

Faculty of Law

TRENDS IN LAW, PRACTICE AND THE SHARĪ'AH IN NIGERIA

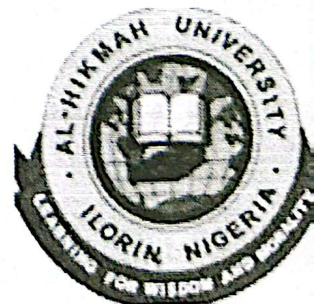
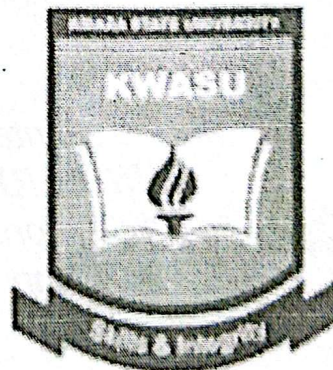
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A *MAQĀSID-AL-SHARĪAH*-BASED THOUGHT ON THE MALIKIYYAH'S VIEW OF THE CONCEPT OF *AL-RADD*

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22.1 INTRODUCTION

The concept of *al-radd* is one of the contentious issues in the field of *mirath* (Islamic law inheritance). The concept of *radd* explains how the excess estate of a deceased should be treated where the inheritors cannot exhaust it and there is still remainder. The sharing formula in the case of situations calling for *radd* is a product of *ijtihad* since such situation did not arise during the lifetime of Prophet Muhammad and was not determined in the Qur'an. The *ijtihad* source of this sharing principle lends it to juristic divergence (*ikhtilaf*) among the companions (*Sahabah*) and later the proponents of the leading *madhahib* (schools) of *fiqh*. There are thus two main views regarding the appropriate method of sharing excess estate. A group of companions proposed that the excess should be proportionally redistributed to fixed sharers (*ashab al-furud*) (except the spouses) in the absence of residuary heirs.¹ This group was followed by the Hanafiyyah and Hanabilah madhhabs. Another group of companions posit that such excess should be returned to the *bayt al-mal* (public treasury) for the benefit of all and sundry. This position was followed by the Malikiyyah and Shafi'yyah madhhabs. Regardless of the position taken, it is from the return of the estate to the proposed persons that the term *ar-radd* emanated.

While the attempt by both sides to solve the problem of a Muslim's estate becoming *escheated* is noted, the fact that they are both products of human reasoning make them susceptible to flaws and loopholes. Thus, each has its inherent challenges. But without the aim of passing any value judgment on either of the juristic positions, this study aims to critique the position of the Malikiyyah using the *maqāsid* framework. The objective is to assess how close that position was to the legislation of *mirath* by the Lawmaker.

¹ Zakariya. I. M, 'Administration of Estate and succession under Islamic law' (paper presented at the Refresher course for judicial Officers on Current Trends in Law and Administration of Justice, Lokoja between 14th – 18th March 2016).

22.2 UNDERSTANDING THE CONCEPTS OF *AL-RADD AND MAQĀSID SHARĪAH*

The Quran and the sunnah of the Prophet do not directly answer the problem of who takes the remainder of an estate after all the fixed heirs have taken their shares. This necessitated the efforts of some companions who came up with the concept of *al-radd* through *ijtihad*, that is, personal interpretation of the Quran and hadith. This opened the concept of *al-radd* to criticism by other companions and jurists who opposed it. The anti-*radd* jurists did not only oppose the concept of *al-radd* but rather proffered a counter-view. Since this work intends to juxtapose the two views: the pro and anti-*radd* views, within the framework of *maqāsid al-sharī'ah*. It is expedient to discuss the concept of *maqāsid al-sharī'ah* so as to appreciate the discussion on the concept of *al-radd* within the framework of *Maqāsid al-sharī'ah*.

