CHAPTER V

SPECIAL CASES ON ISLAMIC INHERITANCE

5.1 Introduction

This Chapter expounds the Special Cases on Islamic Inheritance. Under the Muslim Code of the Philippines, there are only Five (5) Special Cases that are included in the Book III of Succession, namely: The Case of Unborn Child, The Case of Illegitimate Child, The Case of Acknowledging Person, The Case of Divorced Spouses, and The case of a Missing Person. In this chapter, the researcher subdivided the Special Cases into 3 Groups as follows: First, Group 1 is composed of Special Cases of a Child; Second, Group 2 is composed of Special Cases of Brother/s and Sister/s and Finally, Group 3 is composed of Special Cases due to Certain Circumstances.

5.2 Group 1: SPECIAL CASES OF A CHILD

5.2.1 UNBORN CHILD

Under the Muslim Code of the Philippines, a child conceived at the time of the death of the decedent shall be considered an heir provided it will be born later in accordance with Article 10; its corresponding share shall be reserved before the estate is distributed. Under the Muslim Code of the Philippines, Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided it will be born alive, however, briefly, at the time it is completely delivered from the mother's womb.[265]

General rule is that unborn child is only eligible to inherit if he is born alive. If the child is born alive but die subsequently, then shares are distributed amongst his/her heirs.

[265] Muslim Code of the Philippines, Article 97

The Islamic Inheritance Law, as a comprehensive system, protects the rights of the unborn child and ensures justice to them. With regards to the inheritance rights for a foetus, the fuqaha agrees that a foetus is entitled to the inheritance of a deceased benefactor together with the other beneficiaries.[266] However, the inheritance rights for the foetus are subject to two conditions namely:

i) The foetus is already present in its mother's womb at the time of death of the benefactor.

ii) The foetus is born alive even for a few seconds.

The Islamic Inheritance Law identifies several signs that indicate that the foetus is born alive such as crying, feeding, breathing, moving its limbs and so forth. The fuqaha has different opinions whether the whole body of the foetus has to be born alive or just partially. The Syafii, Maliki and Hanbali sects require that the foetus be born alive as a whole. If only some parts of the foetus are born alive and then it passes away, the foetus is not entitled to inherit the inheritance even though the birth was followed by tears.[267]

After fulfilling the conditions above, the foetus has the rights to the inheritance and the portions of the inheritance should be kept for it until its birth. According to the majority of fuqaha, the inheritance can be distributed before the birth of the foetus, but the portion that should be kept for it is the maximum whether it is a male or

[266] Awang, Op. Cit., p. 21
[267] Ibid.

female. For the Maliki sect, the inheritance cannot be distributed until the baby is born and his sex is determined.[268]

5.2.2 TEST TUBE BABY

The Muslim Code of the Philippines does not provide the rule regarding the succession by a test tube baby. However, by virtue of its Applicability clause, Article 187, The Muslim Law may be applied in suppletory manner.

In-vitro fertilisation: This is the process of fertilising an egg with sperm in an artificial environment such as test-tube. A child produced using this method is popularly called "test tube baby."[269]

The procedure involves stimulation of the woman with injected medications to develop multiple follicles (egg-containing structures) in the ovaries. Thereafter, a trans-vaginal ultrasound-guided procedure is performed to remove the eggs from the follicles which are fertilized in the laboratory with her partner's sperm. The embryos are finally placed in the woman's uterus where they will hopefully implant and develop to result in a live birth.[270]

According to Sheikh 'Abd-Allaah al-Jibreen as cited by Sheikh Muhammad Al-Munajjid, in-vitro fertilization is permissible in Islam if certain conditions are fulfilled. They are:

i. That there is a real need for that. A delay of one or two years in having children is not an excuse for the couple to pursue this or similar methods. Rather

[268] Ibid.
[269] Muhammad., Op. Cit., p.18
[270] Ibid.

they should be patient, for Allah may grant them a way out soon without them doing anything that is haram.

ii. The woman should not uncover her ‘awrah before men when there are female staffs available.

iii. It is not permissible for the husband to masturbate; rather he may be intimate with his wife without penetration, and produce semen in this manner.

iv. The woman’s eggs and man’s sperm should not be kept in a freezer for later use, or another appointment, and there should not be any delay in placing them in the woman’s uterus. Rather that should be done immediately without any delay, lest they be mixed with others or be used for other people.

v. The sperm must come from the husband and the egg from the wife, and be implanted in the wife’s uterus. Anything else is not permissible at all.

vi. There should be complete trust in the doctors who are doing this procedure.

As far as inheritance is concerned, the most important condition is the sperm must come from the husband and the egg from the wife, and be implanted in the wife’s uterus. Anything else is not permissible at all. This does not imply that others are not important as well. When the said condition is fulfilled, the child will inherit from both the father and mother and vice versa. However, if there happens to be a mix-up such that another man’s sperm was used to fertilise the wife’s egg, the child will inherit from the mother only. Conversely, if the husband’s sperm was used to fertilise another woman’s egg, the child will inherit from the father only. In a situation whereby the sperm and egg of others were used, there will be no inheritance between the child and his “so-called” parents because they are no-more-than adoptive parents. Note that even if

the child develops in the wife's womb, so long as it's not her egg, the biological connection that will necessitate inheritance between them is missing[271]

5.2.3 ILLEGITIMATE CHILD

Under the Muslim Code of the Philippines, a child who was the cause of the mother's having been divorced by li'an shall have mutual rights of succession only with the mother and her relatives.[272]

Illegitimate child doesn't inherit from the father and the father does not inherit from the illegitimate child. The Prophet (PBUH) said: "If a man commits fornication with a free woman or a slave woman, the child is the product of fornication, he neither inherits nor may anyone inherit from him" [Thirmidi]

In Islam, there are three categories of children: legal, biological and those that are both legal and biological. By legal, we mean children that result from a marriage approved by the Shari'ah. Thus for a man, only his children that are both legal and biological are considered his children and by extension, his heirs; while for a woman, the simple act of giving birth to a child (biological) makes them (mother and child) rightful heirs of one another.[273]

If a man and woman fornicates, (Allah forbids), and a child is born as a result, whether or not they get married afterwards, the man is the biological father but NOT the

[271] Ibid., p. 19
[272] Muslim Code of the Philippines, Article 95
[273] Muhammad Imran, Op. Cit., p. 17

legal father of the child but the woman is both the biological and legal mother. Hence such a child will inherit from his mother ONLY and vice-versa.[274]

This is evident from a Hadith narrated by ‘Abdullah ibn ‘Amr ibn al-‘As who said: “The Prophet (peace be upon him) decided regarding one who was treated as a member of a family after the death of his father, to whom he was attributed when the heirs said he was one of them, that if he was the child of a slave-woman whom the father owned when he had intercourse with her, he was included among those who sought his inclusion, but received none of the inheritance which was previously divided; he, however, received his portion of the inheritance which had not already been divided; but if the father to whom he was attributed had disowned him, he was not joined to the heirs. If he was a child of a slave-woman whom the father did not possess or of a free woman with whom he had illicit intercourse, he was not joined to the heirs and did not inherit even if the one to whom he was attributed is the one who claimed paternity, since he was a child of fornication whether his mother was free or a slave.” Abu Dawud Collection.

The rulings above do not imply that Islam condones any of these acts. The perpetrators are to be duly punished according to Shari’ah. We are interested in the inheritance of innocent children that are products of these unfortunate incidences.[275]

A child will in addition inherit from his mother only after li’an (cursing for adultery) which happens when a man denies the paternity of his wife’s pregnancy and they end up swearing and cursing themselves. The Hadith of

[274] Ibid., p. 18
[275] Ibid.

‘Abdullah ibn ‘Amr ibn al-‘As above confirms this: “…but if the father to whom he was attributed had disowned him, he was not joined to the heirs…”[276]

5.2.4 ADOPTED CHILD

The Muslim Code of the Philippines does not provide the rule regarding the succession by an Adopted Child. However, by virtue of its Applicability clause, Article 187, The Muslim Law may be applied in suppletory manner.

In Shariah, the adopted child is not considered as real son. Hence, he doesn’t get any share in inheritance although guardian can add him in the Will (which is maximum of 1/3 of estate). Some of the evidences are found in the Holy Qur-an. Allah s.w.t. said:

وَمَا جَعَلَ أَدْعِيَآءَكُمْ أَبْنَآءَكُمْ ۚ ذٰلِكُمْ قَوْلُكُم بِأَفْوَاهِكُمْ ۖ
وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِى السَّبِيلَ ﴿٤﴾ ﴿033:004﴾

The Translation of the Qur-anic verse above is by (Abdullah Yousuf Ali):

“…nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way” (Al – Qur –an: 33:04)

ٱدْعُوهُمْ لِءَابَآئِهِمْ هُوَ أَقْسَطُ عِندَ اللَّهِ ۚ فَإِن لَّمْ تَعْلَمُوٓا۟ ءَابَآءَهُمْ فَإِخْوَٰنُكُمْ
فِى الدِّينِ وَمَوَٰلِيكُمْ ۚ وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَآ أَخْطَأْتُم بِهِۦ وَلَٰكِن
مَّا تَعَمَّدَتْ قُلُوبُكُمْ ۚ وَكَانَ اللَّهُ غَفُورًا رَّحِيمًا ﴿٥﴾ ﴿033:005﴾

[276] Ibid.

The Translation of the Qur-anic verse above is by (Taqi Usmani):

"Call them by (the name of) their (real (fathers; It is more equitable in the sight of Allah. And if you do not know their fathers, then they are your brothers in faith and your friends. There is no sin on you in the mistake you make, but in that which you do with intention of your heart; and Allah is Most-Forgiving, Very-Merciful." (Al – Qur – an: 33:05)

5.3 SPECIAL CASES FOR BROTHERS AND SISTERS

5.3.1 A BLESSED BROTHER CASE

A blessed brother is one by whose presence the Son's Daughter or Consanguine Sisters are made residuary heirs. Without him, the Son's Daughter or Consanguine Sisters take nothing of the inheritance.

