Mubahithil fardiyyah, (1996), P. 260

<sup>52</sup>Khuduri A. Addiya'u Ala Darratul Bai da'ul Fil-faraid Vol 2, (1973),P. 68

neither Quranic nor residuary heirs. Generally, all issues, though female relatives are heirs of outer circle of family<sup>53</sup> except those through the mother (uterine brother and sister).

### **3.3.1 False Grand Father (How High Soever)**

False grandfather is a male antecessor between whom and the deceased there is female intervention.<sup>54</sup> The example of false grandfather is Mother's Father (MF), mother's mother's father father's (MMF) mother's father (FMF) father's mother's mother's father (FMMM) how high so ever false grandfather who is nearer in degree to the deceased person excludes one who is more remote. When they are of equal degree of removal from the praepositus that of Quranic or residuary heirs take priority over those who linked through *DHAWUL ARHAM* to the praepositus. For example, mother's mother's father (MMF) is given priority over mother's father's father (MFF) this is because is coming through, a Quranic heir, whereas (MFF) comes from who is *DHAWUL ARHAM*

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<sup>53</sup> Ibid p. 68

<sup>54</sup> Khubuli I. Al-Azbul Faid, Vol. 2. (1999) P. 4

### **3.3.2 False Grand Mother (How High Soever)**

False grandmother is a female ancestor between whom and the praepositus there is intervention of false grand father.<sup>55</sup>The example of false grand father is, mother's father's mother (MFM), father's mother's father's mother (FMFM) how high soever. Her condition of inheritance is the same with that of the false grand father.

### **3.3.3 Grandson With Female Intervention**

They are descendants of the deceased by blood relationship which is the basis of their inheritance. They are grand children of the praepositus but they are neither Quranic nor residuary heirs. The example of them is daughter's son daughter's daughter's son. Son's daughter's son, son's daughter's daughter's son, Daughter's son's son how low soever. The condition of their inheritance is that the one nearer to the praepositus excludes the one who is more remote. Where they are of equal degree of removal those coming through Quranic or residuary heirs are given priority over those of *DHAWUL ARHAM*. For instance, Son's daughter's

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<sup>55</sup>Hussaini A. The Islamic Law of Succession, Darussalam, (2005), P. 211



son (SDS) will exclude Daughter's daughter's son (DDS), this is because (SDS) is coming from who is a Quranic heir whereas is coming through who is a *DHAWUL ARHAM*.<sup>56</sup>

#### **3.3.4 Grand Daughters Through The Daughter**

They are grand daughters of the deceased through his daughter. By blood relationship they are related to the praepositus and they inherit only in the absence of both Quranic and residuary heirs. The example of grand daughters through the daughter is daughter's daughter, daughter's son's daughter, daughter's daughter's daughter, how low soever. Her condition of inheritance is the same with that of the grand sons with female intervention.<sup>57</sup>

#### **3.3.5 Female Children Of The Brothers And Sisters**

They are daughters of all types of brothers and sisters, they are *DHAWUL ARHAM* and they are related to the praepositus by blood relationship, which provided the basis of their inheritance. There is female intervention between the daughters of the sisters and the deceased person but there is none in the case of daughters of the brothers. However they

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<sup>56</sup>Ibid P. 90

are *DHAWUL ARHAM* by their own nature not because there is female intervention.<sup>58</sup> The example of such daughters are Germane brother's daughters, Germane Sister's daughters, consanguine brother's daughters and Sister's daughter's daughters. The condition of their inheritance is governed by the rule that the nearer in degree of removal excluded the one who is more remote. Where they are of equal degree then children of the Quranic and residuary heirs are given priority, over children of *DHAWUL ARHAM*. For example Germane brother's son's daughter (GBSD) will exclude uterine brother's son's daughter (UBSD) this is because (GBSD) is a daughter of a residuary heir whereas (UBSD) is a daughter of who is *DHAWUL ARHAM*.<sup>59</sup>

### **Sons Of The Uterine Brothers And Sons Of All Sisters**

Sons of the uterine brother and sons of all the sisters are relatives of the praepositus by blood relationship. This relationship provides basis of their inheritance. Sons of the uterine brother and all the sisters are linked to the

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<sup>58</sup> Ibid

<sup>59</sup> Khubali, I. Op. Cit, P.110

praepositus through the mother and sisters, respectively rendering them all to become *DHAWUL ARHAM*. This is because there are female interventions in both cases.<sup>60</sup> The example of these are, uterine brother's sons, uterine sister's sons. Germane sister's sons and consanguine sister's sons. The condition of their inheritance depends largely on the principle that the nearer in degree excluded the one who is more remote. And where they are of equal degree of removal the descendant of Quranic heirs are given priority over descendant of *DHAWUL ARHAM*.<sup>61</sup>

### **3.3.6 Paternal Uncle's Daughter**

She is the daughter of paternal uncle of the praepositus. She is related to him by blood relationship, which provided basis of her inheritance. She is a *DHAWUL ARHAM* by her nature not by female intervention. Paternal uncle's daughter can inherit in the absence of Quranic and residuary heirs. Where there are heirs on both the paternal and the maternal sides, the one on the paternal side is given twice the share of

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<sup>60</sup> Sabig, A. Fighus Sunnah, Darul Fikr, Vol. 3, (1977), P. 446

<sup>61</sup> Khubali, I. Al-Azbul Fa'id Sharh Umdatul Farid, Vol. 2, (1999), P. 49

one on the maternal side. For example paternal side is given  $\frac{2}{3}$  and the maternal side is given  $\frac{1}{3}$ .<sup>62</sup>

### **Maternal Uncle And All Aunts**

Maternal uncles and aunts on both sides are *DHAWUL ARHAM* and are related to the praepositus by blood relationship.<sup>63</sup> The example of these are; maternal uncle, Paternal aunt (PAU) and Maternal aunt. The condition of inheritance above under 3.3.7 is also applicable here. Where heirs on the paternal side are not existing the maternal side is given the whole estate and vice versa and share it accordingly. The principle that the male takes twice the share of a female applies.<sup>64</sup>

Finally, the Islamic Law of succession requires that before distribution of the estate of the praepositus among the legal heirs of inner and outer circles of family, their relationship to the praepositus must be established. That they are related by blood relationship which must be legal and legitimate, especially those on the paternal side. All those

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<sup>62</sup> Khalifa, m. *Ahkmul Muwarith*, (2007), P. 377

<sup>63</sup> Ashiru, M. *ijmul Mirath*, (N.D), p. 1777

<sup>64</sup> Gazali, H. Y. *Al-Mirathu Ala Mazahibul Arah Dirasah Wa Tatbigan*, Darul Fikr, (2008), P. 349

enumerated above, under this chapter, are related to the praepositus by blood relationship. However those in the second part of the chapter are relegated to the outer circle of family for the purposes of succession not because of their removal from the praepositus but because of the nature of their relationship or their sex.

### **3.4 Some Challenges Affecting Islamic Law Of Inheritance**

The challenges in the application of Islamic law of inheritance in Nigeria and beyond are numerous which need to be addressed for the development of Islamic law of succession. The first issue is the issue of TAQLID or the adoption of one school of law.

Nigeria adopted Maliki law even before its independence and the adoption was legislated in 1960. Hence, section 2 of Sharia Court of Appeal Law 1960 states” Muslim personal law means muslim law of the Maliki School governing the matters set out in paragraphs (a), (b), (c) and (d) of section II. Section II provided the jurisdiction of the court to decide cases related to Muslim personal law which includes Islamic law of inheritance.

The adoption of Maliki School alone has generated a lot of controversies. For instance the inheritance of heirs of outer circle of family or Dhawal Arham. Maliki School has not recognized Dhawal Arham heirs to inherit, it has preferred public treasury to take deceased's estate.

However, contemporary jurists of the school reversed their view and allowed Dhawal Arham heirs to inherit considering the abuses of the public treasury by those in authority. But what will happen in future if the treasury is established according to Islamic principles. Would the members of the outer family cease to inherit and the traditional Maliki view be readopted? This is s a problem we should anticipate if the law is not reformed. There are instances where the traditional Maliki view was abandoned and the Dhawal Arham heirs were allowed to inherit. In the case of *WAZATA v. YUSUFU HUDA*.<sup>65</sup> The then, Muslim Court of Appeal allowed a paternal aunt, a member of the outer family, to inherit from the estate of the praepositus. The court cited Mukhtasar of Khalil, vol. 2 P. 332. The heirs who

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<sup>65</sup> Unreported case No. MCA/CV47/1857

survived the deceased in this case are his mother who got 1/3, uterine, brother who got 1/6 and the paternal aunt who got the residue of ½ of the estate.

The criticism here is that the courts have given the aunt a preference over the doctrine of Radd. This is because deceased's mother and uterine brother were entitled to get Radd.

In another case *AUDU KABUWAYA v. ABBA GALADANCI*,<sup>66</sup> the Sharia Court of Appeal allowed the Dhawul Arham to inherit rather than the treasury and the reason given was the political authorities were not just and not properly constituted. It is encouraging to see that heirs of the outer circle of family are allowed to inherit instead of public treasury and the law is developing in the right direction. But the question here is what doctrine the courts will adopt. Will they adopt doctrine of *AHLUL TANZIL* (representation) or doctrine of *AHLUL QARABA* (relationship)? These and many more problems the court will face if the law is not reformed and codified.

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<sup>66</sup> unreported case No. SCA/CV/57/1964

Another aspect of the law of inheritance which deserves a treatment here is the uneasy position of women in the Nigerian society with regard to the succession of immovable property. The custom requires that land and buildings should be kept in the family. Thus according to this custom, succession to immovable property is exclusively confirmed to male relations. The Sharia Courts of Appeal were faced with the problem of reversing the decisions of some lower courts on appeal concerning immovable property. Most appeal were made by women who were denied the right to get land or some place in a house as their share of inheritance. See Binta Kano, Amina and Bilki V. Kano N.A<sup>67</sup>. The daughters of the deceased sued the defendant for holding and denying them to inherit their father's house. The trial court allowed the daughters to live in the house as a gift. On appeal, the Sharia Court of Appeal reversed the decision of the lower court and ordered that the whole house should be given to the appellants to share it among themselves.

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<sup>67</sup> Unreported Case No. SCA//CV/70/1962



From the above case, the lower court was not of the view that the daughters were legal heirs to inherit the house but just to live in as their family house, perhaps, when they married they leave the house for others. This means that some lower court judges are easily influenced by prevailing customary law in a given area of their respective jurisdiction in cases of inheritance. This may be possible being nearer to the people and social interaction between them and the people which may have effect on their legal decisions. And again, some judges of the lower courts may decide that the males inherit immovable and females movable properties. If the estate is a house the front door rooms are given to the males while the interior of the house to the females. This inequality may result into inequity which may amount to unjustified exclusion of the heirs of the inner and outer circles of family from their rightful shares. The same wrong position was taken in the case of *Musa v. The estate of Late Ahmadi Michika and three others*.<sup>68</sup> The lower court decided that the house in question shall be rented for the maintenance of the said house

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<sup>68</sup> Unreported Case No. GGS/SCA/CV/25/MB/1983

and that out door rooms shall be given to the males and the interior of the house to the females. On allowing the appeal the then Gongola State Sharia Court of Appeal held that when a person died all the property he left, after satisfying the claims against him, if any, the remaining property shall be for the legal heirs. The court has no power to direct what to do with the property after distribution and that the court shall divide the house into portions among the heirs according to their original shares estimated by the first instant court. Theretofore, each of the heirs shall be shown his or her own share.

Perhaps, the idea here is that women should be kept inside the house so that they are not easily exposed to strangers or passers by. But the judge of the lower court should have considered the value of the rooms at the front side of the house and that of interior of the house. Naturally, both males and females heirs may prefer the former type of rooms which are more valuable. Therefore, it should be done in such a way that the value is proportionate to their shares.

Consequently, where there are more than one house, the custom may require that the house which the deceased person resides in will be reserved as family house.

Preservation of family house will bring many problems. It is another way of excluding the legal heirs from their entitlements. Some unscrupulous members of the family use it to manipulate and displace others from the house. The house may be lapidated; hence, no one will claim responsibility for construction and renovation of the house. It may generate hatred and disputes among the relatives in the family. Any move by other or others to occupy or renovate, or develop or change the position of any thing or a portion in the house without the consent and approval of all the members of the family will bring disputes over the house, which may result into prolonged court cases. When the house is finally distributed it may be possible for them to exclude other heirs, especially females who might have married away from the

family. For example see the case of Iya Maiwaina v. Mamman Captain.<sup>69</sup>

The appellant complained against the respondent, requesting her share of the property left by her father, who had died some time ago. She stated that her brother (father of the respondent) held and retained the house of their father since his death. The house was occupied by her brother's son when he died after the death of their father 30 years before she could claim her share. When the trial court asked her why she has not sought for her share of the estate she replied that at that time she was away in marriage. And at that time she left there was no inheritance.

The Sharia Court of Appeal Northern Nigeria held that when property connected with an inheritance has been held by some of the heirs, the complain of a woman or other heirs will always be heard, the length of time elapsed notwithstanding. Therefore, it is ordered that the trial court redistribute the estate of the deceased person, the father of the appellant.

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<sup>69</sup> Unreported Case No. SCA/CV/99/1962

From this case it must be understood that the trial court must establish not only the death of the praepositus but also the estate and all the legal heirs of the deceased person. Therefore, after the report of the death of the praepositus the trial court or any distributor should investigate thoroughly so that no property or surviving heirs are left out from the distribution.

Another thing to be considered is that family house should not be allotted to males only. See the case of Hajiya Yar Shehu and three others v. Alhaji Garba Karfi.<sup>70</sup> The only issue in dispute after the distribution of the estate of the deceased person is the allotment of the family house and the farmland to the four widows of the deceased. The deceased person in this case was survived by his four wives and a brother and left behind a family house, farmland and other things. The trial court distributed the estate among the heirs to which the brother of the deceased person was not satisfied and appealed to Sharia Court of Appeal concerning the allotment of the family house. His ground of appeal is that the Upper Area

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<sup>70</sup> Unreported Case No. CA/K/1705/87

Court had erred to include the family house and the farm in the allotment of the female heirs, when the male heir is entitled to take three-quarters of the whole estate.

The Sharia Court of Appeal allotted  $\frac{1}{4}$  of the family house and other things to the four wives to share.

The wives appealed to the Court of Appeal. And the court held that the decision of the Shara Court of Appeal quite rightly based on the requirement of the law of inheritance and we affirm the said decision. The appeal has therefore failed and it is dismissed.

The members of the family of the deceased person may reconsider the situations and circumstances of the preserved family house and decide to distribute it among themselves after a length of time has elapsed. This is what happened in the case of: “Aishatu Adda Yola vs Estate of Late, Sardauna Waziri Alhaji Mustafa Mallu Hamman”<sup>71</sup>

The deceased person in this case died on 28/12/1976. Thereafter his estate was distributed but the heirs decided to reserve the house he was residing in as family house.

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<sup>71</sup> Unreported Case No. UACIY/CV/FI/EST5/10

However, after some time the heirs realized that the family house was neglected, there was no renovation and improvement. They reddecided to distribute the said family house. Consequently, they reported the case to the Judge of Upper Area Court I Yola to distribute the house. The judge distributed the house on 4/3/2010 among 4 wives, 6 sons and 4 daughters according to Islamic Law of inheritance.

In the matters of Islamic Law of succession some Area Courts Judges in Nigeria who have little knowledge of the law of inheritance resort to personal interests and custom, thereby, favour some heirs to the detriment of others. See the case of

1. Shehu Usman and 4 others vs Musa Usman and 24 others and the Estates of Late Alhaji Usman<sup>72</sup>

It is an appeal against the decision of Upper Area Court No. 1 Yola when Late Usman Lawan Girei died intestate on 18th of May 2002 and left behind 2 sons, 16 daughters and wives and his estate valued to the sum of N12,278.207.00. The trial court distributed the estate among the legal heirs. The

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<sup>72</sup> Unreported Case No. ADS/SCA/CV/1/XL/2009

appellants were aggrieved with the decision of the trial court and appealed to the Sharia Court of Appeal Adamawa State. The court found that the heirs in the case have not been treated equally as some were given more shares than others of same degree. The trial court judge distributed the estate in which daughters were allotted shares more than the male of their counterpart, which clearly indicates that the distribution was not done in accordance with Islamic Law of inheritance. The appellants urged the court to set aside the distribution and make an order for retrial.

Going by the entire distribution of the estate, and the submission by the counsel that there way no equal distribution made between the heirs the appellate court upheld same as it is seen clearly on the printed record of proceedings of the trial Upper Area Court that shares of other heirs of same degree has gone almost double the others. In fact this kind of distribution is very unique as that is not the intent of the provision of chapter 4 verse 11 and 176 of the Holy Qur'an. The intent of those verses does not mean allotting more shares to another heir of same degree than the



other. The court, therefore, made an order of re-trial of the case before same Upper Area Court No. 1 Yola before another judge with the view to hearing same afresh and exhibit fair and just distribution of the estate among the heirs.

With due respect to the lower court judge it is not fair when you know the law you deliberately ignore it and make up your mind to favour some heirs to the detriment of others.

Another issue that affects the Islamic Law of inheritance is the issue of women liberation organizations or modernists. There are some international women associations, like women liberation, women living under Islamic Law and soon. Such women are aiming at changing the interpretation of the verses of the Holy Qur'an as it affects the position of women. For example the women, in interpreting the Holy Qur'an chapter 4 verse 11 in relation to the shares of the father and mother of the deceased person which says:

“For parents a sixth share of the inheritance to each, if the deceased left children; if no

children and the parents are the (only) heirs,  
the mother has a third.”<sup>73</sup>

The women living under Islamic Law Network when  
interpreting the above verse said:

One third is twice as much as one sixth,  
so if a person leaves no children the  
mother gets twice that the father’s share.  
This is in the text though it is never  
pointed out. In other words, there is a  
context in which a woman gets twice the  
share of her male partner. Whereas the  
son gets twice the share of the daughter,  
the mother gets twice the share of the  
father.”<sup>74</sup>

This type of interpretation is against the Hadith of the  
Prophet (S.A.W) where it says:

“Give the fixed shares to those who are entitled  
to them and the remainder to the nearest male  
agnate.”<sup>75</sup>

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<sup>73</sup> Ali, A. Y. Op. Cit. P. 181

<sup>74</sup> For Ourselves Women Reading the Quran, Published by Women Living under Muslim Law, (1997), P. 136

<sup>75</sup> Al-Selek, M. Bulugh Al-Maram Min Adilat Al-Ahkam, Dar El Aker, Beyrouth Liban, (1993), P. 409

So, where there is father and mother inheriting, the mother takes  $\frac{1}{3}$  and the father takes the remainder  $\frac{2}{3}$  being the only male agante nearer to the deceased person.