22.2.1 The Concept of al-Radd in Islamic Inheritance

Al-radd, technically, is the proportional return or redistribution of the excess estate among the *As-hābul-al-furud* or *dhu al-arham* in the absence of *asabah* heir.² In other words, the excess estate is returned to the fixed heirs or outer family in the absence of fixed heirs. The principle of *al-Radd* refers to the distribution of the excess portions of the estate among the entitled beneficiaries using their original proportion as the sharing formula.³ This occurs when there is a residue left after distributing the property of the deceased amongst the Quran sharers, yet there is no residuary among the heirs of the deceased.⁴

The principle of *al-radd* is a product of *ijtihad* of the companions and was adopted by schools of law that came after them to serve as a legal solution to the problem of who has the right to inherit and what percentage to be inherited from the excess estate of a deceased Muslim in the absence of *asaba* heirs. The activation of the concept hinges on the following conditions: i) the presence of *Ashab al-farā'id*; ii) the absence of *Asabah* heirs; and iii) there must be remainder or excess from the deceased property after giving the *Ashab al-farā'id* their shares.⁵

² 'Administration of Estate and succession under Islamic law', p 45

³ Mohamad, M.F. & Abdullah, M.M., 'The Implementation of Radd in Islamic Inheritance Law (Faraid): One of the Solutions for Estate Administration Problem' In: Shariff, N.N.M., Yakob, M.A., Hamidi, Z.S., Aghwan, Z.A.A., Lateh, N. (eds) *Selected Proceedings from the 1st International Conference on Contemporary Islamic Studies (ICIS 2021)* (Springer, Singapore: 2022) https://doi.org/10.1007/978-981-19-2390-6_10.

⁴ Mohamad, M.F. & Abdullah, M.M., 'The Implementation of Radd in Islamic Inheritance Law (Faraid): One of the Solutions for Estate Administration Problem'.

⁵ *Almirath*, p. 128

22.2.2 The Theory of Maqasid al-Shari'ah

The term "*Maqsad*", in its plural form "*maqāsid*", signifies a purpose, objective, principle, intent, goal. *Maqāsid al-sharī'ah* refers to the objectives, purposes, intents, ends, or principles that underlie Islamic rulings.⁶ All rules and instructions within Islamic law are oriented towards the well-being of individuals and the community, promoting their interests, welfare, and shielding them from harm. Ibn al-Qayyim succinctly captures the essence of Shariah legislation as follows:

The Islamic law is all about wisdom and achieving people's welfare in this life and the afterlife. It is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Islamic law, even if it is claimed to be so according to some interpretation.⁷

The aforementioned quotation establishes the *maqāsid* principles as the foundational and philosophical underpinning of the entire Shariah legal framework.⁸

To attain the objectives of *sharī'ah* across various facets of human life, the objectives are categorized into three: necessities (*Daruriyyat*), needs (*Hajiyyat*), and embellishments (*Tahsniyyat*).⁹ The necessities (*Daruriyyat*) encompass matters pertaining to both religion and worldly affairs, the neglect of which could result in complete disruption and disorder, potentially leading to adverse consequences for society or individuals. The essentials (*Daruriyyat*) can be further subdivided into the protection of five fundamental values crucial for human life: protection of Religion (*ad-Deen*), protection of life (*al-Nafs*), protection of dignity or lineage (*al-'Ird*), protection of intellect (*al-'Aql*), and protection of property (*al-Mal*).¹⁰ The needs (*Hajiyyat*) refer to benefits aimed at alleviating hardship in situations where such hardship does not pose a threat to the prescribed way of life commanded by Allah.

⁶ Auda, J, *Maqāsid ash-sharī'ah: A Beginner's Guide* (IIIT, London, 2008), 3

⁷ ibn al-Qayyim, *I'lam al-Muwaqqi'in*, Taha Abdul Rauf Saad (ed.) (Beirut: Dar al-Jil, 1973), vol. 1, p.333.

⁸ *Maqāsid ash-sharī'ah: A Beginner's Guide*, p.13

⁹ 'New Essential Values Of *Daruriyyah* (Necessities) Of The Objectives Of Islamic Law (*Maqasid Al-Shari'ah*) Objectives Of Islamic Law, The Essential, Islamic Law, Preservation/ Protect, <https://www.researchgate.net/publication/305289062>

¹⁰ Abdul Wahab Khallaf, *Ilmu Usul Fiqh*, Jamhuriyat Egypt, Cairo page 215-220; Mohammed Hashim Kamali, *Al-Maqasid Al-Shari'ah, the objectives of Islamic law*, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjGhNGn85rjAhVMUhUIHb6OBosQFjABegQIBBAB&url=https%3A%2F%2Fwww.academia.edu%2F7121442%2FMaqasid_Al_Shari_ah_Made_Simple_-_Mohammad_Hashim_Kamali&usq=AOvVaw1J_PW1y7GdjgnwgcM4LTib accessed 20th June, 2019

22.3 DISCOURSE ON THE CONCEPT OF *AL-RADD* AMONG THE *MADHĀHIB*

The concept of *al-radd* is not mentioned in the Quran and Sunnah, which allows for the exercise of *ijtihad* by the four popular *madhāhib* of Sharī'ah on the matter.¹¹ This section discusses the views of each of the four Sunni schools on the concept of *al-radd*. It should be mentioned beforehand that although the debates on the operation of the concept of *al-radd* are more pronounced between the *madhāhib*, the debate actually started from within the companions of the Prophet, some of whom postulated the concept. In view of the bipolar juristic positions on the application of the *radd* principle, the companions and the *madhāhib* that follow their rationales have been grouped into two: the Anti-*Radd* and Pro-*Radd*, for ease of discussion.

