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A Doctrinal and Law and Economics Justification of the Treatment of Women in
Islamic Inheritance Laws

by

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ABSTRACT

Several criticisms regarding the treatment of women in Islamic Inheritance Laws have stated that these laws are in favor of males. The most common claim is that women receive half the share of men in the Islamic inheritance system.

This thesis examines this issue from legal and economic prospective. It shows that the inheritance system is part of a broader socio-economic system. Moreover, this thesis shows that unlike men, women in Islamic law receive fixed shares, which guarantees a minimum amount of inheritance for women. It concludes that women have more than twenty conditions where they would inherit equivalent share as men, more share than men, or they would exclusively inherit. In addition, women inherit half the share of men only in four cases if there is a man inheriting from an equivalent status and he is, mostly, obliged to maintain her.

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I. Introduction

The purpose of this thesis is to explore the Islamic laws of inheritance from a legal and economic perspective. However, this paper will not employ formal economic models to explain the rather complicated area of law. Instead, this paper will show that Islamic laws of inheritance are part of a larger socio-economic system. In order to do so, this paper will first introduce a significant amount of background material to explain the sources of Islamic law, the basic tenants of Islamic inheritance law and other aspects of Islamic socio-economic legislation.

Before continuing, it is important to point out that this paper will read as an Islamic apologist thesis. This is a function of my background and the limitations of time and space that constrain a master's thesis. My background is religiously, culturally and legally Islamic. As such, this is the perspective that I bring to this thesis. I am aware that the reader may not share my background and beliefs. I am also aware that a more scholarly exposition of the subject would require a more in depth exploration of the issues including a critical evaluation of the various issues surrounding the Islamic laws of inheritance. This is an area for future research, as I will explain at the end of this thesis. Therefore, the reader should bear these caveats in mind while reading the thesis.

The motivation for this thesis comes from two personal observations. The first is that, especially after the events of September 11, 2001, the focus on Islam in public discourse has intensified. The second is that much of this intensity focuses on the role of women in Islamic society. Today, more than ever before, the application of Islamic law's

dictates, especially regarding women, has created countless questions among the public. The Hijab, polygamy, and Islamic inheritance rules are the most common targets of criticism, in part due to the misunderstanding of these laws as oppressive to Muslim women. Although such criticisms against the treatment of women in Islamic law have been made for a long time, these criticisms have become louder nowadays and are spilling over into the policy arena. These, what I will argue, misinterpreted images of Islamic law, also known as *shari'a*, are becoming codified in legal policies all over the Western world.

In this thesis, the focus will be on the criticism of Islamic inheritance laws. Moreover, this thesis will argue that women take fixed shares in Islamic inheritance law. This means that, unlike agnate male inheritors, women will never be excluded from inheritance if the estate is exhausted by the presence of other heirs. Another point that is argued here is that women inherit half the share of men only in four cases verses more than twenty other cases where women inherit equal or more than male inheritors. In addition, there are cases where only women inherit, whereas equivalent males will not inherit if they had existed at the same cases.

To appreciate the argument in this thesis, brief information regarding sources of Islamic law is introduced in the second section.¹ Then, section three aims to explain how

¹ Some of the thesis structure follows Chaudhry's article "The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law". That is because if someone is writing for non-Muslim readers, he or she should consider introducing basic tenets of Islamic Law. Moreover, it should be noted that the traditional way of presenting the science of inheritance in Islamic traditional books is mostly the way this thesis follows, which is the way Chaudhry followed as well. However, this thesis is different from Chaudhry's article other aspects. Namely, it is different in the sense that it discusses the issue of inheritance from a broader social and economic perspective.

the Islamic law of inheritance works. To make it easier for the reader to follow up, section three includes hypothetical examples. After that, an analyses of the inheritance system including the Islamic concept of justice generally and social justice specifically is discussed in section four. Finally, section five is an overview of the western inheritance system, mostly U.S and British systems.

Returning to the criticism of Islamic law, the decision by the Ontario government to prohibit faith-based arbitration in family law seems to have been primarily motivated by the same voices that are advancing the discrimination claims.² The ban on the face-veil, or *burqa*, in France as well as the passage of constitutional amendments banning the use of *shari'a* law in some American states are two other examples of the policy backlash against the adoption of Islamic legal principles that extend to the private spheres.³

At the international level, almost thirty years ago, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations.⁴ One of the goals of CEDAW was supposedly to eliminate discrimination against women in Muslim countries. The term discrimination was defined in (Article 1) of this treaty as followed:

² Martin Patriquin, "Is Canada Becoming a Nation of Bigots" MacLeans (15 October 2007) online: <http://www.montrealmuslims.ca/module-pagesetter-viewpub-tid-7-pid-1980.html>.

³The French ban on the *burqa* makes the headlines on an ongoing basis. See e.g. Christian Fraser, News Release, "The Women defying France's full-face veil ban" (22 September 2011) online: BBC <<http://www.bbc.co.uk/news/world-europe-15023308>>. The Oklahoma constitutional amendment, although it was passed in a referendum, was struck down by an American federal court. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

⁴ Dubravka Simonovic, *Convention on the Elimination of all Form of Discrimination against Women* (New York, 18 December 1979) Audiovisual Library of Interntional Law, online: United Nations <<http://untreaty.un.org/cod/avl/ha/cedaw/cedaw.html>> (Nov. 15, 2009).

“For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁵

It is interesting that the term “discrimination” is defined in such a way, for this in Islamic law refers to injustice rather than distinction.⁶

As will be shown in this thesis, justice is a fundamental principle of Islamic law. Therefore, the distinctions between men and women in Islamic law must be viewed from the perspective of justice, particularly social justice, and the distinction between the treatment of men and women cannot be described as gender discrimination.

Moreover, this convention has been criticized as being influenced by the Western concept of individualism.⁷ In Islamic law, a woman is defined and treated as a female, which is considered the core of the Muslim community. This is a different perspective than treating females as individuals, which is how women are discussed in the treaty.⁸ Additionally, Article 1 in CEDAW excludes any form of distinction between men and women and considers them ultimately similar, regardless of any religious or cultural values.⁹ However, Islamic law establishes just laws that are not based on imposed similarity.¹⁰

⁵ Division for the Advancement of Women Department of Economic and Social Affairs, *Convention on the Elimination of all Form of Discrimination against Women New*, online:
<<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1>>

⁶ International Islamic Committee For Women And Child (IICWC), “A critical review of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)”, Review, (2000) 21.

⁷ *Ibid.*

⁸ *Ibid*

⁹ *Ibid*

¹⁰ *Ibid*

Before proceeding, it is necessary to elaborate on the concept of justice as it relates to equality and to examine an area of Western law where a similar distinction is sometimes made. Those who argue against the concept of affirmative action claim that the focus should be on equality of opportunity and not equality of outcome.¹¹ That being said, although the U.S. Supreme Court upheld affirmative action programs in state universities under certain conditions,¹² they have not been successful in finding a coherent justification for affirmative action. As one commentator states

This is the confusion and inconsistency into which affirmative action proponents are drawn when they recognize that they must acknowledge the individualist principle at the heart of the equal protection clause, yet still want to find group rights there.¹³

This debate is beyond the scope of this paper; however, it is relevant to point out that there is no agreed upon standard by which to judge the meaning of equality in Western law, particularly when it comes to the rights of women and minorities.

After the approval of the CEDAW treaty, numerous conferences claimed that Muslim women are discriminated against under the *Shari'a* law.¹⁴ Unfortunately, these conferences only caused further confusion on the status of women in Islam.

Many Western scholars have attempted to examine the issues affecting Muslim women and have concluded that Islamic law is prejudiced against women. For example, Honarvar claims in her article "Behind the Veil" that:

¹¹ See e.g. Martin D. Carcieri, "Ten Fallacies Of The Affirmative Action Debate", 1 Fla. Coastal L.J. 385 (2000).

¹² Grutter v. Bollinger, 539 U.S. 306 (2003).

¹³ Carcieri, *supra* note 10 at 389.

¹⁴ Khaliq, Urfan. "Beyond the Veil: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah." *Baffalo Journal of international law*. 4.2 (1995-1996) 4.

While both a male and a female ascendants and descendants can inherit, a woman has half the share of a man... This means that the more female kin a woman has, the less she and they inherit... Once again, the women are apparently disfavored.¹⁵

Some researchers have criticized Honarvar's article for its lack of original Islamic sources, as she relies mostly on orientalist sources,¹⁶ which fail to appreciate the Islamic texts as legitimate legal sources. Furthermore, she neglects to support her claims regarding family law and does not refer to the passages from the two main sources of Islamic law; *Qur'an* and *Sunnah*.¹⁷ Another significant issue with her article is that she shifts her analysis from Islamic law, which is the main concern of her article¹⁸ to gender discrimination and misogynist practices in Islamic societies.¹⁹

A woman in Islamic society lives a sheltered life. She is, if not denied formal education, at least discouraged from continuing education beyond the sixth grade. She is not permitted to work to acquire skills, which would give her economic independence in life. She is under guardianship of her father, grandfather, or other male members of her family until she marries, which is at a relatively young age. After marriage, she is placed in her husband's care and must obey his orders or risk becoming subject to his disciplinary actions.²⁰

I realized that Honarvar's statements, which take the form of over-generalized claims, depict Islamic societies as prisons for women. Despite the fact that these

¹⁵ Honarvar, Nayer . "Behind the Veil: Women's Rights in Islamic Societies *Journal of Law and Religion*". 6. 2 (1988), 355-387, <http://www.jstor.org/stable/1051156>. (accessed June 9, 2011). Also see: Yekini, A. O., Women and Intestate Succession in Islamic Law (May 3, 2008). Islamic Law and Law of the Muslim World Paper No. 08-49. Available at SSRN: <http://ssrn.com/abstract=1278077>

¹⁶ Saracen, . "Islam: A Misogynist Religion? A Look at Family Law, Inheritance and Divorce Rights in Islam ." *Saracen's Corner*. Blogger, 28 Aug 2007. Web. 19 Jan 2010. <<http://saracenarabianknight.blogspot.com/2007/08/islam-misogynist-religion-look-at.html>>.

¹⁷ *Ibid*.

¹⁸ As she states: "The main focus will be on Islamic law and its effect on the status of women, emphasis on family relations (marriage, divorce, and child custody), material possessions (property ownership and inheritance law), and opportunities for women outside their homes." Honarvar, *supra* note 14.

¹⁹ Saracen, *supra* note 16.

²⁰ Honavar, *supra* note 15.

oppressive practices against women exist in almost all societies, one cannot claim that these societies are oppressive unless the laws governing these societies are shown to be unjust. An objective analysis of a legal system should not be influenced by the individual practices of a society. Rather, a systematic analysis of the actual legal system is required. Focusing too heavily on what is happening within a society converts the analysis from a legal one to an anthropological one. While this type of analysis has its own value for addressing injustice in societies, it sheds no light on whether the governing legal system is unjust, or not.

For example, Honarvar's criticism of Muslim societies uses the educational status of women as an example of the failings of Islamic law. Muslim women are certainly denied access to proper education in some parts of the Muslim world, but this denial is not associated with Islamic law. Although CEDAW stipulates that women should have equal access to education to that of men,²¹ the traditional teachings of Islamic law focus great attention on educating females.. The prophet Muhammad said:²² “ The person who brought up three daughters, embellished them with education and training...paradise is ensured for him.”²³ Additionally, the Prophet Muhammad's wife, Aisha,²⁴ is considered a great, learned scholars from whom much of Islamic law is derived. One of the prophet's

²¹ Article 10 of the treaty: “States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women.” *Supra* note 5.

²² The legal relevance of these sayings will be explained in section II Part B at 19, below.

²³ Suliman A. Al-Sajestani, *Sunan Abo Dawood*, vol 2 # 5147 (Cairo, Egypt: 2000).

²⁴ Aisha Bint Abu-Bakr is the the profit's most beloved wife. The profit married her in year 640. She was famous for her knowledge in shri'a law as well as her knowledge of Arabic literature. Moreover, after the prophet Muhammad passed away, she played a significant role in understanding of Islam. She narrated lots of prophet's commands and rules. See Ibn Hagar Al-Asgalani, *Alisabah fi Tamiez Assahabah* (Egypt: Assadah) vol 4 at 359.

companions said: “ I have never heard of anybody with more knowledge in Islamic jurisprudence, medicine, and poetry than Aisha.”²⁵

Those who criticize Islamic law fail to appreciate that Islam is not just a set of religious rituals, but rather for many devout Muslims, is a way of organizing one’s life.

Schooley explains why Muslims are offended by criticisms and attacks on Islam:

It is vital to remember that when evaluating Islamic law for purposes of developing a consensus on international human rights, Islam is more than a set of religious tenets. It also a way of life that demands one to adhere to Shari’a. Whereas western religion is often detached from everyday life, Islam is steeped in the belief that religion is inextricable from the rest of a believer’s life. Consequently, when international bodies or treaties contradict or advocate change of any these tenets or prohibit the free exercise of custom, they place those of the Islamic faith in risk of spiritual damnation.²⁶

Considering this brief background on some of the many criticisms and attacks on Islamic law, it is apparent that an objective approach to Islamic law is required. The purpose of this paper is to examine critically claims made about the status of women in Islamic Law, with a specific focus on inheritance law.²⁷ Therefore, the goal is to consider the treatment of women as a legal matter and not as a social or anthropological issue. This analysis, although legal in focus, will appeal to the field of economics by demonstrating that Islamic laws affecting women are part of a broader socio-economic system deliberately created by Islam.