1. If the Decedent's daughters exhaust the 2/3, the son's daughters take nothing except if there is an existence of a son's son in their own degree of relationship or even below their degree like the son son's son. The latter makes the son's daughters as residuary heirs. If not for him, the son's daughters take nothing. He is therefore a blessed brother because his presence enables them to be residuaries entitled to portions of the inheritance. For clarity, let us solve an example:

Table 137: Distribution of Shares of (SD, SS and 2D)
CASE NO. 1 IN THE PRESENCE OF LUCKY BROTHER (Son's Son)

A woman dies leaving her Husband, mother, father, daughter and the Son's Daughter and Son's Son					
Heirs	**Shares**	**ROP**	**Portions**	**New ROP 3x3=9**	**New Portions**
2 Daughters	**2/3**	**3**	**2**	**6**	**6**
Son's Daughter	**Residue**		**1**	**3**	**1**
Son's Son					**2**
In this case, Son's Daughter becomes residuary in another's right because of the presence of his brother (Son's Son).					

Notice the effect of his presence and his absence, respectively in the two example cases.

Table 138: Distribution of Shares of (SD and 2D)
CASE NO. 2 IN THE ABSENCE OF LUCKY BROTHER (Son's Son)

A woman dies leaving her 2 Daughters and Son's Daughter			
Heirs	**Shares**	**Root of the Problem**	**Portions**
2 Daughters	**2/3**	**3**	**2 + 1 = 3**
Son's Daughter	**Excluded**		**0**
• Son's Daughter is excluded while the residue is reverted (Ar – Radd) to the 2 Daughters			

2. In the same way, when the German sisters take the 2/3, the Consanguine Sisters are excluded except if they were with their brothers (consanguine brothers) who enable them to be as residuary heirs. Therefore, she will then be entitled to portions of the inheritance.

Table 139: Distribution of Shares of (CS, CB, and GS)
CASE NO. 1 IN THE PRESENCE OF LUCKY BROTHER (Consanguine Brother)

A woman dies leaving her 2 German Sisters, Consanguine Sister and Consanguine Brother					
Heirs	**Shares**	**ROP**	**Portions**	**New ROP 3x3=9**	**New Portions**
2 German Sisters	**2/3**	**3**	**2**	**6**	**6**
Consanguine Sister	**Residue**		**1**	**3**	**1**
Consanguine Brother					**2**
• In this case, consanguine sister becomes residuary in another's right because of the presence of his brother (consanguine brother).					

Notice the effect of his presence and his absence, respectively in the two example cases.

Table 140: Distribution of Shares of (GS and CS)
CASE NO. 2 IN THE ABSENCE OF LUCKY BROTHER (Consanguine Brother)

A woman dies leaving her 2 Daughters and Son's Daughter			
Heirs	**Shares**	**Root of the Problem**	**Portions**
2 German Sister	**2/3**	**3**	**2 + 1 = 3**
Consanguine Sister	**Excluded**		**0**
• Consanguine Sister is excluded while the residue is reverted (Ar – Radd) to the 2 German Sisters.			

5.3.2 AN UNLUCKY BROTHER CASE

An unlucky brother is one who by his presence deprives the sister of any portion of inheritance. For illustration, let us solve an example.

1. The wife dies leaving her husband, the mother, the father, the daughter, the son's daughter. The husband shall take 1/4, the mother shall take 1/6, the father shall also take 1/6, the daughter shall take 1/2 and the son's daughter shall take 1/6 as a complement of 2/3. The divisor is adjusted from 12 to 15.

Table 141: Distribution of Shares of (SD, D, M, F and H)
CASE NO. 1 IN THE ABSENCE OF UNLUCKY BROTHER (Son's Son)

***A woman dies leaving her Husband, mother, father, daughter and the Son's Daughter**			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	**1/4**	**12**	**3**
Father	**1/6**		**2**
Mother	**1/6**		**2**
Daughter	**1/2**		**6**
Son's Daughter	**1/6**		**2**
• In this case, the divisor is adjusted from 12 to 15.			

If in this case, a son's son is available, the son's daughter shall be excluded with him (the son's son) because of the exhaustion of the shares.

Table 142: Distribution of Shares of (SD, SS, D, M, F and H)
CASE NO. 2 IN THE PRESENCE OF UNLUCKY BROTHER (Son's Son)

A woman dies leaving her Husband, mother, father, daughter and the Son's Daughter and Son's Son			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	**1/4**	**12**	**3**
Father	**1/6**		**2**
Mother	**1/6**		**2**
Daughter	**1/2**		**6**
Son's Daughter	**Residue**		**0**

Son's Son			
• In this case, the divisor is adjusted from 12 to 13.			

Therefore, the son's son would have been an unlucky brother. Notice the effect of his presence and his absence, respectively in the two example cases.

Note that it is requirement in this situation that the heir who will make her (the daughter) a residuary is in her degree of relationship to the deceased. If his degree is lower than hers, like when the son's daughter concurs with son son's son, the latter cannot make the former a residuary heir and his presence cannot deprive her of her share because she is a sharer.

Moreover, the presence of son son's son who is below the son's daughter's degree of relationship to the deceased is allowed to make the latter a residuary if it is the only alternative by which she can inherit from its decedent.[277] However if his presence will merely deprive her of her share as a sharer, then he cannot make her a residuary because he is below in her degree of relationship to the deceased.[278]

2. The wife dies leaving the husband, the mother, the uterine brother, the German sister and the consanguine sister. See table below.

Table 143: Distribution of Shares of (CS, GS, UB, M, and H)
CASE NO. 1 IN THE ABSENCE OF UNLUCKY BROTHER (Consanguine Brother)

A woman dies leaving her Husband, Mother, Consanguine Sister, German Sister, and Uterine Brother			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	**1/2**	**6**	**3**
Mother	**1/6**		**1**
Consanguine Sister	**1/6**		**1**
German Sister	**1/2**		**3**
Uterine brother	**1/6**		**1**

[277] Al – Sabbuni, Op. Cit., p. 65
[278] Ibid., p. 80

- **In this case, the divisor is adjusted from 6 to 9.**

If in this case, a Consanguine Brother is available, the Consanguine Sister shall be excluded with him (the Consanguine Brother) because of the exhaustion of the shares.

Table 144: Distribution of Shares of (CS, CB, GS, UB, M, and H)
CASE NO. 2 IN THE PRESENCE OF UNLUCKY BROTHER (Consanguine Brother)

A woman dies leaving her Husband, Mother, Consanguine Sister, Consanguine Brother, German Sister, and Uterine Brother			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	½	**6**	**3**
Mother	**1/6**		**1**
Consanguine Brother	**RESIDUE**		**0**
Consanguine Sister			
German Sister	½		**3**
Uterine brother	**1/6**		**1**
• **In this case, the divisor is adjusted from 6 to 8.**			

Therefore, the Consanguine Brother would have been an unlucky brother. Notice the effect of his presence and his absence, respectively in the two examples.

5.3.3 AL-MUKHTASARAH CASE: FULL SISTER AND CONSANGUINE BROTHER/SISTER

The Muslim Code of the Philippines does not provide the rule regarding the succession by Al - Mukhtasarah. However, by virtue of its Applicability clause, Article 187, The Muslim Law may be applied in suppletory manner.

Al-Mukhtasarah means abridged. Full Brother excludes Consanguine Brother and Consanguine Sister. However, Full Sister does not completely exclude Consanguine Brother and Consanguine Sister rather she is restricted to her own share of 1/2. If there is anything left after 1/2 then Consanguine brother and Consanguine Sister

takes it. This situation is termed as Al-Mukhtasarah (abridged). For demonstration, let us solve an example.

1. One dies leaving a mother, consanguine sister, consanguine brother and German sister. The Mother takes 1/6, the German Sister takes 1/2 and the consanguine brother and sister take the residue at a ratio that the portion of one man is equal to the portion of two women. See table below.

Table 145: Distribution of Shares for AL – MUKHTASARAH CASE
CASE NO. 1: Without the presence of GRANDFATHER

A woman dies leaving her Mother, Consanguine Brother, Consanguine Sister and German Sister					
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 6x3=18**	**New Portions**
Mother	**1/6**	**6**	**1**	**3**	**3**
Consanguine Sister	**Residue**		**2**	**6**	**2**
Consanguine Brother					**4**
German Sister	**1/2**		**3**	**9**	**9**

2. One dies leaving a German sister, grandfather, consanguine brother and two consanguine sisters. The German sister takes 1/2, the grandfather takes 1/3 and the residue is taken by the consanguine brother and sister take the residue at a ratio that the portion of one man is equal to the portion of two women.

Table 146: Distribution of Shares of (GS, CB, 2CS and GF)
CASE NO. 2 Grandfather's Choice: One – third of Property

A man dies leaving his Grandfather, German Sister , 2 Consanguine Sister and Consanguine Brother					
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 6x4=24**	**New Portions**
Grandfather	**1/3**	**6**	**1**	**4**	**4**
German Sister	**1/2**		**3**	**12**	**12**
Consanguine Brother	**Residue**		**2**	**8**	**4**
2 Consanguine Sister					**4**

In this example, apportion 1/3 to the grandfather because it is favourable to him, the division of inheritance is not favourable to him because his portion would be reduced from 1/3 considering the presence of the consanguine brother and two consanguine sisters. The German Sister takes her prescribed share 1/2 and what is left is taken by the consanguine brother and two consanguine sisters at the ratio that the share of one man is equal to the share of two women. See **GRANDFATHER SURVIVING WITH BROTHERS AND SISTERS** of this chapter for full details.

5.3.4 GRANDFATHER SURVIVING WITH BROTHERS AND SISTERS

The Muslim Code of the Philippines does not provide the rule regarding the succession of Grandfather Surviving with Brothers And Sisters. However, by virtue of its Applicability clause, Article 187, The Muslim Law may be applied in suppletory manner.

A grandfather surviving with brothers and sisters is a true Grandfather. A true grandfather is one whose relation to the deceased is not interrupted by a woman, like father's father, even how high. If his relation to the deceased is interrupted by a woman, he is not a true Grandfather, like the mother's father. He will only be thu Rahim (singular of thawul arham) meaning distant kindred.

