DISTRIBUTION OF DECEASED MUSLIM'S ESTATE IN THE 21ST CENTURY: LEGAL ISSUES AND SOLUTIONS

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ABSTRACT

Islam is a dynamic religion and a flexible way of life. It accommodates change as long as the change does not alter the root upon which the principles revolve. This paper examines distribution of estate in the 21st century. It discusses the status of modern scientific investigations in relation to succession in *Shari'ah*. Doctrinal and empirical methodologies were adopted in achieving the objectives of this paper. It concludes that the application of modern scientific investigations in interpreting and applying some Islamic rules are valid unless they are flagrantly contrary to *Nass* (express text from the sources of *Shari'ah*) or apparently illegal within the scale of Islamic law. Therefore, the paper recommends the use of modern scientific investigations in issues that Shari'ah allows *ijtihad*. It further recommends for *ijtihad jama'i* (collective *ijtihad*) in these issues. This is to establish a standard and to avoid issuing conflicting rulings in the populace particularly by the unlettered.

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1.1 Introduction

Islamic law of inheritance is one of the most important branches of law in any Muslim society. It prescribed the modus operandi by which the estate of a Muslim deceased is distributed among his legal heirs. The law has its origin in *Al-Quran*, the *Sunnah* of the Holy Prophet Muhammad (SAW), the *Ijtihad* of *Sahabah* (Companions of the Prophet) and the exposition of the early Muslim jurists. These serve as the sources of the law of inheritance under the Islamic legal system. It meticulously defined the heirs' entitlements as such cannot be subject to any alteration or compromised whatsoever. These sources are categorical on the distribution of the deceased's estate by marshalling relatives into a strict and comprehensive order of priorities. The sources are also clear on the conditions, grounds and constrains upon which the rights of heirs depend. However, in the recent years, there are certain innovations that found their ways into the human society and the Muslim world is not an exception. Critical examination of these innovations reveals how it affects the distribution of estate under the Islamic law of inheritance in a way or the other. The innovations are scientific in nature and have posed challenges to scholars in applying the rulings of *Shari'ah* on the issues. As Islam is not only a religion but a way of life; it would not allow these challenges without providing solutions in *Shariah* especially on the application of inheritance. This paper examines scientific challenges of the 21st century in relation to *Shari'ah* rulings in inheritance.

1.2 Rights of Inheritance under Islamic Law

When a Muslim dies his estate is not subjected to inheritance until after the following liabilities are settled:[1]

i) Secured debts i.e. redeeming mortgaged property, payment of zakat mandated by the deceased etc;

[1] A. M. Gurin, *An Introduction to Islamic Law of Succession (Testate and Intested)* (Jodda Comm. Press Ltd, Zaria, 1998) p 8 – 9, M. A. Al-Sabuni, *Al-Mawaareeth fi Al- Shari'ati Al-Islamiyyah Fi Dau'I Al-Kitab Wa Al-Sunnah* (Daru Al-Hadeeth, Cairo, nd) Pp. 34-36.

ii) Funeral expenses of the deceased which must be done moderately;
iii) Ordinary debts whether due for payment or not at the time of the death[2] and
iv) Execution of will if any is left by the deceased.

After settling the above four liabilities, whatever remains is distributed among the deceased's legal heirs.

The distribution of the estate among the heirs depends on the fulfilment of the following grounds and conditions.[3]

i) Grounds: It must be proved that the prospective heir(s) is/are related to the deceased through a valid/legal relationship which justifies their mutual rights of inheritance. This is achieved through either of the followings:
   a. related to the deceased through blood;
   b. valid and subsisting marriage (*Nikah*); or
   c. relation through former master and his/her freed slave (*Wala Al*-I*tq*).

[2] Items roman no (I) and (iii) may either be debts that the deceased owed to fellow men, which the *Shari'ah* requires to be settled as reproduced above, or debts that he owed to Almighty Allah; this include *Zakah* and other forms of religious responsibilities. According to the Hanafi School of Islamic jurisprudence religious debts should not be settled by the heirs unless the deceased had made a bequest to that effect. The Hanafi argued that payment of spiritual debt is an act of worship which is dropped with the death of the deceased though he should account for it before the Almighty Allah. The argument went further that an act of worship is always performed with intention and free will which can only come from a living person. However, according to *Al-Jamhoor* (the majority of the jurists) religious debts should be paid like other debts of the deceased. *Al-Jamhoor* argued that it is debts that are attached to the property (the estate of the deceased), it should be paid even without being bequeathed by the deceased. Thus it does not require intention as it is not purely religious but also monetary. See M. A. Al-Sabuni, *Al-Mawaareeth fi Al- Shari'ati Al-Islamiyyah Fi Dau'i Al-Kitabi Wa Al-Sunnah* (Daru Al-Hadeeth, Cairo, nd) Pp. 34-36.

[3] A. Hussain, *Islamic Law of Succession,*(Maktaba Darul Salam Riyadh, 2005) p 29; see also U. E. Pindiga, *Practical Guide to the Law of Succession,* (Tamaza Publishing Company, Zaria, 2001) pp. 10 – 13.

ii) Conditions of Inheritance: In addition to the proof of the above relationship the following three conditions must also be proved:
   a. the person to be inherited has died. This can be determined either actual through death or by decree of the law court;
   b. that the heir to inherit has survived the deceased; and
   c. existence of the subject matter (estate of the deceased person).[4]

A heir qualifies to inherit only if he belongs to any of the four categories of heirs and that the circumstances surrounding the issue permit. These categories are shown in the following section.