²⁵ *Ibid* at 360.

²⁶ Kimberly Younce Schooley, “Cultural Sovereignty, Islam, and Human Rights – Toward a Communitarian Revision” (1994-1995) 25 *Cumberland law review* 651 at 661 (Lexis).

²⁷ There are other ways to view the question of inheritance. For example, economists have analyzed the economics of family generally and dowry specifically See, e.g., Siwan Anderson, “The Economic of Dawry and Brideprice” (2007) 21 *The Journal of Economic Perspectives* 151; Gary S. Becker, *A Treatise on the Family*, Enlarged edition (Cambridge, MA: Harvard University Press, 1991).

As previously stated, it is necessary to consider that Islam, as perceived by Muslims, is a system and a way of life. Both the *Qur'an* and *Sunna* emphasize the equality of men and women, although they also stress their differences. Men and women are different, yet compatible. To appreciate these concepts and this thesis, I will describe the status of women in pre-Islamic Arabia, before explaining how the Islamic rules were progressive in the context of the era in which they were created. The paper will then address the question of inheritance rights for women and demonstrate how these laws fit into a broader, more coherent vision.

Although Arabic society before the advent of Islam was famous for its unique Arabic poetry, it used to be referred to as *Jahiliah*, which translates as “the days of ignorance.” During this time, Arabic society had no defined set of rules or laws to follow. Rather, they accepted their inherited tribalistic behaviors, which became indubitable values over generations.²⁸ Because wars and battles were a fundamental aspect of life, Arabic tribes were in need of strong men to defend their lands and properties.²⁹ Women, on the other hand, were held in low esteem, as they did not participate in wars.³⁰ They were denied their basic rights such as the right to inherit and to own property.³¹ While inheritance and all other financial benefits were exclusively for those who participate in battles,³² therefore, women were not entitled to inherit wealth from their relatives,

²⁸ Tahir Haddad, *Muslim women in Law and Society*, Translated by Rnak Husni and Danial L. Newman (New York, USA: Routledge) at 35.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² “The pagan Arab did not bequeath any of their belongings to women or children. Everything was inherited by men and they used to say: only those who fight on the back of horses and seized the enemy’s booty should inherit.” See Ftima Umar Naseef, *Women in Islam; A Discourse in Rights and Obligations*,

including their parents and husbands.³³ The great caliph, Umar bin Alkhattab,³⁴ said: “ By Allah, in pre-Islamic period of ignorance we did not pay attention to women until Allah revealed regarding them that which He revealed and assigned to them that which he assigned.”³⁵ During this time, women were treated as a property that could be owned and inherited.³⁶ For example, the eldest son of the deceased person had the right to take his father’s widow under his household unless she paid a ransom for her freedom. The following excerpt describes the practice of inheritance in pre-Islamic society:

when a women’s husband died, his son or another of the deceased’s agnate relatives would throw a cloak over her and thereby claim a right to be her guardian. He could then marry her himself for no marriage portion, marry her off to someone else without securing a marriage portion for her, or, if she had money or property,³⁷ prevent her from remarrying unless she ransomed herself from him.³⁸

This concept, inheriting women, illustrates how women were degraded and humiliated in the pre Islamic society. Other practices include the fact that in the pre-Islamic society, women used to accompany their men in wars, which often occurred between tribes, and the winning tribe was free to enslave the women of the losers; the

translated and edited by Saleha Mahmood Abdin (Egypt; International Islamic Committee for Women & Child, 1999).

³³ *Ibid* at 41.

³⁴ Umar Ibn alkhatab is one of the four famous Caliphats (rulers) of the Islamic empire after Prophet Muhammad passed away. He was well known for his jurisprudence knowledge as well as his justice. He was nick named (*alfarooq*); meaning the one who distinguishes between right and wrong. AlAsgalani, *supra* note 24, vol 2 at 518.

³⁵ Naseef, *supra* note 32 at 41.

³⁶ Asghar A. Engineer, *The Status of Women in Islam* (South Randel: Down Press Group, 2004).

³⁷ “It must be noted that some historian mentioned a few cases where some women were famous during this period. Examples would be; Ateeqah for her conterbution to the treaty of “alfodool” and Al-Khansaa’ who was a very famous poetess. In addition a few other women attained major positions of authority and reigned over their countries, for instance, Azzabaa, monarch of Tadmur and Balquees and Queen of Saba. But these isolated cases did not affect the general status of women in pre-Islamic times.” See Naseef, *supra* note 32 at 35

³⁸ Susan A. Spector, *Women in classical Islamic law: A Survey of the Sources*, vol 5, (Leiden, Boston: Brill, 2010) at 28.

winning tribe was also free to rape them.³⁹ As a result, people in the pre-Islamic society preferred sons to daughters, and used to kill their daughters at birth to avoid the possibility of poverty or humiliation.⁴⁰

So common was this practice that the *Qur'an* severely condemned this savage practice of burying daughters alive:

When news is brought to one of them, of (the birth of) a female (child), his face darkens, and he is filled with inward grief! With shame does he hide himself from his people, because of the bad news he has had! Shall he retain it on (sufferance and) contempt, or bury it in the dust? Ah! What an evil (choice) they decide on?⁴¹

In another verse, the *Qur'an* speaks to the punishment of this practice on the day of resurrections by stating that this will be the day "... when the female (infant), buried alive, is questioned."⁴² In his interpretation to this verse, Ibn Katheer⁴³ says:

On the day of resurrection, the female infant will be questioned about the sin for which she was killed. This question will be a warning for her killer and an intimation on the intensity of the punishment awaiting him, since, if the victim is questioned, the punishment of her oppressor must be great.⁴⁴

³⁹ Engineer, *supra* note 36.

⁴⁰ *Ibid.*

⁴¹ The Noble Qur'an: English Translation of Meaning and Commentary, translated by Muhammad Al-Hilali & Muhammad Khan (Madinah, Saudi Arabia: King Fahad Complex for the Printing of The Holy Qur'an) chapter 16 verses 58-59; Holly Qur'an, trans by Yusuf Ali online: Sacred Texts <<http://www.sacred-texts.com/isl/quran/index.htm>>.

⁴² Qur'an, *supra* note 41 at 81: 8.

⁴³ Ibn katheer Abu Al-Fida, 'Imad Ad-Din, Isma'il. He was born in 1301 in Syria. His famous book, Tafsir Al_Qur'an Al_adhim, is one of the most popular and well known explanation and commentaries on Qur'an. See Ibn Katheer, *Albedaiah wa Alnehaia*, edited and interduced by Abdullah Alturki 1st ed vol 1 (Jiza, Egypt: Hajr, 1997) at 15.

⁴⁴ "Usually the criminal who is questioned and the fact that it is the victim who is questioned in this verse intensifies the accusation directed towards her killer. He is confronted with his crime, his victim and her accusations. This is a powerful device with which to intimidate the killer, for there is nothing more horrifying for a killer than to be confronted by his victim. She will be given the chance to accuse him of his crime in front of Allah Almighty, Lord of the heavens and the earth." See, Naseef, *supra* note 32 at 36.

However, after the advent of Islam, these barbaric practices were prohibited and a code of conduct regarding women was instituted. Allah commands his Prophet to say :

Come, I will rehearse what Allah hath (really) prohibited you from": Join not anything as equal with Him; be good to your parents; kill not your children on a plea of want; We provide sustenance for you and for them;- come not nigh to shameful deeds. Whether open or secret; take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom.⁴⁵

According to Ibn Katheer: “ They killed their children whenever the devil inspires them to do so. Hence, they killed their daughters because they feared dishonor and killed their boys because they feared poverty.”⁴⁶

Islamic law was revolutionary in instituting such codes that fundamentally changed the social outlook on women from one of low esteem to honoring them. In fact, a whole chapter of the *Qur'an* is called the *Chapter of the Women*, in which many of these new economic rights such as dower and inheritance are explained. The first verse of this chapter states that: “O mankind! Reverence your Guardian-Lord, who created you from a single person.”⁴⁷ Men and women are alike in the eye of the God; neither one is inferior to another.⁴⁸ In addition, the prophet Muhammad ordered his followers to treat their children alike without preferring one to another. Thus, when one of the prophet’s companions gave a present only to one of his children, then the prophet commented "Fear Allah and be just with all of your children.”⁴⁹

Another aspect of just treatment of women was the right of women to choose their

⁴⁵ Qur'an, supra note 41 at 6:151.

⁴⁶ *Supra* note 32 at 37.

⁴⁷ Qur'an, supra note 41 at 4:1.

⁴⁸ Haddad, supra note 28 at 37.

⁴⁹ Qureshi M, *Status of women in Islam* (New Delhi, India: Reference Press, 2003) at 185

husbands. Islamic law prohibits forcing daughters to marry someone (usually the parents' choice) against her will. One of the important elements in marriage according to Islamic law is the consent of the woman. The prophet ordered his followers, "Do not marry a non-virgin except on instruction nor marry a virgin except with her permission."⁵⁰ It is indicated from this saying that women should not be married without their permission, no matter whether she is a virgin or she has been married before. The only difference is that the virgin, usually a woman who is much younger, may be shy to express her opinion. Therefore, she has to be asked for her permission and as the prophet said, "Her silence may go for her permission."⁵¹ Moreover, without this consent, the marriage is considered nullified. For instance, a woman was given to marriage by her father without her consent, and when the prophet found out, he annulled that marriage.⁵² In Islamic legal tradition, the Prophet Muhammad has the status both as a legislator and a judge whose judgments represent binding precedents. In the matters of family law, he was the judge that women came to for their domestic disputes as he was seen as their guardian. Hence, one woman came to him saying:

O, prophet of Allah! My father offered me in marriage to his nephew to elevate his social status." Allah's Prophet (Peace be upon Him) returned the matter to her hands, to accept and approve the marriage or to reject. The woman said: "I approve now of what my father has done, but I wanted to teach other women that their fathers have no right in this." (to force them to marry whoever they want.)⁵³

Considering these marriage laws, it should be no surprise that Islamic law also established women's right to inherit and that specific shares for women were established

⁵⁰ Mohammad Shabbir Khan, *Status of women in Islam* (New Delhi, India: S.B. Nagia, 1996) at 14

⁵¹ *Ibid.*

⁵² Engineer, *supra* note 36.

⁵³ Azizah Alhebri, *Women and Islam*, 1st ed (Ontario, Canada: Pergamon Press, 1982).

depending on the circumstances. The *Qur'an* gives women the right to inherit along with men by declaring that “there is a share for men and a share for women from what is left by parents and nearest related.”⁵⁴ Because of the pre-Islamic attitudes towards women, the law of succession was the most difficult for Arabs to accept and follow. They rejected the inheritance verses and used to complain:

The woman is given a quarter or an eighth; the daughter is given half; even the young boy is allocated a share! He who does not fight the enemy or seized the spoils! Do not mention this verse at all, so the Messenger of Allah may forget it; or shall we ask him so that he may change it? Some of them said, “O Messenger of Allah! Do you allocate to the daughter half the property of her father although she does not ride the horse, nor fight the people? Do you allocate a share for young boy who does not make us any wealthier?”⁵⁵

Despite their complaints, the Islamic rules of inheritance were never revoked and have always existed in the body of Islamic law as a way to guarantee a women’s dignity and as a sign of respect for her rights. A woman who was left with two daughters after her husband was killed in the battle of Uhud⁵⁶ came to the Prophet Muhammad complaining that she has two daughters and their uncle has taken her deceased husband’s estate leaving nothing for the girls. The Prophet Muhammad replied: “Allah will settle this question.” It was then that the verses of inheritance, which are found in the *Chapter of the*

⁵⁴ Qur’an, *supra* note 41 at 4:7.

⁵⁵ Naseef, *supra* note 32 at 180

⁵⁶ Uhud is the name of second battle in the Islamic history that took place in Medinah (the prophet’s city). It was named after Uhud mountain that was the centre site of this battle. Moreover, this battle was between Muslims, led by Prophet Muhammad, and Meccan people of Mecca, the original city of prophet before his relatives expelled him. In the site of Uhud, Prophet Muhammad comanded his companions to stand in ranks keeping Uhud mountain behind them to protect their back. He also positioned fifty archers on the top of the mountain to prevent any attack from the enemy’s army. When Muslim almost defeated the enemy, most of the fifty archers left their position to despoil the enemy’s camp. This allowed a surprise attack by Meccan from the mountain. Unfortunately, this battle ended up with great lose in Muslim army as many of them were killed and the prophet was severely injured. Ismaeel O. Ibn Katheer, *The Battles of The Prophet*, trans by Wa’il A. Shihab 1st ed (Almasura, Egypt: Googl Book, 2000).

Women, were revealed. Consequently, the two girls were given two-thirds, the mother one sixth, and the remainder for the uncle.⁵⁷ I shall detail the Islamic scheme of inheritance in more detail below, but it should become evident that Islamic law protects women's property rights. One of the Western scholars who attended the Mixed Tribunals of Cairo in 1911 stated:

When all is said and done, however, nothing astonished me more than to have the proof driven home to me that before AD 632, the Prophet of Islam had accomplished more to safeguard the property rights of the women in his land, than the legislature of Louisiana has yet done for her who bears my name⁵⁸

II. Sources of Islamic Law

By now, the reader will have encountered many references to the *Qur'an* and the Prophet Mohammad's sayings and practices, *Sunna*. As such, it is important to present a brief background on these sources before outlining the Islamic inheritance laws.