22.3.1 Anti-*Radd*

Companions such as Abubakr, Zaid bn Thabit and Abdullah bn Abbas rejected the concept of *al-radd* and ruled that in the case where the totality of the estate exceeds the sharers, the remainder of the estate should be taken to Muslim public treasury (*Bayt-al-mal*).¹² Imam Malik and Imam Shafi'i adopt the views of these companions and they maintained the view that the concept *al-radd* is unknown to the Sharī'ah. Thus, they are called the anti-*radd* jurists in this work.

According to Imam Malik, the *ashab al-furud* are not entitled to more than what is fixed for them in the Quran and Sunnah. In essence, the excess estate will not go back to any surviving legal heirs or to *dhu al-arham*.¹³ This position is based on Suratul Nisa' verses 13-14:

Those are the limits set by Allah: those who obey Allah and His Messenger will be admitted to Gardens beneath which rivers flow, to abide therein (forever) and that will be the supreme achievement. But those who disobey Allah and His Messenger and transgress His limits will be admitted to a Fire, to abide therein, and they shall have a humiliating punishment¹⁴

Imam Malik supported by Imam Shafi'i interpreted the above cited verses to mean that it is not permitted to change the shares of legal heirs whose shares are already defined in the Qur'ān.¹⁵ They also placed reliance on the Hadith where

¹¹ These are the Hanafiyyah, Malikiyyah, Shafi'iyyah and Hanabilah schools of Islamic jurisprudence popularly referred to as the *madhāhib al-arba'* in Islamic *fiqh*.

¹² 'An analysis of residue net estate distribution to bayt al-mal in Singapore'

¹⁴ 'The Meaning of the Glorious Quran: Text, Translation & Commentary', p.285

¹⁵ 'An analysis of residue net estate distribution to bayt-mal in Singapore', pg 60

¹⁵ *Almirtah*, p. 127

the Prophet said Allah has given everyone with a right their due right; hence, there shall be no bequest for an heir.¹⁶ However, the anti-*radd* jurists posited that the excess estate would go to the *bayt al-mal* on the condition that the *bayt al-mal* is properly managed according to the Islamic law. In other words, fixed heirs or distant kindred, as the case may be, can only take from the excess estate when *bayt al-mal* is not properly managed according to Sharia or when it does not exist,¹⁷ which according to Coulson means:

... that the existence and organization of *bayt al-mal* as a function of state should be strictly following the constitutional precept of Shari'ah doctrine which defines the mode of expenditure of its revenues.¹⁸

Based on this anti-*Radd* position, *bayt al-mal* is considered as representative of the residuary heirs.¹⁹ However, there is a slight difference between Imam Maliki and Imam Shafi'i's view in the sense that, Imam Shafi'i agreed that distant kindred can inherit, except that *bayt al-mal* takes priority to receive the excess estate.²⁰ The argument of the anti-*Radd*, in essence, is that since neither the Quran nor Sunnah specifies any share for *dhu al-arham*, giving them from the excess estate is unlawful.²¹

22.3.2 Pro-Radd

The majority of the companions of the Prophet including Umar bn Khattab, Uthman bn Affan, Ali bn Abi Talib, Abdullah bn Abbas, Abdullah bn Mas'ud and Jabir bn Yazid support the concept of *al-radd*.²² And their view was adopted by the Hanafi and Hanbali schools. This does not mean that these companions and jurists oppose *bayt al-mal* as a beneficiary under Islamic law as postulated by the anti-*Radd* jurists, they only posit that it can only inherit in the absence of any legal heirs and distant kindred.²³ The proponents of this view are regarded as pro-*radd* in this study.

