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RECONSTRUCTING THE INHERITANCE SCHEME IN *SHARĪ'AH*: A TEXTUALIST PROPOSITION

By

Azizat Omotoyasi Amoloye-Adebayo, PhD*

ABSTRACT

The interpretation and application of the textual provisions on inheritance by the classical Islamic scholars have been challenged by some contemporary critics as having resulted in a system of inheritance different from that envisaged by the texts. This work is an investigation of this claim. Adopting the methodology of textual analysis of the inheritance provisions and a contextual analysis of the juristic interpretations and application, this work discovered that the doctrinal elaborations that resulted in the Islamic inheritance system have been influenced by an Arab, though Islamic way of thinking. This work from another perspective argues that the literal sense of the inheritance provisions is capable of a variety of contextual applications within the Islamic and proposes an alternative scheme of interpretation and application.

Key Words: *Sharī'ah*, inheritance, interpretation, application.

INTRODUCTION

The interpretation of the Islamic provisions on inheritance by classical jurists has been criticized by contemporary observers, mostly non-Muslim writers on the subject.¹ Section II gives an account of some of these criticisms and objections. Analysts have rationalized a number of the criticized areas to be the result of scriptural interpretation of relevant rules by the classical Islamic jurists. Some of the traditional interpretations, as it is argued, do not at times represent the objectives of the textual provisions on the subject. Alternative

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¹ See notes 2 – 6 below

interpretations of those provisions as enshrined in the basic sources of *Shari'ah* have, therefore, been suggested. Using these suggestions as a critical start point, Section III offers both an analysis of the objections as well as a critical exploration of the Islamic scheme of inheritance. Section IV offers an alternative interpretation of the Islamic textual provisions on inheritance.

SOME RECORDED OBJECTIONS AGAINST THE ISLAMIC SCHEME OF INHERITANCE AS PRESENTLY CONSTITUTED

According to one critic² of the Islamic system of inheritance, the system is in theory 'highly eulogized as an intellectual and legal achievement' but the application in practical terms is avoided by some Muslims. The avoidance is achieved, in her view³, through a devise of 'several' but often 'inconvenient' tactics. In the actual words of the writer:

[M]any are the individuals who feel that in application to their particular circumstances, that law requires some adjustment. . . . These rules (e.g.) restrict the widow of a man who leaves a child to a mere one-eighth of his estate; disadvantage the daughter vis-à-vis the son; disinherit the child of a predeceased child; and (Sunni parties), in the absence of an agnatic male descendant, will carry perhaps a very significant part of the estate to the collateral agnate, who may be a brother, uncle or first cousin, or may be more distant relation. Regardless of how closely the agnatic heir may be related to the decedent, the latter would not necessarily prefer him to take precedence over his (or her) own daughter or grandchild or spouse in the distribution of the estate. Perception that some adjustment is necessary also arises when the "family" of the decedent as defined in residential and emotional terms differs from the assumptions of the law- as for instance when the "family" includes an "adopted" child, a

²Carroll, L., 2001. 'Life Interests and Intergenerational Transfer of Property: Avoiding the Law of Succession'. 8 *Islamic Law and Society*, Pp.245-246; similar arguments can be observed in her earlier publications on the subject such as: 1995, 'Application of the Islamic Law of Succession: Was the Propositus A Sunni or A Shi'i?' 2 *Islamic Law and Society*. Pp. 24-42; 1998, 'Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan'. 5 *Islamic Law and Society*, Pp. 410-411.

³*Ibid*, 'Avoiding the Law of Succession', *supra* note 1, P. 245.

step-child, a widowed daughter-in-law; or when violent family quarrels rupture ties which the law presumes intact.⁴

The above words have been reproduced because they aptly encapsulate some⁵ of the most popular objections to the application of the Islamic law of inheritance by some non-Muslims.⁶ The noted objections as well as other problem areas usually identified in existing literature on the subject⁷ are summarized for analysis in this work as follows:

- i. The asymmetry in the shares of a female heir as a widow, daughter or sister of a decedent vis-à-vis those of her male counterpart as husband, son or brother. This is regardless of whether or not these heirs inherit as co-heirs in all possible instances of coexistence as children and siblings or alone as spouse relict.
- ii. The fact that, except for few isolated cases, a female heir cannot alone be a residuary/agnatic heir according to the view of all the four Sunnī schools. Again, according to these schools, while the presence of a surviving son totally excludes all collateral relatives, the same does not hold true for a surviving daughter. Both scenarios are however possible in the Shi'ī interpretation. It is useful to note that even as regards the right to inherit as a

⁴Ibid, Pp. 245-256.