It is not and it has not been easy even during the regime of the companions (Al Sahaba) to decide the case of true Grandfather surviving with German and Consanguine brothers and sisters because there is no verse in the glorious Qur-an or Prophetic traditions explicitly applicable to it.[279]

5.3.2.1 THE SCHOOL OF THOUGHT ON TRUE GRANDFATHER

In view of the disagreement of the Prophet's companions themselves on the subject, The orthodox Muslim Schools of Thought were consequently divided into two as follows:

1. **The Abu Hanifa School of Thought**

On the basis of the statement of the companions, among them Abu Bakr, Ibn Abbas, Ibn Umar and others, Abu Hanifa maintained thet German, Consanguine and Uterine Brothers and Sisters cannot inherit in the presence of a true grandfather because the latter excludes the former. This argument is anchored on the assumption that a true grandfather takes the place of Father in the absence of the latter. This is also based on the principle mentioned in the Chapter on Al 'Asaba that when residuaries in their own right are numerous, the descendants are preferred over ascendants, the latter preferred over German or Consanguine Brothers and the latter further preferred over german or paternal Uncles.

The right to inherit shall not devolve to other direction on group unless the preceding direction or group is not available. Therefore, when the son survives with the father, the residuary heir in his own right is the son. When a brother concurs with paternal uncle, the brother is the residuary heir. When a true grandfather takes the place of father

[279] Al – Sabbuni, Op. Cit., pp. 88 – 89

and survives with decedent's brother, the former excludes the latter because the direction of descendant's brother, the former excludes the latter because the direction of ascendants precedes the direction of the German Brothers and Sisters as mentioned above.

2. The Jamhur School of Thought

This is the school of thought of Three of the Four Orthodox Muslim Schools (Al-Shafi'I, Al Hanbali and Al Maliki) and also of two disciples (Abu Yusuf and Muhammad) of Abu Hanifa adopting the view of Jamhur Al Sahaba and Tabi'in headed by the popular Imam Zaid Bin Thabit who was reputed to be knowledgeable about the inheritance Law among the prophet's companions and attested to by the prophet (May peace be upon him). This is the school of thought of Ali, Ibn Mas'ud, Al – Shabi and the People of Medina and others (May Allah like them all). They maintained that German and Consanguine Brothers and Sisters can inherit side by side with the grandfather and the latter cannot exclude them. They support their view by arguing that the grandfather and the Brothers are the same degree of relationship with the deceased. These are all related to the deceased through father. The grandfather is the origin of the father and the brothers are the branches of the father. Therefore, there is no reason why one of them should be allowed and the other denied the right to inherit from the deceased.

This School of thought is the correct and the most tenable one. It is followed and observed by the Shari'a Courts in many of the Muslim Countries because it is nearest to justice, well – grounded and designed for public interests.[280]

Further explanation on the School of Thought of the Jamhur:

[280] Al – Sabbuni, Op. Cit., pp. 88 - 91

In the Jamhur School of Thought, the Grandfather, while inheriting together with the decedent's brothers and sisters, may encounter two situations, namely:

- Situation I: He inherits together with the decedent's brothers and sisters only without any other heirs (sharers) like the wife, the mother, and Daughter and others.
- Situation II: He inherits together with the decedent's brothers and sisters with other heir or heirs (Sharers) like the mother, the husband, the daughter, the son's daughter and others.

In the first situation (i.e., the grandfather inheriting with the decedent's brothers and sisters only, the grandfather may opt to take any of the following which he deems advantageous to him.

1. Division (Muqasama) of the inheritance, or
2. One third of the entire inheritance.

Meaning of the Division of the Inheritance:

In this situation, consider the true grandfather as a German Brother. If he inherits with the German Sister alone, he takes double the share of the latter in accordance with the rule that the portion of a male is equal to the portion of two females. If the division of inheritance is not favourable to him, then he may take one – third of the inheritance if he so desires.[281]

When can Division of the Inheritance be favourable to the Grandfather?

The Division of the Inheritance be favourable to the Grandfather in five situations:

1. If he inherits with only one German Sister, in which case he is entitled to two – thirds (2/3) of the property.

[281] Al – Sirajiyyah, p. 41; Al – Sabunni, Op. Cit., p. 93

2. If he inherits with two German Sisters, in which case he takes one – half (1/2) of the property.

3. If he inherits with three German Sisters, in which case he takes two – fifths (2/5) of the property.

4. If he inherits with the German Brother, in which case he is entitled to one – half (1/2) of the property.

5. If he inherits with the German Brother and German Sister, in which case he is entitled to one – fifths (1/5) of the property.

When shall outright Division of Inheritance and the Share of One – third of the Property have the same effect on the grandfather?

1. If he inherits with two German Brothers;
2. If he inherits with four German Sisters;
3. If he inherits with a German Brother and two German Sisters.

In the above – mentioned three situation the grandfather is entitled of one – third of the inheritance. The division of Inheritance will offer an equal number of shares as the one – third to the Grandfather. Therefore, one – third and the outcome of the outright division of inheritance will have the same effect on the Grandfather.

When shall the One – third be favourable to the Grandfather?

One third of property is favourable to the grandfather in any case other than the eight situations we have discussed supra. If one dies leaving a grandfather with five or more sisters or a grandfather with two or more brothers and sisters, the grandfather shall take one – third of the property and the residue divided among brothers and sisters in a proportion that the share of one man is equal to the shares of two women. If we accord

him outright division of inheritance under these kinds of situation, it will be to his advantage considering that his share will be reduced to less than one – third of the property and which is not favourable to the grandfather.

Note: The rules applicable to German Brothers and Sisters of the decedent when they inherit with the grandfather, as explained above are applicable to Consanguine Brothers and Sisters in the absence of German Brothers and Sisters.[282]

In the second situation (The Grandfather inheriting with the decedent's brothers and sisters with other heir or heirs who are sharers), The Grandfather may select from any of the following which he may deem favourable to him:

1. Division of the Inheritance
2. One – Third of the Residue
3. One – Sixth of the Entire Property

It is a condition precedent in this case that the share of the grandfather be not less than one – sixth of the inheritance. He shall always be entitled to one sixth. If in the apportionment of portions to the sharers there is only one – sixth left, it will be given to him. On the other hand, if what would be left after the apportionment of portions to the sharers is less than one – sixth, he will be given one – sixth to the extent of excluding brothers and Sisters. This is the Consensus of the Orthodox Muslim School of Law and Fuqaha.

If after the distribution of portions to the sharers, it appears that outright division of the inheritance is more favourable to him, then he will be given the opportunity to avail of it. If, on the other hand, the giving of one – third of the residue is more

[282] Al – Sabunni, Op. Cit., pp. 89 - 95

favourable to him, then it will be given to him. Otherwise, he will be given one – sixth of the inheritance regardless of the residue because his prescribed share of one – sixth cannot, under any circumstances, be reduced.[283]

Illustrating Examples for situation II

1. The wife dies leaving her husband, grandfather and German brother. The husband takes his prescribed share of one – half and the residue is divided between the German brother and Grandfather. In this case the apportionment of the residue (which is 1/2) between the German Brother and the grandfather is more favourable to the grandfather than the one – third of the residue. It is also more favourable to him than taking the one – sixth because in this apportionment he will certainly get one – fourth considering that the residue is one half which is to be divided equally between him and the German Brother. See table below:

Table 147: Distribution of Shares of (GF, GB and H)
CASE NO. 1 Grandfather's Choice: Division of Hereditary Estate (Muqasama)

A woman dies leaving her Husband, Grandfather, German Brother					
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 2x2=4**	**New Portions**
Husband	**1/2**	**2**	**1**	**2**	**2**
Grandfather	**Residue**		**1**	**2**	**1**
German Brother					**1**

2. One dies leaving a mother, grandfather, two german brothers and two german sisters. The mother takes 1/6, the grandfather takes 1/3 of the residue and the remaining is divided among the two German Brothers and the two German Sisters. See Table Below:

[283] Al – Sabbuni, Op. Cit., p. 95 – 96

Table 148: Distribution of Shares of (GF, 2GB, 2GS and M)
CASE NO. 2 Grandfather's Choice: One – third of Residue

A man dies leaving his Mother, Grandfather, two German Brothers and two German Sisters					
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 2x3=6**	**New Portions**
Mother	**1/6**	**6**	**1**	**3**	**2**
Grandfather	**1/3 R**		**5**	**15**	**5**
2 German Brother	**Residue**				**10**
2 German Sister					

After the mother takes 1/6 and the grandfather takes 1/3 of the residue, the remaining part shall be divided among the residuary heirs (2 German Brothers and 2 German sisters) in a ratio such that the share of one man is equal to the shares of two women.

3. The wife dies leaving her husband, five daughters, Grandfather and Four german Brothers. The husband takes ¼, the daughter takes 2/3, the grandfather takes 1/6 and nothing is left for the german brothers because the share is exhausted the inheritance. The original divisor of the case has been increased from 12 to 13. See table below.

Table 149: Distribution of Shares of (GF, 4GB, H, and 5D)
CASE NO. 3 Grandfather's Choice: One Sixth of the Entire Estate

A woman dies leaving her Husband, Grandfather, five daughters, and four German Brothers			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	**1/4**	**12**	**3**
Grandfather	**1/6**		**2**
4 German Brother	**Residue**		**0**
5 Daughter	**2/3**		**8**

The original divisor of the case is 12 and increased to 13. The husband takes ¼ which is 3/12, the daughters take 2/3 which is 8/12, and the grandfather takes 1/6 which

is 2/12. The total portions are 13/12. The brothers are not given portions in accordance with the consensus of the Ulama.

4. The husband dies leaving two wives, daughter, son's daughter, mother, grandfather and ten German sisters. The two wives take 1/8, the daughter takes 1/6 as a complement of 2/3. The mother takes 1/6, the grandfather gets 1/6 and the ten German sisters take nothing because the shares have exhausted the inheritance. See table below.