1.3 Categories of Heirs

For the purpose of inheritance, heir(s) are categorized into four:

a) *As'hab al-Furud* (Quranic heirs); these are heirs mentioned in the Quran and their shares are specific therein.[5]
b) *Al-Asabah* (Residuary heirs): they receive what remains after the Quranic heirs must have been allotted their shares. This category of heirs are divided into three (3):
   i) residuary in his own right, e.g. son of the deceased;
   ii) residuary in other's right, and residuary with others.[6]
c) *Zawu al-Arham* (Distant kindred); these are distant relatives who are preferred by other jurist to inherit in the absence of Qur'anic and residuary heirs.

[4] Gurin, A. M. *Op cit* p 14 ; see also M. Dasuqi, *Hashiyatu Al-Dasuqi Ala Sharhi Al-Kabir*, Vol. 4 (Daru Al-Fikr, Beirut, nd) p 34; see also A. R. Doi, *Shariah: The Islamic Law*, (Noordeen Publishers, Malaysia 2007) p 272

[5] A. Y. Ali, *The Holy Quran (English Translation)* (Revised Edition, Elliasii Family Book Service India, 2000) Chapter IV: 7, 8, 11, 12 and 176.

[6] M. J. Magriyyah, *The Five Schools of Islamic Law,* (Ansaariya Publications Iran, 1995) p 476 – 479; see also M. A. As-Sabuni, *Almawarith fil Shari'atul Islamiyya*, (Darul Kitabi was Sunnah 1979) p 215

d) *Al-Wala* (Relation through former master and his/her freed slave) is also regarded as a heir in the absence of the above.[7] Finally,
e) *Bait al-Mal* (Islamic Public treasury) is also regarded as an heir when the deceased is not survived by any inheriting male agnatic or residuary heir.[8]

The existence of the last two categories of heirs is practically absent in most Muslim countries today. Therefore, the second century jurists disregarded it and adopted the use of doctrine of Radd (i.e. returning the excess to the existing legal heirs where there are no male agnate to inherit.[9]

1.4 Distribution of Shares

The Holy Qur'an[10] provides:

Allah commands you regarding your children. For the male, a share equivalent to that of two females

This Quranic provision refers to males and females of equal degree and class of removal from the deceased, this means a son of the deceased inherits a share equivalent to that of two daughters of the deceased, a full brother inherits twice as much as that of his sister, a son's son inherits twice as much as that of his sister i.e. son's daughter. However, in the case of inheritance of uterine brothers and sisters (these are brothers and sisters who share the same mother only with the deceased), they share equally.

The Quran also provides[11] "if there are daughters more than two, then for them is $^{2}/_{3}$ of the inheritance, and if there is only one, then it is ½" In this verse, the Holy Qur'an has given the

[7] This is not feasible in the contemporary world. See M. A. Al-Sabuni, *Al-Mawaareeth fi Al- Shari'ati Al-Islamiyyah Fi Dau'i Al-Kitabi Wa Al-Sunnah* (Daru Al-Hadeeth, Cairo, nd) P. 38.
[8] S. U. D. Keffi, *Some Aspects of Islamic Law of Succession,* (Rukhsa Publication Kano, 1990) p. 17,
[9] See for details A. R. Doi, *Shariah: The Islamic Law*, (Noordeen Publishers, Malaysia 2007) pp. 322 - 323
[10] Qur'an Chapter 4:11
[11] *Ibid*.

daughter a specific share which makes her a Quranic heir. The Holy Qur'an mentioned nine Quranic heirs while other three were added through analogy by jurists. Therefore, they are referred to as twelve Quranic heirs. Where sons inherit as agnates, the share of daughter(s) are no longer fixed, as their share is determined by the principle of *Ta'aseeb* i.e. ratio 2:1 male taking twice as much as the female. In the absence of any daughter the son inherits all. This principle is also applicable to agnatic granddaughters. The share of agnatic granddaughter in the absence of a daughter is ½ if they are two or more than their share is $^{2}/_{3}$. However, existence of two or more daughters will totally exclude the granddaughter(s). Where there is one daughter and agnatic granddaughter(s), the daughter takes ½ while the agnatic granddaughter takes $^{1}/_{6}$ making up a total of $^{2}/_{3}$ (which is the females' maximum collective shares). Where there are agnatic grandson(s) together with agnatic grand-daughter then the principle of *Ta'aseeb* applies i.e. the agnatic grandson(s) and the agnatic granddaughter(s) share the remaining ½ in ratio 2:1.

Regarding the parents of the deceased, the Holy Quran provides:

> And for his parents for each of them, there is $^{1}/_{6}$ of the inheritance if he has a child, but if he does not have a child and the parents are the only heirs, then for the mother is $^{1}/_{3}$.[12]

The child referred to in this provision is, any child or agnatic grandchild such as son, son's son or son's daughter how low-so-ever. Where any of these heirs survived then each of the parents inherits $^{1}/_{6}$. In the absence of a child or agnatic grandchild the mother inherits $^{1}/_{3}$. In this situation the share of the father is not mentioned because in the absence of a child or agnatic grandchild the father inherits in dual capacity; i.e both as Qur'anic heir as well as residual. To this class of parents, the maternal grandmother and paternal grandfather have been added

[12] *Ibid*.

as substitute heirs by analogy.[13] The Quranic provision further provides: "…..but if he has brothers or sisters, then for the mother is $^1/_6$". The brother(s) or sister(s) mentioned in this verse referred to all kinds of brothers and sisters (full, half or uterine), plurality of any of them or their combination reduces the mother's share to $^1/_6$.[14]

On the inheritance of spouses, the Holy Quran provides: "And for you there is ½ of what your wives leaves behind if there is no child, but if they have left a child, then for you there is ¼ of what they leave….".