Meanwhile, Umar bn Khattab, Ali bn Abi Talib, Ibn Abbas and Ibn Mas'ud and majority of the companions allow the return from the excess of the estate to all fixed heirs except the husband and wife.²⁴ According to them, the excess is only given to the fixed heirs who have uterine relationship with the deceased, so,

¹⁶ *Sunan Abi Dawud*, Hadith No. 2870. Graded Sahih by Albani.

¹⁷ 'An analysis of residue net estate distribution to *bayt-mal* in Singapore', p.60

¹⁸ 'An analysis of residue net estate distribution to *bayt-mal* in Singapore', p.60

¹⁹ 'An analysis of residue net estate distribution to *bayt-mal* in Singapore', p.60

²⁰ 'An analysis of residue net estate distribution to *bayt-mal* in Singapore', p.60

²¹ *The practice of Muslim family law in Nigeria*, p.364

²² Az-Zarakhsi, M., *al-Mabsut*, 192-193.

²³ Sadali, A & Aznan, 'An analysis of residue net estate distribution to *bayt al-mal* in Singapore', <https://www.emerald.com/insight/0128-1976.htm> accessed on 25 March 2020

²⁴ Al-Tuwajjiriyy, M., *Mukhtasar al-Fiqh al-Islamiyy fi Daw' al-Qur'an wa al-Sunnah*, 911.

relation to the deceased through marital relationship is unable to receive the excess.²⁵ Whereas, Uthman bn Affan's view was to return the excess to all fixed heirs without exception including the widower and widow. He queried why the spouses would be denied when their shares are liable to reduction in the case of 'awl/where the legal heirs exceed the available shares.²⁶

Abū Ḥanīfah and Aḥmad argue in respect of the entitlement of the *bayt al-māl* that this institution acts only as a public treasury and can only be converted to a legal heir in the absence of no natural legal heir, moreover, it is only linked to the deceased through religion. It is by no means closer to the deceased compared to the natural legal heirs.²⁷ Hence, the excess estate should be returned to the fixed heirs or *dhu al-arḥām* when they are present, and not to the *bayt al-māl*.²⁸ Their argument is deduced from verse 6 in Sūrah al-Ahzab that:

The Prophet is closer to the Believers than their own selves, and his wives are their mothers. Blood-relations among each other have closer personal ties, in the Decree of Allah. 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 Allah).²⁹

Hence, fixed heirs and distant kindred are regarded as heirs by blood, except the spouses, who are heirs by marriage.

With this verse, it is established that blood relation is much closer to the deceased than any stranger or even the Muslim community as a whole as represented by the *bayt al-māl*. This forms the basis why majority of the pro-*radd* argued that only heirs under kinship are entitled to share in the excess or residue. Uthman bn Affan disagrees with Ali ibn Abi Ṭalib, Ibn Abbas, and Ibn Masu'd that only kins are entitled to share in the residue.³⁰ In response, Imam Malik and Imam Shafī'i, argued that this verse only came to abrogate the earlier right of sharing estate on the basis of Muslim ties between the *Ansar* and the *Muhajirun* in the early period of Islam. They also adduced that most of the hadiths cited by the pro-*radd* are either weak or interpreted out of context.

All pro-*radd* jurists agreed that outer family members like distant kindred are entitled to inheritance or residue estate in the absence of the fixed heirs. However, the Quran and Sunnah did not mention in specific the fractional share of the outer family in sharing. Hence, there are divergent views among the pro-*radd* on the

²⁵ Maiza. A, 'The Provision of Radd in Inheritance Between Islamic Jurisprudence and the Algerian Family Law' (2018) 10(1) De Jure: Jurnal Hukum dan Syari'ah, 15

²⁶ 'Islamic law of succession', p. 347

²⁷ 'An analysis of residue net estate distribution to *baytul-al-mal* in Singapore', p.1

²⁸ 'An analysis of residue net estate distribution to *baytul-al-mal* in Singapore', p.1

²⁹ 'The Meaning of the Glorious Quran: Text, Translation & Commentary', p.286

³⁰ 'Islamic Law of Inheritance', p. 92

means that can be adopted in sharing the residue. The Hanbali School adopts the concept of *tanzil* in sharing the residue among the outer family. Using this method, the shares of blood relatives (distant kindreds) are determined by allowing them to step into the shoes of the fixed heirs through whom he or she is connected with the deceased. For instance, a son's daughter's child will step in the shoe of the son's daughter of the deceased.³¹

The Hanafi School, on the other hand, adopts the concept of *qaraba*, under which the shares of the relatives are determined by the nature of their own relationship with the deceased. Relatives are lined up into an order of priority based on the rule of class and any member of a higher class excludes any member of a lower class. The four classes in the order of priority are: (a) Descendants (b) Ascendants (c) Descendants of the deceased parents (iv) Descendants of the deceased's grandparents how high so ever.³²

The pro-*radd* jurists cited the hadith where the Prophet allowed only one-third of the estate to be given as bequest when he visited Sa'ad bn Abi Waqqas during his illness. They argued that Sa'ad had only one daughter but the Prophet still instructed him not to give more than one-third as bequest.