⁵Other raised points are the fact that a non-Muslim surviving spouse cannot inherit the deceased spouse; the fluctuating share of a mother when she inherits along with the decedent's father and any surviving spouse; the fact that inheritance by substitution and by representation are only available to some classes of heirs connected to the decedent through the male link only; the interpretation of the text by the jurists that only the sons and not daughters can exclude all collateral relatives (the exception being that daughters can exclude only the uterine relations); the case of *Kalālah* etc.

⁶For differentiated arguments by other non-Muslim critics, see Bowen J.R., 1998. "You May Not Give It Away": How Social Norms Shape Islamic Law In Contemporary Indonesian Jurisprudence. *5 Islamic Law & Society*. Pp. 382-408; Powers, D.S., 1993. The Maliki Family Endowment: Legal Norms and Social Practices. *25(3) International Journal of Middle East Studies*. Pp. 379-406; -2001. 'Parents and Their Minor Children: Familial Politics in the Middle Maghrib in the Eighth/Fourteenth Century.' *16(2) Continuity and Change*. Pp. 177-200.

⁷See footnotes 2-6 above.

- decedent's distant relative; the qualifying heirs are the paternal, male relations in the interpretation of the four Sunnī schools.
- iii. The idea that the child of a predeceased heir ordinarily cannot inherit as of right in the presence of the other surviving heir(s). Again, this is often times gender relative as shall later be discussed.
 - iv. The issue of adopted or step children and a widowed daughter-in-law.
 - v. What is to be taken as the correct interpretation of the word *Kalālah* as is expressed in two of the inheritance verses in the Qur'ān, i.e., Q4:12 and Q4:176.
 - vi. The fact that the concepts of inheritance by substitution as well as by representation are available exclusively to certain classes of heirs connected to the decedent through a male link.
 - vii. The fact that a non-Muslim cannot inherit from a Muslim and vice versa in the view of the four Sunnī schools. While the first part of the rule is the same according to the Shi'ī view, the converse however is not the same. That is to say while non-Muslims have no right of inheritance in the estate of their deceased Muslim relatives; Muslim heirs would enjoy this right under the same circumstances.
 - viii. Fluctuations in the share of a decedent's mother when she inherits alongside the other parent, the father, and a surviving spouse.
 - ix. Status-discrimination of siblings as heirs into germane, consanguine and uterine categories.
 - x. The fact that siblings are caused to be excluded by the presence of the father of the deceased as the closest male agnate under the classical interpretation of the rules. Notwithstanding their exclusion from inheritance by the father, it is interesting that the presence of a decedent's sibling(s) will cause a reduction in the share of a surviving mother to the minimal entitlement.
 - xi. The controversy surrounding the legal entitlement of a surviving grandfather who stands to inherit in the place of a predeceased father.

It is useful to recall, as earlier stated in the introduction, the argument that the classical interpretation and/or application of the inheritance provisions contained in the Islamic textual sources appear to have overtime brought about a system of inheritance different from that envisaged by the same provisions. The argument therefore is that the relevant provisions may require reinterpretation to give force to the ordinary meanings of the expressions used in the provisions, without exporting any extraneous elements in their application. What follows in the next section is a discussion on the summarized points to determine the validity or otherwise of this position.

CRITICAL ANALYSIS OF THE ISLAMIC SCHEME OF INHERITANCE IN THE LIGHT OF THE TEXTUAL PROVISIONS

For clarity of presentation in this section, the Qur'ānic provisions on inheritance (hereinafter, the inheritance verses) are again hereunder reproduced.