Before one can properly appreciate the complexities and subtleties of the issues surrounding Islamic law, it is important to understand the sources and origins of this legal system. By sources, I am referring to the textual foundations upon which Islamic law derives its legitimacy, at least in the eyes of Muslim scholars. These sources have long been accepted in the Islamic world as the source for answers to various questions. As previously stated, Islamic law, also known as *shari'ah*, has two primary sources—the *Qur'an* and *Sunna*—from which all principles of Islamic law follow. However, there are

⁵⁷ Naseef, *supra* note 32 at 178

⁵⁸ Farazana Hassan, *Islam, Women, and the Challenges of Today* (Toronto, Canada: White Knight Books, 2006) at 51.

two additional sources—*Ijma'* and *Qiyas*—that serve as interpretation principles to derive the law from the two primary sources.

It is also necessary to point out that this paper specifically examines the sources and rules of *Sunni* Islamic law. Numerically speaking, Sunni-ism is the dominant sect within Islam. There are other approaches to Islamic law, but these are beyond the scope of this thesis.⁵⁹

A. *Qur'an*

Qur'an is the first and most fundamental source for all Muslims, regardless of sect, around the world. It is both a source of legal commands and prohibitions, as well as a code of conduct for all Muslims. Muslims believe that the *Qur'an* is the compilation of the exact words of god, Allah, as revealed by the Angel Gabriel to Prophet Mohammed (peace be upon him).⁶⁰ The *Quran* was transmitted to mankind by Mohammad over a period of twenty-two years; and has never been changed, altered or added upon since the his death. The *Qur'an* is a one-volume sized book comprising 114 surahs (chapters). Each chapter is made up of ayats (verses), which can be thought of as sentences. There are 6,666 ayats (verses) and 86,430 words in the *Qur'an*.⁶¹

⁵⁹ Carl Sharif El-Tobgui, "The Epistemology of Qiyas and Ta'lil Between the Mu'tazilite Abu 'L-Husayn Al-Basri and Ibn Hazm Al-Zahiri," 2 *UCLA Journal of Islamic and Near Eastern Law* 281, 282 (2003); Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh* 1 (New York: Cambridge University Press, 1997). These sources are agreed upon by all four Sunni schools of jurisprudence. These schools are; (1) Hanafi; (2) Maliki; (3) Shafi'I: and (4) Hanbali. *Ibid* at 33-35.

⁶⁰ Hisham M. Ramadan, *Understanding Islamic Law; From Classic to Contemporary* (Oxford: Altamira Press, 2006).

⁶¹ *Ibid*.

Muslims consider the *Qur'an* itself to be a miracle. “The circumstances of its development, the medium of its message, the eloquence and rhythm of its poetry, all are consider[ed] a part of the miracle of its being”.⁶² According to Muslims, what makes the *Qur'an* absolutely unique and unparalleled is its eloquence. The *Qur'an* repeatedly challenged the Arabs at the time of Muhammad who refused to follow him to produce a chapter similar to it in its eloquence. It is accepted that no one was ever able to meet this particular challenge.⁶³

The *Qur'an* was not written in the style of a modern legal code or law book. However, the *Qur'an* serves as the cornerstone of Islamic law through its specific commandments and injunctions. The number of legal injunctions in the *Qur'an* is about five hundred, and these deal with issues including ethics, criminal law, business transactions, domestic relations, inheritance, and rules of engagement in war.⁶⁴

The laws described in the *Qur'an* differ from the modern textbook approach to legal training.⁶⁵ Therefore, instead of listing legal edicts in a vacuum, the *Qur'an* weaves spiritual reminders with legal commandments. For example, towards the end of the second Chapter (*the Cow*), after exhorting the believers to “fear the Day when ye shall be

⁶² *Ibid.*

⁶³ Hassan H. El-Yacoubi and Jane M. El-Yacoubi, *The Arabic, Qur'anic and Islamic Paradigm: Light, Jewels and Pearls* (Boulder: H. and J. El-Yacoubi, 1991).

⁶⁴ Ramadan, *supra* note 60 at 11.

⁶⁵ I saw modern approach, because Western law students, at one point, would have had to learn the law with a dosage of religious foundations. See for example the classic text that law students in the early nineteenth century used, David Hoffman, *A Course of Legal Study Addressed to Students and the Profession Generally* (Baltimore: Joseph Neal, 1936). In this text, the first chapter deals with moral issues, and the first entry on this is from the Bible.

brought back to Allah” after which “every soul will be paid what it earned, and none shall be dealt with unjustly”⁶⁶, the next verse goes on as follows:

O ye who believe! when ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write: down faithfully as between the parties: let not the scribe refuse to write as Allah has taught him, so let him write. Let him who incurs the liability dictate, but let him fear Allah, his Lord Allah and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully. And get two witnesses, out of your own men ... The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves; but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witnesses whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm) it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things.⁶⁷

In this lengthy verse, the Qur’an legislates the broad principles surrounding debtor-creditor laws. The first command is that all contracts of debt, no matter how large or small, must be reduced to writing. There is a scribe who transcribes the debt contract, and the creditor is the one who dictates the writing. The Qur’an addresses incapacity either due to mental or age defects, and then resolves this by ordering the guardian to take the creditor’s place in the dictation process.

It also mandates that there be two witnesses to the transaction. Finally, an exception is made for spot transactions where the exchange is instantaneous. The verse ends by reminding the followers that these commands are not mere legal rules that may be enforced in some court of law, rather, they are divine commands, which have

⁶⁶ Quran, *supra* note 41 at 2:281.

⁶⁷ *Ibid* at 2:282.

consequences for one's soul in the afterlife. This is the general style of the Qur'an's legislative edicts throughout.

Although the debtor-creditor verse above is somewhat detailed, many of the legally relevant verses tend to be more general in nature. The *Qur'an* is a relatively short book, and it contains more than just legislative edicts. It is, therefore, necessary to look to other sources to aid in the interpretation of the Qur'an as well as and to create legislation concerning areas not specifically addressed in the Qur'an. *Sunna* is the next main source, and it plays the key role in augmenting the teachings of the *Qur'an*.

B. *Sunna*

The second main source of the Islamic law is *Sunna*. In Arabic, it literally means "the path", but as a technical term it means the sayings, actions, and stories of the prophet Muhammad.⁶⁸ They are sometimes referred to as the *hadith*, and can include not only what the prophet Muhammad did as well as what he refrained from doing. The prophet Muhammad said, "I have bequeathed to you two things; if you hold fast to them you will never go astray. They are the *Qur'an* and my *Sunna*".⁶⁹

There are four types of *Sunna* that were reported and recorded: 1. Muhammad's own words, also called *hadith*; 2. Muhammad's actions (such as descriptions of how he prayed, treated the poor, etc); 3. Muhammad's tacit approval of actions performed in his presence, and 4) descriptions of his physical attributes, personality, demeanor, and

⁶⁸ Kristin T. Roy, "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?", 18 *Fordham Int'l L.J.* 920, 944 (1995).

⁶⁹ Ramadan, *supra* note 60 at 12.

disposition. All of these examples are used to expand upon the Islamic laws outlined in the *Qua'ran*.⁷⁰

Since the *Sunna* is the second primary source of Islamic law, it was essential to ensure its authenticity and accuracy. This resulted in the advent of the *sahih* movement, meaning authentic.⁷¹ Dedicated *Sunna*'s scholars compiled *hadiths* of the prophet and attempted to authenticate each *hadith* using different methodologies.⁷² It resulted in a rigorous analytical treatment of each *hadith* and its chain of narrators including their characters and reputations.⁷³ A *hadith* that was recorded in writing, perhaps two hundred years after the death of the prophet, would be narrated by the recorder through a chain of narrators. Therefore, a particular *hadith* might be narrated as follows: I (the recorder) heard Narrator A state that he heard narrator B say that heard narrator C stated that narrator D heard the prophet Mohammad say statement X. The scholars examined the chain of narrators in order to determine whether statement X should be accepted as a valid *Sunna* or *hadith*. They also made sure that all the listed narrators had actually met each other at some point in history. Therefore, if narrator B died before narrator A was born, this would create a doubt as to the authenticity of the *hadith*. The character of the narrators—in terms their truthfulness and forgetfulness—was also considered. A narrator who had a bad memory or was known to be liar would result in a *hadith* that he narrated being rejected as inauthentic.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

From this authentication movement came the six books of *hadiths*, which was compiled by recognized scholars of high character. Two such scholars, Al-Bukhari and Muslim, compiled two books, *Sahih Al-Bukhari* and *Sahih Muslim*, respectively, which are considered the most authentic books after the *Qur'an* as sources of Islamic law.⁷⁴ Al-Bukhari spent sixteen years combing through 600,000 purported *hadiths*, out of which he selected 7,397 to be authentic, half of which selected are repetitions. Muslim's book contains 12,000 *hadiths*, with about 8,000 as repetitions.⁷⁵

Sunna, like the *Qur'an*, is considered a revelation from God that is transmitted to humanity through the prophet Muhammad. However, unlike the *Qur'an*, *Sunna* does not necessarily reflect the words of God. Rather, it is the meaning of God's messages explained by the Prophet. *Sunna* plays an important role in legislating command and injunctions. Furthermore, it holds a special position in Islamic law with respect to the *Qur'an* through four different legislative interactions.

First, it explains the ambiguous (*mujmal*), general ('*aam*), and absolute (*mutlaq*) verses of *Qur'an*.⁷⁶ For example, the *Qur'an* commands muslims to perform the prayer by stating "And perform *As-Salat* (prayer)".⁷⁷ The word prayer, however, is open-ended as it does not explain the form or manner of performing the prayer. This where the *Sunna* comes in. The prophet Muhammad commanded his followers to pray like him, and there are numerous *hadiths* that give a detailed explanation of how to pray. This, therefore,

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at 13.

⁷⁶ Mohammad H. Kamali, *Principles of Islamic Jurisprudence*, second ed (Kuala Lumpur: Ilmiah Publishers, 1998) at 53.

⁷⁷ *Qur'an*, *supra* note 41 at 2:43.

clarifies the exact form Muslims are expected to follow when praying in fulfillment of the *Qur'an's* commandment. These descriptions of the prayer in the *hadith* have the force of law. For example, it was narrated that prophet used to “raise his hands opposite his shoulders when he began [the] prayer”.⁷⁸

Second, the *Sunna* may support and emphasize what comes in *Qur'an*.⁷⁹ For example, the *Qur'an* proclaimed that trade was permissible (“Allah hath permitted trade”⁸⁰) The prophet Muhammad when asked “What type of earning is best?” replied “A man’s work with his hand[s] and every business transaction which is approved.”⁸¹ Here the *Sunna* confirmed the legality of trade and commerce.

Third, *Sunna* may independently establish a new rule that is not stated in *Qur'an*.⁸² The *Qur'an* includes an extensive statement of the rules of inheritance.⁸³ In the various verses that outline the rules of inheritance, including a list of those considered automatic heirs, i.e., those who are automatically entitled inherit from the deceased. In this case, the grandmother is not mentioned as an automatic heir in the *Qur'an*, but she is declared to be an automatic heir by Muhammad under certain conditions.⁸⁴

⁷⁸ Narrated by Bukhari and Muslim cited in Ibn Hajr Alasqalani, *Bulugh Al-Maram Min Adilat Al-Ahkam* (The Attainment of The Objective According to the Evidences of the Ordinances) 64 (transl. Muhieddin Al-Selek) (Beyrouth: Lebanon, 1993).

⁷⁹ Mohammad H, *supra* note 76 at 53.

⁸⁰ *Qur'an*, *supra* note 41 at 2:275.

⁸¹ Al-Bazzar cited in Ibn Hajr Alasqalani, *Bulugh Al-Maram Min Adilat Al-Ahkam* (The Attainment of The Objective According to the Evidences of the Ordinances) 172 (transl. Muhieddin Al-Selek) (Beyrouth: Lebanon, 1993).

⁸² Muil Y. Izz al-Din, *Islamic Law: from Historical foundation to contemporary practice* (Edinburgh: Edinburgh University Press Ltd, 2004) ,39-40.

⁸³ *Qur'an*, 4:11-12.

⁸⁴ Abulrahman IbnQasim, *Hashiat Alroudh Almorbe' Sharh zad Almostakne*, vol.6, second ed (Byrot: Besat, 1989) at 106-107.

Finally, *Sunna* can abrogate or modify rulings of the *Qur'an*. For example, the verse “It is prescribed, when death approaches any of you, if he leave any goods that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the Allah fearing” was abrogated by the prophet’s *hadith*: “No bequest for an heir”. In other words, as will be explained below, automatic inheritors whose shares are prescribed cannot receive more or less through any bequests or wills.

C. *Ijma* (Consensus)

Ijma is the practice of reaching a legal decision by consensus after mutual consultation (*shura*);⁸⁵ it is one of the two broad classes of reasoning (*ijtihad*) that are considered as secondary sources of Islamic law.⁸⁶ Among the two, collective reasoning or *ijma* is given the priority. Where *Qur'an* and *Sunna* do not provide specific guidance on an issue, the Muslim community is directed to exert reasoning to deduce the law. This concept of consensus stems from *Qur'an*: “O ye who believe! Obey Allah, and obey the Messenger, and *those charged with authority among you*. If you differ in any thing among yourselves, refer it to Allah and His Messenger, if you do believe in Allah and the last day; that is best and most suitable for final determination”⁸⁷

One example of *ijma* is that Muslim scholars around the world consentaneously agree that the five daily prayers are compulsory and obligatory for every Muslim, males

⁸⁵ Ramadan, *supra* note 60 at 17.