Moreso, the Hadith where the Prophet gave the entire property to *Mulā'nāt* when her son died was also mentioned as evidence by other pro-*radd* scholars. They argued that the Prophet would not have ordered *Mulā'nāt* to take the entire property when her son died if she cannot inherit more than her fixed share.³³

Imam Abu Hanifa and Hanbali countered the anti-*radd* Maxim that says: 'It is only what is categorically allowed that should be taken as lawful' with another maxim that says 'It is only what the law prohibits that should be taken as haram.'³⁴ In other words, what law is silent over is lawful and since the Quran and Sunnah did not prohibit the fixed heirs or blood relations from inheriting from an excess estate *al-radd* is legal.

22.4 CRITIQUING THE MALIKIYYAH'S VIEW WITHIN THE FRAMEWORK OF MAQĀSID-AL-SHARĪ'AH ON INHERITANCE

The Malikiyyah's view on *al-radd* touches on two of the five essentials of *maqāsid*, as classified by Imam Ghazali to wit: family lineage and property. As a result, this section will consider the *Mafsada* (harm) which the Malikiyyah's view on *al-radd* can cause in the family and the society at large and the *Maslaha* (the good) that can be achieved in not adopting the view. In addition, this section will discuss the

³¹ 'Islamic Law of Inheritance', p.92

³² *Islamic Law of Inheritance*, p. 92

³³ An analysis of residue net estate distribution to *bayt-mal* in Singapore', p.56

³⁴ An analysis of residue net estate distribution to *bayt-mal* in Singapore', p.56

implication of Malikiyyah's view in safeguarding property as one of the objectives of *maqāsid-al-sharī'ah* with its' attendant *Mafsada* and *Maslaha*.

The only possible conclusion one could deduce from Imam Malik's view on *al-radd* is that members of the public as represented by *bayt al-mal* takes priority in the estate of a deceased Muslim over his heirs and families; notwithstanding that there may be outer family or relations (like distant kindred who are not entitled to inheritance in the presence of the fixed heirs) who are financially handicap. Then, the question is, is placing *bayt al-mal* over the deceased's family in the estate of a deceased Muslim consistent with *maqāsid-al-sharī'ah*? Allah said in Suratul-Ahzab verse 6 that:

The Prophet is closer to the Believers than their own selves and his wives are their mothers. Blood-relations among each other have closer personal ties, in the Decree of Allah. 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 Allah.³⁵

The exegesis of this verse in *Tafsir Jalalayn* reads as follow:

The Prophet is closer to the believers than their [own] souls, in terms of what he calls them to and what their own souls have called them to contravene, and his wives are their mothers, insofar as they [the believers] are forbidden to marry them. And those related by blood, kinsmen, are more entitled, to inherit [from], one another in the Book of God than the [other] believers and the Emigrants, in other words, than inheriting on account of [their sharing] faith and the Emigration, which had been the case at the beginning of Islam but was then abrogated; barring any favour you may do your friends, by [making] a bequest, which is permissible. This, namely, the abrogation of inheritance on account of [shared] faith and Emigration by the inheritance on account of kinship, is written in the Book — in both instances *al-kitāb*, 'the Book', denotes the Preserved Tablet (*al-lawh al-mahfūz*).³⁶

Also, in *Tanwir al-Miqbas*, the meaning of the verse was explained thus:

He said: (The Prophet is closer to the believers) the Prophet has a better right to preserve the children of the believers (than their selves) after they die, due to the saying of the Prophet (pbuh): "Whoever dies and leaves behind a burden I will carry it for him, or a debt I will pay it back for him, or wealth it will go to his inheritors",

³⁵ 'The Meaning of the Glorious Quran: Text, Translation & Commentary', p.285

³⁶ Feraz H, 'Tafsir al-Jalalayn', https://www.altafsir.com/Books/Al_Jalalayn_Eng.pdf accessed on 5 January 2021 (underlining for emphasis)