From what is left by parents and those nearest related, there is a share for men and there is a share for women, whether the property be small or large, -a determinate share. (Q4:7)

Allah (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females: if only daughters, above two, their share is two-thirds of the inheritance; if only one, her share is half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third: if the deceased left brothers (or sisters) the mother has a sixth. (The distribution in all cases is) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah: and Allah is All-knowing, All-wise. (Q4:11)

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

debt. If the man or woman in question has left neither ascendants nor descendants⁸, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, their share is a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus it is ordained by Allah; and Allah is All-knowing, Most Forbearing. (Q4:12)

They ask thee for a legal decision, say: Allah directs (thus) about those who leave no descendants or ascendants⁹ as heirs. If it is a man, that dies, leaving a sister but no child, she shall have half the inheritance. If (such deceased was) a woman, who left no child, her brother takes her inheritance: if there are two sisters, they shall have two thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female, thus doth Allah make clear to you (His law), lest ye err. And Allah hath knowledge of all things. (Q4:176)

On a cursory examination, the above provisions appear to be quite explicit in respect of the following three points-

1. The right to inheritance is established for the benefit of all deserving male and female relatives of a decedent. These relatives as heirs are arranged in a hierarchical order depending on the strength of familial and emotional connection to the demised individual.
2. This right is protected in a system of rules within which the entitlement of each qualifying heir is expressed either in definite and/or residuary terms depending on the heir in question.
3. The rules of intestacy as contained in the inheritance verses do not preclude testamentary dispositions. However, Prophetic tradition limits testamentary power to a third of the entire estate.

⁸It is important to note that the phrase 'left neither ascendants nor descendants' is given as the interpretation of the Arabic word *Kalālah* used in the verse. This translation, however, does not enjoy unanimity. Some jurists have argued that the term only refers to a situation where a decedent is not survived by descendants. For an analysis of the various juristic positions, see Cilardo, A., *The Qur'anic Term Kalālah*. (JAIS Monographs: Edinburgh University Press) 1

⁹Ibid.

Taking into account the provisions enshrined in the inheritance verses as well as the above three raised points, some of the summarized objections appear to have some merit and require further investigation. For ease of analysis, the noted objections are discussed under four thematic headings of gender discrimination; status discrimination; religious discrimination; and rights of adopted or step-children as well as a widowed daughter-in-law.

GENDER DISCRIMINATION (I AND VIII)

The first objection relates to the unequal shares recognized for the daughter, sister and widow in relation to their male counterparts in the inheritance verses. This position constitutes one of the salient bases upon which *Shari'ah* has been regarded as sanctioning gender discrimination. The perception, therefore, is that in all cases where men and women inherit together, male heirs must always succeed to larger shares than the female heirs. Chaudhry¹⁰ appears to have successfully challenged this perception. According to her, it is inaccurate to suggest that in *Shari'ah*, the female heirs receive less than the male heirs due to their gender.¹¹

Arguing for a distinction between four classes of familial relationships that heirs of both sexes may constitute vis-à-vis a decedent, she suggests that gender is far from being the rationale for the designated shares. The four classes of heirs, according to her, are the children, the parents, full siblings and uterine siblings. In her view, a female heir may actually inherit 'equally with a male [heir] of the same class in two out of the four basic classes of relatives'.¹² The first of the two classes given of equal shares are the parents, for each of whom the specified shares are a third where they inherit without the descendants or siblings of the decedent, and a sixth in the converse case. The second class is comprised of the uterine siblings that share equally a third of the estate irrespective of their number and sex.

¹⁰See Chaudhry, Z., 'The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law', (1998) 3 Journal of Islamic Law. Pp. 41-98.

¹¹Ibid 76.

¹²Ibid

As regards the circumstances where a female heir receives half the share of the male counterpart, the remaining two groups of relatives in Chaudhry's classification are the children and full siblings.¹³ In her opinion, the rationale is that in *Shari'ah*, there is a system of allocation of responsibility as well as division of labour emphasized in the Qur'anic provision contained in 4:34.¹⁴ Under this system, she argues, it is envisaged that in an Islamic society 'women are free from any economic responsibilities to the family; this burden is solely imposed on the men.'¹⁵ Although the above analysis by Chaudhry appears to be quite explicit on some issues surrounding different treatment on the basis of gender in Islamic inheritance matters, it ignores the fact that in some cases a mother in fact inherits half the share of a father in the classical interpretation of the inheritance verses. This is as regards such instances when the only legal heirs are the parents of the deceased and a spouse relict, male (who is entitled to half of the entire estate) or female (who succeeds to a quarter).