⁸⁶ *Ibid.*

⁸⁷ *Qur'an*, *supra* note 39 at 4:59. For the lawful of *ijma* see Ahmad I. al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Scard Law*, trans. Noh h. Mim (Maryland, USA: Amana Publications, 1994) at 24.

and females alike.⁸⁸ Another example of *ijma* is the Islamic consensus that the *Qur'an* we read and follow is the exact word of God, and it has never been changed.⁸⁹

The participants in the *ijma* decision-making process must meet special conditions. They have to be qualified Islamic scholars who are Muslims and qualified for *ijtihad*.⁹⁰ *Ijtihad* qualification requires a jurist to be knowledgeable of the *Qur'an* and *Sunna*, i.e., they must be able to read, understand and interpret both sources.⁹¹ The jurist is expected to have deep understanding of the *hadith* sciences and to have the ability to distinguish between authentic and unauthentic *hadiths*.⁹² In addition, he or she has to be conversant in the rules of analogical deduction.⁹³

D. Qiyas (Analogy)

Qiyas is another methodology of reasoning or *ijtihad*. Unlike *ijma*, *qiyas* is an individual form of *ijtihad* based on analogical deduction.⁹⁴ As mentioned previously, in order for a jurist to participate in *ijma*, he has first to be qualified to exercise independent analogical reasoning. To decide a new case law that has not been addressed clearly in the other sources, jurists may use analogical reasoning. It is used “to apply the textual rule

⁸⁸ Abulrahman IbnQasim, *Hashiat Alroudh Almorbe' Sharh zad Almostakne*, vol.1, second ed (Byrot: Besat, 1989), 409.

⁸⁹ Ramadan, *supra* note 60 at 11.

⁹⁰ *Ibid* at 17.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ *Ibid* at 18.

provided for a specific situation to another situation not specified, by identifying a common underlying cause (*'illah*) for the law between them.”⁹⁵

Wine, for instance, is prohibited in *Qur'an* and *Sunna* as God says: “They ask thee concerning wine and gambling. Say: In them is great sin, and some profit, for men; but the sin is greater than the profit.”⁹⁶ The prophet also says: “Every intoxicant is *khamr* (wine), and every *khamr* is *haram* (prohibited).”⁹⁷ Muslim scholars examined the effective cause behind the prohibition of wine, and they found out that the cause (*'illah*) of this rule is wine being intoxicant. From this textual rule in the *Qur'an*, they extend the injunction against wine to include any substance that intoxicates such as other alcoholic beverages such as beer or intoxicating drugs such as marijuana or heroin.⁹⁸

Although Muslims consider the ultimate source of Islamic law as God alone, which is why the *Qur'an* and *Sunna* are the primary sources of legislation. Islamic law, however, is not a rigid set of rules that cannot deal with new situations. By offering broad principles and guidelines, the *Qur'an* and the *Sunna* provide more space for flexible evolution of rules through *ijtihad* as long as it does not violate the foundational principles of Islamic law.

The Islamic inheritance system, also known as *'ilmal-fara'id* or estate division, is no different. “Estate division refers to the share allotted to each heir by Sacred Law.”⁹⁹

⁹⁵ Zainab Chaudhry, “The Myth of Misogyny: A reanalysis of Women’s Inheritance In Islamic Law” (1997-1998), 61 Alb.L. Rev. 524.

⁹⁶ *Qur'an*, *supra* note 41 at 2:219.

⁹⁷ Ruqaiyya W. Maqsood, *Examining Religions: Islam* (Oxford: Heinemann educational, 1995) at 139.

⁹⁸ Yusuf Al-Qaradawi, *The Lawful and The Prohibited in Islam*, second ed (Cairo: Al-Falah Foundation for Translation, Publication & Distribution, 2001).

⁹⁹ Ahmad I. al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*, trans. Noh h. Mim (Maryland, USA: Amana Publications, 1994), at 470.

The rules of inheritance are derived from the four sources: *Qur'an*, *Sunna*, *ijma'* and *qiyas*. The Qur'anic basis for inheritance system consists of three verses in that do not exceed one page in length.

Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a 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 ('s) 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, Al-wise. 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 debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus is it ordained by Allah; and Allah is All-knowing, Most Forbearing.¹⁰⁰

At the end of the same chapter, the *Qur'an* states:

They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a 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 does Allah make clear to you (His law), lest you go astray. And Allah is the all knower of every things.¹⁰¹

Similarly, *Sunna* plays a significant role in legislating additional rules regarding inheritance, though, in the context of the rules of inheritance, *Sunna* mostly explains the

¹⁰⁰ Qur'an, *supra* note 41 at 4:11-12.

¹⁰¹ Qur'an, *supra* note 41 at 4:176.

rules rather than establishing new principles. To illustrate, the Prophet explains that the remainder estate after division goes to certain heirs: “Give the obligatory shares of the estate for those who deserve them, and the rest belongs to the closest male to the deceased.”¹⁰² Interestingly, many rulings on dividing estates came only after the Prophet’s death, when the second Caliph (Islamic ruler) Umar employed his intellectual reasoning to solve three cases of inheritance according to Islamic law principles. These three cases have been accepted by *ijma*, or consensus, and hence are also part of the set of Islamic laws. In fact, these cases are famously known among Muslim scholars as Omar’s cases.¹⁰³

The next section explains the basic rules, principles and conditions of the Islamic inheritance system. To support the aim of this thesis, hypothetical cases of women inheriting with men are included to illustrate the circumstances that affect the portion of women’s inheritance.

III. The Islamic Inheritance System

As discussed above, prior to Islam, women in Arab societies had no rights, and especially did not have the right to inherit. Islamic law restored women’s dignity after centuries of humiliation and denial of their basic rights. After being objects of inheritance, woman under Islamic law gained independent legal rights such as the right to

¹⁰² Muslim Ibn Al-Hajaj Al-Naisabari, *Sahih Muslim*, 1st ed (Riyadh, Saudi Arabia: Dar E’lm Alkotob, 2003) at 54.

¹⁰³ Mohammed, Ibn-Authimeen, *Ashab Alforodh (Sharers Inheritors)*, http://www.ibnothaimeen.com/all/books/printer_17834.shtml (accessed Nov, 20 2009).

inherit and own property.¹⁰⁴ According to *Qur'an*: “ There is a share for men and a share for women from what is left by parents and those nearest related, whether the property is small or large, a legal share.”¹⁰⁵ This verse indicates that both men and women are eligible for inheritance because in principle they are equal in the eyes of the God.¹⁰⁶ In reference to this verse, the modern Islamic scholar, Sayed Qutb¹⁰⁷ commented on this verse:

According to this general principle of equality, women in Islam have been granted the right to inheritance and the rights of young children have been secured.¹⁰⁸ The pagan Arabs¹⁰⁹ used to assess each individual according to his or her financial productivity and his or her ability in the battlefield; Islam however, with its divine principles, has looked at individuals as human beings, and assessed them according to their humanness which is an intrinsic property that does not desert any individual. As a second stage, Islam has taken into account the practical obligations of each individual vis-a-vis his family in particular and his society in general.¹¹⁰

There are several *hadiths* in *Sunnah* that emphasize the right of women to inherit.

Saad Ibn Waqqas, a companion of the prophet, narrated:

I was stricken by an ailment that led me to the verge of death. The Prophet came to pay me a visit. I said:” O Allah’s Messenger! I have much property and no heir except my single daughter. Shall I give two-thirds of my property in charity?” He said, “No.” I said, “ Half of it?” He said, “No.” I said, “One third of it?” He said “You may do so though one-third

¹⁰⁴ Naseef, *supra* note 32 at 47.

¹⁰⁵ Qur’an, *supra* note 41 at 4:7.

¹⁰⁶ Ismaeel O. Ibn Katheer, *Almesbah Almoneer: Editing Work of Tafseer Ibn Katheer*, edited by Safie A. Almubarakfory (Riyadh, Saudi Arabia: Dar Assalam, 1990) at 275.

¹⁰⁷ Sayed Qutb is a famous muslim Egyptian thinker, educator and politician. Moreover, He joined Muslim Brotherhood Association in 1953 to be elected seven years later as the head of the association. He had interest in teaching Qur’an from theoretical and intellectual perspectives in the 1940s. His book (Fi Thilal Al-Qur’an) beside 23 other books add major contribution to the Islamic theoretical intellect. He was executed in 1966 for his political activities. See Salah A. Alkhaldi, *Syed Qutb From birth to martyrdom*, 2nd ed (Damascus: Dar Alkalam, 1994) at 15.

¹⁰⁸ Also he is referring to the verses before this one where the rights of orphans are stressed out.

¹⁰⁹ Referring to pre Islamic society.

¹¹⁰ Naseef, *supra* note 32 at 178; Sayed Qutb, *Fi Thilal Al-Qur’an*, 9th ed (Beirut: Dar Alshorog, 1980) at 559.

is also too much, for it is better for you to leave your off-spring wealthy than to leave them poor, asking others for help.¹¹¹

Indeed, the science of inheritance, *'ilmal-fara'id* or science of the shares, is considered by Muslims to be one of the most important sciences in Islamic law. It has a strong emphasis, because knowing in advance what everyone will inherit prevents Muslim families from entering into conflict after the death of a loved one.¹¹² The Prophet said: "Learn the laws of inheritance and teach them to the people for they are one-half of useful knowledge."¹¹³ Another *hadith* encourages the learning of this science:

Learn estate division and teach it to people for I am someone who will be taken from you and calamities will ensue, until two men will one day disagree about the obligatory apportionment and will not find anyone to judge between them.¹¹⁴

With this background, I will now proceed to explaining the Islamic-law division of estates.

A. Dividing the Estate:

In order for there to be an inheritance, first a deceased person must exist. This seems elementary, but nonetheless, the death of the person must be legally established. The deceased may have actually died or could be presumed dead by being lost for a long

¹¹¹ Naseef, *supra* note 41 at 181; Muhammad E. Albukhari, *Saheeh Albukhary* (The authentic of Albukhari) # 2744, edited by Khalil M. Shiha 2nd ed (Beirut: Dar Alma'rafah, 2007) at 712.

¹¹² It is part of the family law that is "a vital part of Shari'a as the family is the foundation of the community" See Chooley at 668.

¹¹³ Ali O. Aldarkutni, *Sunan Aldarkutni*, # 4059 1st ed Almaso'ah Alhadethiah (Beirut: Alresalah, 2004) at 117.

¹¹⁴ *Supra* note 99 at 471.

period of time. In this case, a court must pronounce his or her death according to particular circumstances and rules laid out by Islamic legal scholars.¹¹⁵

Before dividing the estate, there are steps should be followed. The deceased funeral's expenses should be accounted for.¹¹⁶ Next, All debts should be paid.¹¹⁷ Then, There should be an execution of the bequest.¹¹⁸ "The bequest is the act of a living person disposing of his own property, even if it is to be implemented after his death."¹¹⁹ Further, the bequest is an optional act and it is limited to one third of the entire estate in which the person cannot exceed unless each heir agrees. Moreover, heirs are not eligible for the bequest.¹²⁰

After these duties are paid out of the estate, the estate can be distributed now.¹²¹

Once the deceased is indeed legally declared dead, all possible heirs must be identified. As stated, the shares of heirs are summarized in three Qur'anic verses. *Sunna* explains and elaborates more on the amount of the bequest and some other related issues with regard to inheritance. An heir is every person who is eligible to inherit from the

¹¹⁵ *Ibid* at 88- 89.

¹¹⁶ "These expenses are deducted before the deceased's debts are paid, his bequests fulfilled, or his estate divided, unless there is a financial obligation due on the property it self, such as:

- 1- When there is zakhah;
- 2- When some of the property has been put up as collateral;
- 3- Or when he dies bankrupt with unpaid-for merchandise among his property which must be return to the seller before before paying other expenses from the deceased's property." See the Reliance of the Traveller *supra* note 99 at 473

¹¹⁷ Abulrahman IbnQasim, *Hashiat Alroudh Almorbe' Sharh zad Almostakne*, vol.6, second ed (Byrot: Besat, 1989) at, 86.

¹¹⁸ *Ibid*.

¹¹⁹ *Supra* note 99 at 462.

¹²⁰ *Supra* note 117.

¹²¹ *Ibid*.

deceased, as will be explained later.¹²² This person must be alive at the time of the deceased's death.¹²³ Even if an heir dies one minute after the deceased's death, he or she is still considered an heir and their portion will go to their own legal heirs.¹²⁴ This rule can apply, for example, when relatives who are in the same car die in an accident and the time period between their deaths is short. Uncertainty as to who died first,¹²⁵ therefore, has the effect of nullifying the inheritance. So if two brothers, for example, die in an accident together and their death sequence was not known, neither one inherits from the other.

Finally, the estate must be identified. The estate is defined as any wealth that a person leaves after her death.¹²⁶

B. Basic Rules of Inheritance:

There are basic rules and elements that apply to all cases of inheritance:

1- All shares are derived from the *Qur'an* and *Sunna*. That is, the inheritance shares are found in the *Qur'an* except for the grandmother's share, which is taken from *Sunnah*.¹²⁷

2- A potential inheritor who is connected to the deceased through another present closer heir is excluded by that closer heir.¹²⁸ For example, the

¹²² *Ibid* at 91.

¹²³ *Ibid* at 91.