"And for them ¼ of what you leave behind if you did not have a child, but if you have a child then for them is $^1/_8$ of what you leave…." [15] This very verse provides for the minimum and maximum shares of both the husband and wives. It should be noted that whatever share the wives are entitled to is to be shared among them equally.

The above mentioned verse also provides for the inheritance of *Kalala* as follows. "And if a *kalala* man or woman (one who has neither ascendants nor descendants) is inherited from and, he or she has a uterine brother or sister then each of them is $^1/_6$, but if they are more they share in $^1/_3$ equally.[16] It should be noted that this class of sibling inherit only in the absence of any descendant or ascendants, and they are not excluded by the mother. Two or more of them reduces the mother's share to $^1/_6$.[17]

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[13] S. A. Khan, *How to Calculate Inheritance: A simple Approach*, (Goodwords Books, India, 2005) p 28

[14] Quran 4:11; see also M. M. Abdul-Fattah, *Al-Fiqhu Al-Muyassaru Min Al-Quran wa Al-Sunnah*,(Vol. 2, Dar Al Munarah, Egypt, 2004) p 1129

[15] Quran 4:12

[16] *Ibid;* see also S. Ismail, 1st Ethical Ltd. www.1stethical.com pp. 5-6; W. A. Coggins, Succession in Traditional Islamic Law., http//www.mobar.org/58c30eb3-2c4-4c5d-8898-d3918 p4; and Y. Billo, Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States p 19 http//lawbepress.com/express/epc/12 p 19 all accessed on the 24th January 2013 at 5pm

[17] Doi *op cit* p 297

It is important to note the following Quranic heirs, i.e. father, mother, husband, wife, daughter, full and half agnatic sisters, uterine brother and sister together with paternal grandfather maternal grandmother and aquatic granddaughter when entitle to inherit are given fix share and the remaining estate shall be inherited by residuary heirs. Qur'anic heirs such as father, daughter, agnatic granddaughter, full and half-sisters, mother (under *Umariyyatan*) and grandfather, inherit as residuary heirs under certain circumstances. Husband, wife, son, daughter, father and mother are never totally excluded from inheritance, but their shares may vary depending on the presence of some heirs.[18]

Apart from the above heirs all others can be totally excluded from inheritance. For example, a person who is related to the deceased through another, a grand-father for instance, is excluded by the father of the deceased. So also an individual who is nearer in degree of removal/proximity to the deceased excludes the one who is remote e.g. son of the deceased and son's son when both survived the deceased, the former excludes the latter. So also an heir with double connections with the deceased excludes the one with single connections e.g. full brother and half-brother, the former excludes the latter.[19]

1.5 Constraints to inheritance

Just like the law provided for the right of prospective heirs to inherit their deceased relative, it also provided for what will disqualify them from inheriting as well. Heirs may be prevented from inheriting their deceased relative by the rule of disqualification. The causes of the disqualification are:

i) Difference of religion: where the deceased and his heir belong to different faiths/religion. The implication is that a Muslim cannot inherit from a non-Muslim and a non-Muslim from a Muslim. A *Hadith* reported in *Sahih al-Bukhari* that the Prophet (may

[18] Doi *Ibid* Table 7 p 283
[19] *Ibid* table 8 p 284

the peace and blessings of Allah be upon him) said 'No Muslim can inherit from a non-Muslim or a non-Muslim from a Muslim.' It was also reported in *Sunan al-Tirmidhi* that 'Persons of two different faiths cannot inherit from each other'. [20]

ii) Homicide: that is the person who intentionally or without legal reasons cause the death of the deceased such a killer is barred to inherit his victim. This is because; allowing such a person to benefit from his victim's estate will encourage incidents of homicide.[21]

iii) Slavery: slavery is also a bar to inheritance. Slave and his property are regarded as property of his master.[22]

iv) Illegitimacy: an illegitimate child is not qualified to inherit from the estate of his biological father via the act of *zina*. A product of *zina* inherits only from the mother.[23]

v) Divorce by process of lian: where husband and wife took the oath of lian i.e. the husband disowns the paternity of a pregnancy or child through the stipulated process of lian,[24] the husband shall not inherit from the wife carrying the disowned pregnancy if she dies, nor she inherits from him should he die first as the marriage has come to an end. This is because by the oath of lian the marriage came to an end. The child too cannot inherit from the

[20] Quran 4:114 '... And never will Allah grant to the non-believers a way (to triumph) over the believers'. See the case of *Ubudu V Abdulrazak* (2001) 7 NWLR p 670 at 680. It is also the consensus of the Muslim Jurists.

[21] A. A. A. Mahmud, *Guide to Succession under Islamic Law,* (Al Abu Mahdi Ltd, Yola,nd) p 9

[22] S. Sabiq, *Fiqhu Al-Sunnah*,(Vol. 4, Dar el Fikir, Beirut, 1996) p 470-472.; See also M. A. Ambali, *The Practice of Muslim Family Law in Nigeria,* (Tamaza Publishers Company Ltd, Zaria, 1998) p 269 - 270

[23] Ambali, *Ibid* see also Khan, *Op cit* p 51; see also *Rabiu V Amadu* (2003) 5 NWLR p 346 at 352 where it was held that the paternity of child can be denied if the wife delivers a complete baby within a period lesser than 6 months, 5 or 6 days less from the date of the marriage contract.

[24] Quran Chapter 24:6 and 7

estate of the man and vice versa. But both the mother and the child can mutually inherit each other.[25]

vi) Death in common calamity: if two or more related persons died together (e.g. accident) whether simultaneously or in circumstances where it cannot be established which of the relative died first, neither of them will inherit from the estate of the other.[26] However, this issue has been discussed under item 1.6c below as it affects the scientific inventions of the 21st century.