(and his wives) the wives of the Prophet (pbuh) (are (as) their mothers) are like their mother in unmarriageability. (And the owners of kinship) those related with ties of kinship (are closer one to another) have more right to one another in relation to inheritance (in the ordinance of Allah) thus it is written in the Guarded Tablet; and it is said: thus it is written in the Torah; and it is said: thus it is written in the Qur'an (than (other) believers and the fugitives (who fled from Mecca) except that ye should do kindness) a bequest not exceeding a third of the whole inheritance (to your friends) your custodians in religion or your friends. (This) inheritance for relatives and bequests for friends or clients (is written in the Book) in the Guarded Tablet; it is also said: it is written in the Torah and the Children of Israel practise it.³⁷

The commentaries in the interpretation of the above verse by the three *tafā'seer* all pointed that community of believers have their mutual rights, but that does not suffice as an excuse to defeat the prior rights of blood relationships. Hence, this verse puts an end to inheritance based on brotherhood in religion that was in place when the emigrant Muslims got to Medina.

Allah reiterates the same in Surat-ul-Anfal (8) verse 75 where He said:

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 Allah. Verily Allah is well-acquainted with all things³⁸

Tafsir Jalalayn while explaining the meaning of this verse stated thus:

...And those related by blood, kinsmen, are nearer to one another, in terms of inheritance, than [those who share] inheritance on account of [their common] faith and emigration mentioned in the previous verse, according to the Book of God, the Preserved Tablet (*al-lawh almahfūz*). Truly God is Knower of all things, including the wisdom regarding [the rules of] inheritance...³⁹

The commentary of the same verse in the *Tanwīr al-Miqbās min Tafsīr Ibn 'Abbās* goes thus;

³⁷ Mokrane G, *Tanwīr al-Miqbās min Tafsīr Ibn 'Abbās*, <https://www.atafsir.com/Books/IbnAbbas.pdf> accessed on 5th January 2021

³⁸ 'The Meaning of the Glorious Quran: Text, Translation & Commentary', p.114

³⁹ '*Tafsīr al-Jalalayn*', https://www.atafsir.com/Books/Al_Jalalain_Eng.pdf (underline mine for emphasis)

(And those who afterwards) after the first Emigrants (believed) in Muhammad (pbuh) and in the Qur'an (and left their homes) and migrated from Mecca to Medina (and strove along with you) against the enemy, (they are of you) they are with you in secret and openly; (and those who are akin) those who are related by their lineage, the closer than the one who comes next, etc., (are nearer one to another) in relation to the division of estates (in the ordinance of Allah) in the Guarded Tablet. With this verse, the first verse was abrogated. (Lo! Allah is Knower) He knows the idolaters' breaking of their treaties (of all things) the division of estates, what is good for you as well as other things. And Allah knows best the inner meanings of His Scripture.⁴⁰

The commentaries by the *tafā'seer* on this verse also established the priority of blood relationship as a ground of inheritance and the superiority of relatives over other members of the public. No wonder the rights of inheritance that arise from blood relations joined by the connection of social rights and obligations was extended to the maternal relatives like *dhu al-arham* in the absence of the agnatic family members linked through males to a common ancestor with the deceased. This can also be traced to the Hadith of the Prophet reported by Al-Misdam who reported that Allah's Messenger said:

I am the heir of anyone who has no heir. I fulfill his obligations and inherit his wealth. And a maternal uncle is the heir of anyone who has no heir. He fulfils his obligations and inherits wealth.⁴¹

In explaining Suratul-Ahzab verse 6, Yusuf Ali said "...Blood-relationship and its rights and duties do not depend on special circumstances of a temporary nature. Any temporary rights of mutual inheritance established between the early Emigrants and Helpers would not apply to later..."⁴²

In another hadith narrated by Aisha, Abu Ad-Darda' and Abu Hurairah, the Prophet said: 'The maternal uncle inherits from those who have no standard heirs.'

These two hadiths buttress the point that blood relatives like *dhu al-arham* are entitled to inheritance in the absence of the fixed heirs. And in essence, they show some level of closeness of the deceased to the distant kindred. It is also indicated in these hadiths that the messenger of Allah as a symbol authority of Islamic State or *bayt al-mal* inherits individual Muslims where there is no fixed heir and distant kindred to inherit the estate of a deceased Muslim and not vice versa. How could one imagine a situation where excess estate of a deceased Muslim is transferred to a supposed *bayt al-mal* or a mosque in the vicinity of a deceased.