According to Sunnis, following the practice established by caliph 'Umar, the legal entitlement of the mother in both cases is a third of the residual estate after a deduction of the share of the spouse relict.¹⁶ The outstanding two-thirds of the residual estate is, thus, inherited by the father. Although, some early scholars such as *Ibn Abbas* have expressed a contrary view that the practice appears to contradict the clear Qur'anic provision which stipulates a third of the entire estate for the mother, this opposing view has been rejected by the Sunnis.¹⁷ As Khan has argued, '[t]he real reason behind such interpretation of the Qur'an in this matter was simply the refusal to accept the possibility of the mother of the decedent succeeding to a greater share in the

¹³Ibid, Pp. 76 - 77.

¹⁴Which stipulates that- 'Men are the protectors and maintainers of women, because Allah has given the one more than the other, and because they support them from their means ...'

¹⁵Chaudhry, Z., (n 10), Pp.80 - 81

¹⁶Khan, H., 2007. *The Islamic Law of Inheritance: A Comparative Study of Recent Reforms in Muslim Countries*. (Oxford: University Press)80

¹⁷Ibid.

inheritance than the father.¹⁸ This is because if the textual provision had been strictly applied, in the event of co-inheriting with a male spouse relict, the father would have been left a sixth with the mother inheriting twice as much. Also, for the other case where the parents inherit with a female spouse relict, the fractions of the shares would have been $\frac{1}{4}$ for the spouse, $\frac{1}{3}$ for the mother and $\frac{5}{12}$ for the father. In the current author's view, the dissenting view of *Ibn Abbas* appears to accord with the intent of the law for reasons which are further explored in the subsequent sections of this work. Finally, Chaudhry's analysis also leaves unanswered the question of the rationale for status discrimination of the siblings. This is considered below.

STATUS DISCRIMINATION (II, III, V, VI AND IX-XI)

It is important to state here that, as is evident from the inheritance verses reproduced in this work, there appears to be no textual basis for the distinction of a decedent's siblings into full, consanguine and uterine brothers and sisters. A consideration of relevant Prophetic traditions on inheritance also reveals no basis in Hadith literature. This classification appears to have been developed by the early jurists in the application of these verses.

The issue of status discrimination of siblings appears to be closely connected with matters surrounding what is to be taken as the correct interpretation of the Arabic term *Kalālah* used in Q4:12 and 176; the fact that the father (and in his place, the paternal grandfather) is taken to exclude all siblings; and the fact that daughters are only interpreted to exclude only the uterine siblings (however, the son excludes all siblings) in the contemplation of the classical jurists. As regards the term *Kalālah*, it has been correctly argued that the classical interpretation allowed the early jurists 'to create new rules that partly modify the [literal sense of the] Qur'anic provisions in order to solve

¹⁸Ibid.

new cases.¹⁹ Interestingly, although the view of most jurists of the Sunnī and Shi'ī schools appear to interpret *Kalālah* to mean a situation where a decedent is survived by neither descendants (*walad*) nor ascendants (*wālid*) but siblings (or collaterals), none of the schools kept the correct meaning of these two terms in application.²⁰

For example, all the schools appear to converge on the view that both the Arabic words '*walad*' and '*wālid*' are linguistically correct as inclusive terms to mean 'a child: boy or girl' and 'parent: father or mother' respectively.²¹ However, in the interpretation of the inheritance provisions contained in Q4:12 and 176 regarding *Kalālah*, the literal connotation of the terms were not adhered to. In the current author's view, by shifting around the meaning of the terms in their juridical constructions, the early jurists may have contributed to the complexity of the rules under the classical scheme of inheritance. As a supportive mechanism for their agnatic ideology of interpretation, it appears that the issue of status discrimination amongst a decedent's siblings was also established.

Thus, according to the Sunnī application of the provisions of Q4:12,²² a descendant (*walad*) is construed as including the decedent's children regardless of sex as well as grandchildren from only the male children to any degree. Likewise, the provision in the same verse that- 'a brother or a sister, each one of the two gets a sixth; but if more than two, their share is a third' is taken to refer to the uterine siblings only. A parent (*wālid*) is construed as being the decedent's father only or in his place a paternal grandfather to any degree. The implication of this construction is that where a decedent is survived by a child or grandchild through a son (male or female) or the father (and in his place, a paternal grandfather), all the siblings are generally excluded according to the classical scheme.