2.1 Legal Issues of the 21st Century

While there are three unanimously agreed conditions (death of the *praepositus*, existence of estate and survival of heir) of inheritance under Islamic law, this paper is, however, restricted to the third condition that is the survival of the heir. This is because of some scientific inventions of the 21st century on the issue. The paper discusses some of these issues in the following section.

a) The survival of the heir

The survival of an heir is of utmost importance to the division of the property of a deceased person. Immediately after the announcement and ascertainment of his death, the surviving heirs become entitle to the property. Survival in this context connotes that the heir is alive as at the time when the *praepositus* died. In this regard, this paper considers the following issues:

[25]Mahmud, *op cit* p 10; see also Ambali, *Op cit* p 270

[26] Khan, *op cit* p 50- 52; see also *Alhaji Jiddum V Abba Abuna And Goni Adam* (2000) 14 NWLR p 211-225; see also Maghniyyah, *Op cit* p 526 and also Gurin, *op cit* p 19; *Al-Mausu'atu Al-Fiqhiyyah Al-Kuwaitiyyah* Edited and Published by Ministry of Islamic Affairs and Endowment of Kuwait Pp. 1376-1377 electronic copy available at https://shamela.net visited on 30th/05/2018.

i) Child in the Womb

A child in the womb of its mother before delivery is a legal heir of the estate of its lawfully biological father as long as it is established that the child was conceived at the time when the father died. Such a child must be born alive to inherit.[27] Its gender must be known to determine its share/ratio. So also the number of the content of the womb must also be ascertained. In order to determine the gender regards shall be made to scientific investigations through the aid of scanner-devices. Although, some scholars are of the opinion that such activities are not in consonance with the position of Islamic law since the Qur'an explicitly provides that no one knows the contents of a womb. While this is true, but what the Qur'an provides seem to be contrary to this opinion. The Qur'an provides:

> Verily, Allah, with Him (Alone) is the knowledge of the hour, He sends down the rain, and knows that which is in the wombs. No person knows what he will earn tomorrow, and no person knows in what land he will die. Verily, Allah is All-Knower, Well-Acquainted (with things).[28]

From the verse above it can be discern that Allah discharges the knowledge of what the womb contain from all creatures only prior to the 4th month of its creation but after the 4th month the gender of the child is ascertain. There are two reasons for holding this view. Firstly, is the *Hadith* narrated by Bukari[29] and

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[27] For child in the womb to inherit it must have been born alive. This can be established when the baby cries after its delivery. It does not matter if it dies subsequently. *Al-Mausu'atu Al-Fiqhiyyah Al-Kuwaitiyyah* Edited and Published by Ministry of Islamic Affairs and Endowment of Kuwait Pp. 1464 electronic copy available at https://shamela.net visited on 30th/05/2018; M.A.A. Ibn Qudamah, *Al-Mugni* P. 2702 electronic copy available at https://shamela.net visited on 30th/05/2018.

[28] Q 31:34 as translated by M. M Khan, *et al* Translation of the Meaning of The Noble Qur'an in the English Language, King Fahd Complex, Madina (nd) p 556

[29] *Hadith* No. 3208.

Muslim[30] that the Prophet (SAW) said '… thereafter, the angel is sent to him and he breathes into him the spirit…' In explaining the phrase above Ibn Rajab referred to a narration of Hudhayfah bin Usayd who said that Prophet (SAW) has said 'when the *Nutfah* passes forty-two nights in the womb, Allah sends to it an angel who shapes it and creates its hearing, seeing, skin and bones. Then he says, O Lord, is it a male or female? Then your Lord decrees whatever He wills and the angel records it….[31] Thus, based on this authority, our argument is that since the angel take records of the gender, he knows the gender of the child as believed by Ibn Rajab. Secondly, the argument is also attached to the rule of vocabulary and grammar of Arabic language. Allah uses a descriptive word (*Gair Al-A'qil*) in qualifying the nature of the foetus by using the phrase 'that which is in the womb' instead of 'who is in the womb' to show that live and senses have not yet been breathed onto the foetus.[32] Should Allah said 'who is in the womb' then the gender would not be let known to anybody till after delivery but saying 'which is in the womb' shows that nobody should know the gender of foetus before the establishment of live and the senses as narrated by Hudhayfah. Furthermore Imam Ibn Katheer in the interpretation of the verse says 'these are keys of *ghaib* (unknown) that are known to Allah alone except those whom He (Allah) so wish in his creatures to know. Once its knowledge is exposed to someone then it is no more a *ghaib*.[33] Therefore, Allah grant us knowledge of modern sciences to allow us know what he so wish.

So, by and large this paper is of the view that where a father dies leaving a child in the womb, the administrators are empowered to ascertain the gender of the child before setting down his share. And the only means is the scientific means of using scanners and other devices available.

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[30] *Hadith* No. 2643.

[31] M. Fadel, *Jami'u Al-Ulum Wa Al-Hikam* (translated version, Umm Al-Qura, Egypt 2002) p 70

[32] In addition to other meanings demonstrated by the phrase.

[33] I. I. Ibnu Katheer, *Tafseer Al-Qur'an Al-Adheem* electronic copy available at https://shamela.net visited on 30th/05/2018.

The second limp of this topic is the issue of number of children in the womb. This is also ascertainable through the means of modern science devices like scanners.