⁴⁰ 'Tanwīr al-Miqbās min Tafsīr Ibn 'Abbās', <https://www.altafsir.com/Books/IbnAbbas.pdf>

⁴¹ *Inheritance Regulation and Exhortations*, p. 275

⁴² 'The Meaning of the Glorious Quran: Text, Translation & Commentary', p.286

Based on Quran 8 verse 75 and Quran 33 verse 6 earlier quoted, outer families are closer to the deceased than the general public; it is not a surprise that Islam encourages maintaining good family ties and doing good to blood relatives. So, the act of redistributing excess estate to the fixed heirs or blood relatives (*dhu al-arham*) in the absence of fixed heirs keep the deceased dutiful to his family relatives by not leaving them worse off after his death. This is supported by the ḥadith of the Prophet narrated by Amir bn Sa'ad on the authority of his father Sa'ad bin Abi Waqqas where he narrated that the Prophet came to visit him in the year of the farewell pilgrimage when he was afflicted with a severe illness. And he said to the prophet:

O Prophet, you see how ill I am. I have property and no heir except my daughter. Shall I then give away two-thirds of my property as alms?" He replied "No." I said "A half then?" He still said "No." I then asked "A third?" He replied: "A third. And a third is much. It is better that you leave your heirs rich than you should leave them destitute, begging from their neighbours."⁴³

By all indications, redistributing excess estate (*al-radd*) to the fixed heirs and outer family like distant kindred brings benefit or good to the relatives and as well protect the family against harm of discord, jealous and break in family ties. The concept of *al-radd* allowed a deceased to leave his family more buoyant after his demise. And leaving family buoyant after death is not only in line with the Sunnah. It also preserves or safeguards the family ties and lineage as one of the *maqāsid al-sharī'ah*. Therefore, giving priority to the members of public at the expense of family members in the estate of a deceased Muslim does not safeguard family ties and as a result is inconsistent with *maqāsid al-sharī'ah*. And any act or view that is inconsistent with *maqāsid al-sharī'ah* will definitely create *mafsada* (harm) in the society.⁴⁴ Hence, the concept of *al-radd* can properly be situated under *Istislah* as it secures the welfare of the family members by promoting their benefit and as well guard against what can harm them.

One of the harms (*Mafāsīd*) which the remittance of excess estate to *bayt al-mal* could cause is that Muslims may become misguided and resort to distributing their properties themselves among their family members to avoid the excess ending up in *bayt al-mal* at the expense of the original heirs and family members who are in dire need. Hence, the *mafsada* of stepping beyond the limit set by Allah in the distribution of estate becomes rampant among the Muslims. This is definitely not the *maqāsid al-sharī'ah* in institutionalising estate distribution.

⁴³ Sahih Muslim, Translation of Sahih Muslim, Kitab Al-Wasiyya (The Book Of Bequests) Book 13, Hadith Number 399, https://www.iium.edu.my/deed/hadith/muslim/013_smt.html accessed 6th June, 2019

⁴⁴ Kamali, M. H., *Issues in the Legal Theory of Usul and Prospects for Reform* (International Islamic University Malaysia, Gombak, 2002), 12-13.

The perspective of majority of the pro-*radd* jurists is that only the fixed heirs take priority in the *al-radd* estate exempting the spouses; and that it is only in the absence of the fixed heirs that distant kindred or relatives are considered as beneficiaries. A Maqasidic analysis of the operation of *al-radd* from this view shows that it focuses more on enriching the primary heirs while the distant kindreds who are financially handicap and in dire need of assistance suffer. For instance, where a deceased left behind a Full Sister and 2 poor distant kindreds (*dhawu al-arham*) with Ten Million Naira worth of properties (₦10,000,000.00). The daughter will inherit the whole estate as she will inherit half as primary heir and the remaining half as *al-radd*, while the two distant kindred inherit nothing.⁴⁵ This may lead to conflict, raging enmity, jealousy and hatred between the sister that inherited the whole estate and her two distant kindreds. Hence, both the fixed heirs and the outer family ought to be given equal share in the *al-radd* estate and not giving one priority over the other.