¹⁹ Cilardo, A. (n 8) 79. Detailed analysis is not intended here. More discussion is, however, presented in the cited work which provided some inspiration for the analysis on this point.

²⁰ Ibid 83.

²¹ Ibid, Pp. 79-84.

²² Ibid 83

However, in respect of the provisions of Q4:176, the Sunnīs do not include daughters and female descendants of sons in their contemplation of the concept of child (*walad*). Also, all references to siblings in the verse such as the provision that – ‘if there are brothers and sisters, (they share), the male having twice the share of the female’ – are taken to signify full and consanguine siblings only. Conversely, while the Shi’ī jurists also recognize status discrimination of the siblings, they appear to be more consistent in their construction of descendants to include in all cases the female children as well as all female descendants of both male and female children.²³ But they also retain the same construction of *wālid* (parent)²⁴ as signifying the decedent’s father or paternal grandfather however high.

In summary, according to the present scheme of inheritance under both the Sunnī and Shi’ī schools, siblings are categorized into heirs of specific shares of a sixth/a third depending on their number (the uterine siblings) and heirs of residual shares (the full and consanguine siblings). In addition, while the presence of a child (male or female) or the father will exclude the rights of uterine siblings to inherit, only the male child and the father may exclude all other siblings in Sunnī interpretation. In Shi’ī construction, however, children of both sexes exclude all the siblings. Also, even though a mother is not regarded as capable of excluding any sibling, the presence of one sibling will be taken to cause a reduction in her share from the maximum entitlement of a third to her minimal share of a sixth. This is so even in situations where the siblings do not actually succeed to any part of the estate as a result of their exclusion by the father, who then takes the residual share.

The rationale for the distinction of the siblings into the stated categories is unclear from the sources. The current author is, however, of the view that this distinction may have been as a result of the pre-Islamic agnate rule under which only persons related to a decedent through the paternal link were recognized as rightful and residual heirs. With this mind-set, it may have appeared reasonable to suppose

²³Ibid 80

²⁴Ibid 83

that since the Qur'ānic provisions specified heirs that were hitherto unrecognized under the agnate system, then the provisions of Q4:12 in respect of the shares of 'brothers and sisters' must be viewed as referring to uterine siblings. This is because, except for the textual legislation, such siblings would ordinarily not have been in a position to inherit on the basis of their connection to the decedent through the maternal link.

Employing the same ideology, the other provision contained in Q4:176 which stipulates residual shares for siblings may have been regarded as confirming the residual position of siblings connected to the decedent through the paternal link. Also, because daughters were not recognized as agnates based on gender, they were, perhaps, taken as having the capacity only to exclude heirs categorized as newly recognized legal heirs as daughters, i.e., the uterine siblings. It appears, however, that this ideology may have lost its relevance in contemporary times. It may certainly have seemed a laudable development if at the time of inheritance legislation, the uterine siblings as well as female children had no right to begin with. This kind of argument may, however, be difficult to sustain for current application, especially when there appears to be no apparent textual basis. Furthermore, the Shi'ī inclusive recognition of female children and grandchildren (irrespective of sex) from any descendant regardless of sex in the construction of the word *walad* capable of excluding all siblings in the exercise of the right to inheritance also appears to be more constructive. Again, there seems to be no justification for the Sunnī gendered interpretation if the provisions of the inheritance verses are considered. In the same way, it appears irrelevant to considerations of whether or not an individual qualifies to inherit either by representation or substitution in the absence of direct descendants, the requirement of connection to the decedent through the paternal side.

With the qualification that female children as well as their descendants should be recognized as having the power to exclude all siblings in inheritance matters, the Islamic scheme of allocating prior rights of inheritance to children (however young) vis-à-vis a decedent's siblings

appear to enjoy contemporary imitations.²⁵ What seems to be left for consideration in this section is the propriety or otherwise of the exclusion of the siblings from inheritance by the father or paternal grandfather even where the presence of more than one sibling causes a reduction in the share of the mother to the minimal share of a sixth. As Ajetunmobi has correctly argued, 'such expulsion' has no basis in the textual authorities.²⁶ It would appear that the basis is also the pre-Islamic agnatic custom within which the father is regarded as the closest agnate to a predeceased child.