¹²⁴ *Ibid* at 92.

¹²⁵ *Ibid* at 476.

¹²⁶ *Ibid* at 86-87.

¹²⁷ Muhammad A. Alemam, *E'lam Alnobala' BeAhkam Mirath Alnesa*, 1st ed (Yemen: Almutakhasas, 2004) at 14.

¹²⁸ *Ibid* at 14.

deceased's living son excludes the deceased's grandson from inheriting.¹²⁹

Nevertheless, uterine siblings (siblings from mother's side) are not included in this rule, as the presence of their mother does not affect them.¹³⁰

3- Fixed sharers (explained below) cannot be excluded by any other heir.

However, their share may be reduced when specific heirs are present.¹³¹

C. Causes of Inheritance or Who is an Heir?:

In order to be considered a legitimate heir, the person must be related to the deceased through kinship or marriage. A person related by kinship is a close or distant relative who has blood relations with the deceased.¹³² There are three kinds of blood relation, according to Islamic legal scholars. The first are referred to as the 'roots', i.e. the parents and grandparents. The second are the decedent's offspring including his grandchildren. The third group are the decedent's full siblings and their children (including sibling from the father's side and their children), her uterine siblings, her father's full siblings and the father's half siblings and their kids.¹³³ The father's uterine siblings are not eligible to inherit automatically, but they are entitled to receive some share through the bequest process.¹³⁴

¹²⁹ The grandson here is excluded whether the deceased's son is his father or his uncle.

¹³⁰ *Supra* note 127.

¹³¹ *Ibid.*

¹³² *Ibid* at 88.

¹³³ *Ibid* at 91.

¹³⁴ *Ibid.*

As to relationships by marriage, a valid marriage contract is enough as it serves as a sufficient cause of inheritance between married spouses no matter how short the length of marriage before the death of the deviser.¹³⁵

The *Qur'an* has created two categories of heirs in order to determine how these various types of heirs actually inherit. The first group is known as the fixed-share inheritors, or sharers.¹³⁶ Those are the heirs whom the *Qur'anic* verses give an explicit percentage provision. There are twelve sharers: 1) husband, 2) wife, 3) father, 4) true grandfather,¹³⁷ 5) mother, 6) true grandmother,¹³⁸ 7) daughter, 8) son's daughter, 9) full sister, 10) sister from the father's side, 11) uterine brother, 12) and uterine sister. These sharers take six fixed shares as specified in the *Qur'an*: one-eighth, one-sixth, one-third, one-quarter, two-thirds and half of the estate.

The second category is known as the Residuaries.¹³⁹ They are the heirs who take the remainder of the estate after each sharer takes her or his fixed share. The residuaries are divided into three sub-categories; (1) residuary by himself¹⁴⁰ or agnatic heirs; (2) residuary by others¹⁴¹ (3) residuary with others¹⁴². The first sub-category is the most

¹³⁵ There are some exceptions to when relatives inherit from each other. For example, if an heir kills his deviser, he will be excluded from the inheritance, as the prophet stated "No share for the murderer". See *ibid* at 194-195.

¹³⁶ *Ibid* at 91.

¹³⁷ "A true grandfather is a male ancestor between whom and the deceased no female intervenes." see See Jamal J. Nasir, J.J. *The Islamic Law of Personal Status*, 2d seconded (London: Graham & Trotman Ltd., 1990.) 1990, 234.

¹³⁸ "A true grandmother is a female ancestor between whom and the deceased no false grandfather intervenes" "false grandfather is a male ancestor between whom and the deceased a female intervenes" such as a mother's fathers. See *Ibid*.

¹³⁹ IbnQasim, *supra* note 117 at 120.

¹⁴⁰ *Supra* note 137 at 234.

¹⁴¹ IbnQasim, *supra* note 117 at 126.

¹⁴² *Ibid*.

common, specifically the male agnatic heir whose “relation to the deceased is traced without the intervention of female links”¹⁴³ as follows: sons, father, true grandfather, full brothers, brothers from the father’s side, and father’s brothers.¹⁴⁴ Agnatic heirs, generally speaking, can only inherit as residuaries. In other words, they have no fixed share and only inherit what is left after the division of the estate according to the percentages specified above. The only exception to this rule is the father and the true grandfather who can inherit in three different situations: they may inherit as sharers, as residuaries, or both as sharers and residuaries simultaneously, depending on who the deceased’s survivors are. Agnatic heirs are excluded from the inheritance if the estate is exhausted by the sharers, aside from the sons and the father, who cannot be excluded.¹⁴⁵ Furthermore, the agnate relative closest in degree to the deceased excludes the more distant ones. For example, the presence of a son or agnatic grandchild, however low, excludes the father from inheriting (but the father may still inherit under another scheme); the father excludes the brothers of the deceased from inheriting; and brothers exclude the father’s brothers from inheriting.¹⁴⁶

The other two kinds of residuaries are originally sharers, i.e. they would have inherited under the fixed share category, but they become residuaries in special circumstances. They then inherit the remainder, and not a fixed share. Residuary by others includes every female sharer who becomes a residuary because she inherits with her same level male heir. An example of this is a daughter (or daughters) of the deceased

¹⁴³ *Supra* note 137 at 234.

¹⁴⁴ *Ibid* at 91.

¹⁴⁵ *Ibid*.

¹⁴⁶ Meaning that the father cannot inherit as a residuary with the presence of the son, but he still inherits as a sharer. See *supra* note 99 at 503.

who inherits with her (or their) brother (or brothers), who is the deceased's son (or sons). The presence of a brother or brothers means that the sister is now lumped in with the brothers in taking the residual share of the estate, i.e., the sister or sisters are entitled to half the share of the son.¹⁴⁷

However, “residuary with others” refers to a female sharer who becomes a residuary because she inherits with another female and no male agnatic heir exists. This kind of residuary is confined to the full sister and the sister from the father's side when they inherit with the daughter. The sisters become residuaries and take the remainder of the estate after the daughter takes her share.¹⁴⁸

In sum, all possible heirs are not automatically entitled to an inheritance—some heirs may exclude others. However, spouses, parents and children of the deceased cannot be excluded, although the presence of other heirs may reduce their shares.¹⁴⁹

E. Rules of Exclusion:

There are two kinds of exclusion: total exclusion, and partial exclusion. A totally excluded heir is an eligible heir who does not inherit because of the presence of another closer heir to the deceased.¹⁵⁰ Inheritors of this kind are as follows:

- 1- The deceased's descendant however low, as well as the father and grandfather exclude uterine siblings.

¹⁴⁷ IbnQasim, *supra* note 117 at 126.

¹⁴⁸ *Ibid* at 126.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Supra* note 99 at 495.

- 2- The deceased's son, or son's son, as well as the father exclude full brothers and half brothers.
- 3- The deceased's full brothers excludes half brothers.
- 4- The deceased's son excludes the grandsons.
- 5- The deceased's mother excludes all the grandmothers.
- 6- The deceased's father excludes the grandfather and grandmother from the father side.
- 7- Two or more deceased's daughters exclude the deceased son's daughter.¹⁵¹
- 8- Two or more full sisters exclude the half sisters.¹⁵²

The second type of excluded inheritor is not totally excluded. Rather, their shares are reduced by the existence of other certain heirs. For instance, if a woman dies, then the presence of her children reduce her husband's share from half of the estate to one quarter. Similarly, a mother receives one-sixth instead of one third if the deceased is survived by children. Moreover, an eligible heir whose share is totally excluded cannot exclude any other heir; although he or she can reduce the share of certain heirs. Uterine siblings, for

¹⁵¹ Unless there exist a grandson who is at the same distance to the deceased as they are, or by one who is farther from the deceased as they are. In this case granddaughters inherit as residuaries by other and receive half the share of the male inheriting with them. For example: " if there are two daughters and a granddaughter, the two daughters take two thirds and the granddaughter receives nothing. But if there also exists with her a grandson... then she [as a residuary with him] gets the rest of the estate with him, the male receiving the share of two females and such male is nicknamed *blessed brother*." *Supra* note 99 at 496.

¹⁵² The same situation applies here; if there is a half brother, they inherit as residuaries with him. *Ibid*.

instance, are excluded by the presence of the deceased's father, but their existence reduces the deceased's mother's share from one-third to one sixth.¹⁵³

Having provided an overview of the rules, this paper will now describe how the various heirs actually inherit in order to illustrate the various scenarios where women can inherit. While the rules may initially seem complicated, a series of examples will be provided to illustrate how these rules operate in practice

F. Fixed Shares

a. Share of Daughter

The *Qur'an* clearly explains the children's share as follow:

Allah commands you as regards your children's inheritance: to the male, a portion equal to that of two females: if there are only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is a half.¹⁵⁴

The daughter, therefore, has three cases of inheriting depending on her special circumstances. The first case is when she inherits half the estate if there is no son exists with her, i.e she has no brother. If there are two or more daughters, they share two thirds of the estate equally.¹⁵⁵ In these two cases the daughters are defined fixed sharers.

In the presence of a son, however, the daughter becomes a residuary by her brother and takes one half of the portion of her brother (i.e. the deceased's son).¹⁵⁶

¹⁵³ *Ibid.*

¹⁵⁴ Qur'an, 4:11 (Muhammed T. Alhilaly and Muhammed M. Khan translatio).

¹⁵⁵ IbnQasim, *supra* note 117 at 110.

¹⁵⁶ *Ibid.*, 109.

Furthermore, in the absence of any living sons or daughters, the son's daughter inherits the same proportion as the daughter.¹⁵⁷

If there is only one daughter and a son's daughter, the daughter will take her half and the son's daughter will take one sixth to complete the two third portion.¹⁵⁸ However, if there is more than one daughter, the son's daughter is excluded from inheritance, as they will complete the two-thirds portion of the estate. If deceased's son has a son, but the son is also deceased, the son's daughter becomes a residuary by the son's son and she inherits half of his share. Finally, the son's daughter herself cannot inherit if a son (i.e., her father or uncle) is still living.

b. Shares of the mother and father

Regarding the deceased's parents, the *Qur'an* explains their fixed shares as follows:

For parents, a sixth share of the inheritance to each if the deceased left children; if no children, and parents are the only heirs, the mother has a third; if the deceased left brothers or sisters, the mother has a sixth.¹⁵⁹

Hence, the mother receives a sixth of the estate if the deceased leaves a child. If the child is a daughter, the father receives the sixth as a sharer and take the remainder as a residuary if the estate is not exhausted by sharers. If there is no child, however, the mother receives one third. Moreover, in case the deceased has two or more brothers and

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, 112 .

¹⁵⁹ Qura'n, *supra* note 41 at 4:11.

sisters, or even one brother and one sister, the mother receives a sixth,¹⁶⁰ while the father in these two latter cases is treated as a residuary receiving the remainder of the estate.¹⁶¹

c. Shares of the wife and husband

The *Qur'anic* verse regarding the wife and husband states that:

In what your wives leave, your share is half if they leave no children; but if they leave a child, you get a fourth after payment of legacies and debts. In what you leave their share is a fourth if you leave no child; but if you leave a child, they get an eighth after payment of bequests and debts.¹⁶²

Obviously, a wife and husband cannot inherit together at the same time from each other. Therefore, the deceased's spouse will always be alone in her or his own class. Each of them, the wife and the husband of the decedent, have two cases of inheriting. With regard to the husband, he receives one half of the estate if his deceased wife left no child¹⁶³. In case that such a child exists, the husband will receive one fourth. The wife; on the other hand, will receive one fourth if the deceased left no child, and one eighth in the presence of any child.

d. Shares of full sister

Their shares are also prescribed in the *Qur'an*:

Allah directs about those who leave no descendants or ascendants as heirs. If it is a man that dies leaving a sister but no child, she shall have half the inheritance; if the deceased was a woman who left no child, her brother takes her inheritance; if

¹⁶⁰ If there is just only one sister or one brother, the mother will receive the third and the father will be a residuary. *Ibid* at 103.

¹⁶¹ *Ibid* at 120.

¹⁶² *Qur'an*, *supra* note 41 4:12.

¹⁶³ It has to be the decedent's child, does not matter if the child is from that marriage or not.

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.¹⁶⁴

The following heirs exclude all kinds of siblings, including sisters, of the deceased from inheriting: the deceased's son, the deceased's male agnatic grandchild however low, the deceased's father, and the deceased's true grandfather. If none of these are present and there is only one full sister, she will receive half of the estate. Two or more full sisters will share two thirds equally. Full sisters may also inherit as residuaries¹⁶⁵ if a full brother is present. In that case, the deceased's brother will take twice the share of his sister. In addition, full sisters can also become residuaries¹⁶⁶ if one or more of the deceased's daughters exist with them (but no male children of the deceased exist). Then the sisters will take the remainder of the estate after daughters receive their shares.¹⁶⁷

Siblings from father side take the same proportions of full siblings in their absence. So full siblings exclude half siblings¹⁶⁸ except in two cases. The first one is if the deceased leaves only one full sister and one or more half sisters. In this case, the full sister receives half and the half sisters receive the remaining sixth to complete the portion of two thirds.¹⁶⁹ The second case is when there are two or more full sisters and half sisters

¹⁶⁴ Qur'an, *supra* note 41 at 4:176 .

¹⁶⁵ As mentioned previously, this case is residuary by others.

¹⁶⁶ Residuaries with others.

¹⁶⁷ IbnQasim, *supra* note 117 at 109.

¹⁶⁸ Half siblings here are siblings from the father's side, as uterine siblings are allotted different portions.