Table 150: Distribution of Shares of (GF, 2W, D, SD, M, and 10GS)
CASE NO. 3 Grandfather's Choice: One Sixth of the Entire Estate

A man dies leaving his 2 Wives, Daughter, Son's Daughter, Mother, Grandfather and 10 German Sisters			
Heirs	**Shares**	**Root of the Problem**	**Portions**
2 wives	**1/8**	**24**	**3**
Daughter	**1/2**		**12**
Son's daughter	**1/6**		**4**
Mother	**1/6**		**4**
Grandfather	**1/6**		**4**
10 German Sisters	**Residue**		**0**

The original divisor of the case is 24 and increased to 27. The wives take 1/8 which is 3, the daughter takes 1/2 which is 12, the son's daughter takes 1/6 which is 4, the mother takes 1/6 which is 4, and the grandfather takes 1/6 which is 4. The total portion is 27. The divisor is increased and the 10 German Sisters take nothing because the sharers have exhausted the entire inheritance.

5. The wife dies leaving her husband, four daughters, mother, grandfather, two German sisters and three German brothers. The husband takes 1/4, the daughters take 2/3, the mother takes 1/6 and the sharers exhaust the estate but since the grandfather must be given his share of 1/6, the divisor must be increased, see table below.

Table 151: Distribution of Shares of (GF, H, 4D, M, GF, 2GS and 3GB)
CASE NO. 3 Grandfather's Choice: One Sixth of the Entire Estate

*A woman dies leaving her husband, 4 Daughter, Mother, Grandfather, 2 German Sisters and 3 German Brothers *			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	**1/4**	**12**	**3**
4 Daughter	**2/3**		**8**
Mother	**1/6**		**2**
Grandfather	**1/6**		**2**
2 German Sisters	**Residue**		**0**
3 German Brothers			

The original divisor of the case is 12 and increased to 15. The husband takes 1/4 which is 3/12, the daughters take 2/3 which is 8/12, the grandfather takes 1/6 which is 2/12 and the mother takes 1/6 which is 2/12. The total portions are 15/12. The brothers and sisters are not given portions in accordance with the consensus of the Ulama.

Under the circumstance mentioned above the grandfather is sharer and he has to receive his prescribed share of one – sixth even to the extent of increasing the divisor.

Note: In our previous discussions, only the German brothers and sisters are mentioned. Take note that the rules are applicable to consanguine brothers and sisters in the absence of the German brothers and sisters. In other words, German brothers and sisters exclude consanguine brothers and sisters.

THE RULE WHEN THE GERMAN AND CONSANGUINE BROTHERS AND SISTERS SURVIVE AT THE SAME TIME WITH THE GRANDFATHER

Earlier, only the situations wherein the grandfather survives with the German brothers and sisters or with the consanguine brothers and sisters are projected. But there are situations wherein these two kinds of brothers and sisters concur with the grandfather at the same time.

If the German and consanguine brothers and sisters survive together with grandfather, they are to be considered as if they belong to only one kind. Then it will be unfavourable to the grandfather because in the division of the estate they will be counted as heirs regardless of their kind. After the grandfather has taken his prescribed share, then the German brothers and sisters take the residue due to the exclusion of the consanguine brothers and sisters.

In the case, therefore, the presence of consanguine brothers and sisters is unfavourable to the interest of the grandfather. Actually the consanguine brothers and sisters cannot inherit with the German brothers and sisters because the latter exclude the former except in the situation where the German sister concurs with the consanguine brothers and sisters.[284] See the Special Case on **AL-MUKHTASARAH CASE** of this chapter for full details.

For clarity, let us solve an example:

1. One dies leaving a grandfather, a German brother and a consanguine brother. In this example, count the consanguine brother as an heir. Therefore, apportion 1/3 to the grandfather and 2/3 to the German and consanguine brothers. Then and there the German brother excludes the consanguine brothers and takes the entire 2/3. See table below:

Table 152: Distribution of Shares of (GF, GB, and CB)
CASE NO. 1 Grandfather's Choice: One - Third

***A woman dies leaving her Grandfather, German Brother and Consanguine Brother ***			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Grandfather	**1/3**	**3**	**1**
German Brother	**Residue**		**2**
Consanguine Brother	**Excluded by GB**		**0**

[284] Al – Sabbuni, Op. Cit., p. 100

In this case, apportion to the grandfather is 1/3 in accordance with the principle mentioned earlier that he can opt for either 1/3 or for an outright division of the inheritance whichever is favourable to him. In this situation, 1/3 and outright division of the inheritance has the same effect on him since he is to be treated like a German brother and the inheritance is divided among three. But after the grandfather takes the share, the share of the consanguine brother is taken by the German brother.

Note: if the grandfather survives with the uterine brothers and sisters, the latter shall be excluded because their inheritance is only possible in (kalala), meaning there is no available ascendants and descendants of the decedent. It must be also noted that German brother's sons and consanguine brother's son cannot inherit with the grandfather.[285]

5.3.3 AL-AKDARIYAH (TROUBLESOME) CASE

The Muslim Code of the Philippines does not provide the rule regarding the succession by Al - Akdariyah. However, by virtue of its Applicability clause, Article 187, The Muslim Law may be applied in suppletory manner.

This case originated with a woman from the descendants of Akdar. Hence it is named "Al – Akdariya". It has been said that her case troubled the school of thought of Zayid Bin Thabit. It becomes therefore a special case because it has deviated from well-established principle. Hence the case is called Al – Akdariyyah but many others had other names for that.[286]

[285] Al – Sabbuni, Op. Cit., p. 103
[286] Alauya, Op. Cit., p. 70

For clarity, take the case of a woman who dies leaving her Husband, Mother, Grandfather and German Sister. According to the previous school of thought of Zaid Bin Thabit, the German Sister is excluded because the Husband takes half, the Mother receives one third and the residue (which is one sixth) is the share of the Grandfather. It is not possible for the German Sister to share with the Grandfather in the one – sixth because it is invalid to reduce the prescribed share of the Grandfather under this situation. What is possible is to exclude the German Sister in accordance with the previous principle. This is also the school of thought of Imam Abu Hanifa and Imam Ahmad Bin Hanbal, (Allah likes them both).[287] See table below.

Table 153: Distribution of Shares of AL – AKDARIYAH CASE
CASE NO. 1 By Basic Computation

A woman dies leaving her husband, Mother, Grandfather and German Sister			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	**1/2**	**6**	**3**
Mother	**1/3**		**2**
Grandfather	**1/6**		**1**
German Sister	**Excluded**		**NO SHARE**

However, This is not acceptable according to most Jurists because full sister cannot be excluded by husband, mother or grandfather. For this reason, the problem is referred to as "troublesome."[288]

But Zaid Bin Thabit deviated from the established principle and prescribed in this case a share of one – half for the German Sister and increased the divisor from six to nine and thereafter added a portion of the German sister to the portion of grandfather and

[287] Ibid.
[288] Muhammad, Op. Cit., p. 96

divided the combined portion to them at a ratio that the share of one man is equal to shares of two women. By way of correcting it, the divisor is increased to 27. The husband then takes 9, the mother takes 6, the grandfather takes 8 and the German Sister takes 4. This is adopted by Imam Al – Shafi'i and Imam Malik as their school of thought.[289] See table below.

Table 154: Distribution of Shares of AL – AKDARIYAH CASE
CASE NO. 2 By Special Computation

A woman dies leaving her husband, Mother, Grandfather and German Sister						
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 9 x 3 = 27**	**New Portion**	
Husband	**1/2**	**6**	**3**	**3**	**9**	
Mother	**1/3**		**2**	**2**	**6**	
Grandfather	**1/6**		**1**	**4**	**12**	**8**
German Sister	**1/2**		**3**			**4**

- The original Divisor is 6 increased to 9 and corrected to 27. In this case, Grandfather acts as a full brother, so he takes twice the portion of full sister. Moreover, Consanguine sister may replace a full sister and the rule of Akdariyya will still be valid

This was how the problem was solved by Zaid ibn Thabit, the most knowledgeable companion of the Holy Prophet (peace be upon him) in the Science of Inheritance. May Allah be pleased with them all. Ameen.

5.3.5 AL-HIMARIYYAH CASE: FULL BROTHER AND UTERINE BROTHERS

This is a famous case known as Al-Himariyyah (donkey) case or famously referred to as "our father is stone cast into the sea.." Case or Al-Hajariyyah (the stone) case. This case was decided by Umar ibn Al-Khattab (RA), however, later jurists have disagreed with Caliph Umar.

[289] Alauya, Op. Cit., p. 70

Under the Muslim Code of the Philippines, the full brother shall, if nothing is left for him after the distribution of shares and he survives with uterine brothers, participate with the latter in the one-third of the hereditary estate per capita.[290]

In the joint inheritance problems, in the presence of uterine brothers, real brothers are excluded. Hanafis and Hanbalis subscribe to this practice, whereas, Shafiis and Malikis include them with the uterine brothers and sisters in the one third share of inheritance.[291]

Heirs are: Deceased woman left behind a Husband, 1 Mother, 2 Uterine Brothers, and 2 Full Brothers.Based on Hanafi/Hanabli fiqh this case is decided as follows:

- Mother gets 1/6 and Husband gets 1/2
- Uterine Brother and Sister inherits 1/3 jointly (1/6 each)
- Full Brothers get residue. But since there is no residue, they are left with nothing!