RELIGIOUS DISCRIMINATION

As stated above, in the contemplation of the both the Sunnī and the Shi'ī schools, a non-Muslim has no right of inheritance against the estate of a Muslim decedent no matter the degree of familial or emotional connection.²⁷ The textual basis for this position is contained in the popular Hadīth that 'a non-Muslim cannot inherit a Muslim'. Interestingly, while the position of the Sunnī jurists is that the converse is also the case, Shi'ī jurists recognise the right of Muslims to inherit from their non-Muslim relatives.²⁸ It has been suggested that 'this rule is of academic interest in the present day Muslim world'.²⁹ According to the stated view, '[i]t is highly unlikely that there are persons of different faith within a family'.³⁰ In the current author's view, it may be difficult to empirically sustain this general assumption. What appears

²⁵See the 'Order of Entitlement Under the Intestacy Rules' provisions under the English Administrative of Estates Act, 1925, as amended. For detailed discussion of these provisions for contemporary purposes in England, see Barlow, J. King, L., and King, A., *Wills, Administration and Taxation Law and Practice* (9th edn, Sweet & Maxwell, Sydney 2008) Pp.42-55.

²⁶See Ajetunmobi, M.A., 'The Intricacy of Al 'Awl (Pro-Rata Reduction) In Islamic Law of Succession', (1987)*Islamic Culture*. Pp. 51-69; 1988, 'Collection and Review of AL-'Awl (Pro-Rata Reduction) In Shari'ah law of Succession', (1988) 27(3) *Islamic Studies*. Pp. 209-219; 'Kalalah in Islamic Law of Inheritance' (1991)65(iv) *Islamic Culture*. Pp. 47-79.

²⁷For instances of judicial construction of this position in some Muslim countries, see Khan, H., 2007. *Supra*, note 21, Pp.51-2.

²⁸Khan, H., 2007. *Supra* note 16, P.53.

²⁹*Ibid* 156.

³⁰*Ibid*.

to be more important is a consideration of the possible rationale for the Islamic position in respect of the right of a non-Muslim to inherit a Muslim relative.

This work posits that the Sunnī application of the rule appears to be more justifiable than the Shi'ī construction. In the first instance, it seems reasonable that a religious law such as *Shari'ah* should attempt to desist from any interference in the personal matters of non-adherents. So that if a Muslim's right to inheritance cannot be guaranteed and enforced vis-à-vis the estate of another non-Muslim decedent who is a relative, it seems fair and equitable that the reverse should not also be the case. Secondly, the fact that there is no mutual right of inheritance between a Muslim and non-Muslim does not obliterate other ways of devising property at death. In fact, the Islamic position is that a non-Muslim may be the beneficiary of a legal bequest or a gift *inter vivos*. It appears, therefore, that it is also in consonance with the principle of religious freedom that a non-Muslim's estate is regarded as being outside the scope of inheritance legislation in Islam.

RIGHTS OF ADOPTED OR STEP CHILDREN AND A WIDOWED DAUGHTER-IN-LAW

Carroll³¹ has contended that the Islamic inheritance system does not cater for the interests of the above stated categories of heirs. The bases of this objection, in the current author's view, do not represent serious infractions of any objective standard. In the first instance, the concept of adoption as is understood in the popular sense is not recognized in Islam.³² Secondly, while it may be true that the inheritance verses do not cover the rights of the stated categories of

³¹'Avoiding the Law of Succession', *supra* note 1, P. 245-6.

³²The provisions of Q33:5 states: 'Call them by after their fathers: that is juster in the sight of Allah. But if ye know not their father's name, (then they are) your brothers in faith or your friends . . .', for an exposition of and the justification for the Islamic stance against the concept of adoption in the popular sense, see Ishaque, S., 'Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in the Context of a Child's Right to an Identity.' (2008) *Int.J.L.P.F.*, Pp. 393-418.

heirs, it is also a fact that a decedent may devise up to a third of an estate to such persons if so desired. Similarly, the argument that the child of a predeceased heir has no right of inheritance [as contained in (iii) above] may also be countered on the ground that in the same way as adopted or step-children, grandchildren of any degree may be the beneficiaries of a bequest for up to a third of the entire estate. In any event, it is not in all cases that grandchildren do not have an automatic right of inheritance. Where, for example, the decedent is not survived by direct descendants, grandchildren become rightful heirs in such cases. In some situations, a grandchild may in fact inherit alongside direct descendants.