More so, Islamic law opposes capitalist economic system that encourages concentration of wealth in a single or a few individuals.⁴⁶ Besides the fact that Islamic law of inheritance encourages sharing of wealth left by a deceased among his heirs, breaking up the concentration of wealth in individuals and spreading it out in the society is one of the objectives of inheritance in Islam.⁴⁷ Women, old, young, minors and major irrespective of their genders are entitled to inheritance.⁴⁸ As a result, there is a just redistribution of wealth allowing everyone to get what is rightfully due to them.⁴⁹ To this end, giving priority to the fixed heirs over outer family members is capable of concentrating wealth in the hand of few individuals and this is inconsistent with the *Maqāsid-al-sharī'ah*.

⁴⁵ Butressing this sharing formula, an online Mufti, while addressing this case, quoted the statement of Ibn Qudamah in *al-Mughni* that: "the return of excess estate (to the fixed sharers) takes precedence over the inheritance of distant kindreds, for when a deceased leaves behind an agnate or Quranic sharer among his close relations, they take all the estate, as this is the popular position on the inheritance of distant kindreds" [إن الرد يقدم على ميراث ذوي الأرحام، فمتى خلف الميت عصة] [أو ذا فرض من أقرابه أخذ المال كله، ولا شيء لذوي الأرحام، وهذا قول عامة من ورث ذوي الأرحام]. See islamweb.net, "الرد يقدم على ميراث ذوي الأرحام" Question No. 36002 submitted on 9 Jumada al-Aakhir 1424 (7 August 2003)

<https://www.islamweb.net/ar/fatwa/36002/%D8%A7%D9%84%D8%B1%D8%AF-%D9%8A%D9%82%D8%AF%D9%85-%D8%B9%D9%84%D9%89-%D9%85%D9%8A%D8%B1%D8%A7%D8%AB-%D8%B0%D9%88%D9%8A-%D8%A7%D9%84%D8%A3%D8%B1%D8%AD%D8%A7%D9%85#>

⁴⁶ Kato, T. "Islamic and capitalist economies: Comparison using econophysics models of wealth exchange and redistribution" (2022) 17 (9) *PLoS ONE*: e0275113. <https://doi.org/10.1371/journal.pone.0275113>; Elshurafa, D. "Islamic Capitalism—An Imminent Reality or a Hopeful Possibility for Islamic Finance?" (2012) 26 (3) *Arab Law Quarterly*, pp. 339–60.

⁴⁷ AbdulHamid. S, 'Kitab al-Fara'id (The Book Pertaining To The Rules Of Inheritance)' https://www.iiu.edu.my/deed/hadith/muslim/011_smt.html accessed on 5 January 2020.

⁴⁸ Adelina. Z & Ni Putu. D, 'Islamic Inheritance law(fara'id) and its' economic implication' file:///C:/Users/ACER/Downloads/10_30993_tifbr_v8i1_64.pdf accessed on 17 December 2020.

⁴⁹ 'Kitab al-Fara'id (The Book Pertaining to the Rules of Inheritance)' https://www.iiu.edu.my/deed/hadith/muslim/011_smt.html accessed 5 January 2020.

22.5 CONCLUSION

The absence any direct prescription in the legal texts (*nusus*) for the treatment of excess estate where the shares exceed the number of qualified Quranic sharers threw up divergent positions among the jurists companions and the different *madhahib*. In addition, as opposed to what is common among Islamic law of inheritance literatures, the research was able to establish that *dhul -al-arham* (distant kindred) is entitled to inheritance in the absence of the fixed heirs and residuary heirs. This work was able to reveal that Malikiyyah's opinion is inconsistent with the *Maqāsid-al-sharī' ah* despite the fact that the rules of *Istislah*, *Istihsan* and *Maslaha al-Mursalah*, which are all deployed in the Malikiyyah Madhab, support the application of the concept of *al-radd* as it preserves the family ties and safeguards them against harm that is capable of causing disunity in the family. This is one of the objectives of *maqāsid-al-sharī' ah*. Also, the pro-*radd* view of giving priority to the fixed legal heirs in the *al-radd* estate is capable of concentrating wealth in a single hand which also contravenes *maqāsid al-shariah* in the law of inheritance.

Therefore, in view of the rising and apparent unequitable distribution of wealth evident in the current World economic order, and considering the fact that the madhhab of Malikiyyah operates predominantly in today's developing countries where the overwhelming numbers of Muslims struggle economically, there is need for the scholars of Malikiyyah to reappraise the application of the principle of *al-radd* in conformity with the *maqasid al-Shari'ah* of protecting family ties (*hifz al-nas*) and properties (*hifz al-mal*).