Table 155: Distribution of Shares for AL – HIMARIYYAH CASE
CASE NO. 1 By Basic Calculation

A woman dies leaving her husband, Mother, 2 Uterine Brothers and 2 German Brother			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	**1/2**	**6**	**3**
Mother	**1/6**		**1**
2 Uterine Brothers	**1/3**		**2**
2 German Brothers	**Residue**		**0**

On the other hand, Umar bin Al - Khattab decided this case as following:

[290] Muslim Code of the Philippines, Article 122 (2)
[291] Kakhakel, Syed Shabbir Ahmed, "Islamic Inheritance Law – Calculations Simplified" 15 Jamad ud Thani, 1427 H, p. 82

■ Background: A Deceased woman left behind a Husband, 1 Mother, 2 Uterine Brothers, and 2 Full Brothers. Umar bin Al - Khattab (RA) first decided that Husband gets 1/2, Mother gets 1/6, 2 Uterine Brothers gets 1/3. The Full Brothers are entitled to remaining residue but since there is no residue, they get nothing. Despite that the distribution was correct; Two Full brother protested on the ground that he was more related to the deceased than the uterine brothers since he has the same father and mother with her whereas uterine brothers have the same mother with her only. Two full brothers argued that even if the father was a donkey (Himar) or a stone cast into the sea and they have no paternal relationship, they still had the same and equal relationship with the deceased as the Uterine Brothers through the same "Mother". Umar bin Al-Khattab (ra) reconsidered and made the final verdict as Husband gets 1/2, Mother gets 1/6, 2 Uterine Brothers gets 1/6 and 2 Full Brothers get 1/6 (hence they share 1/3 equally). The final table then becomes as follows:

Table 156: Distribution of Shares for AL – HIMARIYYAH CASE
CASE NO. 2 By Special Computation

A woman dies leaving her husband, Mother, 2 Uterine Brothers and 2 German Brother					
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 6x2=12**	**New Portions**
Husband	**1/2**	**6**	**3**	**6**	**6**
Mother	**1/6**		**1**	**2**	**2**
2 Uterine Brother	**1/3**		**2**	**4**	**2**
2 German Brother					**2**

Imams Malik and As-Shafi'i supported this verdict though Ahmad ibn Hanbal and Abu Hanifa opposed it for the fact that full brother is a residuary who by definition inherits the whole estate when alone or takes the residue, and if nothing is left

(as in this problem), he goes empty handed. Whereas the two 'Umar cases are "heir-specific" i.e. applicable when the heirs are wife, mother and father ONLY or husband, mother and father ONLY.[292] Partnership is also applicable when the following are present:

i) More than two uterine brothers, two or more uterine sisters or a combination of uterine brother(s) and sisters(s) because they all inherit 1/3 of the estate.

ii) More than one full brother or a combination of full brother(s) and full sister(s) since they are equally entitled to residue.

Al-Himariyyah rule does not apply if the heirs comprises of:

i) One uterine brother or sister given that he/she gets 1/6 of the estate and this will distort the problem.

ii) One or more full sisters ONLY. The reason is that they have fixed shares.

iii) One or more consanguine brother(s) or sister(s). Though they are also residuaries, but are related to the deceased through the father only. Al-Himariyyah rule doesn't apply to Consanguine brother/sister (as they don't have same mother) Al-Himariyyah rule override principle of Asabah (male / female gets same share).

Jurist considers it's unfair that Full Brothers (who are closer relative to deceased) gets nothing while uterine brother gets a share. Hence, some of highly respected Companions of Prophet (pbuh) including Umar bin Al-Khattab, Uthman bin Affan, Abdullah bin Masud, Zaid bin Thabit, as well as Imam Malik and Imam Shafii (may Allah be pleased with all of them) adopted a rule (now well known as Al-Himariyyah

[292] Ibid. p. 87

Rule) that when there is Uterine siblings inheriting with full siblings, they all share 1/3 portion equally.

Two famous jurists, Imam Abu Hanifa and Imam Ahmed bin Hanbal did not adopt Al-Himariyyah Rule. They argued that Ashab-ul-Furud has priority and secondly Al-Himariyyah Rule goes against Quran in two counts:

A) Quran states that two or more Uterine Siblings should get 1/3 (which they don't get under Al - Himariyyah Rule), and

B) In case of Full Brother and Full Sisters male should get twice as much as female, which doesn't happen in case of Al-Himarriyah Rule, where Full Brother/Sister inherits equally. They argued that Quran's rule must be left unchanged, even if under some circumstances the Umar bin Khattab's ruling was sound.

5.4 Group 3 : SPECIAL CASES DUE TO SPECIAL CIRCUMSTANCES

5.4.1 UMARIYATAINI

The Muslim Code of the Philippines does not provide the rule regarding the Umariyataini Cases. However, by virtue of its Applicability Clause, Article 187, The Muslim Law may be applied in suppletory manner.

Umariyataini signifies two cases decided by Caliph Umar bin Al – Khattab (RA). These stand as precedents for the mother's share of 1/3 of the Residue. The share of the Mother when she concurs with the father is one – third of the decedent's estate as discussed ahead. However, there are two cases decided by Umar (RA) and concurred in and widely accepted by his companions (Jamhur) wherein the mother receives only one third of the residue (after the share of one of spouses had been given). The two instances

are also called Al – Garawaini (two Bright Stars) because of their popularity.[293] The exmples of the two are as follows: Supposing a deceased is survived by his parents (mother and father) only, how will his estate be distributed among them? See table below:

Table 157: Distribution of Shares of (F and M)
CASE NO. 1 By Basic Calculation

A woman dies leaving her Mother and her Father			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Mother	**1/3**	**3**	**1**
Father	**Residue**		**2**

This shows that father inherits twice the share of mother in the absence of children or any descendant through son. This is in line with the evidence from the Holy Qur-an, لِلذَّكَرِ مِثْلُ حَظِّ الْأُنْثَيَيْنِ as to the effect: "(Al – Qur-an, 4:11) to the male, a portion equal to that of two females;"

However, consider the following two Cases:

Table 158: Distribution of Shares of (W, M and F)
CASE NO. 1 By Basic Calculation

A man dies leaving his Wife, his Mother and his Father			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Wife	**¼**	**12**	**3**
Mother	**1/3**		**4**
Father	**Residue**		**5**

[293] Alauya, Op. Cit., pp. 31 – 32

Table 159: Distribution of Shares of (H, M and F)
CASE NO. 2 By Basic Calculation

A woman dies leaving her Husband, her Mother and her Father			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Husband	½	**6**	**3**
Mother	**1/3**		**2**
Father	**Residue**		**1**

Observe that in Case 1, the number of portions of mother is almost the same with that of the father; while in Case 2, her number of portions doubles his. Though the distributions are correct, they violate the principle that father gets twice the share or number of portions of mother in the absence of children or descendants through son. These pair of problems arose during the Caliphate of ‘Umar. That is why they are symbolically referred to as ‘Umariyyataini. The resolution was that instead of giving mother 1/3 of the estate, she should be given 1/3 OF THE RESIDUE so as to maintain the ratio of 2 is to 1 between father and mother.[294]

Therefore, Case No. 1 becomes:

Table 160: Distribution of Shares for UMARIYATAINI CASE
CASE NO. 1 By Special Calculation

A man dies leaving his Wife, his Mother and his Father			
Heirs	**Shares**	**Root of the Problem**	**Portions**
Wife	**1/4**	**4**	**1**
Mother	**1/3 R**		**1**
Father	**Residue**		**2**

[294] Muhammad, Op. Cit., p. 85

Similarly, Case No. 2 can be resolved as follows

Table 161: Distribution of Shares for UMARIYATAINI CASE
CASE NO. 2 By Special Calculation

A woman dies leaving her Husband, her Mother and her Father					
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 2 x 3**	**New Portions**
Husband	**1/2**	**2**	**1**	**6**	**3**
Mother	**1/3 R**		**1**		**1**
Father	**Residue**				**2**

Recall that in the absence of father, grandfather replaces him but does not inherit all his privileges according to the more popular view of scholars. As stated earlier, this is because father excludes full and consanguine siblings but grandfather cannot exclude them. 'Umariyyataini is another. Unlike father, grandfather does not have the "power" to relegate mother from 1/3 of the estate to 1/3 of the residue. Therefore, if grandfather were to take the place of father in Cases 1 and 2, he will be given 5 and 1 portions respectively. Adjustments shall not be made.[295]

5.4.2 SIMULTANEOUS DEATH - MANASIKHA (2-IN-1 INHERITANCE)

Under the Muslim Code of the Philippines, If, as between two or more persons who are called to succeed each other, there is a doubt as to which of them died first, whoever alleges the death of one prior to the other shall prove the same; in the absence of such proof, it is presumed that they died at the same time and there shall be no transmission of rights from one to the other. However, the successional rights of their respective heirs shall not be affected.[296]

[295] Ibid., p. 86
[296] Muslim Code of the Philippines, Article 12

Dictionary meaning of manasikha is to revoke or compensate. This terminology is basically used to describe the procedure of distributing shares of an heir received from predecessor after his/her demise, between his/her bonafide heirs. It is possible for an heir to not only inherit the estate of the predecessor but also one of the other heirs due to his/her death. The jurists have therefore formulated an easy procedure for the simultaneous distribution of this kind of inheritance. General principle of Mirath is that the claimant of inheritance must be alive at the time of death of the predecessor. Hence, if two mutual heirs die simultaneously, then they cannot inherit from each other.[297]

a. Hanbali, Shafii and Maliki jurists profess that if sequence of death of two mutual heirs is not ascertained, then it is assumed to be simultaneous. They cannot inherit from each other; this is based on practice of Hazrat Abu Bakr and Hazrat Umar Al-Khttab (RA).

b. Shafiis believe that if sequence of death of two mutual heirs cannot be ascertain, then the inheritance is suspended until it is ascertained or there is mutual agreement amongst the heirs on who died first.

c. Hanafis think that even if sequence cannot be ascertained; they can still inherit from each other. This is based on view of Hazrat Ali (RA) and Hazrat Abdullah bin Masood (RA).

d. If there is simultaneous death of mutual heirs and sequence is known, then this situation is called Ma'nasikha. Inheritance is divided number of times i.e. firstly between immediate kin and then their heirs.