In the alternative to the above procedure, the administrators may decide to use what is obtainable in their locality in terms of the highest number of children approximately born at a time by same mother; this is to say twins or triplets. The current position on its ratio is that of four (quadruplets) sons or daughters – the bigger amount thereof.[34] If this is the case then the administrators may earmark the share of four male children. [35] This will satisfy any number less than four irrespective of their gender.[36]

ii) Simultaneous Death of cross heirs

The Maliki school is of the opinion that where the death of two or more co-heirs occur simultaneously and the time of their death is not known as to ascertain who died first amongst them then none among them is to inherit from the estate of the other rather their respective surviving heirs should inherit them [37]

[34] This is the opinion of Abu Hanifah and some Maliki scholars; for details see Abdul-Fattah, M. M., 500 Questions and Answers on Islamic Jurisprudence, Dar Al-Manarah, Egypt 2011, p 374; Ibn Rusd is of the same view, he said ' this issue should be judged by the prevailing custom and practice of the people' Ibn Abdulhakam said 'this should be based on what people are used to and not on minority practice' see *Al-Mausu'atu Al-Fiqhiyyah Al-Kuwaitiyyah* Edited and Published by Ministry of Islamic Affairs and Endowment of Kuwait Pp. 1463 electronic copy available at https://shamela.net visited on 30th/05/2018.

[35] See A. H. Diram, 'Distribution of the Deceased Person's Estate under Islamic Law of Inheritance and the Unconventional Practices Associated with it: A Case Study of North-East Region of Nigeria', (Final Year Project Unpublished, 2004)*;* However, other muslim scholars frowned at that they go by the position of a share of one male child and that in the event of more than one is born, then the other heirs held a resulting trust for the unborn.(Allahu a'alam)

[36] This paper made effort to exhibit *Fatwa* of Islamic Fiqh Academy on this issue but could not lay hand on any.

[37] M. A. Sa'id, *Fathu Al- Jawad Fi Sharhi Al-Irshaad,* (Arabic Version, Sadam & Co., Kano, 2001) pp. 135 – 162. However, in case of a claim that the death was not simultaneous, the claimant should take oath to establish his

individually. Perhaps, Maliki School relied so much on the ambiguity that exist on the time of the deaths,[38] secondly, in the past there was no other method of ascertaining the time of death. Thus, the only option available was to succumb to this view.[39] However, one may argue that currently the position could have been held differently because of the existence of scientific post mortem examination available.

The nagging question is the legality of post mortem in this category of cases. It is argued that in terms of ascertaining the time of death any extraneous equipments to be used outside what the Prophet (SAW) used during his time is not accepted. This is because Islam is a natural religion and way of life, hence; inheritance is an aspect of obedience to Allah and as such only the procedure by which Allah provided for can be utilised.[40] However, this view appears to be weak, as Islam is not a rigid religion, rather it accepts changes so long as it does not alter any of the principles of worship (*Ibadaat).*[41] To this end, Sadau is of the strong view that examination of cadaver to ascertain time of death is legal as long as it can be done by a certified and *adil* (trusted) Muslim medical doctor or by a team of doctors which must consist of at least a Muslim[42] when other *Shari'ah* requirements have been fulfilled.

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claim. See M.A.A. Ibn Qudamah, *Al-Mugni* P. 2702 electronic copy available at https://shamela.net visited on 30th/05/2018.

[38] Ibn Qudamah is also of the same view see Ibn Qudamah, *Ibid.* P. 2702 electronic copy available at https://shamela.net visited on 30th/05/2018

[39] It can be seen that none of all the schools of Islamic jurisprudence went contrary to Maliki's view in this regard. Nonetheless, even most of the contemporary ulama are not against the view as one may find in the subsequent arguments in the main text of this paper.

[40] Sheikh Muhammad Nasir, an Islamic Scholar who specialized in the science of Hadith in the Islamic University of Madina, Saudi Arabia, in an Interview with him in Yola on the 30th December 2008.

[41] Sheikh Jibrin Sadau is an Islamic Scholar domiciled in Yola who specialised in Sharia from the Jami'atul Islamiya Madina. This view was aired in an interview with the researcher in Yola on the 5th of January 2010.

[42] *Ibid*. As a general rule, it is not always possible and or necessary that medical examination or other medical actions to a Muslim patient must always be conducted by a Muslim medical doctor. Trustworthiness should be

Post mortem is applied upon availability of cadaver. However, it is not applied on the body that could not be physically found. Relatives or other people who know the deceased should ascertain the cadaver. By this its heirs may be ascertained.[43] But where the cadaver is not recognised by the right people mentioned hitherto, Maliki School's view is to be applied.

b) Transsexual Person

A transsexual person is someone who has had a medical, hormonal and/or surgical treatment to alter their physical features so that they more closely resemble those of the opposite sex.[44] Also of importance to know is that every heir must claim the right either as a male heir or as a female heir otherwise the heir forfeits the right of inheritance. However, in a situation where the heir is a transsexual person in what capacity will he inherit? The person could be a male as at birth but he underwent a transformation to become a female. At the time when the *praepositus* died the heir realises the fact that the share of male is double that of a female he may raise the issue that he was a

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the guiding principle. A time non-Muslim medical doctor may be preferred above a Muslim doctor. OIC Fiqh Academy issued a *Fatwa* on male doctors treating female patients in the following order; if a female specialist doctor is available, then she should be one to examine the female patient. In the absence of such a specialist, the patient may be examined by a trustworthy non-Muslim female doctor, if not then by a Muslim male doctor, and if not, then by a non-Muslim male doctor; on the understanding that in diagnosing and treating the ailment, the doctor should see only the minimum necessary of the patient's body. See OIC Fiqh Academy *Fatwa* No. 81 (12/8).

[43] In a situation where either of the bodies or both of them could not be found post mortem examination will not be possible or accepted as the case may be. One may wonder as to a situation when coheirs die simultaneously and their bodies could or could not be found. The answer is simple, for instance in a state of mayhem or accident or even the recent situation in Haiti where the State experienced a serious earthquake in record, both situations may arise. So post mortem may be allowed when the cadavers of the respective coheirs are found in a good state of examination otherwise the examination cannot be performed or in the case of Boko Haram attacks on civilian population where lives were lost simultaneously and somebodies were burnt to ashes, it became impossible to examine the bodies. In these situations ascertaining the time of death would not be possible.