Again the interpretation contradicts Ijma of the jurists. That is in the case of Umariyyatan, where one of the spouses, father and mother are surviving the deceased person, the fathers share; according to Ijma double the share of the mother in order not to contradict the rule of agnatization.

The women living under Muslim law network (as they called themselves) are mixing two different positions of inheritance of the parents. The first position is, in the presence of the children of the deceased person, father and mother, each parent gets  $\frac{1}{6}$  of the estate. The second position, the mother gets  $\frac{1}{3}$  of the estate in the absence of the children of the praepositus. But the verse is silent about the share of the father in this context. This is interpreted by the Hadith of the Prophet and IJMA of the jurists to mean the father is a residuary in this position. Therefore if they (parents) are the only heirs in this case the mother takes  $\frac{1}{3}$  and the

father takes the residue which is  $2/3$ .<sup>76</sup> This is contrary to what the women are saying because the father's share doubled the mothers share.

Furthermore, the women claim that the gender inequality in the inheritance of the daughter and other females and the power of exclusion of the females from their Qunaic shares to residuary by their male counterparts is unacceptable. They also strongly condemned the orthodox interpretation of the verses of the Holy Qur'an concerning succession.<sup>77</sup> They argued that the interpretations were made by males who did not understand the content and full meaning of the verses and they were even bias in their interpretations. Such condemnation is not fair because those who interpreted the Holy Qur'an have knowledge of the Holy Qur'an, Sunnah and Fiqh. Moreover, in most cases the interpretations are made by the verses of the Holy Qur'an and the Ahadith of the Prophet (S.A.W)

The women should know that the Hadith interpretes the Holy Qur'an, therefore any contrary interpretation to *HADITH*

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<sup>76</sup> Ali, A. Y. Op. CIT. p. 181

<sup>77</sup> For ourselves Women Reading the Quran (1997), P. 141

and *IJMA* has no legal effect whatsoever. Furthermore, it is not true in all cases there is gender inequality among the male and female heirs. Under the same law the female heir inherits equally with her male counterpart in some situations. But she takes 1/3 share in the other situation and the male 2/3. The daughter is given half of the estate when she coexists with the father who is entitled to one sixth of it by the Holy Qur'an<sup>78</sup> and the remainder by the Hadith of the Holy Prophet making up to half of the estate. Germane sister when she inherits with the consanguine brother she takes half of the estate while the other half goes to the brother. The father inherits 1/6 equally with the mother in the presence of the son or son's son. Likewise the uterine brother inherits 1/6 equally with uterine sister.<sup>79</sup> On the other hand the son inherits twice the share of the daughter. Also the germane and consanguine brothers take double share for their sisters. The husband is given twice what would be the share of his wife from him.<sup>80</sup>

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<sup>78</sup> Ali, A. Y. Op. Cit. P. 523 of chapter 59 verse 7 of the Holy Quran

<sup>79</sup> Ali, A. Y. Op. Cit. P. 182

<sup>80</sup> Ibid

The rationale behind giving a male heir a share twice the share of a female heir is perhaps, women are free from the usual economic responsibility. They are not obliged to provide for any person, even for themselves. They are to be maintained and taken care of by the men. The man's obligations to relatives, male and female alike, may well exceed what he could possibly inherit from any of them. The idea of having such shares is to ensure justice and equity among the legal heirs. Moreover, Allah created us and He knows what is better for us and, we must accept that He is capable to make laws governing our lives. Whatever He has done for us we must accept it whole heartedly.

Finally, the judges and all concerned must understand that under Islamic Law of succession the same rules of succession are applied to all types of cases and social issues.

Islam being the complete way of life, the Holy Qur'an contains rules for the disposal of intestate property. Therefore, it is an obligation on the judge or any other distributor of the estate to distribute it honestly and justly. The Holy Qur'an chapter 4 verse 9 says:

“Let those, disposing of an estate, have the same fear in their minds as they would have for their own if they had left a helpless family behind. Let them fear God and speak words of appropriate (comfort).<sup>81</sup>

The above verse has made a very touching address to the distributors of the deceased estate. When distributing they should be honest and kind to the legal heirs, one day it may happen to their own families. We must also remember the prophetic Hadith which shays: ‘The judges are of three categories, one to go to paradise and two to hell. One who knows the law and applies it will go to paradise. But one who does not know the law is a shared to say so will go to hell and one who knows the law but intentionally dose injustice will go to hell.’<sup>82</sup>

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<sup>81</sup> Ali, A. Y. Op. Cit. P. 180

<sup>82</sup> Al-Selek, M. Op. Cit. P. 603

## CHAPTER FOUR

### ANALYSIS OF THE SUCCESSION RIGHT OF THE HEIRS OF INNER AND OUTER FAMILY

#### 4.0 Introduction

The succession right of the heirs depends largely on blood relationship as a ground of inheritance. The research here will focus on two types of heirs; the heirs of inner and outer circles of family otherwise called conventional and non-conventional heirs. The former, is divided into two types. First, *ASHABUL FARA'ID* (Quranic heirs) whose shares are fixed and specified in the Quran, Sunnah and *Ijma*. Second, *Asabah* (agnatic heirs) whose shares are not fixed in the above jurisprudential sources of law<sup>1</sup>. The latter, are referred to as *Dhawul Arham* in Arabic terminology<sup>2</sup>. Their inheritance is regulated by three doctrines. Thus: *Ahlul Rahimi*, *Ahlul Qaraba* and *Ahlul Tanzil* doctrines<sup>3</sup>. They inherit according to the views of the Islamic jurists under the above three doctrines.

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<sup>1</sup> Rashid, A. *Iddatul-Bahith Fi-Ahkami-tawarith*, Darussalam (1389 H), P. 11

<sup>2</sup> Aifauzani, S. *Attahagigat Al-Mardiyyan Fi—Mubahithil Fardiyyah*, Darussalam

<sup>3</sup> Abdul Hamid, *Sharhul Rahabiyyatu Fi'imulmawarith*, Darul fikr (1998), P. 181



#### **4.1 Heirs Of The Inner Circle Of Family (Ashabul Fara'id Wal Asaba)**

*ASHABUL FARA'ID*, with the exception of husband and wife, all the rest are related to the *praepositus* by blood relationship, and that relationship is the ground or basis of their inheritance. English books writers sometimes call them primary heirs or the recipients of fixed shares or conventional or Quranic heirs. However, this research work prefers to call them Quranic heirs throughout the work. They include, with the exception of spouses, three males and seven females.<sup>4</sup> The male Quranic heirs are the father, the true grandfather how high soever and the uterine brother. The female Quranic heirs are; the mother, the true grandmother, the daughter, the son's daughter how low soever, the Germane sister, the consanguine sister and the uterine sister.<sup>5</sup> It should be noted that some of these heirs exclude others completely or partially, and that their shares may exhaust the estate of the deceased, that is when added together may be in unity with the estate,<sup>6</sup> which is

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<sup>4</sup> Attasuliyu, A. *Al-bahjatu Fi Sharhi-Tahfa*, Darul Islami Vol.2, (1951), P. 395

<sup>5</sup> Al-Qurdabi, M. *Bidayatul-Mujtahid Wanihayatul Mugtasid*, Darul fikr Vol.2, (1975), P. 339

<sup>6</sup> Sabigi, S. *Fighu-Sunnah*, Vol.3, Darul fikr, Beirut, (1984), P. 618

called *Adilah*. Sometimes, however, the fixed shares may add up to more than a unity. This is called *AWL* and the fractional shares are reduced proportionately.<sup>7</sup> Sometimes also the shares may not exhaust the estate, in which case the total of the shares be less than unity. The remainder or residue will be divided by way of *RADD* or return according to Hannafi School or the residue will be transferred to the public treasury according to Maliki.<sup>8</sup> The shares of the Quranic heirs are fixed in the Holy Quran as in fractions of  $1/2$ ,  $1/4$ ,  $1/8$ ,  $1/6$ ,  $1/3$ , and  $2/3$ . These shares are fixed by Allah (SWT) himself. Therefore, there is no decrease or increase in the shares. The shares are fixed in chapter 4: Verses 11, 12, and 176.

The second type of heirs of the inner circle of family are *ASABAH* or agnatic heirs; they are called agnatic or residuary heirs because their shares are not so determined or specified in the Holy Quran, *Sunnah*, and *Ijma*.<sup>9</sup> An agnate is a male or a male who is related to the deceased through another male or through both a male and a female. For example, the son or

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<sup>7</sup> Badran, B. *Al-Mawarith Wal-Wasiyyah Wal-Hibah*, Askandariyyah, Egypt, (N.D), P. and 73

<sup>8</sup> Ibid P. 73

<sup>9</sup> Dibawi, *Khula-Satu Ilmul* Fara'id Darussalam, Cairo, (1937), P. 15

consanguine brother or germane brother respectively. The agnatic heirs are: son, son's son how low soever, germane brother, consanguine brother, germane brother's son, paternal uncle, and paternal uncle's son. However, there are some complications arising owing to the fact that the father and father's father how high soever occupy a varying position between Quranic and agnatic class of heirs.<sup>10</sup> The son is not a Quranic heir but he is a special agnate who cannot be excluded by any other heirs and who can exclude other heirs both Quranic and agnatic heirs.<sup>11</sup> The agnatic heir takes the whole of the estate in the absence of any Quranic heirs or he receives what is left from the estate after considering the shares of the Quranic heir/hiers.<sup>12</sup> And nothing is given to him if the estate is exhausted by the presence of the Quranic heirs. *ASABAT NASABIYYAH* or agnatic heirs by blood relationship are divided into three categories. They are Asabah Bi Nafsihi, Asabah Bi Gayrihi and Asabah Ma'a Gayriha. First, *ASABAH BI NAFSIHI* or residuary in his own right. And this involves

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<sup>10</sup> aL-Gurdabi, M. Bidayatul-Mujtahid Wanihayatul Mugtasid, Darul Fikr Vol. 2, (1975), P. 342

<sup>11</sup> Badran, B. Al-Mawarith Wal-Wasiyyah Wal-Hibah, Egypt, (N.D), P. 67

<sup>12</sup> Muhammad, A. fathful-Bari, Vol.12, (1402 H), P.8-9

male agnatic heirs. Asabah bi Nafsihi inherit under the principle of priority.

According to this principle agnatic heirs are preferred one before another. The characteristics of the heirs have been classified into three main categories and they are.<sup>13</sup>

- a. **Status:** This has been classified into six classes, the descendants, that is, the son, son's son how low soever belong to the first class category. The father occupied the second class, but father's father, germane and consanguine brothers belong to the third class. While germane and consanguine brother's sons are in fourth class paternal uncles are in fifth class. The sixth class belongs to the uncle's sons
- b. **Degree of removal:** This means the degree relationship of the heir to the praepositus which is ascertained by the number of removes. For instance, the son and the father are in the first degree, there being no intermediary between them and the deceased. However, the son's son, the father's father and the

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<sup>13</sup> Suhrawardy, A. and Russell, First steps in Islamic Law in West Africa, I.P.B. Lagos, (1906), P. 110

brothers occupied the second degree of removal because there is one link between them in each case. The son's son's son, father's father's father and brother's son's son are in the third because there are two links between them and the deceased.<sup>14</sup>

- c. Blood relationship:** Here it is either of the full blood or half blood. The one with full blood is given priority over one with half blood.<sup>15</sup>

The rule operates in the following:

- a. An heir belonging to the first class will exclude an heir of the second or any lower class. Notwithstanding that the heir in the second may stand in a nearer degree of removal to the deceased. For example the deceased leaves a son's son's son and a father. The grandson belongs to the first class and the father to the second class. The grandson heir excluded the father from the residue to his  $\frac{1}{6}$  as a Quranic heir.<sup>16</sup>

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<sup>14</sup> Ibid P. 111

<sup>15</sup> Ibid

<sup>16</sup> Khan, S. A. How to calculate inheritance, Good word Books, INDIA, (2005), P. 41

Furthermore, an agnatic heir belonging to the, for instance, fourth class will exclude an agnatic heir belonging to the fifth class, notwithstanding, that the latter may stand in the same degree of relationship to the praepositus. For example, where the agnatic heirs of the deceased person are his germane brother's son and paternal germane uncle. The brother's son is given priority to exclude the uncle because the uncle is in the fifth class, though they are in the same degree of removal to the praepositus.<sup>17</sup>

- b. Where two or more agnatic heirs belong to the same class the one which stands in a nearer degree of removal to the deceased will exclude the other or others. However, if they are in the same degree they will share the residue equally, for example the deceased person leaves a son and son's son. Both are of the first class but the son is in the first degree of removal to the deceased and the son's son in the second degree.<sup>18</sup> Therefore the son is preferred to

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<sup>17</sup> Ibid

<sup>18</sup> Suhrawardy, A. and Russel, A. op. Cit. 111

- take the whole of the estate, because he excludes the son's son totally from the inheritance.<sup>19</sup>
- c. Where two heirs belong to same class and stand in the same degree of removal to the deceased person, the one which is of the full blood relationship will exclude the other with half blood. For example the deceased leaves a paternal germane uncle and a consanguine uncle. Both uncles belong to the same class and stand in the same degree of removal to the deceased person. But the uncle germane being of full blood is preferred to inherit as an agnatic heir to the uncle consanguine being of half blood.<sup>20</sup> Second, *ASABAH BIGAYRIHA* or residuary by another and they are females agnatized by their males counterparts. Third, *ASABAH MA'A GHAYRIHA* or residuary with another. That is germane or consanguine sister with daughter or son's daughter, how low soever.

The positions of inheritance of the second and third types of agnatic heirs will be discussed when considering individual heirs in this chapter.

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<sup>19</sup> Ibid

<sup>20</sup> Ibid

## **4.2 Inheritance Of The Ascendants**

The succession right of the ascendants involves the inheritance of the parents of the deceased person how high soever. Such inheritance concerns with father, mother, father's father, mother's mother and father's mother how high soever.

### **Inheritance Of Father**

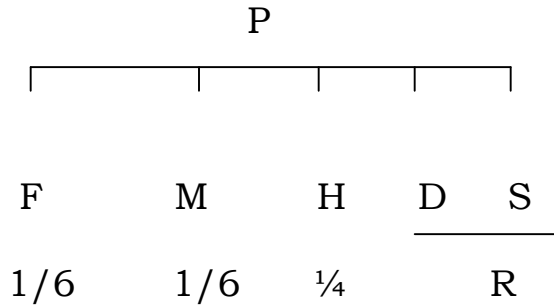
The father of the deceased person is both Quranic heir and a residuary.<sup>21</sup> He inherits 1/6 of the estate as a Quranic heir when he co-exists with the son or son's son how low soever. The Holy Quran 4:11 says "For parents, a sixth share of the inheritance to each, if the deceased left children".<sup>22</sup> For example; where the praepositus is survived by her father, husband, mother, daughter, and son, if the net estate is N36,000.00 the distribution would be;

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<sup>21</sup> Abu -Zahra, M. Ahkamu Tarikat Wal Mawarith, Darul Fikr, (1963), P. 148

<sup>22</sup> Ali, A. Y. the Holy Quran Text, Translation and Commentary, The Islamic University of Al-Imam Mohammed Ibu Sa'ud (1934), Vol. 1, P. 181





L.C.D, 12:  $2 + 2 + 3 + (5) = 12$

D. and S will share the residue in the ratio 1:2 = 3

Since 5 is the share of daughter and son is not divisible by 3,  
we multiply all through by 3 = 36:  $6 + 6 + 9 + (15) = 36$ .

The share for each heir will be  $36:6 + 6 + 9 + 5 + 10 = 36$ .

Therefore, the shares will be;

$$1. \quad \text{Father's share } \frac{6}{36} \times \frac{36000}{1} = \text{N6,000.00}$$

$$2. \quad \text{Mother's share the same as the father}$$

$$\frac{6}{36} \times \frac{36000}{1} = \text{N6,000.00}$$

$$3. \quad \text{Husband's share is } \frac{9}{36} \times \frac{36000}{1} = \text{N9,000.00}$$

$$4. \quad \text{The daughter's share is } \frac{5}{36} \times \frac{36000}{1} = \text{N5,000.00}$$

$$5. \quad \text{The son's share is } \frac{10}{36} \times \frac{36000}{1} = \text{N10,000.00}$$

**Total = 36000.00**

Second, the father also inherits as an Quranic and residuary heir when he inherits along with daughter or son's daughter how low soever.<sup>23</sup> In such situation the father takes 1/6 plus residue of the estate. The authority comes from the Holy Quran and *SUNNAH* of the Holy Prophet (S.A.W) followed by *IJMA* of the Islamic jurists.<sup>24</sup> The Holy Quran 4:11 say:

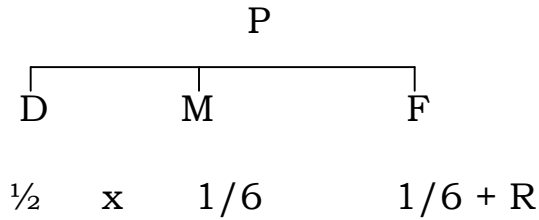
"..... For parents, a sixth share of the inheritance to each, if the deceased left children...."<sup>25</sup> The father is given the right to take the residue because of the *Sunnah* of the Prophet (S.A.W) and he said; "Give the fixed shares to those who are entitled to them, the remainder goes to the nearest male agnate."<sup>26</sup> For example; where the praepositus is survived by a daughter, mother and father. Thus:

<sup>23</sup> Abu-Zahra, M. Op. Cit P. 148

<sup>24</sup> Al- Jaza'iriyi, A. j. Minhajul Muslim, Darul Fikr, (1976) PP:407-408

<sup>25</sup> Ali, A. Y. Op. Cit. P. 181

<sup>26</sup> Muhammad, A. Faithful-Bari, Vol. 12 (1402H), P. 9



L.C.D,  $6:3+1+(1+1)= 6$

Each heirs =  $6:3+1+1+2 = 6$ .

The above legal heirs are related to the praepositus by blood relationship but for the purpose of inheritance some exclude others either partially or totally from the inheritance.<sup>27</sup> Under this situation, the daughter will get  $3/6$  of the estate. The mother inherits  $1/6$  by the presence of the daughter and the father gets  $1/6$  plus the residue of the estate which equals to  $2/6$  of the estate.