[297] Kakakhel, Op. Cit., p. 66

Original method involves listing the heirs of each dead person and their shares against each. Once the estate of the predecessor has been ascertained; divide it between the eligible heirs. There after distribute estate of the remaining dead amongst their heirs including that received from others. Putting a circle against the name of every dead person, keep on adding his/her receivable shares. To simplify calculations personal assets of the dead should be included here. In order to counter check the calculations, add the personal estates of each dead with the estate of the predecessor, If the sum of the share of all heirs is equal to this figure, then the solution is correct otherwise it has to be re done. To elucidate the working of the both methods, let's solve an example.[298]

Say a man passes on leaving behind his wife and children. Before his estate is distributed, the wife also dies. Note that although the wife is absent, she will still inherit from the husband because she was alive at the time he died. So, the husband's estate will be distributed among the wife and children. Thereafter, wife's estate will be shared among the children. But instead of doing this one after the other, the two distributions can be at once. It's a bit complex especially if the second deceased have heirs who are not entitled to inherit from the first deceased.[299]

The General principle of Mirath is that the claimant of inheritance must be alive at the time of death of decedent. Hence, if two mutual heirs die simultaneously, then they cannot inherit from each other. Example of this is if two brothers died simultaneously or father or son dies simultaneously etc. If there is simultaneous death of mutual heirs and

[298] Ibid., p. 67
[299] Muhammad, Op. Cit. p. 92

sequence is known, then this situation is called Manasikha Then inheritance is divided multiple time, one for the first person and then for subsequent person.[300]

When does succession to vested interests arise?

Succession to vested interests arises when one or more heirs who are due to receive their shares out of the estate of a decedent die before the distribution of the said inheritance (mirath). Naturally, the share of the heir that would have been received were it not for his death will form part of the heir's Inheritance (mirath) and will then, in turn, be transmitted to hi heirs. In this situation, the problems should be simultaneously solved through a merger of the two decedent situation (Al - Jami'a) which would be solved as one.[301]

The three situations most likely to happen in the succession to vested interests:

1. That the heirs of the second decedent are themselves the heirs of the first decedent. In this case, the problem will not vary. For clarity, Let us solve an Example. A father dies leaving his five sons, as his only heirs. Before the distribution of the father's inheritance, one of the sons dies leaving his brothers as his only heirs, The Inheritance (mirath) left by their father, therefore, shall be divided among his remaining four sons as if the deceased son has not occurred with his brothers. Here the inheritance of the second decedent shall likewise be equally distributed among his brothers.[302]

[300] Razi, Op. Cit., p. 57
[301] Al ' Athbu Al Faid fi Alfiyyah Al – Faraidh, p. 152
[302] Alauya, Op. Cit., p. 105

Table 162: Distribution of Shares of (5S)

Heirs	Shares	ROP	Portions
Son	Residue	4	1
Son			1
Son			1
Son			1
Son	DECEASED		

2. That the heirs of the second decedent are themselves the heirs of the first decedent with variation as to their relationship with the decedents.

For clarity, Let us solve an Example. A man with two wives has a son by his first wife and three daughters by his second wife. He dies leaving his two wives, and four children. Before the division of his estate among the above mentioned heirs, one of his daughters died. There is no doubt that the heirs of the first decedent except the first wife are the heirs of the second decedent with variation as to their relationship with the two decedents.[303]

Table 163: Distribution of Shares of Two Cases

First Decedent Husband					Second Decedent Daughter				MERGED	
Heirs	Shares	ROP	Portions 8	New Portion 8x5=40	HEIRS	Shares	Root of the Problem	Portions	40x6 = 240	
2W	1/8	8	1	5					30	
D	R		7	7					42	
D				7					42	
S				14				6	84	
D				7	GS	2/3	6	4	14	42

[303] Ibid.

					GS				14	
					CB	R		1	7	
					M	1/6		1	7	

The son in the first problem becomes a consanguine brother in the second problem and the daughters in the first problem turns German Sister in the second problem. Therefore, the distribution of the inheritance here will vary. A merger of the two – decedent situation (Al Jami'a) is necessary which should be solved simultaneously.[304]

3. That the heirs of the second decedent are not the heirs of the first decedent or some of them may inherit from both. In this situation, a merger is apparently needed of the two – decedent situation (Al – Jami'a) combining and finally resolving the two problems because the distribution of inheritance (mirath) to the heirs will have variations.[305]

Procedure of merger in the succession to vested interests:

It is necessary to lay down the following steps for mergers (Al Jami'a) to reconcile the two or more existing situations.[306]

1. Solve for the distribution problem of the firs decedent's estate and give every heir his/ her share including that of the second decedent as though concurring with all the other heirs.

2. Solve the problem of the second decedent in the distribution of his inheritance (mirath) to his lawful heirs and correct it, if needed, without looking into the first problem.

[304] Ibid., pp. 105 – 106
[305] Al ' Athbu Al Faid fi Alfiyyah Al – Faraidh, pp. 152 – 153
[306] Aluya, Op. Cit., p. 106

3. Compare the share of the second decedent in the first problem and the total of all shares allotted to those inheriting from him in the second problem.

4. Compare the two problems to find out the existence of Al – mumathala, meaning equality; Al muwafaqa, meaning in agreement or Al mubayyana, meaning disagreement between the share of the second decedent in the first problem and the totality of all the shares of his heirs in the second problem.

If there exists equality (mumathala) between the shares of the second decedent in the first problem and the totality of shares allotted to those inheriting from him in the second problem, the divisor of the first problem as corrected itself a summation or a common denominator (Al Jami'a) to resolve the two problems.[307]

If there is in agreement (Muwafaqa) between the portion of the second decedent and the divisor in the second case involving his heirs, multiply the divisor in the first case by the (wafq) agreed point like half, third and the like of the divisor in the second case and the result is the common denominator (al Jami'a) of the two portions.[308]

If there exists disagreement (mubayyana) between the portion of the second decedent and the divisor in the second case involving his heirs, multiply the divisor in the first case by the divisor in the second case the result is called Al Jami'a or the common denominator that can simultaneously solve the two problems. In Summary, see table below.

[307] Al ' Athbu Al Faid fi Alfiyyah Al – Faraidh, pp. 153 – 154
[308] Ibid.

Table 164: Summary of Merger

Case		Therefore
Mumathala (Equality)	if the portion of the second decedent is equal to the divisor (ROP) of the heir in the second case	The Divisor (ROP) in the First Case is Consider as the common denominator (Al – Jami'a) in order to solve the two Cases Simultaneously
Muwafaqa (In agreement)	if the portion of the second decedent is in agreement to the divisor (ROP) of the heir in the second case, like in half, in third etc.	The Divisor (ROP) in the First Case is multiplied by the (wafq) agreed point like half, third and the like of the divisor (ROP) in the second case. The result is called Al Jami'a or the common denominator that can simultaneously solve the two problems.
Mubayyana (Disagreement)	if the portion of the second decedent is in disagreement to the divisor (ROP) of the heir in the second case	The Divisor (ROP) in the First Case is multiplied by the divisor (ROP) in the second case. The result is called Al Jami'a or the common denominator that can simultaneously solve the two problems.

The example where there exists equality (Al Mumathala)

A man dies leaving his wife, mother, son's daughter and his father. Thereafter son's daughter dies leaving her husband, 2 sons, 3 daughters and her mother.[309]

[309] Alauya, Op. Cit., pp. 107

Table 165: Distribution of Shares where there exists equality (Al Mumathala)

First Decedent Husband			Second Decedent Son's Daughter				MERGED
Heirs	Shares	Portions 24	HEIRS	Shares	Root of the Problem	Portions	Al – Jami'a 24
Wife	1/8	3					3
Mother	1/6	4					4
Father	1/6+R	5				12	5
Son's Daughter	½	12	H	1/4	12	3	12
			M	1/6		2	
			2S	R		7 (4)	
			3D			(3)	

Explanation:

In this case observe that the Jami'a (24) is itself the divisor of the first case because there exists tamathul (equality) between the portion of the second decedent which is 12 and the divisor in the second case involving his heirs which also is 12. The guiding principle in a situation when there is tamathul (equality) is to consider the divisor of the first case as the Jami'a when the portion of the second decedent is to be distributed to her heirs.[310]

[310] Ibid., p. 108

Example where there exists Agreement (Al Muwafaqa)

A wife dies leaving her husband, daughter, son's daughter and Son's Son. Thereafter, the husband dies leaving his second wife, mother, two consanguine sisters and uterine brother.[311] See table below.

There exists agreement (muwafaqa) between them on the third and one – third of 15 which is 5, i.e., the agreed point of the two problems.

Table 166: Distribution of Shares where there exists Agreement (Al Muwafaqa)

<table>
<tr><th colspan="4">First Decedent
1st Wife</th><th colspan="4">Second Decedent
Husband</th><th>MERGED</th></tr>
<tr><th>Heirs</th><th>Shares</th><th>Portions
4</th><th>New Portion
4x3=12</th><th rowspan="2">HEIRS</th><th rowspan="2">Shares</th><th rowspan="2">Root of the Problem</th><th rowspan="2">Portions</th><th>Al – Jami'a
12x5 = 60</th></tr>
<tr><td>D</td><td>1/2</td><td>2</td><td>6</td><td>30</td></tr>
<tr><td>SS</td><td rowspan="2">R</td><td rowspan="2">1</td><td>2</td><td></td><td></td><td></td><td></td><td>10</td></tr>
<tr><td>SD</td><td>1</td><td></td><td></td><td></td><td></td><td></td><td>5</td></tr>
<tr><td colspan="4"></td><td></td><td></td><td></td><td>15</td><td></td></tr>
<tr><td rowspan="4">H</td><td rowspan="4">1/4</td><td rowspan="4">1</td><td rowspan="4">3</td><td>W</td><td>1/4</td><td rowspan="4">12</td><td>3</td><td rowspan="4">15</td></tr>
<tr><td>M</td><td>1/6</td><td>2</td></tr>
<tr><td>2CS</td><td>2/3</td><td>8</td></tr>
<tr><td>UB</td><td>1/6</td><td>2</td></tr>
</table>

Explanation:

The divisor of the first case has been corrected to 12 and the original divisor of the second case is 12 and increased to 15. There exists an agreement on a third between the portions of the second decedent who is the husband and the share of his heirs in the second case (divisor of the second case). The one – third of 15 is 5 and is multiplied by

[311] Ibid., p. 109

the rectified divisor of the first case. The result is 60 which is the Al – Jami'a, a merger of the two cases.