¹⁶⁹ As mentioned previously, the portion of two thirds is the share of two or more sisters.

and a half brother exist. The half sisters inherit as residuaries by their brother who is the closest male agnate to the deceased, as he inherits as a residuary.¹⁷⁰

e. Shares of uterine siblings

Their shares are prescribed as follows:

If a man or woman whose inheritance is in question, has left neither ascendants nor descendents, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third.¹⁷¹

In addition to the previously mentioned heirs whose presence exclude siblings, the deceased's daughter and agnatic granddaughter's presence will also exclude uterine siblings from inheriting.¹⁷² Unlike other siblings, uterine siblings receive the same shares regardless of their sex. An only uterine sibling will receive one sixth. If there are two or more uterine siblings, they will share one third of the estate divided equally between them.¹⁷³

G. Hypothetical examples

Given that these rules are quite complex and may not be easy to follow, I have provided some examples to see how they operate. The examples focus on those situations when women are inheriting.

A. Examples where women inherit more than men

¹⁷⁰ In this second case, half sisters can only inherit if a half brother exists because she will become a residuary and take half the share of the half brother. The half brother in this case is called “blessed brother” because without him his sisters would not inherit. For sisters inheritance, see IbnQasim, *supra* note 117 at 109, 126.

¹⁷¹ Qur'an, *supra* note 41 at 4:12.

¹⁷² Neither full sibling nor half siblings can exclude uterine siblings. See IbnQasim, *supra* note 117 at 117.
¹⁷³ *Ibid* at 117.

a. Example 1

Consider the following example. A woman dies leaving a husband, a father, a mother, and two daughters. Since there are children, the husband is entitled to one fourth, the mother one sixth, and the father will also take the remainder after all other inheritors receive their shares. The two daughters receive two thirds divided equally between them. To understand dividing in fractions, a common denominator is created, in this case 12. Then the shares are divided into portions. Table 1 shows the fractional shares of the various heirs in the second row, shows the fractional shares of the various heirs in the second row, and the shares of the heirs in full numbers in the third row.

Table 1

Inheritors	<u>Husband</u>	<u>Father</u>	<u>Mother</u>	<u>2 Daughters</u>
Units	$\frac{1}{4}$	$\frac{1}{6} + \text{the remainder}$	$\frac{1}{6}$	$\frac{2}{3}$
Portion	3	2+0	2	8

In this case, the mother and the father, who are in the same class, receive an equal share as the father takes only the sixth for the fact that inheritors exhaust all the estate, so there is no remainder. Moreover, each daughter inherits more than the husband and twice the share of their grandfather, or the deceased's father.¹⁷⁴ Hence, the women in this example inherit as much or more than the men.

¹⁷⁴ As you would realize, there is a scarcity in the estate in this case and some other cases. Each person will share a portion of these deficiencies according to particular rules. See Almaric Rumsey, *Moohummudan Law of Inheritance and right and relations affecting it: Sunni Doctraine*, third ed (London: W.H. Allen, 1880) at 110-111. This case is solved by dividing the estate on the base number (15). Suppose that the estate is \$120. $120 \div 15 = 8$. Then we multiply 8 by each portion of inheritors to find out how much each heir would inherit. For example the husband portion is $8 \times 3 = 24$. In this case the father receives 16, mother receives 16 and the daughters take 64.

Not only do the women inherit as much or more than the men, if the example involved two sons instead of two daughters, the results would still be interesting. Despite the fact that they are in the same class and sharing the same degree of closeness to the deceased, the daughters in the earlier example will inherit more than the sons.¹⁷⁵ The two sons would inherit as residuaries while the father would inherit as a fixed sharer. The father of the deceased would receive one-sixth, as would the mother, while the husband would receive one-quarter. The two sons would then receive the remainder of the estate. Table 2 presents this division. Note that the common denominator is first created with the husband, father and mother in mind, and then the remainder is applied to the two sons. This allows for a like comparison with the example above.

Table 2

Inheritors	<u>Husband</u>	<u>Father</u>	<u>Mother</u>	<u>2 sons</u>
Units	$\frac{1}{4}$	$\frac{1}{6}$	$\frac{1}{6}$	The remainder
Portions	3	2	2	5

The mother receives as much as the father, just as in the previous example, but the sons receive five shares as opposed to the eight shares received by the two daughters in the previous example.¹⁷⁶

b. Example 2

A woman dies leaving a husband, father, mother and one daughter. In distributing her estate, her husband will take one fourth because of the presence of the daughter. Each

¹⁷⁵ Salah Soltan, *Woman's Inheritance in Islam: Discrimination or Justice?*, trans. Gihan ElGindy (Hilliard, Ohio: Sultan Publisher, 2004) at 18.

¹⁷⁶ *Ibid* at 19.

parent will receive one sixth. In addition, the remainder goes to father if the estate is not exhausted by the sharers. The daughter will take half of the entire estate. Table 3 presents this division.

Table 3

Inheritors	Husband	Father	Mother	1 Daughter
Units	1/4	1/6 + the remainder	1/6	1/2
Portion	3	2+0	2	6

In this situation, the daughter takes twice the share of the husband, and three times the share of her grandfather.¹⁷⁷

In the case when a son exists instead of the daughter, he will take the remainder as the closest residuary to the deceased. Therefore, his portion compared to the daughter is lesser.

Table 4

Inheritors	Husband	Father	Mother	1 son
Units	1/4	1/6	1/6	The remainder
Portions	3	2	2	5

In the event that there were more than two sisters or two brothers, the division would be the same as in the two versions of example 1. The three (or more) sisters would share equally in the 8 portions seen in the table 1, while the three (or more) sons would share in 5 portions seen in the table 2.

B. Examples where women inherit the same amount as men

¹⁷⁷ Chaudhry, *supra* note 95 at 536.

a. Example 1

A woman dies leaving her husband, mother, one uterine brother and one uterine sister. In this case the husband will take one half of the estate, the mother will receive one sixth and the one third will be equally divided between the siblings. Hence, the sister takes the same portion of the estate as her brother.

b. Example 2

A woman dies leaving only her husband, mother, one uterine sister and one full brother. The mother will take one sixth because of the presence of two siblings, the uterine sister will take one sixth, and the full brother will receive the remainder as the only male agnatic inheritor. Although the full brother inherits the remainder, his portion in this case is the same as the uterine sister.¹⁷⁸

Table 5

Inheritors	<u>Husband</u>	<u>Mother</u>	<u>Uterine sister</u>	<u>Full brother</u>
Units	1/2	1/6	1/6	The remainder
Portions	3	1	1	1

C. Examples where women inherit half the share of men

There are four cases where women inherit half the share of men.¹⁷⁹ The first one is when the deceased leaves children of different genders. The daughters will inherit half of the sons' portions. For example, if a deceased left two sons and two daughters, then the estate is treated as a remainder with the sons and daughter being residuaries. The deceased's sons and daughters will receive their shares as in the table below:

¹⁷⁸ Sultan, *supra* note 175 at 21.

¹⁷⁹ *Ibid* at 29.

Table 6

Inheritors	<u>Son1</u>	<u>Son2</u>	<u>Daughter1</u>	<u>Daughter2</u>
Units	Remainder with twice the share of sister	Remainder with twice the share of sister	Remainder with one share	Remainder with one share
Portions	2	2	1	1

Each son will receive 2/6 or one third of the estate, while the daughters will receive 1/6 of the estate.

The second case is when a deceased leaves only her father and mother. The mother will take one third and the father will take the remaining two thirds.

The third case is when the deceased leaves brothers and sisters from the same class such as full siblings or half siblings¹⁸⁰. The sisters will receive the half amount of share as their brothers just as in the first case.

Finally, in the fourth case, the wife will always take half the share of husband, although they never inherit together for the fact that one of them is the deceased.¹⁸¹

D. Examples where only women inherit.

If the deceased leaves only female inheritors such as daughters and mother, they will inherit the whole estate.¹⁸² Furthermore, there are other cases when only a female

¹⁸⁰ Uterine siblings will always receive the same share regardless of their sex. See IbnQasim, *supra* note 117 at 115.

¹⁸¹ Sultan, *supra* note 175 at 29-30.

¹⁸² The method used here is called return “*radd*”, which is distributing the surplus among sharers in the ratio of their respective shares. This method is used because the shares do not exhaust the property

inherits, while, on the other hand, a male who was similarly situated as the female may not inherit at all. For example, a deceased woman left her husband, a full sister, and a half sister. The husband will take one half, while the other half goes to the full sister. The half sister here takes the sixth¹⁸³ to complete the two thirds. As an aside, the reader should see that the sum of the fractions exceeds one. Because the fractions in this situation are more than the whole, the method used here is the Increase or “*aul*”.¹⁸⁴ This methodology take a common denominator, in this case twelve, and then writes out the portions, in this case three, three, and one. Then the portions are added up to seven, and each inheritor receives their original share out of seven. This can be seen applied in table 7 below.

Table 7

Inheritors	Husband	Full sister	Half sister
Unites	$\frac{1}{2}$	$\frac{1}{2}$	$\frac{1}{6}$
Portions	3	3	1

On the other hand, a half brother will not inherit if he exists instead of the half sister in the same last situation. That is because he is a residuary who inherits the rest of the property after the shares are satisfied. In this case there is no remainder; therefore, he inherits nothing.¹⁸⁵

Table 8

Inheritors	Husband	Full sister	Half brother
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and there are no residuaries. See Almaric, *supra* note 174 at 114; IbnQasim, *supra* note 117 at 130.

¹⁸³ *Supra* note 117 at 130.

¹⁸⁴ The two thirds is the portion of two sisters. The half sister here should inherit although sharers already exhaust the property. That is because she is a sharer and sharers have to inherit whenever they exist if nothing prevents them from inheriting. See IbnQasim, *supra* note 115 at 92.

¹⁸⁵ Sultan, *supra* note 175 at 32-33.

Unites	$\frac{1}{2}$	$\frac{1}{2}$	The remainder
Portions	3	3	0

This overview of the various scenarios should illustrate two points: the first is that women almost always receive some share of inheritance, especially if they are close in the relationship to the deceased. The second is that they only receive a lesser share when a male equivalent of their class is present, i.e. sons and daughters or full brothers and full sisters. These two points will serve as the basis of my analysis of the Islamic legal system of inheritance that I will discuss next.

IV. An Analysis of the Islamic Inheritance System

There are several metrics by which to evaluate a legal rule or even a legal system in general. These metrics can be based on e.g., gender, race, social justice or economics. Modern legal scholarship in North America has generated a large number of articles analyzing various legal rules from various perspectives. This thesis uses a socio-economic metric of social justice to analyze the Islamic legal system of inheritance. This metric was chosen because critics of Islamic-law tend to use the same one to claim that Islamic law does not treat women fairly, especially in terms of economics. First, this section will present the general concept of justice in Islam. Next, it will show how the Islamic legal system is just from a social and economic perspective. Finally, it will show how the Islamic inheritance rules fit into the larger Islamic social and economic system.

A. Islamic Concept of Justice:

A central principles in Islamic law, and that is the equivalent to legislative intent in Western law, is called the *magasid al-shari'ah* or the purposes or objectives of the law.¹⁸⁶ With respect to social and economic legislation in Islamic law, the primary intent of these objectives is to promote and protect the well-being or the interests of mankind. That is to protect the five essential necessity of life in which neglecting them leads to destruction.¹⁸⁷ These essentials are religion, life, intellect, progeny or family and private property or wealth.¹⁸⁸ These five essentials are both promoted and protected in the various Islamic laws against any harm or undermining. In addition, generally speaking, if a law or injunction violates the concept of *magasid*, this law is invalid.¹⁸⁹

The concept of *magasid* guides all Islamic legislation including the economic system. As Islam recognizes private ownership, this recognition is conditional on the private property serving the concept of the *magasid*, which requires that no harm to the five essential interests be the consequence of this private ownership system.¹⁹⁰ This concept, therefore, applied to private property requires that any harmful form of earning money is prohibited. For example, interest-based transactions are totally prohibited, various edicts in the *Qur'an* and the *Sunna* make it clear that earning interest is a form of commercial transaction that is harmful to the cause of people.¹⁹¹

¹⁸⁶ Chaudhry, *supra* note 95 at 522.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ "Those who devour usury will not stand....Allah has permitted trade and forbidden usury.... Allah will deprive usury of all blessing, but will give increase for deeds of charity....". *Qur'an, supra* note 41 at 2:275.

¹⁹¹ *Qur'an, supra* note 41 at 2:275-6.

Moreover, incomes earned through the sale of harmful activities such as alcoholic or narcotic substances are also prohibited.¹⁹² “A transaction is forbidden if it means gain for one individual but loss for another. Thus, mutual consent is not enough for a permissible transaction; it must also be socially optimal.”¹⁹³ Despite the recognition of private ownership in Islam, Islamic economics also emphasizes the encouragement of social, non-individualistic values and fighting against selfishness and injustice.¹⁹⁴

Because justice is the key factor that assures the endurance of the previously mentioned five essentials, it is a basic objective and a primary pillar of the concept of *magased*. Over 360 *Qur’anic* verses embrace different concepts of justice.¹⁹⁵ The Qur’an either explicitly or implicitly commanding justice and forbidding or admonishing against injustice.¹⁹⁶ Consequently, “no single idea or mechanism in Islam is as pertinent to attainment of equilibrium as the religion’s conception of justice.”¹⁹⁷ Hence, according to Al-sadr¹⁹⁸, social justice is one of the three main principles of Islamic economy.¹⁹⁹

¹⁹² M. M. Metwally, “Economic consequences of applying Islamic principles in Muslim societies” (1997) 24: 7 *Int Jour of Social Economics* 941- 957 at 943 (Emerald).