Third the father inherits as residuary when he inherits in the absence of any *WALAD* (child of the deceased person).<sup>28</sup>

The Holy Quran 4:11 says;

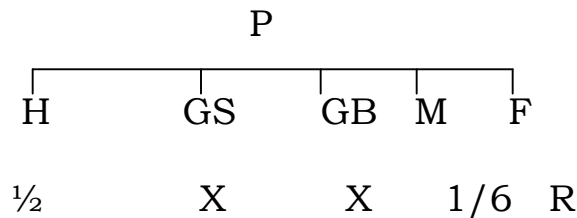
“.....if no children and the parents are heirs, the mother has a third.....”<sup>29</sup>

<sup>27</sup> Abdulhramid M. *Sharhu Rahabbiyyatu Fi'ilmil MAWARITH*, (1998), p. 80

<sup>28</sup> Badran, B. *Al-MAWARITH Wal-Wasiyah Wal-Hibah*, Egypt, (N.D), P.29

<sup>29</sup> Ali, A, Y. Op. CIT. p. 181

By virtue of this verse Allah (S.W.T) has fixed the share of the mother as  $\frac{1}{3}$  but there is silence about father's share. This is interpreted to mean that Allah (S.W.T) has made the father residuary.<sup>30</sup> When the father is alone he inherits the whole of the estate but where he inherits together with other Quranic heirs in the absence of the children he takes the residue of the estate. Example; where the praepositus is survived by her husband, Germane sister, Germane brother, mother and father. Thus: the estate is N36,000.00 the distribution would be;



L.C.D,  $6:3 + 0 + 0 + 1 + 2 = 6$

For each  $6: 3 + 1 + 2 = 6$

The husband of the deceased is entitled to  $\frac{1}{2}$  of the estate in the absence of any *WALAD*. Germane brother and sister are excluded from the inheritance totally by the father. The mother is excluded partially from  $\frac{1}{3}$  to  $\frac{1}{6}$  by the presence

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<sup>30</sup> Fardiyi, I. A. Al-Azbul-Fa'id, Sharh Umdatil Farid, Darul Kutubi Ilmiyyah, Beirut, Vol. 1, (1189H), P. 67

of the Germane brother and sister. The father is a residuary and he takes the residue which is 1/3 of the estate.

### **Inheritance Of True Grandfather**

The true grandfather is a male ancestor between whom and the deceased there is no female intervention.<sup>31</sup> True grandfather who is sometimes called father's father how high soever inherits in the absence of father of the deceased. By *IJMA* of the jurists he steps into the shoes of the father in the following situations.

First, he inherits as a residuary only in the absence of any *WALAD*.<sup>32</sup> Second, he inherits in two capacities (as Quranic and agnatic heir) when he coexists with the daughter or son's daughter how low soever.<sup>33</sup> Third, he inherits 1/6 as a Quranic heir when he coexists with male *WALAD* (son or son's son how low soever).<sup>34</sup> It is by *IJMA* of the jurists that the father of the deceased agnatized the mother in the case of *Umariyyatan*<sup>35</sup> but the father's father cannot agnatise her.

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<sup>31</sup> Rashid, A. *Iddatul-Bahith fiahkami Tawarith*, Darussalam, Beirtul, (1389H), P. 20

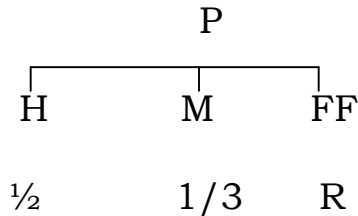
<sup>32</sup> Dibawi, M. *khilasatu Imul Fara'd*, Darul fikr, cairo, (1937) P. 15

<sup>33</sup> Gurin, A. M. *An Introduction to Islamic Law of Succession Jodda Com.*, Zaria, (1998), P. 69

<sup>34</sup> Siddigi, A. H. *Sahih Muslim (English)*, Beirut, Vol. 3, (N.D), P. 69

<sup>35</sup> Assidig, A. M. *Masaliku-DALALA, Ala Mas'ili Mutni-Risala*, Darul Fikr Cairo, (N.D)P. 334

That is agreed upon by all jurists. For example where the deceased wife is survived by her husband mother and father's father:



L.C.D, 6: 3 + 2 + 1 = 6

In this case the husband takes 3/6 which is  $\frac{1}{2}$  of the estate in the absence of children of the deceased. The mother is getting 1/3 of the estate instead of 1/3 of the residue if she was inheriting together with father and husband.<sup>36</sup>

### **Inheritance of mother**

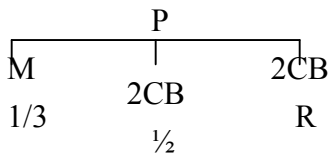
The mother of the deceased is a Quranic heir. She inherits in three main situations. First, she inherits her specified maximum share of 1/3 in the absence of any *WALAD* and two or more brothers and sisters or mixed together. The Holy Quran 4:11 says,

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<sup>36</sup> Adawi, A. Hasiyatu Adawi, (N.D), P. 327

“..... if no children and the parents are the (only heirs, the mother has a third...”<sup>37</sup>

For example:



$$\text{L.C.D } 6:2 + 3 + 1 = 6$$

Thus: The mother inherits  $2/6 = 1/3$  of the estate. The husband takes  $3/6 = 1/2$  of the estate and germane brother takes  $1/6$  of the estate.

Second, the mother inherits the specified minimum share of  $1/6$  when she inherits with *WALAD* or two or more brothers and sisters.<sup>38</sup> The Holy Quran 4:11 says;

“.....For parents, a sixth share of the inheritance to each, if the deceased left children.... If the deceased left brothers (or sisters) the mother has a sixth...”<sup>39</sup>The Holy Quran used the word *IKHWATU* which means two or more brothers, sisters or both. There is no difference of sex or type, the presence of two

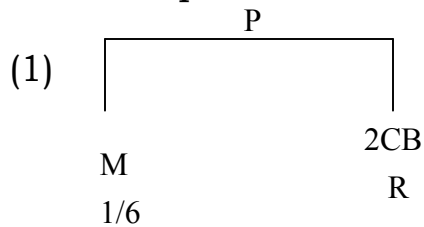
<sup>37</sup> Ali, A. Y. Op. cit. P. 181

<sup>38</sup> Al-Qurdabi, M. bidayatul Mujtahid Wanihayatul Mujasid Vol. 2, (1975), P. 342

<sup>39</sup> Ali, a. y. op. Cit. P. 181

or more of them will reduce the mother's share from  $1/3$  to  $1/6$ .<sup>40</sup>

For example:

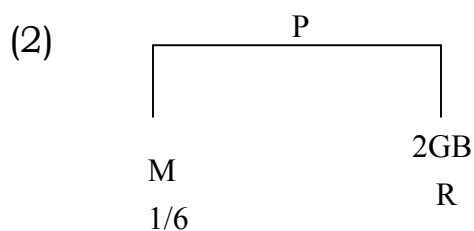


In the above case the L.C.D. = 6;  $1 + (5) = 6$ . This means that the mother is reduced from  $1/3$  to  $1/6$  by the two consanguine brothers who inherit as residuaries. Each legal heir inherits as follows:

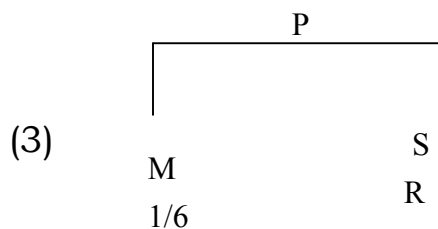
6:  $1 + (5) = 6$                       The mother  $2/12$  of the estate

12:  $2 + (10) = 12$                       The 1<sup>st</sup> CB =  $5/12$  of the estate

12:  $2 + 5 + 5 = 12$                       The 2<sup>nd</sup> CB =  $5/12$  of the estate



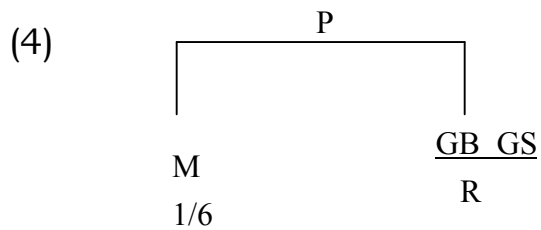
Inherit the same as above.



<sup>40</sup> Attasuli, A. al-bajatu fi-sharhil tuhfah, wal-Mawarth, (1963), P. 150



Here the mother inherits 1/6 and son takes the residue of 5/6 of the estate.

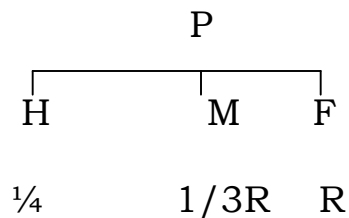


$$18:3+(15) = 18$$

$$18:3+10+5=18$$

The mother inherits 1/6, the germane brother inherits 10/18 and germane sister 5/18 of the estate.

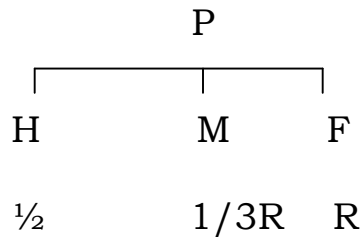
Third, the mother inherits 1/3 of the residue of the estate under the doctrine of *UMARIYYATAN*. A case of inheritance involving husband, mother and father as surviving heirs came before Sayyidina Umar (R.A.).<sup>41</sup> He decided the case according to the general rule as follows:



$$\text{L.C.D. } 12: 3 + 4 + 5 = 12$$

<sup>41</sup> Abuzahr, M. Abuzahr, M. Ahkamu-Tarikat Wal-Mawarath, (1963), P. 150

He then realized that the mother's share doubled the share of the father. He argued that this is inconsistent with the rule of agnatization. He therefore, decided that the father would agnatise the mother. She will still retain her Quranic share of  $\frac{1}{3}$  but of the residue.<sup>42</sup> So he reversed his decision as follows:



L.C.D, 6:  $3 + 1 + 2 = 6$

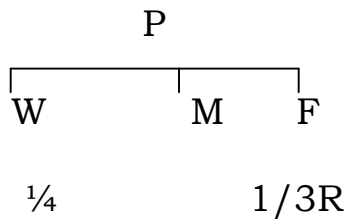
In the final solution, the husband takes  $\frac{3}{6}$  of the estate in the absence of *WALAD*. The mother takes  $\frac{1}{6}$  as the  $\frac{1}{3}$  of the residue after giving the husband his share and the father gets  $\frac{2}{6}$  of the estate, which is twice the share of the mother.<sup>43</sup> The second case is by analogy to the above case when the spouse relict heir is the wife. Although there is a breach of the law of agnatization but that is very minor. Hence, the mother gets less than the share of the father but

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<sup>42</sup> Ibid, P. 151

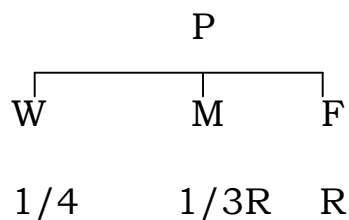
<sup>43</sup> Ibid

his share will not double her share.<sup>44</sup> In the initial example the general rule is applied, thus:



L.C.D, 12:  $3 + 4 + 5 = 12$

From the above example, if the share of the mother and that of the father are compared one will find that the father's share is greater than the mother's share. However, the jurists argued that the law should remain constant and they made analogy to the case decided by Sayyidina Umar by giving the mother  $\frac{1}{3}$  of the remainder of the estate after giving the wife her own Quranic share of  $\frac{1}{4}$ .<sup>45</sup> For example:



L.C.D, 12;  $3 + 3 + 6 = 12$

In the above example, the wife will get  $\frac{3}{12}$  of the estate, in the absence of the children of the deceased. The mother

<sup>44</sup> Sabigi, S. Fiqhussunnah, Darul fikr vol. 3 (1984), P. 622

<sup>45</sup> Badran, B. A. op. Cit. P. 36

gets 3/12 of the estate instead of 1/3. The father inherits 6/12 that doubled the share of the mother. The *SAHABAH*, (the Prophets (S.A.W) companions), who agreed with *SAYYIDINA* Umar's decision are; Zaid Bin Thabit, Abdullahi Bin Mas'ud, Uthman Bin Affan (R.A). And the view is followed by majority of *FUQAHU* (Islamic jurists).<sup>46</sup> The minority view which did not favour the Sayyidina Umar's decision included Abdullahi Ibn Abbas, Aliyu Ibn Abi Talib, Mu'azu Bin Jabal (R.A.).<sup>47</sup>

It can be observed that the mother is one of those most affected Quranic heirs by the doctrine of exclusion. She is in three different situations excluded partially by the presence of other legal heirs. She is excluded by the children of her child, how low soever, partially from 1/3 to 1/6. By the presence of two or more, all types of brothers and sisters. This constitutes an exception to the general rule that a legal heir cannot inherit in presence of his or her link to the *praepositus*. The mother is the link for the uterine brother and sister. But instead of her excluding them totally from the inheritance they inherit together and exclude her partially from 1/3 to 1/6. Last, the

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<sup>46</sup> Abu-zahra, M. *ahkamu-Tarikat Wal-Mawarith*, Darul fikr (1963), P. 151

<sup>47</sup> Ibid

mother is excluded in the use of Umariyyatan from 1/3 of the estate to 1/3 of the residue as explained above in the cases of Umariyyatan.

### **Inheritance Of True Grandmother**

The inheritance of the true grandmother how high soever is not from the Holy Quran but from the Sunnah and *IJMA* of the Islamic jurists. According to these sources she inherits 1/6 when she is alone.<sup>48</sup> For example where the praepositus, is survived by mother's mother, wife and consanguine brother.

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MM	W	CB
1/6	1/4	R

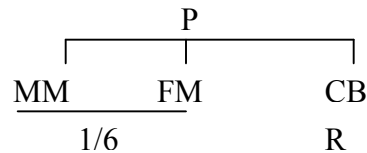
L.C.D 12:2+3+7 =12

In this case the mother's mother inherits 2/12 of the estate which is equivalent to 1/6. The wife takes 3/12 and the consanguine brother takes 7/12 as an agnatic heir. Two or more true grandmothers inherit 1/6 to share equally between themselves. The *HADITH* of the Holy Prophet said:

“Abdatu Bin Assamatu narrated that the Prophet (S.A.W) decided the inheritance of two grandmothers and he gave

<sup>48</sup> Gazali, H. Y. Al-Mirathu Ala Mazahibil ARBAH Dirasat Wa Tatbigan, Darul Fikr, (2008), P. 32

them 1/6 to share equally.”<sup>49</sup> For example; where the praepositus is survived by his mother’s mother, father’s mother and consanguine brother.



$$\text{L.C.D } 6: (1) + 5 = 6$$

$$12: (2) + 10 = 12$$

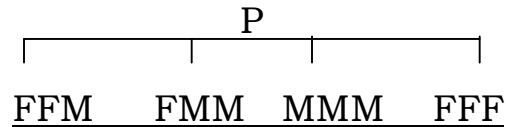
$$\text{for each } 12: 1 + 1 + 10 = 12$$

In this case each grandmother will get 1/12 of the estate and consanguine brother who takes the residue will be given 10/12 of the estate.

In another *HADITH* “Abdurrahman Bin Yazid narrated that the Holy Prophet (S.A.W) gave 1/6 to three true grandmothers; two of them from fathers side and one from mothers side.”<sup>50</sup> For example; where the praepositus is survived by father’s father’s mother, fathers mothers mother, mothers mother’s mother and father’s father’s father. Thus:

<sup>49</sup> Sadig, A. M. Masaliku-Dalala Ala Masa’ili, Mutni Risala (N,.D), P. 344

<sup>50</sup> Al-Qurdabiyi, M. Bidayatul Mujtahid Wanihayatul Mugtaasid, Vol. 2, (1975), P. 350



$$1/6 \qquad R$$

$$\text{L.C.D, } 6: (1) + 5 = 6$$

$$18 : (3) + 15 = 18$$

For each heir:

$$18:1 + 1 + 1 + 15 = 18$$

In this case each grandmother inherits 1/18 of the estate and father's father's father who is an agnatic heir inherits 15/18 of the estate. The general rule is that, as a result of being closer relative in degree to the praepositus the closer relatives excludes the more remote. Also as can be seen, father excludes father's father or father's mother likewise mother excludes mothers mother and fathers, mother. But father cannot exclude mother's mother from the inheritance.<sup>51</sup>

However, from *IJMA* of the jurists all the schools agreed that true grandmother can inherit on the positions mentioned above.<sup>52</sup>

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<sup>51</sup> Ibid, P. 351

<sup>52</sup> Abu-zahra, M. Ahkamu-Tarikat wal-Mawarith, Darul fikr (1963), P. 168

### **4.3 Inheritance Of The Descendants**

The descendants include males and females children and grandchildren of the deceased, person.

#### **Inheritance Of Son And Son's Son**

The males are son and son's son how low soever who are in the lineal descendants of the praepositus. They are related to the deceased by blood relationship; hence they must be legitimate children. The inheritance of the son and son's son how low soever is the same. But, the son's son inherits in the absence of the son. They inherits as residuaries and wait for the residue of the estate when inheriting with other Quranic heirs.<sup>53</sup> When they are inheriting with the daughter or granddaughter of the same degree of removal the rule of agnatization applies.<sup>54</sup> But when inheriting alone (Son or son's son) he takes the whole of the estate.

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<sup>53</sup> Ibid, P. 131

<sup>54</sup> Ibid



## Inheritance Of Daughter

The female descendants are the daughter and son's daughter how low soever. The positions of the inheritance of the daughter of the deceased person are three.

First, a single daughter inherits a share of  $\frac{1}{2}$  of the estate in the absence of any other *WALAD* child. The Holy Quran 4:11 says:

“.....But if there be one (daughter) only, she shall inherit the half .....”<sup>55</sup> For example where the *praepositus* died leaving a daughter and a consanguine brother as surviving heirs.

For example:



L.C.D. 2:  $1 + 1 = 2$

The daughter is entitled to  $\frac{1}{2}$  of the estate and the residue  $\frac{1}{2}$  goes to the consanguine brother.