[44] R. Mairi, and G. Davidson, *Chambers 21st Century Dictionary* (Revised Edition, Chambers Harrap Publishers Ltd, Great Britain, 2004) p 1498

male heir as at birth and vice-versa. In this situation what would be the position of Islam?[45] Islam forbids resembling opposite sex in all forms. *Hijab* requirement is not only to cover women body but to make them different from men. Allah said 'O Prophet! Tell your wives and your daughters and the women of the believers to draw their cloaks (veil) all over their bodies (i.e. screen themselves completely except the eyes). That will be better, that they should be known ...'[46] This requires women to be distinguished and known with their dress as a prescribed issue. The Prophet is reported to have said 'Allah has cursed women who bear resemblance of men and men that bear resemblance of women'.[47]

c) Cause of death of another

Writers be it Arabic or otherwise are unanimous in interpreting the Arabic noun *Al-Qaatilu* as murderer, whereas it is not necessary to mean so. The hadith of the Prophet (SAW)[48] says *'la yarithu Al-Qaatilu'* meaning 'a killer does not inherit.' It is as a result of these wordings that most writers chose murderer as an English word for *Al-Qaatilu* without giving regard to other meanings and implications associated with the word. They might be forced to hold this meaning by the fact that a murderer in Islam is more often than not convicted by law even before distributing his victim's estate.

In Islam, when a man kills another whose property he is entitled to inherit, the law exclude him from inheriting the deceased

[45] Cf the position of apostasy where the party is not allowed to inherit not based on status quo rather he is disqualified based on his current position of apostasy. (Allahu aalam); comparing the apostasy to transsexual and applying the same rule may not be right. The aim of this research is to provide further researches on this area. Human activity cannot change status of heirs especially, when the action carried out is illegal and therefore, an illegal action cannot change status of the heirs.

[46] Quran 33:59.

[47] A.A. Ibn Taimiyah, *Majmu'u Al-Fatawa* Pp. 11182-11189 electronic copy available at https://shamela.net visited on 30th/05/2018.

[48] M. I. Al-Shafi'ee, *Al-Umm* Pp. 2101-2102 electronic copy available at https://shamela.net visited on 30th/05/2018.

person.[49] This is to safeguard the lives of people against their heirs particularly of intentional killing. In Maliki School, however, a person who causes the death of another unintentionally (by accident, or mistaken identity) will inherit him [50] but will not inherit anything from the *diyya* (blood money).[51] Note that causal homicide as in retaliation or self defence or the execution of an order of court does not exclude an heir from exercising his rights of inheritance.[52] Nevertheless, Imam Shafi'i goes with a contrary view, to him all killings are to work as an impediment even in cases of self-defence or by an order of punishment.[53] His argument may not be far from the fact that no one shall satisfactorily measure the proportionality of the offence (attack) and that of the defence. In this respect Shafi'i shares the malikis view that the doors need to be closed. However, the view may not necessarily be on similar basis to Maliki's principle of *Saddu Al-zaree'ah* (blocking any chance that will lead to an unlawful act). Others find it easy to say that where the killing was as a result of war the killer inherits his victim so long as the relationship permits.[54] This argument is not absolute. This is applied in war instances where the faith of the adversaries, such as *bughat* (rebels), is not different. Note that Imam Hanbali opined that murder which acts as an impediment is one which is punishable either by fine or otherwise.[55] Maliki School further believe that 'the murder must be premeditated irrespective of being carried out with another person or caused by any means or done by a false witness to death penalty. The reason of the juristic rule lies in the fact that if the murderer is permitted to inherit, the heirs would accelerate the death of the persons whose heirs they are; and it would lead to the ruin of the world'.[56] The question on the issue of causing death is: what is the status of a driver or pilot who negligently or otherwise run out of the road and causes the death of his passengers whom

[49] *Ibid.*
[50] Al-Shafi'ee *op cit*
[51] *Ibid*; Sa'id *op cit*
[52] Qadri *op cit*
[53] *Ibid*
[54] Nchi *op cit*
[55] *Ibid*
[56] *Ibid* p 425-426

amongst is his co-heir? This is regarded as *Qatl al-Khata'* (unintentional killing or causing death by mistake). The driver or the pilot would not inherit according to Imam Abu Haneefah. According to him causing death is a complete bar from inheritance, whether *Qatl al-Khata'* or *Qatl al-Amd.* However, the Malikis are of the view that the killer is only barred from inheriting *Diyyah* (blood money). An exception to the general rule of '*la yarithu al-qaatilu'* whether *Qatl al-Khata'* or *Qatl al-Amd* is when the killer is a lunatic or a minor.[57]

It should be noted that in terms of expiation the driver or the pilot as the case may be must expiate irrespective of whether or not the act was negligently done. But for the purpose of inheritance, Imam[58] is of the view that the driver or the pilot will inherit the deceased where the death was not as a result of the driver's negligence. But where he is negligent then he cannot inherit the *praepositus*. Thus, it is a trite law in Islam that where a person is unjustly killed by another, the latter's act bars him from inheriting his victim no matter how closely related they might be.

d) Illegitimacy and the Nigerian Constitution

An illegitimate child may not inherit from his father but may inherit from the mother.[59] 'On this issue reference may be made to the Constitution which prohibits discrimination on the basis of a person's circumstances of birth.[60] Nevertheless, this provision[61] does not apply to this scenario. The Constitution conferred appellate and supervisory jurisdiction of Islamic personal law

[57] Al-Shafi'ee *op cit*

[58] Ustaz Abdullah Hassan Imam is an Islamic Scholar, his area of specialisation include *Ulum Al-Qur'an*, *Fiqh* and Arabic literature. His opinion was granted in an interview with him via phone on the 27th of January 2010.