In addition, the quantity of bequest to a non-heir may in reality exceed a third in the event of the concurrence of legal heirs to such excess. Therefore, in situations where a grandchild has no automatic right to inheritance due to the presence of other heirs with stronger claims, as well as for adopted/step-relations and a widowed daughter-in-law, whether or not the stated categories of heirs inherit appears to be entirely up to a decedent who should have left them catered for in a bequest. At this juncture, it is interesting to note that a number of Muslim countries³³ have made reforms to their legal regimes of inheritance to protect the rights of the children of a predeceased heir to inherit. In some countries, the right of such heirs is protected under a system of 'Obligatory Bequests' against the estate of a decedent³⁴ and in others, grandchildren are allowed to inherit by representation³⁵ and succession to the legal share of the predeceased heir (their parent). The basis of this development from the perspective of the classical jurists of Islamic law of the various schools is, however, unclear.

³³Such as Egypt, Syria, Tunisia, Morocco, Pakistan, Jordan, Algeria and Kuwait. See Khan, H., 2007, *supra* note 16, Pp.178-9.

³⁴*Ibid.*

³⁵*Ibid.*

RECONSTRUCTION OF THE SCHEME OF INHERITANCE IN *SHARĪAH* BASED ON TEXTUAL PROVISIONS CONTAINED IN ITS BASIC SOURCES

The analysis in the preceding section is to demonstrate the possibility that the doctrinal elaborations that resulted in the Islamic inheritance scheme 'move completely inside an Arab and Islamic way of thinking'.³⁶ It is useful to state the Islamic perspective that Prophet Muhammad used to validate diverse approaches to matters provided that the objective of *Sharī'ah* was observed in all cases. Importantly, the Qur'ānic verse in 16:93 emphasizes that '[a]nd had Allah willed, He would have made you (all) one nation'. The implication of all this, to the current author, is that the meanings of the letters of the law may vary across societies. However, the 'spirit' of the law must always be respected.

Thus, while the current author argues that the classical scheme may not necessarily constitute the only way to interpret and apply the inheritance verses for contemporary practices, it is appreciated that the scheme must have served the aspirations of its interpreters in consonance with *Sharī'ah*. In the same way, the attempt in this work to construct a different scheme of inheritance based on the literal sense of the inheritance verses which appear to serve contemporary aspirations is seemingly legitimate.. It is against the above background that the following alternative way of construing the meaning³⁷ and rationale of inheritance regulation in *Sharī'ah* is proposed thus-

1. In the first instance, the current author is of the opinion that the classical distinction between Qur'ānic heirs and agnates is artificial. In terms of familial connection, the closest relatives to a decedent in the four categories of children, spouses, parents and siblings are all recognized as Qur'ānic heirs with specified shares.
2. Thus, according to the provisions of Q4:11, where a decedent is only survived by children of both sexes, they succeed to the

³⁶ Cilardo, A., (n 8) 79.

³⁷ Some inspiration for this construction is also drawn from the works of Ajetunmbi, M.A., 198 1988 and 1991, *Supra* note 26.

entire estate with the male heir inheriting double the share of the female heir. All siblings are excluded. In situations where female children inherit alongside other qualifying heirs such as the spouse relict, one daughter succeeds to a half and two or more daughters will inherit two-thirds. But where the decedent is also survived by parents, they are not excluded by the children. Each parent succeeds to the minimal entitlement of a sixth. Where, however, the decedent is survived by neither children nor siblings, each parent inherits a third. In situations where the parents inherit alongside siblings, the parents take the minimal entitlement of a sixth.

3. As Q4:12 stipulates, the spouse relict's legal share is half for the male and a fourth for the female, if the decedent is not survived by children. The presence of child(ren) reduces the shares respectively to a fourth and an eighth. More than one sibling regardless of sex and status are allocated the share of a third to be distributed equally amongst them. However, if there is only one sibling, male or female; full, consanguine or uterine, the relevant share is a sixth. Therefore, only the presence of children of both sexes, and not the father as well the spouse relict, may exclude all categories of siblings.
4. Finally, based on the provisions of Q4:176, where a decedent is not survived by any child, a surviving female sibling inherits half of the estate. Two or more of such female siblings are entitled to a third. But where the decedent is survived only by a single brother, the surviving brother succeeds to the entire estate. If the only surviving heirs are a mixture of male and female siblings, they succeed in residual terms on the basis of half the share of the male heir to the female.