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<sup>55</sup> Ali, A. Y. Op. cit. p. 181

Second, two or more daughters inherit 2/3 of the estate and share it equally among themselves if there is no son. The Holy Quran 4:11 says;

“..... If there is more than two daughters, they shall have two thirds of the inheritance.....”<sup>56</sup> The interpretation of the above verse is disputed among the Islamic law jurists. Abdullahi Ibn Abbas held that the number of daughters here, means, three or more. This is because, according to him considering the words in Arabic *FAUQA’ISNATAIN* (above two) literally means more than two and what is more than two is three or more.<sup>57</sup> However, the interpretation given by the majority of the Islamic jurists followed by all Sunni schools is that two or more daughters who are qualified to inherit 2/3 of the estate. According to this view, which is based on *IJMA*, the Arabic term *FOUQA* as in the verse has superfluous meaning both literally and technically. They have advanced reasons to support their opinion. Firstly, the term in the verse was practically and clearly explained by the *SUNNAH* of the prophet (S.A.W) in the Hadith of late Sa’ad Bn Rabia where the

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<sup>56</sup> Ibid

<sup>57</sup> SABIG, s. Fiqhu-Sunnah, Vol. 3, Beirut, (1984), P. 618

Prophet (S.A.W) himself gave 2/3 of the estate left by the deceased to his two daughters.<sup>58</sup> Secondly, the Holy Quran 4:176 itself explaining the verse by saying,

“.....if a childless man has two sisters, they shall inherit two thirds of what he leaves....”<sup>59</sup>The verse refers to the inheritance of germane or consanguine sister. Consequently, the inheritance of sister is comparable to that of the daughter. Since the Holy Quran gives two third of the estate to two or more sisters. The positions here should be applicable to the position of the daughters too.<sup>60</sup>

In the final analysis two or more daughters are entitled to 2/3 of the estate left by the deceased parent. For example where the praepositus is survived by two daughters, wife and two Germane brothers. Thus:

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<sup>58</sup> Al-Khubali, I. Al-Azbul-fa'id sharh UMDATIL-FARID, Vol. 1, (1189H), P. 71

<sup>59</sup> Ali, A. Y. Op. Cit. P. 235

<sup>60</sup> Buga, M. Arrahabiyvatu fi Ilmil fara'id, Darussalam, (1988), P. 55

P		
<hr/>		
2D	W	2GB
2/3	1/8	R

L.C.D. 24:  $(16 + 3 + (5)) = 24$

48:  $(32) + 6 + (10) = 48$

For each 48:  $16 + 16 + 6 + 5 + 5 = 48$

This means each daughter will get 16/48 of the estate and the wife's share is 6/48 and each of the two Germane brothers will inherit 5/48 of the estate.

Third, the daughter inherits as *ASABAH BI GHYRIHA* (residuary by another) when she co-exists with the son. The rule of agnatization applies here. When the females are in the same status, blood relationship and degree of removal with the male or males.<sup>61</sup> In all cases where the rule of agnatization applies, the ratio of the share of the daughter to the son's share is 1:2. The son agnatizes the daughter whereby the son takes double share for the daughter. The Holy Quran 4:11

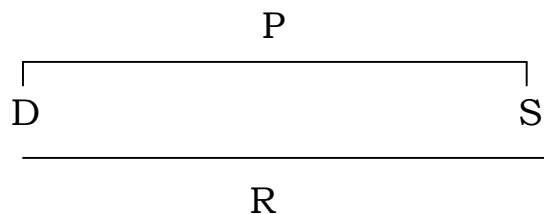
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<sup>61</sup> Abu-Zahra, M. Ahkamu-Taria ka wal-Mawarith, Darul fikr, (1963), P. 131

says: “Allah has thus enjoined you concerning your children; a male shall inherit twice as much as a female.”<sup>62</sup>

For example where the praepositus was survived by daughter and son.

For example:



L. C. D. 3:  $1 + 2 = 3$

In this case the son agnaitized the daughter and she becomes *Asabah Bi Ghyriha*.<sup>63</sup> And they share the estate in ratio  $1:2 = 3$ . This means the daughter will take  $1/3$  and the son takes  $2/3$  of the estate.

### **Inheritance Of Son's Daughter**

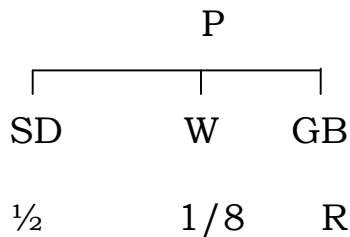
The son's daughter how low soever is Quranic heir and her inheritance of the shares is fixed by the *Sunnah* of the Prophet and *IJMA* of the Jurists. Her inheritance necessarily followed the inheritance of the direct daughter of the

<sup>62</sup> Ali, A. y. OP. Cit. P. 181

<sup>63</sup> Dibaw, Kbulasatu Illmul faraid, Daru salam, cairo, (1937), P. 16

deceased.<sup>64</sup> She inherits  $\frac{1}{2}$  of the estate when she is alone and in the absence of any *WALAD* of the *praepositus*.<sup>65</sup> The authority for the inheritance of the daughter is interpreted by *IJMA*<sup>66</sup> to include the share of the son's daughter. The Holy Quran 4:11 says:

“..... But if there be one daughter only she shall inherit the half....”<sup>67</sup> For example where the *praepositus* died and was survived by son's daughter, wife and a germane brother. The distribution of the estate will be as follows:



L.C.D. 8:  $4 + 1 + 3 = 8$

In this case the son's daughter inherits  $\frac{4}{8}$ , the wife takes  $\frac{1}{8}$  and the German brother takes  $\frac{3}{8}$  of the estate. When the shares are added together the total is in unity with

<sup>64</sup> Muhammad, A. *Faithful –Bari*, Darul fikr Vol. 12, (1402H), P. 13

<sup>65</sup> Attasuli, A. *Albajatu-FI-Sharhil Tuhfa*, Darul fikr, Vol. 2, (1951), P. 397

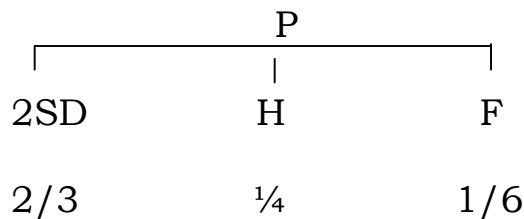
<sup>66</sup> Abu-zahra, M. *Ahkamu Tarikat wal Mawarith*, Darul fikril ARABIYYI, (1963), p. 133

<sup>67</sup> Arrashid, A. *Iddatul-Bahith fi-Ahkamil-Tawarith*, Darul fikr (1389), P. 13

the original estate (L.C.D). This means the estate is exhausted by the heirs.<sup>68</sup>

Second, two or more son's daughters are entitled to inherit 2/3 of the estate left by the praepositus in the absence of children and grandson of the praepositus. The Holy Quran 4:11 says:

“If there be more than two daughters they shall have two third of the inheritance...”<sup>69</sup> For example where the praepositus died and was survived by two son's daughters, husband and father (F). She left net estate of N52000.00, the distribution will be as follows:



L.C.D. 12: (8) + 3 + 2 = 13 AWL

12: 4 + 4 + 3 + 2 = 13

Here the total of the shares is more than the original estate; hence, it resulted into *AWL* (over subscribed shares).<sup>70</sup>

<sup>68</sup> Arrashid, A. iddatul-Bahith fi-Ahkamil-Tawarith, Darul fikr (1389), p. 13

<sup>69</sup> Ali A.. Y. Op. Cip. 181

<sup>70</sup> Buga, M. Arrashabiyatu fi-Ilmuil-fara'd, Darul Salm, (1988), P. 249

The shares of the heirs will be decreased proportionate to their fixed shares.<sup>71</sup> Thus (the total of the shares) becomes the denominator of the fractions instead of 12:13:4 + 4 + 3 + 2 = 13.

1. First son's daughter will take:

$$\frac{4}{13} \times \frac{52000}{1} = \text{N}16000.00$$

2. Second son's daughter takes = N16000.00

3. The husband will get  $\frac{3}{13} \times \frac{52000}{1} = \text{N}12000.00$

$$\frac{3}{13} \times \frac{52000}{1}$$

4. The father inherit  $\frac{2}{13} \times \frac{5200}{1} = \text{N}8000.$

$$\frac{2}{13} \times \frac{5200}{1}$$

**Total of the Shares =N52000.00**

Third, the son's daughter inherits as *ASABAH BI GHYRIHA* (residuary by another) when she inherits together with son's son.<sup>72</sup> In this situation the doctrine of agnatization will apply. The son's son takes double share for the son's daughter in the ratio 2:1. The Holy Quran 4:11 says:

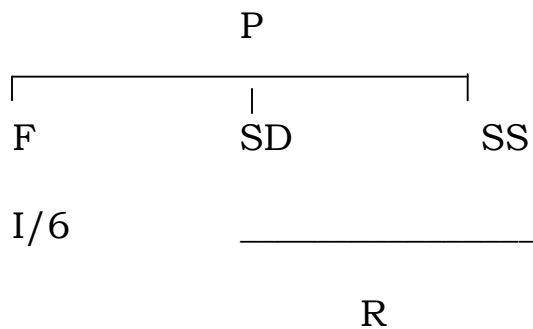
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<sup>71</sup> Ibid

<sup>72</sup> Badran B. *Al-Mawarith wal-wasiyyah wal-llibah Askandariyyah*, Egypt, (N.D), P. 40



“A male shall inherit twice as much as a female....”<sup>73</sup> The rule of agnatization applies when the male and the female are in the same blood relationship and the same degree of removal from the praepositus. For example where the praepositus is survived by his father son’s daughter and son’s son.



$$\text{L.C.D. } 6: 1 + (5) = 6$$

$$18: 3 + (15) = 18$$

$$\text{For each } 18: 3 + 5 + 10 = 18$$

This means the father inherits 3/18, the sons daughter get 5/18 and the son’s son takes 10/18 all of the estate, which doubled the share of the son’s daughter.

Fourth, son’s daughter inherits 1/6 when she co-exists with one daughter of the deceased person.<sup>74</sup> This position of inheritance is based on *IJMA* following the case decided by

<sup>73</sup> Ali A. Y. Op. Cit. P. 181

<sup>74</sup> Al-Maliki, U. Siraju-salik ASHALUL Musalik, Vol. 2, (N.D), P.243

Abu Musa and Ibn Masud and the *HADITH* of the Prophet (S.A.W). Thus Abu Musa was asked about the inheritance of daughter, son's daughter and a consanguine sister (it could be Germane sister) of the deceased. He decided that the daughter will take  $\frac{1}{2}$  and the consanguine sister will take  $\frac{1}{2}$  of the estate leaving the son's daughter without anything since her share is not specifically fixed in the Quran. After that he said, "Go and ask Ibn Mas'ud who will certainly agree with me."<sup>75</sup>

Abu Musa's decision as follows:

P		
D	SD	CS
$\frac{1}{2}$	X	$\frac{1}{2}$

$$\text{L.C.D. 2: } 1 + 0 + 1 = 2$$

Thus; daughter  $\frac{1}{2}$ , son's daughter nothing and consanguine sister  $\frac{1}{2}$ . But when Ibn Mas'ud was informed about Abu Musa's opinion he replied "Then, you have been misled, but myself do not claim infallibility but I will decide this case precisely as the Prophet (S.A.W) himself decided it" He gave the daughter  $\frac{1}{2}$  of the estate, the son's daughter  $\frac{1}{6}$  to complete

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<sup>75</sup> Gurin, A. M. An Introduction tom ISLAMIC law of Succesion, Jodda com. PRESS Ltd, (1988), P. 91

the  $\frac{2}{3}$  fixed for two or more daughters and the sister takes residue of the estate.<sup>76</sup> This becomes the authority where  $\frac{1}{6}$  is fixed for the son's daughter when she inherits with a daughter of the deceased and also it is the basis, for making sisters with daughter's residuaries, that is, *ASABAH MA'A GHYRIHA*, Ibn Mas'ud decided that case as follows:

P		
<hr/>		
D	SD	CS
$\frac{1}{2}$	$\frac{1}{6}$	R
L.C.D. 6: $3 + 1 + 2 = 6$		

This means the daughter will take  $\frac{3}{6}$  of the estate, son's daughter  $\frac{1}{6}$  and the consanguine sister will inherit  $\frac{2}{6}$  of the estate.

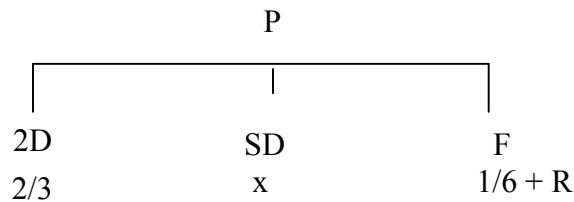
When son's daughter co-exists with two or more daughters, she is totally excluded from the inheritance because; the  $\frac{2}{3}$  given to two or more daughters has been

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<sup>76</sup> Abu-zahra, Op. cit. p. 135

exhausted.<sup>77</sup> For example, where two daughters, son's daughter and father survived the praepositus.

For example:



$$\text{L.C.D. } 6: (4) + 0 + (1 + 1) = 6$$

$$6 : (4) + 2 = 6$$

This means that the two daughters each will inherit 2/6 and the father will take 2/6. But the son's daughter is in fact excluded by the presence of the two daughters who have exhausted the 2/3 fixed for two or more daughters.

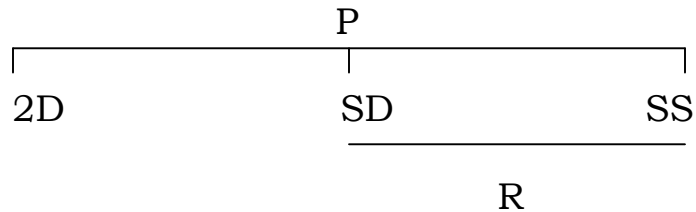
However, where there be with the son's daughter, son's son, then she will share with him the residue of the estate. That the son's son taking a portion equal to that of two sisters. That leads to the doctrine of lucky kinsman (Akhu Mubarak) where the son's daughter needs her brother to agnatise her.<sup>78</sup>

For example where the Praepositus (P) is survived by two daughters (2D), son's daughter (SD) and son's son (SS). Under

<sup>77</sup> Al-Qurdabi, M.A. Bidayatul-Mujtahid wanihaya tul Mugtashid, Darul fikr Vol 2, (1975), P. 34

<sup>78</sup> Sabig, S. Fighussunnah, Darul Fikr, Vol. 3, (1977), P. 435

such situation, the son's daughter is lucky to have her brother who can agnatise her to get something.



L. C. D. 3: 2 + (1) = 3

SD and SS share the residue in the ratio of 1: 2 = 3

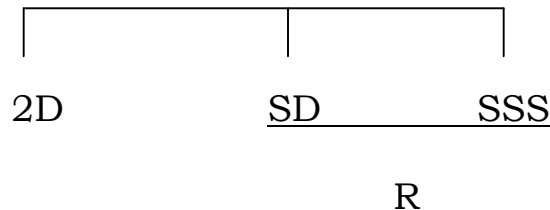
SD and SS share the residue in the ratio of 1: 2 = 3

For each heir 9: 3 + 3 + 1 + 2 = 9

Consequently, the first daughter inherits 3/9 of the estate, the second daughter the same share. Whereas the son's daughter is lucky here to get 1/9, the son's son takes 2/9 of the estate which is twice the share of the son's daughter.

The general rule is that a male agnatisees the female only when they are in the same degree of removal from the praepositus. But the exception to this general rule is that of the doctrine of lucky kinsman. By Ijma, in such a case the son's son of lower degree of removal can agnatise the son's daughter and they divide the residue according to the rule of

agnatization.<sup>79</sup> For example where praepostius was survived by two daughters (2D), a son's daughter (SD) and son's son's son (SSS):



L. C. D. 3: (2) + (1) = 3

SD and SSS will share the residue in the ratio of

1: 2 = 3 as if they are of the same degree of removal;

9 : (6) + (3) = 9

For each heir = 9 : 3 + 3 + 1 + 2 = 9

In this case the first daughter inherits 3/9 of the estate, second daughter inherits 1/9 and son's son's son takes 2/9 which is twice the share of he son's daughter.

However, even in the event of lucky kinsman case the son's daughter and the son's son how low soever will have the residue where there is any.<sup>80</sup> It may happen that the whole estate is exhausted by other heirs. For example, they may be

<sup>79</sup> Khalifa, M. T. A. Ahkamul Mawarith 1400 Mas, Alati Mirathiyyah, Tashmilu Jami'I Halatil Mirath, Darussalam, (2007), P. 89

<sup>80</sup> Ibid

fortunate or unfortunate to get something where the praepositus was survived by two daughters (2D), Father (F), Mother (M), son's daughter (SD) and Son's son:

2D	F	M	<u>SD</u>	<u>SS</u>
2/3	1/6	1/6	R	

L. C. D. 6: (4) + 1 + 1 + (0) = 6

For each heir = 6: 2 + 2 + 1 + 1 = 6

Here the first daughter gets 2/6, the second gets the same share, the father takes 1/6 and the mother gets the same as the father's. However, son's daughter and son's son get nothing as agnatic heirs since the estate is exhausted by the presence of the Quranic heirs whose shares are to be given preference before considering the shares of the agnatic heirs.<sup>81</sup>

#### 4.4 Inheritance Of The Collateral

Collateral means persons related by blood relationship but not in ascending or descending line. Brothers and sisters

<sup>81</sup> Ashur, M. Imul Mirath Asraruhu wa al-Fadhuhu wa'amthilatu Mahlulat Ta'arif Mubsatah, Maktabatul Qur'an, (1988), P. 68

are collaterals to each other. They include Germane brother and sister, consanguine brother and sister and uterine brother and sister. The position of inheritance of Germane and consanguine brothers was discussed under 4.1 of this chapter; hence, they are *ASABAH* (agnatic heirs). Therefore the inheritance rights of uterine brother and the sisters will be discussed here.

### **Inheritance Of Uterine Brothers And Sisters**

Uterine brothers or sisters are Qur<sup>82</sup>anic heirs and they inherit in two main situations. First, a uterine brother or a sister can inherit 1/6 of the estate in the absence of any *WALAD* how low soever, the father and the father's father how high soever.<sup>82</sup> The Holy Quran 4:12 says:

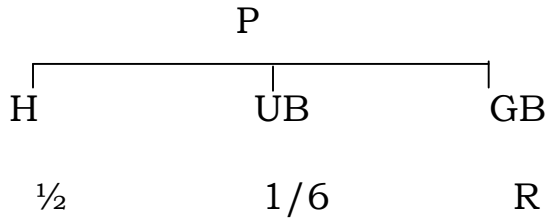
“.....if the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister each one of the two gets a sixth...”<sup>83</sup>For example where the deceased is survived by her husband, uterine brother and Germane brother.

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<sup>82</sup> Muhammad, A. Fathful Bari, Darul Ihya'l Atturath Al-Arabi, Beirut Vol. 12, (1402H), P. 21

<sup>83</sup> Ali, A. Y. Op. Cit. P. 182





L.C.D. 6: 3 + 1 + 2 = 6

In the above case the husband inherits 3/6 of the estate, the uterine brother takes 1/6 because he is alone and the same share could be given to the uterine sister if she was the one inheriting.<sup>84</sup> The Germane brother is an agnatic heir he, therefore, takes the residue which is 2/3 of the estate.