[59] *Ibid*

[60] Section 42 (2) Constitution of the Federal Republic of Nigeria, 1999.

[61] *Ibid*.

matters on Sharia Court of Appeal.[62] Islamic personal law here include marriage conducted in accordance with Islamic law, issues relating to the validity or dissolution of that marriage or issues regarding family relationship or *Waqf,* gift, will or succession where the endower, donor, testator or deceased person is a Muslim.[63] This has settled the controversy, being of Islamic faith confers power on Sharia Court of Appeal to assume jurisdiction and distribute the estate of a deceased Muslim estate. *Expressio unius est exlcusi alterius* (express mention of one exclude others) principle can be applied here. The express mention of distribution of a deceased estate in accordance with Islamic law if the deceased is a Muslim, excludes other modes of distribution than in accordance with Islamic law.

Be that as it may, an illegitimate child is regarded as the son of the mother only. There are, therefore, mutual rights of inheritance as between the illegitimate and his mother and his maternal relations. The wife (or husband) and descendants of an illegitimate child may inherit him and vice visa'.[64] However, could scientific examination of DNA prove that the child belongs to the denying man within marital relationship? The answer is for the spouses to invoke *Li'an*.[65] DNA cannot substitute express provision of *Al-Qur'an*. The rule is *La qiyasa ma'a al-Nass* (no independent reasoning or analogy in the presence of express authority from *Al-Qur'an* and *Al-Sunnah*). However, the child may have right in customary court.

f) Hermaphrodite[66] (*Khuntha*)

Hermaphrodite is a person who possesses both reproductive organs of a male and a female [67] or possesses none of the

[62] See Sections 262 and 277 of the Constitution of the Federal Republic of Nigeria, 1999, For Sharia Court of Appeal jurisdiction of FCT and a State respectively.
[63] *Ibid*.
[64] S. I. Nchi. and A. M. Sama'il, *Islamic Law and Practice in Nigeria* p
[65] *See Qur'an 24:6-9*
[66] In this paper hermaphrodite would be given the pronoun of a child that is 'it' instead of 'he' or 'she'.
[67] Mairi, *op cit* p 630

organs[68] or one whose sexual identity is not clear, whether male or female.[69] Gurin sees hermaphrodite as a person who is neither man nor woman.[70] It inherits its deceased relative as a matter of its degree of closeness with the deceased. The share of a hermaphrodite is the share of an heir whose feature is more pronounced on it. The pronouncement upon which the jurists relied was the physical features. Where the features of a man are prevalent, then it shall be the share of a male child to be given to it. Similarly, when the features are that of a woman then it shall be entitled to that of a woman.[71] But where neither features is evident then it is to be treated as having the worse condition.[72] To illustrate this point if a woman dies and leaves behind her husband, mother, sister and a paternal *khuntha,* the *Khuntha* will be treated as a male because in this case he will take a share less than that of a paternal sister (showing his worse status). Similarly, if a woman dies and leaves behind her husband, full sister and a paternal *Khuntha,* if the *khuntha,* in this case is treated as a female she will inherit but if she is treated as a male he will not inherit due to the rule of exclusion. So in this case the *khuntha* is to be treated as a male since treating him that is the worse treatment to be offered.[73]

However, the *Fatwa* of the Permanent Committee of the Fiqh Council of Saudi Arabia slightly differed from the above. The Committee is of the view that if a hermaphrodite reaches maturity and his sex class is indeterminate he will be given 1/2 (half) the share of a male and 1/2 (half) the share of a female, but before he reached maturity he shall be given the share of whichever is more obvious. Preferably it should be deferred until

[68] Abdul-Fattah, *op cit* p 373

[69] A.A. Al-Jibreen, *Fatawa Islamiyah* Islamic Verdicts of the Permanent Committee and the Decisions of the Fiqh Council of Saudi Arabia vol.5 (Darussalam: Riyadh: 2002) P.87

[70] See A. M. Gurin, *An Introduction To Islamic Law of Succession*,(Jodda, Zaria, 1989) p 19

[71] see *Ibid*

[72] Abdul-Fattah *op cit*

[73] *Ibid*

he reaches maturity, so that hopefully, his case will become clear.[74]

This position was perhaps held due to the dearth of scientific devices which today are available. Islam allows scientific methods to be applied in ascertaining the status of a hermaphrodite. This is because, physical features may not tell exactly the status of a human being.[75] The argument is that, the hermaphrodite could be a man with physically prevalent features of a woman but it has not gotten womb and its male feature is capable of empowering fertilisation. This feature can only be proved by scientific investigation. In other words, it might possess the mix features of a man and a woman at the same time on equal basis. This makes the hermaphrodite *mushkil* (confusing). In this regard, the use of the modern devices to ascertain the actual position of the hermaphrodite may be resorted to.[76] However, prior to the advent of scientific method of ascertaining gender, Islamic jurists differ in respect to the share of hermaphrodite whose gender cannot be physically ascertained. Maliki, Abu-Yusuf and Shi'a schools consider that the share of a hermaphrodite is an average share of a son and a daughter. But Hanafi School opined that its share is a smallest share as a male or a female.[77]

g) An Artificially Inseminated Child

This paper is not intended to discuss the legality or illegality of artificial insemination in Islam. The paper would discuss the status of a child whose procreation is through artificial insemination as the status relates to inheritance.

The question that provokes this paper is whether the child conceived through artificial insemination is legally entitled to inherit the estate of the person who donated the semen for the fertilization of the egg which subsequently culminated into child's birth?