Example where there exists disagreement (Al Mubayana)

A wife dies leaving her husband, father, mother and two daughters. Thereafter, the husband dies leaving his german sister, mother, second wife and uterine brother.[312] See table below.

Table 167: Distribution of Shares where there exists Disagreement (Al Mubayana)

<table>
<tr><th colspan="4">First Decedent
1st Wife</th><th colspan="4">Second Decedent
Husband</th><th colspan="3">MERGED</th></tr>
<tr><th>Heirs</th><th>Shares</th><th>ROP</th><th>Portions
15</th><th rowspan="2">HEIRS</th><th rowspan="2">Shares</th><th rowspan="2">Root of the Problem</th><th rowspan="2">Portions
13</th><th colspan="2">Al – Jami'a
15x13 = 195</th></tr>
<tr><td>F</td><td>1/6</td><td rowspan="4">12</td><td>2</td><td colspan="2">26</td></tr>
<tr><td>M</td><td>1/6</td><td>2</td><td colspan="4">26</td></tr>
<tr><td>2D</td><td>2/3</td><td>8</td><td colspan="4">104</td></tr>
<tr><td rowspan="4">H</td><td rowspan="4">¼</td><td rowspan="4">3</td><td>GS</td><td>1/2</td><td rowspan="4">12</td><td>6</td><td>18</td><td rowspan="4">39</td></tr>
<tr><td>M</td><td>1/6</td><td>2</td><td>6</td></tr>
<tr><td>W</td><td>1/4</td><td>3</td><td>9</td></tr>
<tr><td>UB</td><td>1/6</td><td>2</td><td>6</td></tr>
</table>

Explanation:

The original divisor of the first case is 12 and is increased to 15 and the original divisor of the second case is likewise 12 and increased to 13. The second decedent (who is the husband) is entitled to 3 portions. There exists a disagreement between this number and the increased divisor of the second case which is 13. Therefore, the divisor of the second case is multiplied with the divisor of the first case i.e. (13 x 15 =195) and the

[312] Ibid., pp. 111 - 112

result is 195. This is the Al Jami'a or the common denominator that can simultaneously solve the two problems.

We multiply 3 with the portion of every heir in the Jami'a (or the common denominator). To check the accuracy of the correction of the problem, we multiply 3 with 13 (3 x 13 = 39) and the result is 39 and then see if it tallies with the total of the portions of the heirs in the second problem. In the given problem, the total of the portions of the heirs in the second case is 39. Hence it is accurate.

Note: it is possible that there may arise more than one common denominator (Al – Jami'a) when one dies, then followed by the death of the second, the third, the fourth and the fifth before the distribution of their respective heirs. In this case, follow the same procedure in the above given examples.

5.4.3 NEGOTIATION IN THE INHERITANCE

The Muslim Code of the Philippines does not provide the rule regarding Negotiation in the Inheritance. However, by virtue of its Applicability clause, Article 187, The Muslim Law may be applied in suppletory manner.

One or more heirs may negotiate his / their share in the inheritance for and in favour of the entire heirs or merely for and in favour of one or more of the heirs for some consideration. This is permissible in Shari'a. It has been narrated that Abd Al Rahman Bin 'Auf (may Allah be pleased with him) had four wives and when he died one of his wives (Tumadhir Bin Al Asbaq) negotiated her share of one – fourth of one – eighth in consideration of one hundred thousand dirham.[313]

[313] Ibid., p. 112

Procedure in the negotiation:

When an heir negotiates his/ her share in the inheritance two situations may occur: 1) negotiation may be for and in behalf of the entire heirs in a given case; or 2) it may be merely for one or more of them.[314]

FIRST SITUATION

If the negotiation is for and in favour of the entire heirs, the problem has first to be corrected. Thereafter, the share of the heirs whose share is negotiated shall be deducted from the corrected problem as if he has received his corresponding share. The balance shall be distributed between or among the other heirs. The total of the portions of the other heirs shall be the divisor of the case. For clarity, let us solve an example.[315]

Example: A husband dies leaving a father, a daughter and a wife and the inheritance is one house and P4,200. The other heirs negotiate with the wife and she accepts the house as her share leaving her share in the P4,200 for and in favour of the other heirs concurring with her in the problem. In this case, the inheritance of P4,200 is divided between the father and daughter. The number of their portions is the number of divisor of the problem.

Table 168: Distribution of Shares of (W, F and D)

Heirs	Shares	Root of the Problem	Portions
Wife	**1/8**	**24**	**3**
Father	**1/6 + Residue**		**4+5 = 9**
Daughter	**1/2**		**12**

The divisor of this problem is originally 24 disregarding the share of the wife which is 3 and already negotiated, the remainder is 21 and will instead become the

[314] Ibid.
[315] Ibid., pp. 112 – 113

divisor of the problem. It will then be divided between the father and the daughter as follows: P4,200 is divided by 21 = P200 per one portion.

Table 169: Computation of Shares of (F and D)

Heirs	Computation
Father's Portion:	**9 x 200 = P1,800**
Daughter's Portion:	**12 x 200 = P2,400**
	Total = P4,200

The computation may likewise be done as follows:

Table 170: Distribution of Shares of (W, F and D)

Heirs	Shares	Root of the Problem	Portions
Wife	**1/8**	**8**	**1**
Father	**Residue**		**3**
Daughter	**1/2**		**4**
• The father is among the residuary in his own right.			

P4,200 is divided by 7 = P600 per one portion.

Table 171: Computation of Shares of (F and D)

Heirs	Computation
Father's Portion:	**3 x 600 = P1,800**
Daughter's Portion:	**4 x 600 = P2,400**
	Total = P4,200

SECOND SITUATION:

If the negotiation is merely for and in favour of one of the heirs, the heir in whose favour transfer is made shall at the same time take the place of the heir whose share is transferred to him and his original share.[316] For illustration, Let us solve an example.

Example: A husband dies leaving his wife, daughter and two sons. One of the sons negotiates for his sister to transfer her share to him for some consideration that he

[316] Ibid., p. 113

will give out of his own assets. After the negotiation is concluded, the inheritance is distributed to the two sons and the wife. The son in whose favour the share of his sister is transferred takes his share together with the share of his sister. See table below.

Table 172: Distribution of Shares of (W, 2S and D)
Case no. 1 By Basic Computation

*A man dies leaving his father and his mother *					
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 8x5=40**	**New Portions**
Wife	**1/8**	**8**	**1**	**5**	**5**
Son	**Residue**		**7**	**35**	**14**
Son					**14**
Daughter					**7**

The divisor of the problem is 8 and on the strength of the correction it becomes 40. The wife takes 5, the daughter takes 7, and each of the sons takes 14.

Table 173: Distribution of Shares of (W, 2S and D)
Case no. 2 After Negotiation

*A man dies leaving his father and his mother *					
Heirs	**Shares**	**Root of the Problem**	**Portions**	**New ROP 8x5=40**	**New Portions**
Wife	**1/8**	**8**	**1**	**5**	**5**
Son	**Residue**		**7**	**35**	**14**
Son					**14 +7 = 21**
Daughter					**0**

Thereafter, the share of the daughter is added to the share of the son to whom it is transferred and it becomes 21.

5.4.4 DIVORCED PERSON

Under the Muslim Code of the Philippines, the husband who divorces his wife shall have mutual rights of inheritance with her while she is observing her 'idda. After the

expiration of the 'idda, there shall be no mutual rights of succession between them. The husband who, while in a condition of death-illness, divorces his wife shall not inherit from her, but she shall have the right to succeed him even after the expiration of her 'idda.[317]

5.4.5 APOSTATE

The Muslim Code of the Philippines does not provide the rule regarding the succession by an apostate. However, by virtue of its Applicability clause, Article 187, The Muslim Law may be applied in suppletory manner.

A Muslim who changes his religion is called an apostate (murtadd). An apostate is barred from inheriting from Muslims.[318] An apostate who dies as a renegade or moves to a country of non-believers (dar ul har'b) or his / her annexation from Islam has been declared by a judge (qadhi) or he/she has been murdered, according to Imam Abu Hanifa (RA) his/her assets and property made as a Muslim shall be distributed amongst his/her Muslim heirs while the rest will be deposited into the treasury (bait ul ma'al). Jurist of other School recommend its total distribution amongst the Muslim heirs. Imam Shafii (RA) advocates that it will all be deposited into the treasury. The entire jurists are unanimous on division of the property of feminine apostate to be divided among her relations. An apostate is barred from being an heir to a Muslim or those like him.[319]

[317] Muslim Code of the Philippines, Article 96
[318] Razi, Op. Cit., p. 22
[319] Kakakhel, Op. Cit., p. 77

5.4.6 PRISONER

The Muslim Code of the Philippines does not provide the rule regarding the succession by a prisoner. However, by virtue of its Applicability Clause, Article 187, The Muslim Law may be applied in suppletory manner.

There is no change in the normal laws for a prisoner of war held by non-Muslim belligerents till he holds fasts to the religion. In case he becomes an apostate or is missing, special laws applicable in those situations will apply to him as well.[320]

5.4.7 MISSING PERSON

Under the Muslim Code of the Philippines, the share of an heir who is missing or otherwise absent at the time of the death of the decedent shall be reserved: Until he reappears and claims it; Until he is proven dead; or Until the lapse of ten years after which he shall be presumed dead by decree of the court.[321]

In the mafqud problem, the Islamic Inheritance Law pays special attention to the distribution of inheritance to them. Mafqud means a person who is missing without knowing the status whether the person is still alive or has passed away. In the case of a missing person, the wife may not remarry and his property may not be inherited and the rights of the missing person must be maintained until there is clear evidence whether he is alive or dead.[322]

The power to determine and decide whether a mafqud is alive or dead lies on the court based on evidence, investigation or the expiry of waiting period (as

[320] Ibid.
[321] Muslim Code of the Philippines, Article 98
[322] Awang, op. cit., p. 22

determined by the fuqaha). When the court decided that the mafqud has died, then his time of death is counted as the same time the ruling was issued. The beneficiaries who are present at the time of the court ruling are entitled to inherit the property of the mafqud. Similarly, a mafqud may inherit a benefactor's property before a court ruling is made against him/her. If the ruling of a mafqud's death has been made by the court, but it turns out later that the supposed mafqud is still alive, then he/she would not be able to re-claim the property that has been spent by the beneficiaries, except only to take any leftover property.[323]

In Shariah such missing person is considered alive unless his death is confirmed. Share of missing person is reserved until he returns. If he doesn't return and his death is confirmed then his share are distributed amongst his heirs. His death date is considered to be date when he was gone missing. Based on that date his legal heirs are ascertained.[324] There is difference of opinion on the wait period for return of missing person:

a. Imam Abu Hanifa considered 120 years, Hanafi jurist generally puts it as 90 years (as normal life span).

b. Maliki considered it to be 70 years.

c. Shafii and Hanbali allowed courts to determine the length of time. However, Imam Ahmed (RA) considered minimum 4 years, and Imam Shafi (RA) minimum 7 years if there is strong presumption of death (like in war).