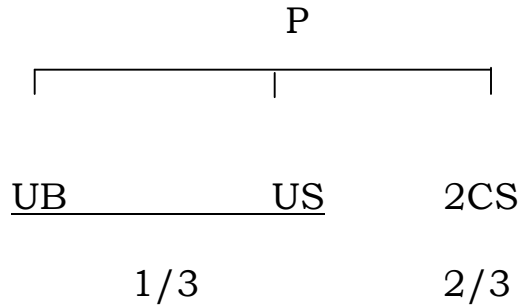
Second, two or more uterine brothers or sisters or mixed together inherits 1/3 of the estate and they share it equally among themselves irrespective of their difference of sex. The Holy Quran 4:12 says:

“..... If there be more, they shall equally share the third of the estate.....”<sup>85</sup> For example where a uterine brother, uterine sister and two consanguine sisters survived the praepositus.

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<sup>84</sup> Adawi, A. Hashiyatu Adawi, Darul Fikr Vol. 2 (N.D). P. 333

<sup>85</sup> Ali A. Y. Op. Cit. P. 182



L.C.D. 3: (1) + (2) = 3

6: (2) + (4) = 6

For each heir 6: 1 + 1 + 2 + 2 = 6

Here each uterine will take 1/6 and each consanguine sister inherits 1/3 of the estate.

### **Inheritance Of Germane Sister**

The Germane sister is a Quranic heir and she inherits in five situations. First a single Germane sister is entitled to inherits  $\frac{1}{2}$  of the estate in the absence of child/children, Germane brother, father and father's father of the praepsotitus.<sup>86</sup> The Holy Quran 4:176 says:

“Thus Allah instructs you regarding the person who has neither parents nor children. If a man dies and he has a sister, she shall inherit the half of what he leaves.....”<sup>87</sup>

<sup>86</sup> Muhammad, A. Faithful-Bari, Darul Ihya'I Vol. 12, (1402H), P. 20

<sup>87</sup> Ali, A. Y. Op. Cit. P. 235

By *IJMA* of the jurists the word children in this verse refers to males only (son, and son's son how low soever). This means that the Germane sister of the deceased can inherit along with the daughter or son's daughter how low soever.<sup>88</sup> Furthermore, this position of inheritance is called *KALALA* number two.<sup>89</sup> Consequently, according to Maliki School only son, son's son and father can exclude germane sister. However, according to Hanafi School, father's father can also exclude the germane sister.

Second, two or more Germane sisters are entitled to inherit 2/3 of the net estate left by the deceased brother or sister but in the absence of Germane brother, father, son, son's son, daughter, and son's daughter.<sup>90</sup> The Holy Quran 4:176 says:

“....if a childless man has two sisters; they shall inherit two thirds of what he leaves.....”<sup>91</sup>

For example where his two Germane sisters and two uterine brothers survive the praepositus

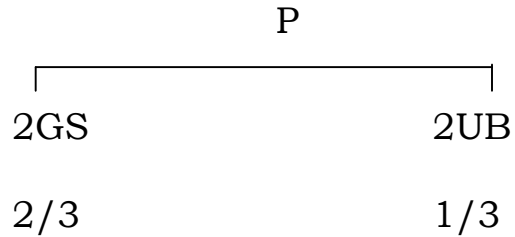
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<sup>88</sup> Amuhammad, A. Op. Cit. P. 21

<sup>89</sup> Ibid

<sup>90</sup> Arahili, W. Figul –Islam wa'adillatuhu, Darul fikr, (N.D), P. 320

<sup>91</sup> Ali, A. Y. Op. Cit. P. 235



L.C.D. 3:  $(2) + (1) = 3$

6:  $(4) + (2) = 6$

For each 6:  $2 + 2 + 1 + 1 = 6$

This means each Germane sister will inherit  $\frac{2}{6}$  and each of the uterine brothers can take  $\frac{1}{6}$  of the estate of the praepositus.

Third, Germane sister inherits as *ASABAH BI GHYRIHA* (Residuary with the Germane brother.<sup>92</sup> The Holy Quran 4:176 says:

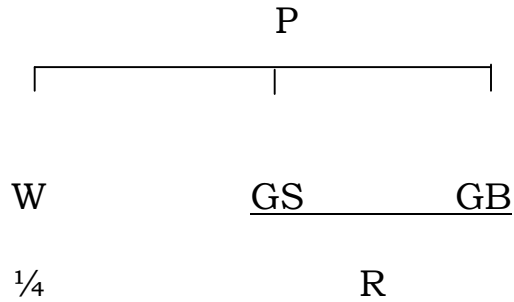
“..... and if there are brothers and sisters then for the males there is a share of two females.”<sup>93</sup>

For example where the praepositus is survived by his wife, Germane sister and Germane brother.

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<sup>92</sup> Assabumi, M. A. *Al-Mawarith-fishariati Islamiyya Al-dau'il Kitabi Wassaunnah*, (N.D.)P. 60

<sup>93</sup> Ali, A. Y. Op. Cit. P. 235



L.C.D. 4: 1 + 1+ 2 = 4

For each 4:1+1+2 =4

The wife inherits  $\frac{1}{4}$  of the estate, the Germane sister inherits  $\frac{1}{4}$  and the Germane brother inherits  $\frac{2}{4}$  as the agnatic heir. His share is twice the share of the germane sister.

Fourth, the germane sister inherits as *ASABAH MA'A GHAYRIHA* (residuary with another) in the presence of the daughter of the deceased or his son's daughter how low soever.<sup>1</sup> The authority is from *HADITH* of the Holy Prophet (S.A.W) and the practical case decided by Abu Musa and Ibn Mas'ud. The *HADITH* says "make sisters with daughters residuaries"<sup>95</sup>

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<sup>1</sup> Adawi, A. Hashiyatu Adawi, Darul, Fikr, Vol. 2, (N.D), P. 330

<sup>95</sup> Khalifa, Ahkamul Mawarith, Dar Salam, (2007), P. 173

For example where the praepositus is survived by his daughter son's daughter and Germane sister and the let estate is N96000.00. The distribution of the estate will be as follows:

P		
<hr/>		
D	SD	GS
$\frac{1}{2}$	$\frac{1}{6}$	R

L.C.D.6:  $3 + 1 + 2 = 6$

The daughter's share IS  $\frac{3}{6} \times \frac{96000}{1} = \text{N}48,000.00$

The son's daughters

Share is  $\frac{1}{6} \times \frac{96000}{1} = \text{N}16,000 .00$

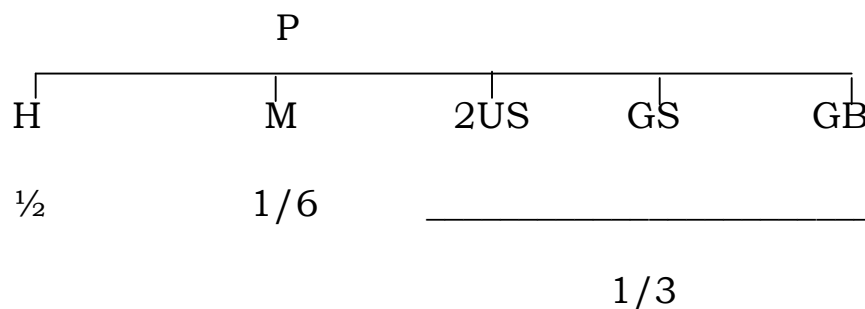
The German sister

Share is  $\frac{2}{6} \times \frac{96000}{1} = \text{N}32,000$

**Total = N96000.00**

Fifth, Germane sister partakes in  $\frac{1}{3}$  allocated for the uterine brothers and sisters under the doctrine of

*HIMARIYYAH* (A donkey's case).<sup>96</sup> The germane sister also joins her brother and two or more uterines in the case of Himariyyah to share together  $\frac{1}{3}$  given to two or more uterines. For example where the praepositus is survived by her husband, mother, two uterine sisters Germane sister and Germane brother. Thus;



L.C.D. 6:  $3 + 1 + (2) = 6$

24:  $12 + 4 + (8) = 24$

24:  $12 + 4 + 2 + 2 + 2 + 2 = 24$

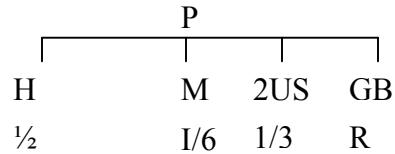
In this case the husband takes  $\frac{12}{24}$  the mother gets  $\frac{4}{24}$ , the two uterines each inherits  $\frac{2}{24}$ , the Germane sister and the germane brother each inherits  $\frac{2}{24}$  of the estate.

The origin of this case can be traced back to the time of Sayyidina Umar. A case of inheritance came before him involving husband, mother, two uterines and a germane brother

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<sup>96</sup> Abu-Zahra, M. Ahkamu tarikat wal-mawarith, Darul fikrul Arabi, (1963), P. 142

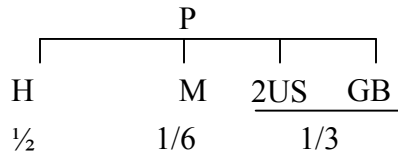
who survive the deceased person. He decided the case by applying the general rule as follows:



L.C.D.  $6 : 3 + 1 + 2 + 0 = 6$

In this case the husband takes  $\frac{3}{6}$  which is  $\frac{1}{2}$ , the mother inherits  $\frac{1}{6}$ , the two uterine sisters inherit  $\frac{2}{6}$  which is  $\frac{1}{3}$  of the estate, but the germane brother is, in fact, excluded totally from the inheritance because the estate is exhausted by the presence of the Quranic heirs. The germane brother, therefore, complained to Sayyidina Umar that he is related to the praepositus twice, that is, through both father and mother. If our relationship to the praepositus is not considered or he is considered to be a donkey or stone thrown into the sea would not my position be the same of that of the uterines? Sayidina Umar thought about it and after consultation with other Prophet's companions reversed his decision as follows:





L C. D. 6: 3+ 1 + (2) = 6

We multiuphy all through by 3 considering the number of uterines and germane brother who considered himself to be a uterine:

18: 9 + 3 + (6) = 18

For each heir 18: 9 + 3 + 2 + 2 + 2 = 18

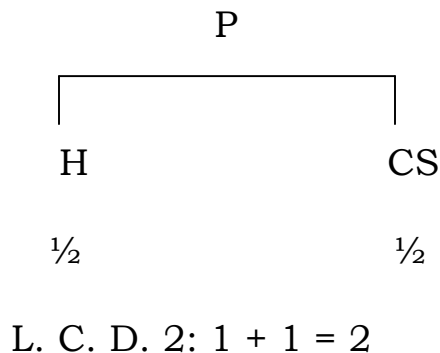
This means the husband has  $9/18 = \frac{1}{2}$ , mother has  $3/18$ , each sister inherits  $2/18 = 1/9$ , and germane brother also inheirt  $2/18 = 1/9$  of the esrtate.

The case is called Himariyyah (donkey case), Hajariyyah (stone case), Yammiyyah (sea case) and Musharakah (partnership case). The doctrine is applied only where a case of inheritance fulfilled three coinditions and they are; first, there must be two or more uteirnes. Second, there must be atleast one germane brother and there must be Quranic heirs who can exhaust the estate.

## Inheritnace Of Consanguine Sister

Consanguine sister is a Quranic heir; by *SUNNAH* of the Prophept (S.A.W) and *IJMA* of the jurists. Holy Quran verses 4:176 refers to both the germane sister and consanguine sister and their inheritance is referred to as the second *KALALA*<sup>97</sup> The inheritance of the consanguine sister is as follows: first, she is entitled to inheirt  $\frac{1}{2}$  of the estate in the absence of her brother and sister (GB and GS), the children of the deceased and father of the deceased. The Holy Quran 4:176 says:

“.....if a man dies and he has a sister she shall inherit the half of what he leaves”<sup>98</sup> For example where the pracpositus and is survived by her husband and consequine sister.



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<sup>97</sup> Ali, A. Y. Op. Cit. P. 235

<sup>98</sup> Ibid

In this case, in the absence of those listed above, the consanguine sister inherits the  $\frac{1}{2}$  and the husband  $\frac{1}{2}$  of the estate.

Second, two or more consanguine sisters inherit  $\frac{2}{3}$  of the estate left by the deceased brother in the absence of consanguine brother, Germane brother and sister, children of the deceased and father. The Holy Quran says;

“.... If a childless man has two sisters, they shall inherit two – thirds of what he leaves....”<sup>99</sup> For example where the decedent is survived by two consanguine sisters, uterine sister and mother.

P		
2CS	US	M
$\frac{2}{3}$	$\frac{1}{6}$	$\frac{1}{6}$

$$\text{L.C.D.6: } (4) + 1 + 1 = 6$$

$$\text{For each } 6:2 + 2 + 1 + 1 = 6$$

In this case the two consanguine sisters inherit  $\frac{2}{3}$  which is  $\frac{4}{6}$  of the estate, for each sister  $\frac{2}{6}$ . The uterine sister takes  $\frac{1}{6}$  and the mother takes  $\frac{1}{6}$  of the estate.

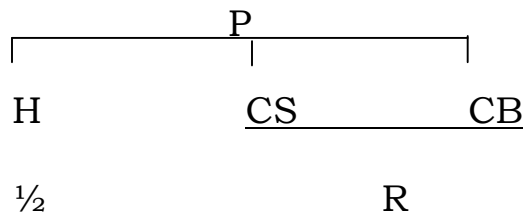
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<sup>99</sup> Ibid

Third, the consanguine sister inherits as residuary by another (*ASABAH BI GHYRIHA*) when she inherits along with consanguine brother in the absence of children of the deceased, germane brother and sister and father. In such position the rule of agnatization applies. The Holy Quran 4:176 says:

“.....But if he has both brothers and sisters the share for each male be that of two females.<sup>100</sup> For example where the *praepositus* is survived by her husband, consanguine sister and consanguine brother. Thus:

$$1:2 = 3$$



$$\text{L.C.D 2: } 1 + (1) = 2$$

$$6: 3 + (3) = 6$$

$$\text{For each 6: } 3 + 1 + 2 = 6$$

In the above case the husband gets  $\frac{1}{2}$ , the consanguine sister inherits  $\frac{1}{6}$  by way of agnatization and the consanguine brother takes  $\frac{2}{6}$  which is twice the share of his sister.

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<sup>100</sup> Ibid

Fourth, consanguine sister inherits as residuary with another (*ASABAH MA'A GHYRIHA*). This is where the consanguine sister co-exists with daughter or son's daughter how low soever. The authority is from the *SUNNAH* of the Prophet (S.A.W), which says "make sisters with daughters residuary." And also the decision of Abu Musa and Ibn Mas'ud is relevant here.<sup>101</sup> For example; where the *praepositus* is survived by his daughter, Son's daughter and consanguine sister.

P		
<hr/>		
D	SD	CS
$\frac{1}{2}$	$\frac{1}{6}$	R
L.C.D 6 3 + 1 + 2 = 6		

In the above case the daughter takes  $\frac{1}{2}$ , son's daughter inherits  $\frac{1}{6}$  and consanguine sister gets  $\frac{2}{6}$  of the estate because she is a residuary with the daughters.

Fifth, the consanguine sister inherits  $\frac{1}{6}$  when she co-exists with one germane sister to complete  $\frac{2}{3}$  fixed for two

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<sup>101</sup> Sabiq, S. Fighul-Sunnah, Darul fikr Vol. 3. (1984), P. 621

or more sisters.<sup>102</sup> They cannot share the  $\frac{2}{3}$  equally because they are not of the same blood relationship. The authority is from the case decided by Abu Musa and Ibn Mas'ud.<sup>103</sup> For example where the praepositus is survived by a germane sister, a consanguine sister and two uterine sisters.

P		
<hr/>		
GS	CS	2US
$\frac{1}{2}$	$\frac{1}{6}$	$\frac{1}{3}$

L.C.D:  $6: 3 + 1 + (2) = 6$

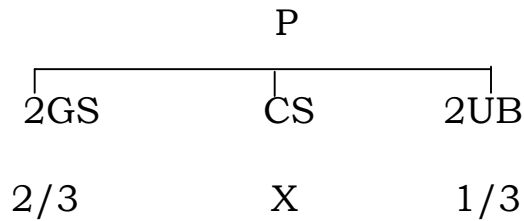
For each 6:  $3 + 1 + 1 + 1 = 6$

The germane sister and consanguine sister are given  $\frac{2}{3}$  but germane sister is preferred than the consanguine sister. Therefore, the former takes  $\frac{1}{2}$  from the  $\frac{2}{3}$  and the consanguine sister, takes  $\frac{1}{6}$  to complete the  $\frac{2}{3}$  given to them. The two uterine sisters each will take  $\frac{1}{6}$  making up  $\frac{2}{6}$  which is  $\frac{1}{3}$  of the estate. Thus  $\frac{2}{3} - \frac{1}{2} = \frac{4-3}{6} = \frac{1}{6}$ . That  $\frac{1}{6}$  goes to the consanguine sister. Sixth, the consanguine sister may be excluded from the inheritance in the presence of two

<sup>102</sup> Ibid

<sup>103</sup> Mustapha, D. Arah Biyyatill Ilmil Fara'id, (1988), P. 199

or more germane sisters.<sup>104</sup> For example where the *praepositus* was survived by two germane sisters, a consanguine sister and two uterine brothers.



L.C.D: 3: (2) + 0 + (1) = 3

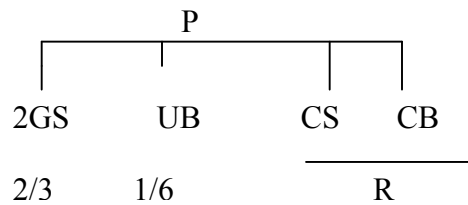
For each 6: 2 + 2 + 1 + 1 = 6

In this case the consanguine sister, in fact, is totally excluded from the inheritance because that 2/3 given to them is exhausted by the presence of the two germane sisters. And each of the uterine brothers inherits 1/6 of the estate. However, she may be lucky to have her brother consanguine brother to agnate her<sup>105</sup> under the doctrine of lucky Kinsman. For example:

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<sup>104</sup> Sabig, S. Op. Cit P. 621

<sup>105</sup> Gurin, A. M. An Introduction to Islamic Law of Succession (Testate/intestate), Jodda Com. Press, LTD. (1998), p. 103



L.C.D.  $6(4) + 1 + (1) = 6$

18:  $(12) + 3 + (3) = 18$

For each 18:  $6 + 6 + 3 + 1 + 2 = 18$

In this case each germane sister takes  $6/18$ , uterine brother takes  $3/18$ , consanguine sister who is now lucky to have consanguine brother will take  $1/18$  and consanguine brother takes  $2/18$  of the estate.