In examining the rationale for discriminate shares in some cases for female heirs in relation to their male counterparts, the justification by Chaudhry³⁸ appears to be strongly persuasive in view of the reconstructed scheme. This is because the issues of status discrimination of the siblings as well as the fluctuating shares of a mother where she inherits alongside the father and a spouse relict, did

³⁸Chaudhry, Z., (n 15) Pp.41-98.

not appear to support her arguments. Her argument was that in all cases where men inherit double the share of the female heir, it is based on the fact of greater financial responsibility allocated to the male family members. Yet, while the uterine siblings under the classical scheme inherited equally on the basis of Q4:12, the full and consanguine siblings inherited on the ratio of 2:1 vis-à-vis male and female siblings respectively. Also, as has been said, the classical scheme also adopted this rule in respect of allocating the share of parents where they inherit with either of the spouses.

However, with the reconstructed rules, there appears to be much ground for sustaining Chaudhry's position. As earlier stated, the Islamic position as is evident in the provisions of Q4:34 is that the responsibility for the alimentary provision and economic needs of women is placed on their male relatives. Applying this ideology to the constructed scheme of shares, Chaudhry's argument that for the two instances where women inherit unequally in relative terms to the men in Islam there are two other instances where they inherit equally, appears convincing. From the constructed rules, the mother and father inherit identical shares, as do the male and female siblings where they qualify to inherit with other heirs due to their non-exclusion by heirs of greater priority- the children. The other two instances are as regards the residual shares of children and siblings of both sexes.

In the current author's view, the rationale of greater financial responsibility appears vindicated in the latter two instances of discriminate shares. It is arguable that in such situations, the male heirs constitute the closest male relatives to the female heirs. By way of illustration, the male heirs within a decedent's children would certainly constitute the closest male relatives to the female heirs, even where there is a surviving grandfather. In the other instance of unequal shares of the siblings, the wording of the provision of Q4:176 indicates the absence of linear ascendants (the parents of the siblings), in particular the father on whom would have rested the financial responsibility of the female siblings (his daughters). Thus, with the father's absence, the responsibility for his daughter's financial needs

(the female siblings) shifts onto their brothers with whom they have enjoyed a right to inherit their deceased sibling.

The equal shares of the siblings in Q4:12 appear to, therefore, be in accord with the reasoning that there is no expectation of greater financial responsibility in such cases. The reason for this appears to be an indication of the presence of linear ascendants, in particular the father, as comprising part of the surviving heirs. In such situations, siblings share equally a fraction of the estate regardless of sex. This is because the closest male member to the female siblings in such cases is their father, a surviving heir. As regards the identical shares of each parent in all situations, it may be argued that *Shari'ah* does not envisage that a man would require the estate of his predeceased child to discharge his financial responsibilities to his wife, the mother of the decedent.

Finally, where a decedent is not survived by any heir of the above discussed categories, it is here conceived that all surviving extended relatives may qualify as legal heirs. In such situations, distinctions on the basis of gender and considerations regarding paternal or maternal connections should be considered as irrelevant. However, since extended relatives do not enjoy a specific allocation of shares as such in the textual provisions, the execution of legal bequests stipulating the hierarchical order of extended relatives and the shares to be allocated may need to be encouraged to minimize disputes. Otherwise, all surviving relatives may succeed to equal portions of the estate on the basis of what is just and equitable in the particular circumstances of each case.

CONCLUSION

Islamic law experts have argued that the scheme of inheritance in *Shari'ah* is exhaustive enough to accommodate diverse situations currently and in the future.³⁹ The Islamic textual legislation on inheritance are contained in the Quranic provisions enshrined

³⁹Chaudhry, Z. (n 10) 63

essentially in chapter 4, verses 11, 12 and 176 as well as relevant Prophetic traditions. Critical analysts (e.g. Carroll, 2001) have, however, suggested that the classical interpretation and application of these textual provisions has resulted in a system of inheritance different from that envisaged by the textual sources. Upon close scrutiny, this work discovered that the doctrinal elaborations that resulted in the Islamic inheritance system have been influenced by an Arab, though still Islamic, way of thinking. It was also discovered that alternative interpretation and application may still be proposed within the same Islamic spirit.

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