[323] Ibid.
[324] Razi, op. cit., p.59

A missing person is considered to be alive as far as his own property and assets are concerned. He is treated as dead for estate of others. His assets cannot be divided until his death has been declared by a bonafide court order. In the estate of others his/her share as an heir is worked out considering him/her to be alive first and then as a dead. Other heirs are given lesser share till his/her return or declaration of his/her death. A declaration of death is a based on circumstantial probability of death to be decided by a Governmental functionary (Court of Law). On this decision being made, other heirs of a progenitor will receive their shares. Shares of the missing person will not be inherited by his/her heirs because a missing person is treated as dead in the estate of others. In case his/her death has been ascertained (sure death) through circumstantial evidence then date of his death will be used to work out the inheritance. If it is a court declaration then only those heirs still alive after the date of the order will be eligible. Those who died later but were alive between the period of disappearance and declaration of death will be considered as ineligible because a missing person is treated as alive for his/her assets.[325]

Another view from the book of Muhammad Imran Muhammad states that a missing person can either be the one to be inherited or the heir. If he is to be inherited his estate shall not be allotted to his heirs until he attains 70 years of age (or 90 according to some Jurists). But before then, if some rules are satisfied, the estate can be shared. On the other hand, when an important heir that can distort the sharing formulae such as a son is missing, unless he is officially pronounced dead by a court of law

[325] Kakakhel, Op. Cit., p. 75

(after Shari'ah accepted due process has being followed), no one will inherit from the estate of the deceased. However, if it has to apportioned, some rule will come to play.[326]

5.4.8 INHERITANCE OF A CONTROVERSIAL HEIR

Under the Muslim Code of the Philippines, without prejudice to the order of succession of heirs, mutual rights of inheritance shall obtain: namely, between the acknowledging father and the acknowledged child; and between the kinsman acknowledged through another person and the acknowledger.[327]

A person who claims to be an heir of a deceased such that the claim is accepted by some heirs and rejected by others is said to be a controversial heir. The estate will be distributed in such a way that those that reject the controversial heir will get their full shares, while the share of those that accept him will be deducted and given to him.[328]

5.4.9 HERMAPHRODITE

The Muslim Code of the Philippines does not provide the rule regarding the succession by Hermaphrodite. However, by virtue of its Applicability Clause, Article 187, The Muslim Law may be applied in suppletory manner.

If an individual's gender cannot be determined then he is called Hermaphrodite (Khunta al-Mushkal). Such person's sex is determined based on his physical (genital organs) and sexual characteristics (beard, breaths, menstruation).[329]

[326] Muhammad, Op. Cit. p. 92
[327] Muslim Code of the Philippines, Article 94
[328] Muhammad, Op. Cit., p. 93
[329] Razi, Op. Cit., p. 59

Inheritance for the khuntha has been discussed in the Islamic Inheritance Law in detail to ensure their status and position in receiving the inheritance either as a male or female beneficiary. In Islamic law, a khuntha is a person who has both male and female genitals, or has no sign of being either a male or a female, but only has a point for urination. In the problem of determining the sex of a khuntha, faraid scholars have determined a few signs to identify the gender.[330]

One of the signs is if a khuntha is still a child, then the sex can be determined by observing the point where it urinates through either a male or female genital. If it urinates through the penis, it is treated as a male and inherits as a male beneficiary.[331]

If it urinates through the female genital, it is treated as a female and inherits as a female beneficiary. If it urinates from both sexual organs, then it should be observed from which genital the urine is produced more. If the urine comes out more from the penis, then the khuntha is regarded as a male and vice versa.[332]

But the majority of fuqaha think that the determination of sex should be made by observing which of the genitals that produce urine first. If the urine comes out from the penis first, then the khuntha is regarded as a male and vice versa. If the khuntha is an adult, then the indicators that prove him a man are the signs such as having moustache, beard and the likes. Then, it is regarded as a man and inherits as a male beneficiary. If there are signs that the khuntha is a woman such as having

[330] Awang, Op. Cit., p. 21
[331] Ibid.
[332] Ibid.

menstruation, growing breasts, pregnancy and the likes, the khuntha is regarded as a woman and inherits as a female beneficiary.[333]

There are some opinions which state that if the gender of a khuntha cannot be determined, then the gender will be determined by counting the number of rib bones at the bottom left side of the body. If it is obvious that the number of rib bones on the left is less than the right, it is regarded as a male beneficiary. There are other views which say that the gender determination of a khuntha is determined by its instinct and desire either towards a female or a male. If its interest inclines towards a woman, it is regarded as a man and vice versa.[334]

Their share is calculated both as male and female:

a. Hanafis profess that a hermaphrodite gets whichever share is smaller (either as male or female). This is the majority opinion of the Companions (RH) of the Prophet (SAW).

b. Amir bin Shurahbil Al-Shabi (RA) who based his opinion on Abdullah bin Abbas (RA) stated that a hermaphrodite gets half of the combined shares (both as male and female), hence making it as an average share. Hanbali and Shafii advocate that if gender cannot be determined then this approach is to be taken.

In a hermaphrodite, if the male characteristics are predominant then he is to be considered as a male. One with predominant feminine traits is to be treated as a female. Difficulty arises with those hermaphrodites who display a mix of both sides. They are the ones to be called as 'Khunta al Mushkal'. In their case calculations are done twice

[333] Ibid., p. 22
[334] Ibid.

considering them as a male and female alternatively. They will be given the least share of both sides. This calculation is a mirror image situation of a missing person and an unborn child. Decision of the ruler shall be final irrespective of the opinion of the affected person.[335]

Hermaphrodites may either be partial or total. A Partial hermaphrodite is considered to be a male or female depending on the organ that is functional or more functional. However, if both are functional in the same proportion, the individual is said to be a total hermaphrodite and is given half of both male and female portions of inheritance. Hence, its number of heads is 1½.[336]

5.4.10 RENUNCIATION OF SHARE (TAKHARUJ)

The Muslim Code of the Philippines does not provide the rule regarding the succession by Renunciation of Share. However, by virtue of its Applicability clause, Article 187, The Muslim Law may be applied in suppletory manner.

A composition entered into by some heirs by mutual consent, to renounce their share of the inheritance in consideration for some specific things / interests is called 'Takhrij'. This is permissible in Sharia.[337] It is an agreement between one of the heirs and the rest, that if he is given a specific item FROM or OUTSIDE the estate, he will relinquish his whole share of the estate.[338] Subtract the unitary share of the heir from the

[335] Kakakhel, Op. Cit., p. 79
[336] Muhammad, Op. Cit., p. 93
[337] Kakhakel, Op. Cit., p. 72
[338] Muhammad, Op. Cit., p. 92

sum total of all the remaining heirs without disturbing the unitary value of the individual shares.[339]

Although the Islamic Inheritance Law has determined the inheritance of beneficiaries with their respective portions, the law has provided ample space to the beneficiaries to either accept the inheritance or otherwise. A beneficiary's rejection of the inheritance can be done through the takharuj doctrine.[340]

Takharuj in the Islamic Inheritance Law means a beneficiary who withdraws himself/herself from accepting the inheritance either in part or in full with one of the beneficiaries, or a few of the beneficiaries by accepting a certain payment ('iwad) whether from the inherited property, or other properties, or without any payment.[341]

Takharuj with payment is a form of mu'awadah contract which is accepted by Islamic Law if there is submission or willingness among the beneficiaries involved. The takharuj doctrine is practised in inheritance distribution in various forms and with various means of payment solely to provide comfort and freedom to the beneficiaries involved. It should be done with the approval and willingness from the beneficiaries who have rights in the distribution of the inheritance, whether through individual or group beneficiaries and whether with a specific payment or without any payment.[342]

[339] Kakhakel, Loc. Cit.
[340] Awang, Op. Cit., p. 23
[341] Ibid.
[342] Ibid.

In implementing the takharuj doctrine, there are three conditions that may override the execution, namely when the debt claim amount exceeds the available inheritance of the deceased. While the beneficiaries are not ready to pay the debt, then takharuj is considered to become null and void. Secondly, if a will claim arises upon the deceased; the claim may cause the actual inherited portion among the beneficiaries to change. Thirdly, when there is an unknown beneficiary before the distribution or at the time of takharuj, while his/her presence may cause changes in the rights and the beneficiaries' portions of the inheritance. Based on these three conditions, the takaruj doctrine cannot be implemented.[343]

Any heir has the right to quit his/her share from the inheritance. The better way to do it is to transfer the acquired estate in his/her name which can then be transferred to the chosen person. Not doing so can result in many complications. These days it is common to dissuade the women folk from claiming their shares. Conditions are created that sisters are left with no other option but to quit. Learned religious scholars profess that the shared estate be hand over to the women folk and will be kept in their possession for a year. Later they can chose to transfer it anyone else, if so desired. Women are even deceived to quit their shares under duress or temptation or ignorance. Either of these tricks is wrong and forbidden.[344]

[343] Ibid.
[344] Kakhakel, Op. Cit., p. 80