Under this lucky Kinsman case consanguine brother's son cannot agnatis the consanguine sister as in the position of the son's daughter a male of lower degree can agnate her.<sup>106</sup>

#### 4.5 Inheritance Of The Uncle

Uncle is the brother of one's father or mother<sup>107</sup>. In Islamic law only those uncles related to the deceased by blood relationship are entitled to inherit. However, only germane

<sup>106</sup> Ibid, P. 104

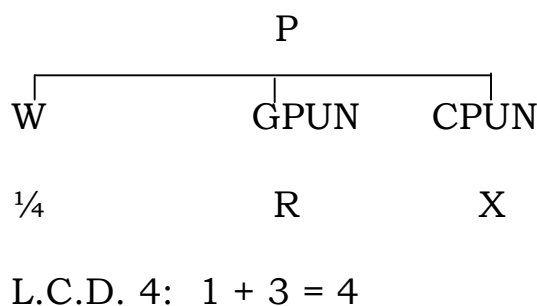
<sup>107</sup> Hussain, A. Islamic inheritance, Darrusalam, (2005), P. 307



and consanguine paternal uncles can inherit in the capacity of agnatic heir. All the other uncles as well as all the aunts are considered as heirs of the outer circle of family.<sup>108</sup> Therefore, uncles germane, consanguine and their sons how low soever can inherit their deceased relative as residuaries. Where he is alone he takes the whole of the estate but if in the presence of other Quranic heirs he takes the residue of the estate. The Prophet (S.A.W) said;

“Give the ordained shares to their rightful heirs. Whatever is left after that, it is for the male person who is nearest (to the deceased).”<sup>109</sup>

For example the deceased leaves a wife, paternal germane and paternal consanguine uncles. Thus;



In this case the wife inherits  $\frac{1}{4}$  of the estate and paternal germane uncle, takes the remainder which is  $\frac{3}{4}$  of the estate.

<sup>108</sup> Gurin, A. M. An Introduction to Islamic Law of Succession, Jodda Press (1981), P. 67

<sup>109</sup> Al-Jibaly, M. Inheritance regulation and exhortations, Sec. Ed., Al-Kitab and Assunnah, (2005), P. 15

Both uncles belong to the same class and stand in the same degree of relationship to the deceased, but the uncle germane, being of the full blood, is preferred to the uncle consanguinean, who is excluded, being of the half blood.

#### **4.6 Heirs Of The Outer Circle Of Family (Dhawul Arham)**

The second type of heirs under discussion are non-conventional heirs, they are referred to as *Dhawul – Arham* in arabic terminology. The literal meaning of *Dhawul in Arabic* word means possessor and *Arham* plural of *Rahim* which means womb. Heirs in this category are called *Dhawul Arham*<sup>110</sup> because they are associated with wombs. Technically, *Dhawul Arham* means those who are neither Quranic nor residuary heirs.<sup>111</sup> Such blood relatives are called *Dhawul Arham*, for the purpose of inheritance, not because of their degree of removal or distance from the deceased person but because of the nature of their relationship or sex. Some members of *Dhawul Arham* may be as near to the praepositus as ordinary legal heirs. For example father's father, son's son,

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<sup>110</sup> Alfauzani, S. Attahagigat-Al-Mardiyyah F-Mubahithil, Fardiyyah, (1986), P. 260

<sup>111</sup> Ibid

son's daughter, son's son's daughter and germane brother's son are ordinary legal heirs but mother's father, daughter's daughter's son, daughter's daughter and germane brother's daughter are members of *Dhawul Arham*.<sup>112</sup>

The definition shows that *Dhawul Arham* include all blood relations, whether near or remote who are not Quranic heirs or residuaries. The companions of the Prophet (S.A.W) held different views on the inheritance rights of the *Dhawul Arham*.

Majority of the prophet's companions held the view that *Dhawul Arham* can inherit in the absence of Quranic and agnatic heirs, save spouse relic, hence, they inherit together. Among them are: Umar Bn AL-Khattab, Aliyu Bn. Abi Talib Ibn Mas'ud, Abi Abaidatu Bn Al-jarrah, Mu'azu Bn. Jabal, Abi Addar-Da'i Ibn Abbas (Radiyahallahu Anhum). The view is followed by Imam Hanifa, Imam Ahmad, Imam shafie (in one of his views) depending on the integrity of the public treasury<sup>113</sup> Those who do not support the above view among the companions of the prophet (S.A.W), include Zaid Bn. Thabit who opined that *Dhawul Arham* cannot inherit, the

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<sup>112</sup> Khuduri, A. Addiyyau Al-Darratul Baiddu'u fill-fara'id, Darul Salam Vol. 2, (1973), P. 68

<sup>113</sup> Al-fauzani, S. Attahagigat Al-Mardiyyah fi-Mubahithil fardiyyah, Darul fikr (1986), P. 261

estate or the residue of the estate would be taken to *Baitul Mal*. This is, also, the second view of Ibn Abbas which followed by Sa'id Ibn Musayyib, Sa'id Ibn Jubair, Imam Malik, Al-Auzai, Abu-Thaur, Dawud and Ibn Jarir (*Rahima Humullah*).<sup>114</sup> The argument over the rights of inheritance of *Dhawul Arham* can be traced back to the period of prophet's companions and their successors. Some of them who are not in support of the rights, as we have noted above, put forward the following reasons for preferring *Baitul Mal* than *Dhawul Arham*:

1. According to them the system of inheritance is fixed or specified in the Quran, *Sunnah* and *Ijma* of the jurists. Since the inheritance of *Dhawul Arham* has no basis from these sources of law the view that they can inherit equally has no basis from the text. Such view is void since the knowledge of inheritance cannot be based on logical deduction.<sup>115</sup> They also relied on the tradition of the prophet (S.AW), that the prophet was asked about the inheritance of maternal aunt and paternal aunt and

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<sup>114</sup> Arrashid, A. *Iddatul Bathith fi-Alkami Tawarith*, (1389H), p. 116 AND abu Zahra, M. Op. Cit. P. 217

<sup>115</sup> khubali, I. *Al-Azbul faid shairh Umdatul farid*, Vol. 2, (1999), P. 21

- he said that angel Jibril informed him that they have no share in the inheritance.<sup>116</sup>
2. Logically, according to them, when the estate of the praepostus is taken to *Baitul-Mal* it would benefit many muslims. But if the *Dhawul Arham* are given right to inherit the circulation of wealth is curtailed in the few hands. In islam what is paramount is the general public interest not individual interest.<sup>117</sup>
  3. On the saying that Allah (S.W.T) has mentioned *Dhawul Arham* in Chapter 8, Verse 76, Chapter 33 verse 6 and Chapter 4 verse 7, of the Holy Quran they said that the verses are of general meaning which are interpreted by the verses concerning inheritance (i.e. 4:11, 12 and 176) which gives rights of inheritance to Quranic and agnatic heirs only. Therefore, when verses of general meaning are read together with these of precise meaning the later would prevail.<sup>118</sup>

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<sup>116</sup> Ibid

<sup>117</sup> Al-FAUZANI, s. Op. Cit. P. 262

<sup>118</sup> Ibid

Following the above reasons, Malikis in support of Zaid Bn. Thabit's view held that in the absence of the Quranic and agnatic heirs the inheritance went into the *Baitul Mal*. But the later Maliki jurists gradually modified their view and did in fact allow the *Dhawul Arham* to inherit. *Baitul Mal* was held to have lost its character as an heir because it was not properly constituted according to Islamic dictates. Bahja and many other authoritative books of Maliki school preferred Radd and *Dhawul Arham* to *Baitul Mal*.<sup>119</sup>

The proposing side of the debate include Imam Hanafi, Imam Hambali and one view of Shafi'i school following the view of Sayyidina Umar, and so forth.<sup>120</sup> They also put forward their reasons for supporting the right of *Dhawul Arham* to inherit as follows:

1. According to them these verses of the Holy Quran; 4:7, 8:75 and 33:6. give *Dhawul Arham* preference to inherit:
  - i. "Men shall have a share in what their parents and kinsmen leave; and women shall have a share in

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<sup>119</sup> Abdul Jawari, A. Usaulul Ilmil Mawarithu, Kismatit Tarikati bitarikatil Hisabiyyah Wabil Kiradi, Darul Kutubil Ilmiyyah, (1988), P. 46

<sup>120</sup> Gurin, A. M. An Introduction to Islamic Law of Succession, Jodda Press (1998), P. 68

what their parents and kinsmen leave; whether it is little or much, it is legally theirs.<sup>121</sup>

ii. “..... And according to the Book of Allah, those who are bound by tie of blood are nearest to one another. Allah has knowledge of all things”<sup>122</sup>

iii. “.....Blood relations are closer to one another in the Book of Allah than to other believers or *Muhajirs* (the emigrants to Madina), although you are permitted to do your friends a kindness. That is decreed in Allah’s book.<sup>123</sup>

2. From the Sunnah of the prophet (S.A.W) that Sayyidina Umar (*Radiyallahu Anhu*) relying on the decision of the prophet gave maternal uncle right to inherit in the absence of Quranic and agnatic heirs and said “verily the apostle of Allah said the Almighty Allah and His messenger are responsible for one who has no near kinsmen and the maternal uncle inherit one who has no legal heir.<sup>124</sup> Commenting on this Hadith they said it is an authentic

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<sup>121</sup> Ali, A. Y. Op. Cit. P. 180

<sup>122</sup> Ibid P. 435

<sup>123</sup> Ibid, P. 1104

<sup>124</sup> Khubali, I. Al-Azul faid sharha Umdatul farid, Darul fikr, Vol. 2 (1999), P. 22

sunnah and it is the authority for the inheritance of *Dhawul Arham*. There is no one, after this, said there is no basis of their inheritance from the text.

In another Hadith Imam Ahmad narrated from Sahal Ibn Hanif that one man shot another with an arrow to death. The deceased was survived by his maternal uncle. Abu Ubaida wrote to *Sayyidina Umar (R. A.)* about this incident. He answered “I heard from the messenger of Allah (S.A.W) saying that maternal uncle can inherit only where there is no legal heir. He must, therefore, pay ransom money and inherit.<sup>125</sup> Furthermore, when Thabit Bn Dahdahin died the prophet (S.A.W) asked Qai’su Bn. Asimin “Do you know his relative among you?” Qaisu answered “He is a stranger to us we don’t know his relatives except his sister’s son Abu-Lubabata Bn Abdul Munziri”. The Prophet, consequently, allowed the deceased’s nephew to inherit. They reasoned further that the decision of the Prophet (S.W.A) on the inheritance of maternal aunt and paternal aunt that

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<sup>125</sup> Akubali, I. Al-Azbul fa’id sharb Umdati farid, \_Daru Kutubi Llmiyyah Vol. 2 (1999) P. 22



they cannot inherit (as cited by Maliki's above) indicates that if there are Quranic heirs and agnatic heirs *Dhawul Arham* would not inherit. And that is why in the subsequent *Hadith* he decided that maternal aunt can inherit in the absence of deceased's legal heirs.<sup>126</sup>

3. According to them even by logic *Dhawul Arham* would be preferred than *Baitul Mal*. Because when close observation is taken one will understand that the *Baitul Mal* is linked to the praepositus through Islam only but *Dhawul Arham* have two links (i.e. Islam and blood ties), therefore, their relationship to the deceased is stronger than that of *Baitul Mal*.<sup>127</sup>

Considering the above arguments one may critically analyze that the Hanafis side is proposing and supporting the inheritance of *Dhawul Arham* and against *Baitul Mal* as a legal heir. Malikis on the other hand are opposing the inheritance of *Dhawul Arham* in favour of *Baitul Mal*.<sup>128</sup> The authorities and reasons advanced by the proposing side are so strong that

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<sup>126</sup> Sabuni, M. *Mawarith fi shariati Islamiyyah Ala Dau' Kitab Wassunah*, (N.D), P. 148

<sup>127</sup> Khubali, I. *Al-Azbul fa'id sharh Umdatul farid*, Darul fikr, Vol. 2 (1999), P. 19

<sup>128</sup> Ibid

they out-weight the arguments of the opposition. Hanafis were able to cite Quranic verses, Ahadith of the Prophet (S.A.W) and analogical deduction to support their arguments, whereas Malikis have not cited authorities except one Hadith but relied only on analogical deduction criticising proposing side for citing irrelevant authorities to support their arguments. Consequently, the jurists in Maliki and Shafie Schools have changed their views and followed the view of Hanafis and Ahmad Bin Hambal because of the abuse of Baitul Mal. Therefore, all Sunni Schools agreed upon the inheritance of Dhawul Arham in the absence of Quranic and agnatic heirs.

#### **4.6.1 Ahlul Rahim Ahlul – Qaraba And Ahlul Tanzil**

Three major doctrines were adopted by the Islamic law jurists to regulate the inheritance of *Dhawul Arham*. Firstly, the doctrine of *Ahlul Rahimi* where the estate will be distributed among the *Dhawul Arham* on the condition that near and remote; males and females relatives are treated with equal share. The qualification here is being *Dhawul Arham* only. The view is adopted by Nuhu Bn Darijin, Haishu Bn

Mubashirin. The doctrine is not popular; hence, its application is fast diminishing among the *Ulam'aal-Mujtahidun* (Jurists).<sup>129</sup>

The second doctrine is Ahlul-Qaraba adopted by Hanafi School. Under this doctrine it is where the right of inheritance of the *Dhawul Arham* is determined by the nature of their relationship with the praepositus. Priority of degree of removal and blood relationship are also considered with different opinions between Abu Yusuf and Muhammad Shaibani in the same school.<sup>130</sup> They had little in common apart from being students of Abu Hanifa. Abu Yusuf was a lawyer and a judge of the central government at Baghdad, while Shaybani was essentially an academic lawyer and an author of academic works and propounder of legal doctrines. In keeping, perhaps, with this difference of personal character, Abu Yusuf's solution of the present problem is simple and practical, while Shaybani's is more complex and difficult because it seeks to express more fully the various implications of inheritance by *Dhawul Arham*.<sup>131</sup>

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<sup>129</sup> Lakhvri, Op. Cit. P. 137

<sup>130</sup> Gazali, H. Y. Op. Cit. P. 309

<sup>131</sup> Muhammad, Y. Certain Aspects of the Law of Succession Affecting Women in Northern, Nigeria, Jorunal of the centre of Islamic Legal Studies, A.B.U, Zaria, Vol. 1 No. 1, (N.D), P. 36

The third doctrine is *Ahlul – Tanzil*, under this doctrine the right of inheritance of *Dhawul Arham* is considered by reference to the link who is the legal heir of the praepositus through whom *Dhawul Arham* linked to the deceased. According to the doctrine *Dhawul Arham* represents those who inherit as Quranic or agnatic heirs. They inherit the shares of those that represent as if the legal heirs are alive and inheriting. The doctrine is adopted by Hambali School, later jurists of Shafie and Maliki Schools.<sup>132</sup> Under the three doctrines, there is agreement that, where only one member of *Dhawul Arham* is surviving the deceased, he or she will inherit the whole of the estate. They have also agreed that spouse relict can inherit together with the members of *Dhawul Arham*. The spouse relict takes his or her maximum Quranic share and *Dhawul Arham* inherit the residue of the estate. But they differed where there are two or more heirs of *Dhawul Arham*.<sup>133</sup>

#### **4 .6.2 The Inheritance of Dhawul Arham**

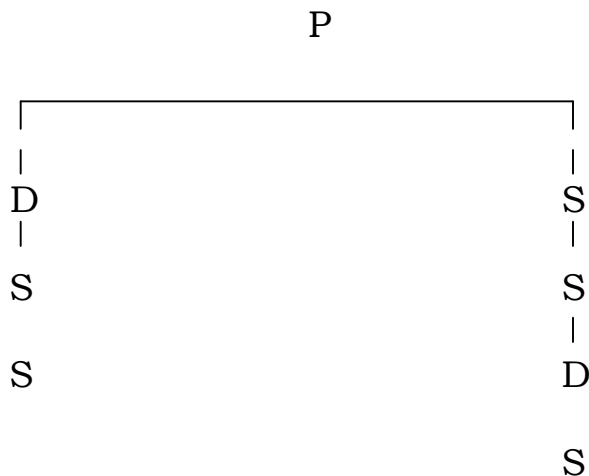
First category of *Dhawul Arham*. In the first category of the heirs of the outer circle of family are descendants of the

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<sup>132</sup>Zahili, W. *Figul Islam wa'adillatuhu*, Vol. 8, (N.D), P. 283

<sup>133</sup> Ibid P. 284

praepositus. For purpose of their inheritance the jurists of the three doctrines differed. According to *Ahlul Quraba* where the degree of removal of the heirs of *Dhawul Arham* in this category differed, those who are nearer to the deceased person exclude those who are more remote to him. For example where the praepositus was survived by daughter's son's son and son's son's daughter's son:



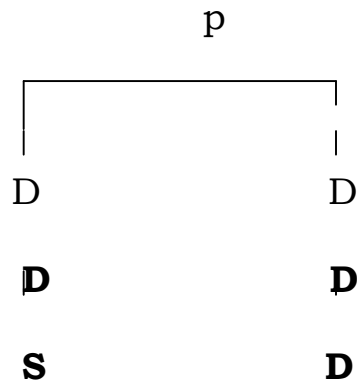
According to *Ahlul – Qaraba* the whole of the estate would be inherited by daughter's son's son for being nearer to the deceased.<sup>134</sup> According to *Ahlul – Tanzil* the whole estate would be inherited by the son's son's daughter's son because he is nearer to the legal heir of the deceased.

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<sup>134</sup> Ibid, P. 20

Another example is where the praepositus was survived by daughter's daughter's son and daughter's daughter's daughter.

According to *Ahlul Qaraba* the rule of agnatization will be applicable.



The ratio is 2: 1 = 3

DDS inherits 2/3 of the estate.

DDD inherits 1/3 of the estate.

According to *Ahlul – Tanzil* surviving heirs are replacing their mothers.<sup>135</sup> Therefore, the estate would be, and first inherited by the mothers (or daughters of the deceased) as Quranic heirs and the returns of the residue would be made to

<sup>135</sup> Lakhvi, S. H. A. Al-Mirath, Justice of Islam In The Rules Of Inheritance, Kano – Nigeria, (2003), p. 139

them. Consequently the share of each mother goes to her respective child or grandchild.<sup>136</sup>

In the above two cases is where *Dhawul Arham* has direct link to the legal heir or has a link but with intermediary to the legal heirs of the same sex as shown above. However, where *Dhawul Arham* has no direct link to the legal heir with or without many intermediaries to the legal heirs involving both males and females, there is difference of opinion in Hanafi School.

According to Abu Yusuf the sex of the surviving heirs will be considered but not the links even the links to the legal heirs are many. The sides from which the surviving *Dhawul Arham* comes from should also be considered, if they are males only or females only they share the estate equally.<sup>137</sup> Where there are both males and females the rule of agnatization will be applied.