¹⁹³ Muhammed I. Ansari, “Islamic perspectives on Sustainable Development” (1995) 11 *The American Journal of Islamic social sciences* 349 at 398.

¹⁹⁴ Muhammad S. Chudry, “Fundamental of Islamic Economic System” online: Muslim Tents <http://www.muslimtents.com/shaufi/b16/b16_18.htm>.

¹⁹⁵ For example: “Establish weight with justice and do not fall short of the balance.” Qur’an, *supra* note 41 at 55:7-9.

¹⁹⁶ Mustafa Koylu, *Islam and its quest for peace: Jihad, Justice, and Education*, vol 15 (Washington, DC: The Council for Research in Values and Philosophy, 2003) at 72.

¹⁹⁷ *Ibid.*

¹⁹⁸ Mohemmed Baqir Alsadr is the author of one of the most important work in Islamic economy, *Iqtesadona*.

¹⁹⁹ The other two principles are multi-faceted ownership and economic freedom within a certain limit. Mohemmed B. Alsadr, *Iqtesadona*, 20th ed (Beirut: Dar Alta’aruf, 1987).

Islam gives special attention to economic justice, although all kinds of justice are emphasized.²⁰⁰ During the early days of Islam, it was “ the economic disparities [that] were most persistently criticized, because they were the most difficult to remedy and were at the heart of the social discord”.²⁰¹ Furthermore, a whole chapter in the *Qur’an* called the Women legislated new codes regarding orphans’ and womens’ economic rights. Concepts such as inheritance and dower are emphasized, and these were an explicit challenge to the tribal communities at the time where women were previously denied their basic rights.²⁰²

That is why the chapter of the Women is introduced by five verses that stress the importance of justice before even the rules of inheritance are laid out. In addition, a new code of economic rights is established for three categories of people (orphans, women and those “weak of understanding”, i.e. those lacking capacity),²⁰³ these three having been denied these rights in the pre-Islamic society. The codes are established as follows:

To orphans restore their property (When they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own for this is indeed a great sin. If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice. And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer. And give not to the foolish your property which Allah has made a means of support for you, but

²⁰⁰ Koylu, *supra* note 196.

²⁰¹ *Ibid* at 73.

²⁰² Refat A. Alawadi, *Iejaz Alqur’an Fi Tashrei’ Almirath*, 1st ed (Cairo: Dar Alsalam, 2008) at 40.

²⁰³ *Ibid* at 105.

feed and cloth them therewith, and speak to the words of justice. And try the orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them, but consume it not wastefully and hastily, fearing that they should grow up, and whoever (amongst guardians) is rich, he should take no wages, but if he is poor. Let him have for himself what is just and reasonable (according to his labour). And when you release their property to them, take witness in their presence; and Allah is All-Sufficient in taking account.²⁰⁴

This new revolutionary code of protecting women's economic rights is an obvious example of the ample attention given to social justice in Islam.

Social solidarity in Islam is a cornerstone in the Islamic economic system as well as a technique to achieve the objectives of *magasid* and social justice. The aim of social solidarity is to prevent the accumulation of the wealth in the hands of the wealthiest: "In order that it [wealth or property] may not make a circuit between the wealthy among you"²⁰⁵, resulting in a community where some live in luxury and the rest live in poverty. These permanent economic class distinctions in a community are severely condemned in Qur'an.²⁰⁶ While the existence of different social classes in which the economic balance of the society is not violated is understood and respected by Islamic law, the excessive economic gap between these social classes is what Islamic law tries to resist.²⁰⁷ With this technique, social solidarity, Islam aims to create a society where "each individual must

²⁰⁴ Qur'an, *supra* note 41 at 4:2-3.

²⁰⁵ Qur'an, *supra* note 41 at 59:7.

Also: "Woe to every slanderer, defamer. Who amasses wealth and counts it. He thinks that his wealth will make him abide. Nay, he will certainly be hurled into the crushing disaster. And what will make thee realise what the crushing disaster is? It is the Fire kindled by Allah. Which rises over hearts..." 104:1-7.

²⁰⁶ Alawadi, *supra* note 202 at 73.

²⁰⁷ Ahmad H. Al-maamiry, *Economics in Islam*, 1st ed (New Delhi: Lancers Books, 1987) at 138.

feel that he forms with the others a compact and solid unity, based on fraternity, social solidarity and equity of rights and duties”.²⁰⁸

The most striking tool that Islam uses to redistribute wealth is the obligatory charity, also known as the *Zakah* (or *Zakat*). *Zakah* is counted as the third pillar of Islam (after affirming one’s faith and daily prayer), and as such is the most socially significant economic practice of Islamic law.²⁰⁹ While *Zakah* literally means purification, it refers in Islamic law to the certain amount of the wealth of certain kind of property collected in a certain time from those who are liable for the *Zakah* and then given to a certain group of needy people in the Muslim community. In other words, “every Muslim whose wealth exceeds a particular level (called *nisab*) is obliged to give a share of that wealth to the poor and needy in the form of a religious tax called *zakat*.”²¹⁰ In today’s practical terms, all muslims whose net wealth exceeds a certain amount must pay 2.5% of their net wealth to eligible charities. The eligible charities, include, the poor and needy. This has the function of ensuring that wealth does not accumulate without any socially productive usage. If the wealth is simply left in the bank (and interest is forbidden in Islam), then over time, the *Zakah* will either keep being used to pay for the charity, be invested in projects to offset the deductions made for the charity, or be consumed. This, then means that *Zakah* plays the main role in establishing social equity and economic justice in the

²⁰⁸ Alawadi, *supra* note 202.

²⁰⁹ Prophet Muhammad said ““Islam is built upon five [pillars]: the testimony that there is no god but Allaah and that Muhammad is the Messenger of Allaah; establishing regular prayer (*salaah*); paying the *zakaah*; Hajj (pilgrimage) and fasting Ramadaan.” Albukari, *supra* note 106 at 72.

²¹⁰ Metwally, *supra* note 192 .

Islamic community.²¹¹ As an economic instrument, *Zakah* achieves socioeconomic justice by preventing the possibly harmful accumulation of the wealth among the rich and consequently alleviating the level of poverty.

The *Zakah* serves as the building block of social harmony in the community. In this sense, the *Zakah* and the rules of inheritance are part of the larger Islamic economic scheme. The *Zakah* is an obligation that requires, effectively, all to assist those less fortunate in society, in general. While the *Zakah* is paid to the poor and needy groups to ensure stability and economic balance of the community, inheritance is given to relatives to insure harmony and solidarity of the family. Both achieve social justice that Islamic law aims to create, as well as they prevent the accumulation of the money in the hands of the few.

It should be noted though that while the *Zakah* functions as form of social security as it is paid to the needy, inheritance on the other hand is a legal share for certain relatives regardless of their economic status. Nonetheless, the rules of inheritance insure that no one relative is left with the entire estate while other close relatives are left with nothing. These two instruments, are not the only economic tools available in Islamic law.

Family maintenance, for example, is another economic tool, which is an obligation of the father.²¹² The objective of this obligation is to assure the consistency of provision for each member of the family.²¹³ Besides the financial obligation of a man

²¹¹ Mohammad A. Muqtedar Khan, "The philosophical foundation of Islamic political economy" (1996) 13 American Journal of Islamic Sciences 389 at 398.

²¹² Ibn Qasem, *supra* note 117.

²¹³ Naseef, *supra* note 32.

towards his family, he is even obliged to maintain his estranged wife as long as she suckles his child.²¹⁴ This is stated very clearly in the verse “ Mothers... must be maintained and clothed in a reasonable manner by the father of the child.”²¹⁵ Ad-Dahhak states in his explanation of the *Qur’an*: “if a man divorces his wife and she continued to suckle his child, he should continue to provide provision and clothing for her in a reasonable manner.”²¹⁶

The maintenance of a divorced wife is also an obligation on her husband during the waiting period:²¹⁷

“Lodge them in your own homes, according to your means. Do not harass them so as to make life intolerable for them. If they are with a child, maintain them until they deliver their burden; and if, after that, they give suckle to your children, give them their pay and consult together in all reasonableness. But if cannot bear with each other, let another woman suckle for you.”²¹⁸

Maintenance also extends to parents and other close relatives who have no other source of income. There is a consensus among Muslim legal scholars that elderly parents who have no source of support are their offspring’s obligation to support and maintain.²¹⁹

²¹⁴ *Ibid.*

²¹⁵ *Qur’an*, *supra* note 41 at 2:233.

²¹⁶ Naseef, *supra* note 32.

²¹⁷ Waiting period “iddah” is the period after any divorce in which woman refrains from getting married again. See Ibn Qasem, *supra* note 117.

²¹⁸ *Qur’an*, *supra* note 41 at 65:6.

²¹⁹ Ibn Qasem, *supra* note 117.

Maintenance in this context is a form of social security that provides means and support for members of the family through their life.²²⁰

The *Qur'an* sets the amount of maintenance to be according to man's wealth: "Let the rich spend according to his wealth and the poor according to what Allah has given him."²²¹ In this context, Ibn Katheer²²² says, "The father or the guardian should spend on his children, the poor according to his means and according to what Allah has given him. Indeed Allah does not burden a soul with more than it can handle."²²³

In summary, Islamic law provides many financial provisions for the sake of the family. That is because family in Islam is functioning as preservation of human race and foundation of any human society. Thus, it is the objective of law basically to protect and preserve the family, as this is mainly what the concept of *maqasid* is all about.

B. Social Justice for Women:

While men in the Islamic society have many financial responsibilities, women are exempted from all financial obligations. In his book, *Religion on the Rise*, Murad Horman draws attention to the correspondence between rights and obligations:

Under Western scrutiny is also the alleged discrimination of Muslim women under the Islamic law of inheritance, because according to Surah Al-Nisa (4:11), a daughter is entitled to only

²²⁰ Naseef, *supra* note 32.

²²¹ Qur'an, *supra* note 41 at 65:7.

²²² Ismaeel Ibn Omar Ibn Katheer is the author of the significant book in Qur'an commentaries (Tafseer Al-Qur'an Ala'theem). He was born 786 in a family of Islamic scholars. He started reading Qur'an in a very young age as he memorized the whole book of Qur'an when he was 10 years old. Beside his knowledge in Qur'an, he is an expert in Sunnah and juresbrudence. He has several other books in Sunnah. See Ismaeel Ibn Katheer, *Albedayah Wa Alnehayah*, edited Abdulla A. Alturky 1st ed (Cairo: Hajar, 1997) at 13.

²²³ Naseef, *supra* note 32 at 170.

half of her brother's share. Nevertheless, she may yet have the better end of the bargain here since, in contrast to her brother (s), she is under no obligation whatsoever for the upkeep of the family. Here, again, unequal rights correspond to unequal obligations.²²⁴

To see this, two more economic instruments need to be examined. They are the dower and the maintenance, which was discussed more generally above.

a. Dower:

Dower, *mahr or sedag* in Arabic, is defined as “the property given by the husband to indicate his willingness to contract marriage, to establish a family, and to lay the foundations for affection and companionship.”²²⁵ The husband is obliged to pay a dower to his wife at the time of marriage contract. Unlike the pre-Islamic period when women used to be sold for any price,²²⁶ Islam raised women's honorary status by requiring men seeking a wife to pay her for the honor of the marriage. This dower indicates the groom's commitment to this marriage and his true interest and respect to his bride. It is not in any way a bridal price. Instead, “dower has been ordered to underline the prestige of the marriage contract and to stress its importance . . . It has not been enjoined as a

²²⁴ Hassan, *supra* note 36 at 46.

²²⁵ Jamal J. Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation*, 3rd ed (Danvers, USA: Martinus Nijhoff Publishers, 2009). Martinus Nijhoff Online. 27 April 2011 DOI:10.1163/ej.9789004172739.i-227.32

²²⁶ “The amount of the purchase price would vary and could be quite large if the woman was regarded as prospective mother of warriors... Any of a woman's male relatives: her father, brother, cousin or any other male guardian, had the right to give her away in marriage to whomsoever they chose. Shigar, another form of marriage, developed out of custom of one man telling another that he would marry his daughter or sister to the other, in exchange for the other's daughter or sister becoming his wife. This form of marriage enabled each of the two girls to be the dower for the other girl. Guardians of orphan children had the same unbridled power and often married girls off and misappropriated their property.” See Nisrine Abid, *Sharia, Muslim States and International Human Rights Treaty Obligations: A comparative Study*, (London: BIICL,2008) at 8.

consideration like a price or a wage, otherwise it would have been set as a prior condition.”²²⁷

In addition, the bride has an exclusive right to dower that no one can claim as the *Qur'an* states: “And give to the women (whom you marry) their *Mahr* with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allāh has made it lawful).”²²⁸ Jurists have indicated that spending the dower on the bride’s trousseau or household is not legal as these expenses are already the husband’s duty.²²⁹

Although Islamic jurists have different opinions in regards to the minimum amount of dower, they accept that there is no set upper limit for the amount of it.²³⁰ Umar ibn al-Khatāb tried to set an upper limit on the dower to control what he thought were excessive dowers. He proposed to pass a law that taxed any amount exceeding this limit where the excess would go to the public treasury. A woman confronted him and said: “O commander of the Faithful, does the Book of Allah have more right to be followed or your statement? He said, “The Book of Allah.” So she then told him, “You have just prohibited the people from giving an excessive amount for dower but Allah has stated in His Book, ‘And if you have given them a great amount of gold as dower, take not the least bit of it back.’ Umar said ‘the woman is right, and Umar is wrong’.” He then ended his law limiting the dower.²³¹

²²⁷ Nasir, *supra* note 225.