[74] Al-Jibreen, *op cit.*
[75] Sadau *op cit*
[76] *Ibid*
[77] Doi *op cit*

Therefore in order to address this issue, it is necessary to discern the concept, process and nature of the subject. Artificial insemination is a process of placing sperm inside the woman's uterus by any means other than conventional way of mating between a man and a woman.[78] However, another definition is that artificial insemination is a method by which a woman is impregnated through injection of semen donated by a man other than her husband and not through sexual intercourse.[79]

It is important to know that from these two definitions one may infer that there are two types of artificial insemination that exist. One is that the husband of the woman donates his semen and the other is that another person other than the husband donates his semen which should be injected into the uterus and would produce same result.[80]

The OIC Fiqh Academy Council divided "Artificial insemination" into seven (7) known methods used nowadays:[81]

A) The first five (5) methods are all forbidden and absolutely prohibited for its own sake or due to ensuing consequences manifested in confusion about parenthood and loss of motherhood and other *Shari'a* prohibited matters. These methods are:

1. The fertilization taking place in vitro between the semen taken from the husband and the ovum taken from a woman who is not his wife, and the fertilized ovum is then planted in the womb of his wife

2. The fertilization taking place in vitro between the semen taken from a man who is not the husband and the ovum

[78] See B. Shiela, (ed) *Osborn Concise Law Dictionary* (9th edition, Sweet & Maxwell, UK 2001), p 38
[79] G. A. Bryan, *Black's Law Dictionary* (5th edition, West Publishing Co., U. S. A., 2002) p 103
[80] M. A. Salihu, 'Critical Examination of the Right of Artificially Inseminated Child to Inherit under Islamic Law', (Final Year Project submitted to the Faculty of Law, University of Ilorin, Nigeria 2011) p 54
[81] OIC Fiqh Academy Council Resolution No.16 (4/3).

taken from the wife of another man and the fertilized ovum is then planted in the womb of his woman.

3. The fertilization taking place in vitro between the semen and the ovum taken from spouses, and the fertilized ovum is then planted in the womb of a volunteer woman.

4. The fertilization taking place in vitro between male semen and female ovum taken from two strangers and the fertilized ovum is then planted in the womb of another man's wife.

5. The fertilization taking place in vitro between the semen and the ovum taken from spouses, and the fertilized ovum is then planted in the womb of the husband's other spouse.

B) However, in the Council's opinion, there is no objection if one resorts to the sixth or seventh method, in case of necessity, provided all required precautions are taken. These two methods are:

6. Fertilization in vitro of a woman's ovum by her husband's semen and implantation of the fertilized ovum in the womb of this same woman.
7. External insemination, by taking the semen of a husband and injecting it in the appropriate place *in* the womb or uterus of his wife, for *in-vivo* fertilization.

It is worthy to note that what qualifies a child to inherit from the estate of its father is the issue of legitimacy. Being a biological father of a child does not give the child any ground to inheritance unless as at the time of its birth the father and the mother were legally married.[82] This position destroys the status of an artificially inseminated child by means of the first five methods stated above.[83]

Therefore, a product of an artificial insemination through the donation of the husband to the mother is a legitimate child of the

[82] Nchi, *op cit* p. 118
[83] See OIC Fiqh Academy Council *op cit*

father when it complies with the sixth or seventh method. A product of this can inherit from the estate of the father as of right, provided that as at the time of the donation, the father and the mother are not only legally married but the marriage was subsisting. [84] Furthermore, such insemination shall only be resorted to in case of necessity, provided all required precautions are taken.[85] One may wonder how one could donate semen while the marriage was not subsisting. There was a case[86] in France where a husband donated his semen to a semen bank before his death. After the death, the widower requested for the semen to be injected into her uterus for the purpose of procreation. The authority in charge of the insemination refused the request and the widower instituted an action against the authority in a law court. The court held its judgement in favour of the widower and the semen of her deceased husband was inseminated into her, though it could not work in her favour.

In this scenario, could the insemination work, the child would have been a biological child of the deceased husband but the marriage was not subsisting at that time and therefore the child cannot inherit the deceased.[87] OIC *Fiqh* Academy resolved that in the light of the scientifically established possibility of preserving non-fertilized ovules for future use, only the number of ovules required each time for insemination must be fertilized to avoid the existence of surplus fertilized ovules. If a surplus of fertilized ovules exists in any way, it shall be left without medical care until the life of this surplus ends naturally. This shows that reserving the ovules for future use than the necessary needed at that time is illegal. This is in accordance with the principle of *Saddu Al-Zaree'ah*.[88]

[84] See Http://en.Wikipedia.org/wiki/E:/Books/artificialinsemination.html accessed on 26th May 2014 at 11:38am
[85] OIC Fiqh Academy Council *op cit*
[86] *Ibid*
[87] See Salihu *op cit* p 71
[88] OIC Fiqh Academy Council Resolution No.55 (6/6).

1.7 Conclusion

From the foregoing therefore, the paper concludes that the application of modern scientific investigations in interpreting and applying some Islamic rules are valid and acceptable unless they are flagrantly contrary to *Nass* (express text from the sources of *Shari'ah*) or apparently illegal within the scale of Islamic law. Islam is a dynamic religion and a flexible way of life and therefore accommodates change as long as the change does not alter the root and axis upon which the principles of *Shari'ah* revolve. Therefore, the paper recommends the use of modern scientific investigations in issues that Shari'ah allows *ijtihad*. It further recommends for *ijtihad jama'i* (collective *ijtihad*) in these issues. This is to establish a standard and avoid issuing conflicting rulings in the populace particularly by the unlettered.