According to Muhammad Shaibani<sup>138</sup> where the links are of different sexes but their children are not many with many

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<sup>136</sup> Khubali, I. Op. Cit. P. 20

<sup>137</sup> Ibid P. 21

<sup>138</sup> Khubali, I. Op. Cit. p. 31

sides, the estate would be distributed by considering the sex of the links to the surviving heirs. And then their shares be given to their surviving children respectively.<sup>139</sup>

Example: where the praepositus was survived by daughter's daughter's son and daughter's son's daughter.

According to Abu Yusuf the estate will be distributed by applying the rule of agnatization. Therefore, the daughter's daughter's son inherits 2/3 and the daughter's son's daughter will inherit 1/3 of the estate.<sup>140</sup>

According to Muhammad Shaybani the estate will be distributed by considering the links of the surviving heirs (daughter's daughter and daughter's son). The rule of agnatization will be applied whereby the DD takes 1/3 and DS will take 2/3. Thus the DD Share of 1/3 will go to her son while DS share 2/3 would go to his daughter.<sup>141</sup>

According to *Ahlul-Tanzil* the estate will be distributed equally among daughter's daughter's son and daughter's son's

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<sup>139</sup> Ibid

<sup>140</sup> Ibid, P. 32

<sup>141</sup> Ibid, P. 32



daughter by taking the share of their respective grand mothers.<sup>142</sup>

## **Second Category of Dhawul Arham**

Those in the second category of *Dhawul Arham* come through the ascendants (parents) of the praepositus. They include false grandfathers and false grandmothers. For the purpose of their inheritance the propounded of the two doctrines differed in legal opinion.

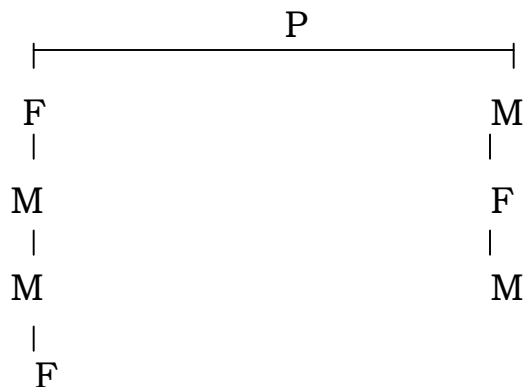
According to *Ahlul Qaraba* when the degree of removal of the *Dhawul Arham* differed the one who is nearer to the deceased will be given priority over one who is more remote, whichever side he comes from; whether from father's or mother's side and whether he has direct link to the legal heir of the deceased or not.<sup>143</sup> For example:

Where the deceased was survived by father's mother's mother's father and mother's father's mother;

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<sup>142</sup> Rashid, A. Iddatul Bathitgh fi- Ahkami Tawarith, Darul, fikr (1389H), P. 45

<sup>143</sup> Lakhvi, H. A. Op. P. 139



According to *Ahlul Qaraba* the inheritance of the whole estate will go to the mother's father's mother because she is nearer to the praepositus.

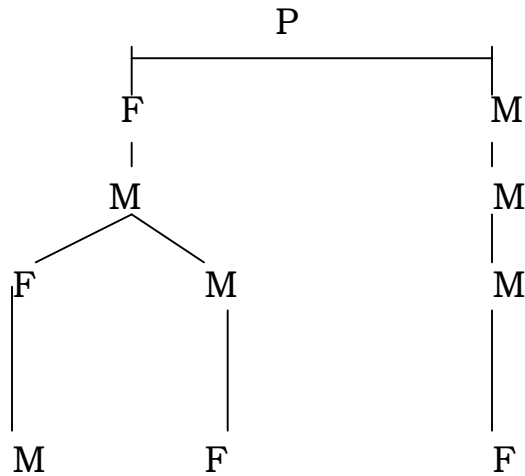
Hambali School agreed that she (MFM) inherits the whole estate because she takes the position of the mother whereas FMMF represents the grandmother. By *Ijma* the mother excludes grandmother.<sup>144</sup>

According to shafi'i school, the whole estate will be inherited by father's mother's mother's father because he is nearer to the legal heir. *Ahlul - Tanzil* maintained their position that in all cases of *Dhawul- Arham* the one nearer to the legal heir of the praepositus will be given priority over the one who is more remote.<sup>145</sup>

<sup>144</sup> KhUBALI, i. Al-Azbul faid sharh, Umdatul farid, Vol. 2 (1999), P. 20

<sup>145</sup> Ibid, P. 21

Another example is where the praepositus was survived by father's mother's father's mother, father's mother's mother's father and mother's mother's mother's father, and thus:



According to *Ahlul - Qaraba* the estate will be distributed into three (3). 2/3 of the estate will be given to those coming through the father of the deceased and 1/3 to those from the mother of the deceased's side.<sup>146</sup> Thus:

$$\text{LC.D 3: } (2) + 1 = 3$$

FMF and FMM are considered to be 3. Since 2 is not divisible by 3 we multiply all through by 3.

$$9: (6) + 3 = 9$$

$$9: 4 + 2 + 3 = 9$$

<sup>146</sup> Badran, B. Mawarith Wal-Wasiyyah wal-Hibah fi shariatil Ilamiyyati, DARULSDALAM, (N.D), P. 79

= FMFM will inherit  $\frac{4}{9}$  of the estate.

FMMF will inherit  $\frac{2}{9}$  of the estate and

MMMF will inherit  $\frac{3}{9}$  of the estate.

According to *Ahlul –Tanzil* the estate will be shared equally among FMMF/MMMF and because they are nearer to the legal heirs of the deceased person than FMFM. As it would be among FMMF and MMF whereby they inherit  $\frac{1}{2}$  of the estate each as Quranic and returned shares.

3: (2) = 2 Quranic shares.

2: 1 + 1 = 2 with RADD shares.

FMMF inherits  $\frac{1}{2}$  of the estate and MMMF inherits  $\frac{1}{2}$  of the estate, but there is no inheritance for FMFM being more remote from the legal heir of the praepositus.

### **Third Category Of Dhawul Arham**

The third category of *Dhawul Arham* are the descendants of the deceased's parents and they include the sister's children, the brothers' daughters and uterine brothers' children, how low soever.<sup>147</sup> The principles governing the

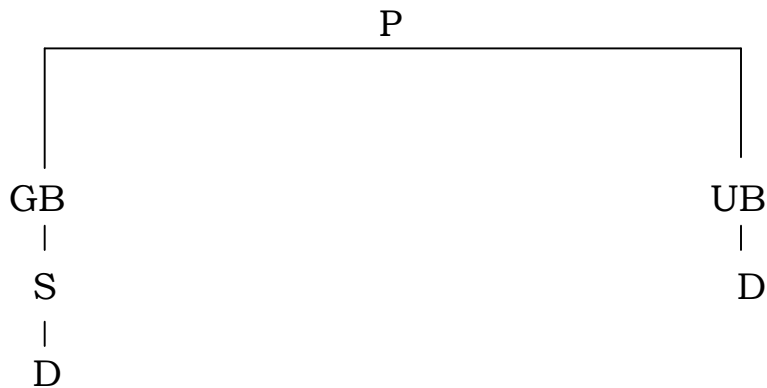
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<sup>147</sup>Gazali, OP. Cit. P. 330

inheritance of *Dhawul – Arham* under this category are better explained by the following examples. <sup>148</sup>

**EXAMPLE 1:**

Where the praepositus was survived by the daughter of the uterine brother and germane brother's son's daughter, thus:



According to *Ahlul – Qaraba* the whole estate would be inherited by the uterine brother's daughter for being nearer in degree of removal from the deceased person than germane brother's son's daughter.<sup>149</sup>

According to *Ahlul-Tanzil* if the surviving *Dhawul-Arham* are to replace the ordinary legal heirs, in this case, they become uterine brother and germane brother's son. As Quranic heir uterine brother is entitled to 1/6 and as agnatic heir germane brother's son will inherit the residue which is

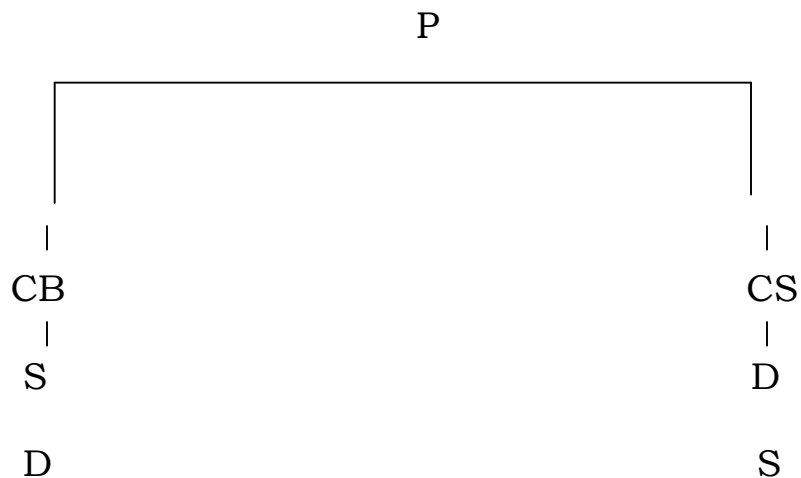
<sup>148</sup> Zahili, W. Figihul Islam wa Adillatulu, Darul fikr, Vol. 8 (N.D), P. 393

<sup>149</sup> Ibid

5/6 of the estate.<sup>150</sup> Therefore uterine brother's daughter will inherit 1/6 the share of her father and germane brother's daughter will inherit 5/6 the share of her father.<sup>151</sup>

## EXAMPLE II

Where the praepositus was survived by consanguine brother's son's daughter and consanguine sister's daughter's son. Thus:



The jurists agreed that the whole estate will be inherited by CBSD but they have advanced different reasons.<sup>152</sup>

According to *Ahlul-Qaraba* there are two reasons. First, because CBSD is a daughter of an agnatic heir and second, the two surviving *Dhawul-Arham* are in the same degree of removal from the praepositus.

<sup>150</sup> Ibid

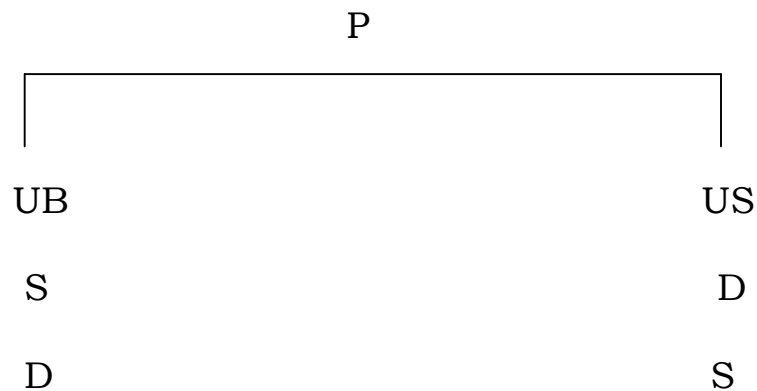
<sup>151</sup> Khubali'I I. *Al-Azulfa'd sharh Umdatul farid*, Vol. 2 (1999), P. 20

<sup>152</sup> Ibid

*Ahlul –Tanzil* gave only one reason that is CBSD is nearer to the legal heir of the deceased than CSDS who is more remote to the legal heir.<sup>153</sup>

### **EXAMPLE III**

Where the praepositus was survived by uterine brother's son's daughter and uterine sister's daughter's son. Thus:



According to Abu Yusuf the estate will be shared according to the rule of agnatization.<sup>154</sup> Ratio1: 2 = 3. Therefore UBSD will take 1/3 and USDS will take 2/3 of the estate.

According to Muhammad Shaybani and *Ahlul-Tanzil* the estate will be distributed equally among them considering the ordinary legal heirs of the deceased. Therefore, UBSD will get

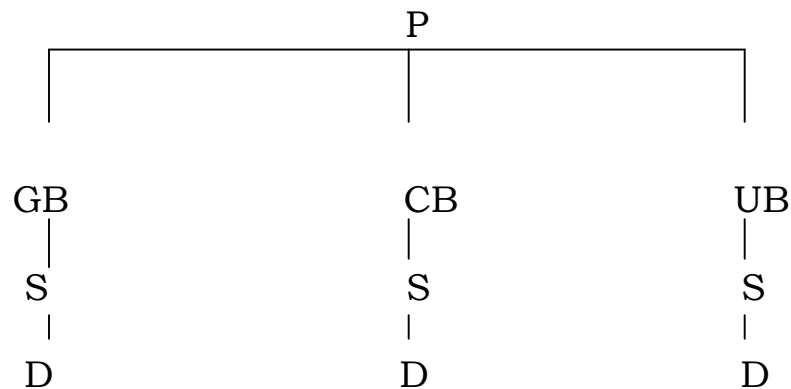
<sup>153</sup> Badran, B. Mawarith wal-wasiyyah wal Hibah fi-shariatil Islamiyyati, Mawarith wal-wasiyyah wal Hibah fi-shariatil Islamiyyati Darusalam (N.D), P. 82

<sup>154</sup> Ibid

½ of the estate as Quranic and the return shares. The USDS will also get the same share.<sup>155</sup>

#### **EXAMPLE IV:**

Where the praepositus was survived by three (3) different types of brother's sons' daughters. Thus:



Both *Ahlul-Qaraba* and *Ahlul -Tanzil* agreed that the whole estate will be inherited by germane brother's son's daughter. She is given priority here because she is the daughter of an agnatic heir and of full blood relationship.<sup>156</sup> She can exclude consanguine brother's son's daughter and uterine brother's son's daughter. Furthermore, there is agreement of the jurists that the germane brother's son can exclude consanguine brother's son and where the child of an

<sup>155</sup> Khubali, Op. Cit. P. 21

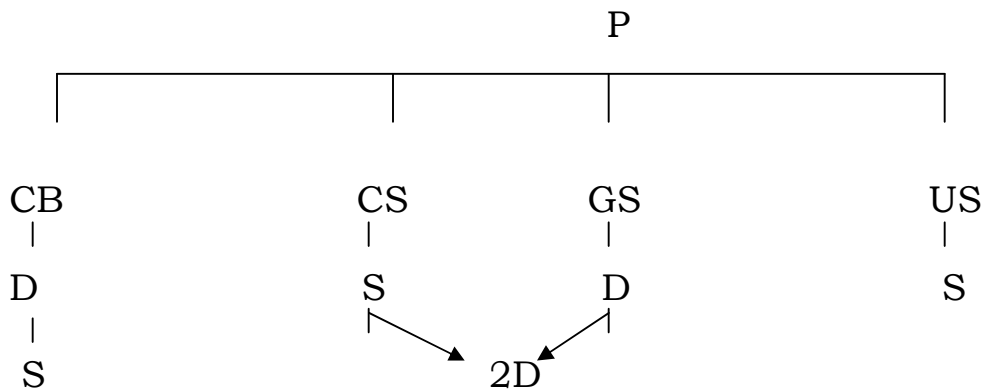
<sup>156</sup> Ibid



agnatic heir inherits together with the child of *Dhawul Arham* the former is given priority over the later.<sup>157</sup>

#### **EXAMPLE V:**

Where the praepositus was survived by his consanguine brother's daughter's son, consanguine sister's son's two daughters, germane sister's daughter's two daughters and uterine sister's son's daughter.<sup>158</sup>



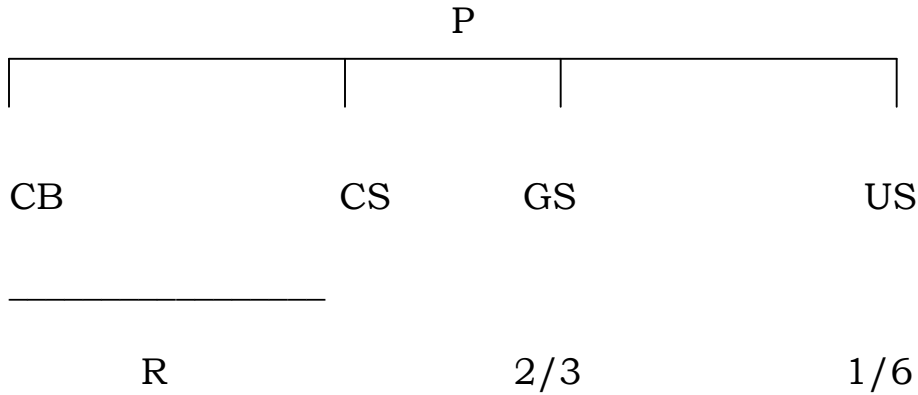
According to Abu Yusuf the whole of the estate will be inherited by the germane sister's daughter's two daughters (GSD2D) for having stronger blood ties to the deceased.<sup>159</sup>

According to Muhammad Shaybani the estate will be distributed by considering those who are directly connected to the praepositus and the surviving *Dhawul-Arham*<sup>160</sup> as follows:

<sup>157</sup> Badran, B. *Mawarith wal-wasiyyah wal Hibah fi Shariatil Islamiyyati*, (n.d), p. 83

<sup>158</sup> Ibid, P. 84

<sup>159</sup> Khubali, I. Op. Cit. P. 21



According to him these are directly connected to the praepositus. CB will agnatise CS and they share the residue in the ratio 2: 2 = 4 because CS is considered to be two sisters because of her two grand daughters. GS will inherit 2/3 because she is considered to be two sisters because of her two grand daughters. US will take her 1/6 as Quranic heir. Thus:

L.C.D.      6: (1) + 4 + 1 =      6

                 24: (4) + 16 + 4 =      24

                 24: 2 + 2 + 16 + 4 =   24

                 24: 2 + (2 + 16) + 4 = 24

                 24: 2 + (18) + 4 =      24

                 24: 2 + 9 + 9 + 4 =    24

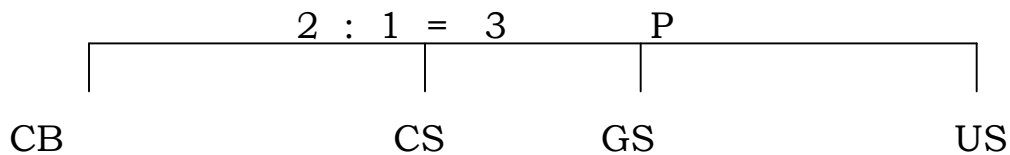
Therefore, CBDS will inherit 2/24 of the estate each daughter of CSS and GSD will take 9/24 of the estate the total

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<sup>160</sup> Ibid

of which is 18/24 of the estate. And USSD will get 4/24 of the estate.

According to *Ahlul-Tanzil* if the surviving *Dhawul-Arham* are to be placed in the position of the legal heirs they will become consanguine brother, consanguine sister, germane sister and uterine sister.




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	R	$\frac{1}{2}$	1/6
L.C.D	6: (2) + 3 + 1 =	6	
	18: (6) + 9 + 3 =	18	
	18: 4 + 2 + 9 + 3 =	18	
	18: 4 + (2 + 9) + 3 =	18	
	18: 4 + (11) + 3 =	18	
	36: 8 + (22) + 6 =	36	
	36: 8 + 11 + 11 + 6 =	36	

Therefore CBDS will inherit 8/36 of the estate CSS2D and GSD2D each will get 11/36 of the estate which will be totaled to 22/36. And USSD will take 6/36 of the estate.<sup>161</sup>

#### **Fourth Category of Dhawul Arham**

In the fourth category there are paternal uncles/aunts, maternal uncles/aunt and their descendants how low soever.<sup>162</sup>

Furthermore there are germane and consanguine paternal uncle's/aunt's daughters and paternal uterine uncles/ aunts and their descendants how low soever. According to *Ahlul Quraba* under this category a germane paternal aunt's son or daughter will exclude a consanguine paternal uncle's daughter. Both can exclude a uterine maternal aunt's child. Therefore, Abu Yusuf and Muhammad Shaibani agreed that those coming from the first category exclude those from any lower category. And those coming from the same category the one with full blood exclude the one with half blood. Those from the same category but not of the same

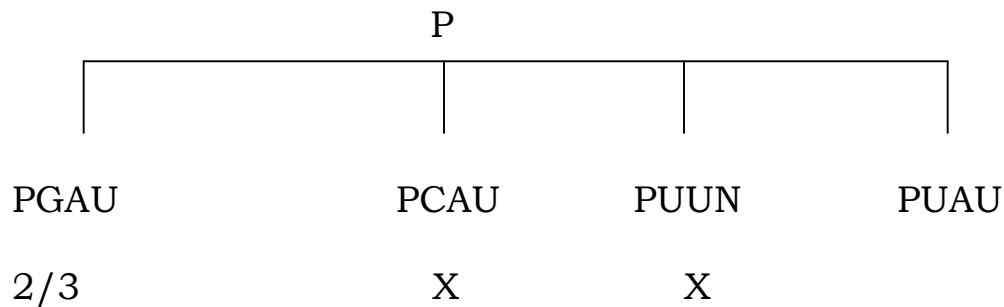
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<sup>161</sup> Khubali, I. *Al-Azbul fa'd sharh Umdatul farid*, Vol. 2. (1999), P. 53

<sup>162</sup> Gazali, H. Y. Op. Cit. P. 348

degree of removal, the one who is nearer to the deceased person exclude the one who is too remote.<sup>163</sup> The examples will illustrate the principles.

Where the praepositus was survived by three aunts of different types and they are; Paternal germane aunt, paternal consanguine aunt, paternal uterine uncle and paternal uterine aun.<sup>164</sup> Thus:



According to *Ahlul-Qaraba* the whole of the estate will be inherited by the paternal germane aunt because she is of full blood and she has stronger blood ties to the praepositus.<sup>165</sup>

According to *Ahlul-Tanzil* they share the estate as if they were Quranic heirs.

<sup>163</sup> Aliyu A. Fathul Bari, Darusalam, Vol. 2, (1348H), P. 24

<sup>164</sup> Badran, B. Mirath wal Wasiyyah wal Hibah fi-shari'ati Islamiyyati, (N.D), P. 83

<sup>165</sup> Ibid

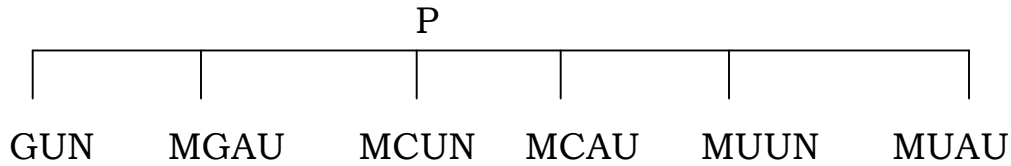
	P		
PGA	PCA	PUUN	PUAU
$\frac{1}{2}$	$\frac{1}{6}$	<hr/>	
		$\frac{1}{3}$	
L.C.D.	6: 3 + 1 + (2) =		6
	6: 3 + 1 + (2) =		6
	6: 3 + 1 + 1 + 1 =		6

Therefore PGAU will inherit  $\frac{3}{6}$  of the estate, PCAU will get  $\frac{1}{6}$  of the estate, PUUN will take  $\frac{1}{6}$  of the estate and PUAU will inherit the same share ( $\frac{1}{6}$ ) of the estate.

Where in a case there are males or females only, the estate will be shared among them equally. And where there are mixture of males and females the rule of agnatization will be applied. For example where the praepositus was survived by three maternal uncles of different kinds and three maternal aunts of different types.<sup>166</sup> Thus:

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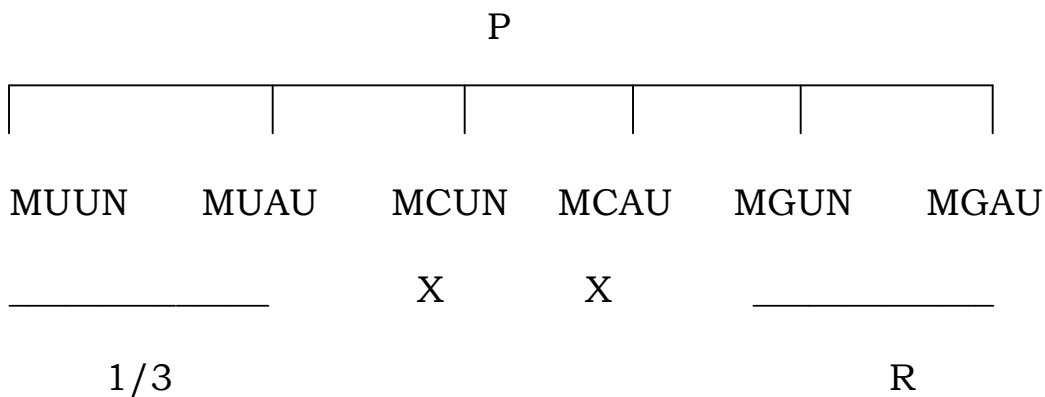
<sup>166</sup> Khubali, I. Op. Cit. P. 54



According to *Ahlul-Qaraba* the estate will be distributed among the maternal germane uncle and maternal germane aunt by the application of the rule of agnatization.

Ratio: 1 : 2 = 3 = 2/3 and 1/3 of the estate respectively.

According to *Ahlul-Tanzil* the maternal uterine uncle and the maternal uterine aunt will inherit 1/3 of the estate. And the residue will be inherited by maternal germane uncle and the maternal germane aunt. The maternal consanguine uncle and the maternal consanguine aunt are excluded from the inheritance by the germane.<sup>167</sup>




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<sup>167</sup> Ibid

$$\begin{array}{lcl} \text{LC.D.} & 3: (1) + (2) = & 3 \\ & 6: (2) + (4) = & 6 \\ & 6: 1 + 1 + 2 + 2 = & 6 \end{array}$$

This means MUUN will inherit 1/6 the same share will go to MUAU, but MCUN and MCAU are excluded from the inheritance; however, MGUN takes 2/6 and MGAU get the same share.

According to Shafi'i School the rule of agnatization will be applied. Thus, the school has deviated from the opinion of *Ahlul –Tanzil* in this case.<sup>168</sup> The school opinion is as follows:

P					
MUUN	MUAU	MCUN	MCAU	MGUN	MGAU
_____		X	X	_____	
1/3				R	
LC.D.	3: (1) + (2) =		3	Ratio 1: 2 = 3	
	6: (2) + (4) =		6		
	6: 1 + 1 + 2 + 2 =		6		

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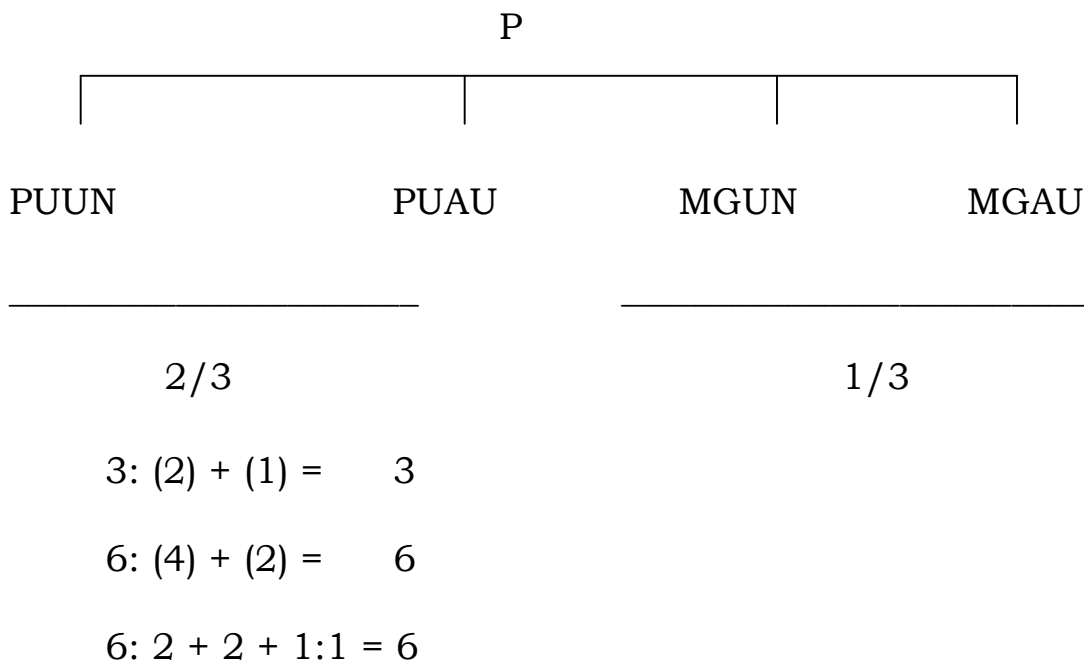
<sup>168</sup> Ibid, P. 53



This means MUUN will inherit  $\frac{2}{9}$ ; MUAU will inherit  $\frac{1}{9}$ ; MGUN will inherit  $\frac{4}{9}$  and MGAU will inherit  $\frac{2}{9}$  of the estate.

The last example here is where a deceased person was survived by paternal uterine uncle, paternal uterine Aunt, maternal germane uncle and maternal germane aunt.<sup>169</sup>

*Ahlul –Tanzil* and *Ahlul-Qaraba* agreed that the estate will be divided into three. The paternal side will take  $\frac{2}{3}$  and the maternal side taking  $\frac{1}{3}$  of the estate. Thus:



This means that the PUUN and PUAU will inherit  $\frac{2}{6}$  each. MGUN and MGAU each will inherit  $\frac{1}{6}$  of the estate.

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<sup>169</sup> Zahili, W. Op. Cit. 397

However, according to Hanafi and Shafi'i schools the rule of agnatization will be applied.<sup>170</sup> Thus, Ratio 1:2 = 3

P			
PUUN	PUAU	MGUN	MGAU
<hr/>		<hr/>	
2/3		1/3	
3: (2) + (1) =		3	
9: (6) + (3) =		9	
9: 4 + 2 + 2+1 =		9	

This means PUUN inherits 4/9, PUAU inherits 2/9, MGUN inherits 2/9 and MGAU inherits 1/9 of the estate.

All the above legal heirs are heirs of the inner and outer circles of family. Their succession right has been analyzed and discussed considering their various positions of inheritance. Their shares vary from one situation to another because of the effect of the doctrine of exclusion. Therefore, the chapter discussed not only the principle of inheritance of the legal heirs of the inner and outer circles of family but also the form

<sup>170</sup> Badrar, B. Op. Cit. P. 83

of exclusion which affected the shares of the legal heirs. Such exclusion may be total or partial depending on the circumstances and positions of the inherence of the legal heirs. The exclusion may occur by the existence of the other legal heirs. For instance the daughter excludes the son's daughter from  $\frac{1}{2}$  to  $\frac{1}{6}$  and the son excludes the son's son totally from the inheritance. Therefore, by implication the doctrine of exclusion is discussed in chapter three and four of this research work by way of practical analysis.

## **CHAPTER FIVE**

### **SUMMARY, OBSERVATION AND RECOMMENDATION**

#### **5.1 Summary**

The research made a general introduction of the topic of research, outlined in the research problem, aims and objectives of the research, and reviewed some literature in the subject area. It also enumerated chapters under the organizational layout where observation and recommendation will be discussed.

The research work traced historical development of Islamic law of inheritance from Jahiliyyah period (period of ignorance) to its final stage of development when all the three fundamental verses of the Holy Quran relating to Islamic law of inheritance were revealed. The research work discussed Jewish and Christian law of inheritance; as system of inheritance that existed before the advent of Islamic law. But, from the discussion, it is clear that Islamic law of inheritance is not an off shoot of the previous laws of the revealed religions.

The researcher analyzed blood relationship as a basis of

inheritance under Islamic law which provides ground of inheritance for the heirs of inner and outer circles of family. The heirs are classified into four categories of *NASAB* or blood relationship. Under these categories each individual heir's inheritance, how he or she excludes others and how he or she is excluded from the inheritance was discussed. Commentary is made on the claim of the women liberation and women living under Muslim law network on the interpretation of the provisions for the shares of the heirs of inner and outer circles of family. Such claim is analyzed, discouraged and solution is proffered.

The research work analyzed the succession right of the heirs of inner and outer family. The work divided the heirs into two classes and each class is divided into four categories of heirs. And again under each category the succession right of an individual heir is analyzed and discussed. Examples and illustrations are provided for good understanding of the inheritance of each legal heir. After fixing the shares the research has gone deep into analytical and logical distribution of estate of the *praepositus* among the legal heirs. Most of the

shares given reasons and authority concerning the inheritance of an individual heir. Finally, considering the fact that the work discussed not only the principle of inheritance but also the doctrine of exclusion, the two are analyzed and discussed in chapter three and four concurrently. The research work critically examined both justified and unjustified exclusion of heirs from certain properties, affected by customary.

Practices the conclusion of the work offers summary, observation and recommendation.

## **5.2 Observation**

In the light of our discussion in the preceding chapters we observe as follows;

1. It is sad to note that some lower court judges appointed and vested with the jurisdiction to entertain matters of inheritance have a very shallow knowledge of the Islamic law of inheritance hence leading to very absurd decisions or distribution of estate. Hence, many cases before the courts may not be opportuned to be appealed to the appellate courts to enable the parties to get the remedy of

the law.

2. It is observed that in Nigeria the official position regarding application of Islamic law is the application of the law as interpreted and applied by the Maliki School. The judges do in some cases especially with regard to application of Radd (Return; where residue of shares is returned to the qualified legal heirs) and succession of Dhawul Arham do resought to other schools to apply Radd or permit members of Dhawul Arham to inherit which is technically wrong because there is no legal backing for such action.
3. In the course of this research work it is observed that there is abundance of literature on the subject area. But very little is written in English on the topic blood relationship as a basis of inheritance under Islamic law; A case study of the inner and outer circles of family.
4. Customary law has found its way to interfere with the Islamic law in the field of the inheritance of immovable property. The deceased landed property and houses, according to the custom devolves on his male heirs.

Where there are more than one house, the custom may require that the house, the deceased's person resides in will be reserved as family house and if there is disagreement between the heirs the out door rooms are given to the males and the interior ones to the female without considering the rules of Islamic law.

5. Women who claim to be living under Muslim law network who are trying to change and give different meaning to the verses of the Holy Quran in favour of women are growing in numbers in Nigeria. They claim that males and females inherit equally and in some positions the female inherits a share more than that of the male. They gave example of the inheritance of the father and mother in chapter 4 verse 11. That the father inherits  $1/6$  and the mother  $1/3$ .

### **5.3 Recommendation**

In the light of the above observations we recommend as follows:

1. With regard to the first observation it is our humble



recommendation that when appointing lower court judges the judicial service commission concerned should appoint judges, who have knowledge in Islamic law, especially in Islamic law of inheritance.

2. With regard to the second observations it is our humble recommendation that the application of Islamic law which adopted Maliki school of law should be reformed. The reform should accommodate various laws from various schools, more especially Hanafi school to give it a wider perspective to include the inheritance of heirs of the outer circle of family and the doctrine of Radd. The reforms will give the judges legal backing to decide or distribute estate among the members of Dhawul Arham and Radd.

3. With regard to the third observations it is our humble recommendation that learned Islamic scholars in or out of our universities be encouraged to write books on the subject matter. Islamic organizations should bear the cost of the publications, so that we will have available reading literature on the topic in English Language.

4. With regard to the fourth observation it is our humble recommendation that the preservation of family house is an unjustified exclusion of the legal heirs from the property. The idea should be discouraged by the judges and the learned jurists in our society. Islamic law has not recognized family house and whatever the deceased person left is subject of inheritance. The judges and all concerned must understand that under Islamic law of succession whether the property left by the deceased is real or personal, ancestral or self-acquired, corpus or usufruct, movable or immovable, the same rules of success are applied. Therefore no distinction between the types of property and the sex of the legal heirs, whether male or female the same law applies.
5. With regard to the fifth observation, while accepting gender inequality in some positions of inheritance among the males and females this research work is recommending that the women libtrations should be made to understand that the idea of having such shares is to ensure justice and equity among the legal heirs.

Moreover, as Muslims we must believe that Allah created us and he knows us best. Therefore, we must appreciate that Allah is competent to make laws governing our lives and we must obey without entertaining any doubt.

Women living under Muslim law network who are trying to change and give different meaning to the verses of the Holy Quran in favour of women must be educated to understand and realize their mistake. Because their claim is a deliberate attempt to confuse women and other ignorant persons to misunderstand the provisions of Islamic law of succession. They should know that the Hadith and *IJMA* of the jurists' interpret the Holy Quran therefore any contrary interpretation to the Holy texts is null and void and has no legal effect whatsoever. Their interpretation should not be given universal acceptance, because it is full of contradictions, falsehood and bias. Our law faculties in our Nigerian universities should endeavour to identify such write-ups with the view to discredit, falsify and discourage them so that they will not gain ground to spread all over the world.

Finally, the students, lawyers, judges, all concerned and interested persons in the subject matter should remember what the Prophet (S.A.W) has said:

“Learn the knowledge of inheritance and teach it to others because it is half of knowledge and it is easily forgotten and it is first knowledge to be lifted from my Ummah.”

The above Hadith of the Prophet (S.A.W) is warning and encouraging us to learn the subject of inheritance. It is a warning because one day people will lack the true knowledge and result into disputes and at last total ignorance of it.

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