²²⁸ Qur’an, *supra* note 41 at 4:4.

²²⁹ Naseef, *supra* note 32 at 174.

²³⁰ Nasir, *supra* note 225 at 90; Naseef, *supra* note 32 at 175.

²³¹ Sayed Khatab & Gary Bouma, *Democracy in Islam*, 1st ed. (New York: Routledge, 2007).

Hence, the dower also acts a means for protecting the woman financially during the marriage. As the dower is her property, the husband has no claim over it, except if she dies before him. In the event of a divorce, the dower remains her property.

b. Maintenance:

Regardless of a man's financial status, he is responsible to maintain his wife and his children according to his means whether his wife or kids are wealthy and capable to maintain themselves or not.²³² Namely, it is his duty to provide them with food, clothing and accommodation.²³³ Several verses from the *Qur'an* and statements of the *Sunna* clearly support this. For example, the *Qur'an* states: "Let the rich man spend according to his wealth and the poor man according to what Allah has given him."²³⁴ According to Ibn Katheer, this verse refers to the father regarding maintaining his children.²³⁵ Another verse indicates that if a divorced wife continues to suckle her child, this child's father is obliged to maintain her. "Mothers... must be maintained and accommodated by the father of the child."²³⁶ If the divorcee is pregnant, the father of the baby has to maintain her until she delivers her child.²³⁷ Also it is clearly stated in *Qur'an* that accommodation is included in the maintenance.

Lodge them in your own homes, according to your means. Do not harass them so as to make life intolerable for them. If they are with child, maintain them until they deliver their burden; and if, after that, they give suck to their children, give them their pay and consult together in all

²³² Naseef, *supra* not 32 at 170.

²³³ *Ibid.*

²³⁴ *Qur'an*, *supra* note 41 at 65:7.

²³⁵ Naseef, *supra* not 32 at 170.

²³⁶ *Qur'an*, *supra* note 41 at 2:233.

²³⁷ Taqiodeen M. Alftohi, *Muntaha Aleradat*, edited by Abdullah A. Alturki 1st ed (Beirut: Alresalah Institution, 1999) at 448.

reasonableness. But if you cannot bear with each other, let other women suckle for you.²³⁸

Similarly, the *Sunnah* in more than one place states that women should be maintained by their husbands. A man asked the Prophet about the duty of the husband towards his wife, the prophet said: “Feed her as and when you feed yourself; cloth her as and when you cloth yourself; do not strike her on the face; do not abuse her and do not separate yourself from her except inside the house.”²³⁹ Indeed, it is totally lawful for the wife to take from her husband’s money without his knowledge or permission in case he denies to maintain her. This is evident in the *Sunnah* as the Prophet allowed a woman who was married to a miser to take from her husbands’ money what was sufficient for her and for her children.²⁴⁰

Qur’an and *sunnah* draw ample attention to the rights of parents.²⁴¹ Quranic verse says: “People ask you (O Prophet) how should they spend. Say, ‘whatever you spend should be spent on Allah (in good cause), on parents, near relatives, on orphans, destitutes and travelers (who fall short of money in foreign lands)’.”²⁴² According to the majority of Muslim jurists, it is the son’s obligation to maintain his needy parents if they

²³⁸ Qur’an, supra note 41 at 65:6.

²³⁹ Naseef, supra note 32 at 172.

²⁴⁰ *Ibid.*

²⁴¹ The most significant verse that instructs Muslims to kindly and nicely treat parents is:

“Thy Lord hath decreed that ye worship none but Him, and that ye be kind to parents. Whether one or both of them attain old age in thy life, say not to them a word of contempt, nor repel them, but address them in terms of honour. And, out of kindness, lower to them the wing of humility, and say: "My Lord! bestow on them thy Mercy even as they cherished me in childhood." Qur’an 17: 23- 24

As for the mother, she enjoys triple rights as that of the father.

“A man came to the Messenger of Allah (peace and blessings of Allah be upon him) and said, ‘O Messenger of Allah, who among the people is most deserving of my good companionship?’ He said, ‘Your mother.’ The man asked, ‘Then who?’ He said, ‘Your mother.’ He asked, then who?’ He said, ‘Your mother.’ He asked, ‘Then who?’ He said, ‘Your father.’” Albukhari, supra note 106 at 1492.

²⁴² Qur’an, supra note 41 at 2: 215.

have no source of money.²⁴³ A narration of the Prophet stated that: “Among the best of that which a man consumes is what he earns (by his own efforts), and his son is part of that which he earns.”²⁴⁴ It is also stated by jurists that a man is obliged to spend on his parents and grand parents as well as his children and grand children if he is able to maintain them and if they have no source of money.²⁴⁵

The *Qur'an* describes the relationship between maintenance and the inheritance law as follows:

Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling. The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No-one should be charged beyond his capacity. A mother should not be made to suffer because of her child, nor should he to whom the child is born (be made to suffer) because of his child. And on the (father's) heir is incumbent the like of that (which was incumbent on the father). If they desire to wean the child by mutual consent and (after) consultation, it is no sin for them; and if ye wish to give your children out to nurse, it is no sin for you, provide that ye pay what is due from you in kindness. Observe your duty to Allah, and know that Allah is Seer of what ye do.²⁴⁶

Therefore, an heir who is inheriting from the child has a similar duty of that of the father in providing maintenance. Namely, if the father is unable to provide sustenance to his child or if the child is a poor orphan, then it is the male agnate's obligation to maintain the child and to pay for the suckling.²⁴⁷

²⁴³ Sabeq Alsayeid, *Fiqh Alsunnah* (Cairo : Alfath for Arabic Media, 1982) at 276.

²⁴⁴ Abo Dawood Suliman Ibn A. Alsajistani, *Sunan Abi Dawood*, edited by Muhammad M. Abdulhamid (Beirut, Almaktabah Alasriah) vol 3 # 3528 at 289.

²⁴⁵ Muhammad S. Abadi, *Awn Almabood Sharh Sunan Abi daood; A Commentary on Sunan Abi Dawood*, edited by Sidgy M. Alattar (Dar Alfikr, 1995) at 353.

²⁴⁶ *Qur'an*, *supra* note 41 at 2:233.

²⁴⁷ Muhammad Alqurtobi, *Algame' Leahkam Al-Qur'an* ed by Hisham S. Albukhari (Saudi Arabia: Dar Alam Alkotob, 2003).

C. Are women discriminated against in the laws of inheritance?

In short, my answer is no. As one commentator states:

The law of inheritance ordained by Allah have established justice and put an end to women's oppression. This divine justice is based on the principles of "division of responsibilities" and, "benefits according to responsibilities", which have wide applications. Islam has exempted women from all financial responsibilities and has handed them to men. A man has to meet all the financial needs of his family by providing for his wife, children and female relatives. He also has to pay the dowry to his bride, as well as any financial penalties. It is therefore natural and just that a man should be given twice as much as women to enable them to meet their various financial obligations.²⁴⁸

From the previous hypothetical examples, it is clear that the rule entitling women to half the share of men is not always the case. In fact, women can inherit under four conditions: 1) they may inherit less than male heirs, 2) they may inherit an equal amount as male heirs, 3) they may inherit more than male heirs or 4) they may be the only heirs. The biggest fractional share for any inheritor is two-thirds, which is only entitled to women. Therefore, it is an overgeneralization to claim that women in Islam inherit half the share of men, as the number of cases where they receive such a portion is only four cases, compared to twenty-six cases where women inherit equal to or more than men.²⁴⁹

As mentioned previously, Islam is a total system that cannot be fragmented into isolated rules. To understand the rationale behind the inequality of division in the four cases where women inherit half the share of men, one has to bear in mind that the inheritance system interacts with the economic system of the family. That is to say, men are financially responsible for certain female relatives, and therefore, require a greater share of the inheritance.

²⁴⁸ Naseef, *supra* note 32 at 180.

²⁴⁹ *Ibid* at 39.

. Therefore, the man is completely responsible for the woman's maintenance in most of the cases listed above where the woman receives half the share of her male equivalents. When a deceased leaves children of both genders behind, the daughters of the deceased will either be married, or not. If they are married, their husbands have the primary responsibility for their maintenance. If they are not married, their brothers could be collectively responsible. The sons of the deceased, on the other hand, may have their own families to support, as well as their mother and unmarried sisters. The same logic applies when a deceased leaves behind only siblings of both genders.²⁵⁰

In the case where a deceased leaves only his parents behind, his father takes twice his mother's share, because the father is still obligated to care for the mother. Finally, in the case where the wife always inherits half of what her husband inherits from her, again, if the wife dies leaving a husband, the husband may have children to support. But if the husband dies, then his children would have the obligation to support his widow.²⁵¹

Unlike men, women in Islam have no financial responsibilities.²⁵² Even if the wife, for example, is far richer than her husband, the husband is obliged to maintain her according to his means and no one has legal right to claim on her properties be it a husband, father, brother, or son.²⁵³

²⁵⁰ For more information about women maintenance in Islam see Muhammed A. Alshoukani, *Nil Alawtar min Asrar montaqa alakbar*, first ed (Beirut, Lebanon: Dar Ibn Hazm, 2000), 1349, 1398- 1399.

²⁵¹ In the event there are no children, then the wife may inherit all of the estate in the opinion of some Islamic legal scholars.

²⁵² Naseef, *supra* note 32.

²⁵³ *Supra* note 255.

To illustrate the interaction between maintenance and inheritance, consider the cases where full siblings are the heirs as opposed to uterine siblings. A full brother is responsible for maintaining his full sister in the absence of her father, so his share is always twice that of the sister.²⁵⁴ The uterine brother, on the other hand, is not responsible for maintaining his uterine sisters, since they are only related by their mother, so their share is equal whenever they inherit together.

Furthermore, as illustrated in one of the above examples when the full brother inherits with the uterine sister, they take the same share because she is his uterine sister and he does not maintain her. Also, the father inherits twice the share of the mother in the absence of a child and a spouse because, as a husband, he is obliged to maintain her. Thus, if the son is present, the father receives an equal share as the mother because in this case the mother's welfare is, mostly, her grandson's obligation.²⁵⁵

Men's financial responsibilities do not stop here. Besides their obligations to spend on their wives, daughters, children, sisters and their parents, they are also obliged to pay a dowry as a gift to the wife before marriage.²⁵⁶ This dowry is considered as her property even after she is divorced. In fact, the main three sources of women's assets in Islam are; inheritance, maintenance, and dowry. While men receive only from the first one, they give in the second two ones.²⁵⁷ This has led one commentator to state that:

²⁵⁴ And obviously the father is absent in the case if they inherit, because otherwise the father will exclude them if he is present.

²⁵⁵ The maintenance of mother is the obligation of her sons however low if her husband is old or cannot support her financially. See *supra* note 252 at 1399.

²⁵⁶ *Supra* note 252 at 1287.

²⁵⁷ Islamic law emphasizes that the men's effort is devoted for the sake of their women. Another example

While this outlines how Islam makes various men in the community responsible of the care of women through their lives, it must be made clear that Islam does not object to Muslim women taking care of themselves and their families if they can and choose to do so. It is not, however, an obligation or requirement upon them, and thus is not their responsibility. Rather, it is their choice.²⁵⁸

Therefore, the Islamic rules of inheritance should be seen as a complete social safety scheme whereby women are provided for either through their male relatives or inheritance. Where there is a male relative who is obligated to take care of them, their share in the inheritance decreases. When, however, no such male relative exists, their share rebounds to the full amount or even more than equivalent males would have received had they existed.

V. Western inheritance laws and Islamic laws: similar or different?

It is beyond the scope of this thesis to conduct legal comparisons; however, some lessons can be derived by examining the evolution of Western (i.e., British and American) inheritance law.

Unlike the Islamic inheritance system, the Western Law of Succession is derived generally from the statutory law.²⁵⁹ Moreover, distribution of the property usually follows the law of the state in which this property is located. That is to say if the property is

of this is that mothers have special privilege over fathers. In a hadith, it is narrated that

A man came to the Messenger of Allah (peace and blessings of Allah be upon him) and said, ‘O Messenger of Allah, who among the people is most deserving of my good companionship?’ He said, ‘Your mother.’ The man asked, ‘Then who?’ He said, ‘Your mother.’ He asked, then who?’ He said, ‘Your mother.’ He asked, ‘Then who?’ He said, ‘Your father.’” See *supra* note 252 at 1398.

²⁵⁸ Sultan, *supra* note 175.

²⁵⁹ Robert L. Mennell, *Wills and Trust in a Nut Shell* (ST.Paul: West Publishing co., 1979) 178.

located in more than one state, the property distribution will vary from one state to another according to the variation of the law of each state.²⁶⁰

Islamic law, on the other hand, tends to be quite stable in terms of the shares allocated to various heirs. If two countries implement Islamic law, then regardless of whether the deceased dies in the first or the second country, the division of the estate will be the same.

Western law of succession; on the other hand, depends mainly on the will written by the deceased before his death.²⁶¹ The will determines the estate distribution and may exclude some basic heirs from receiving any share.²⁶² If there is no will, the law of intestate succession sets out rules for assets distribution.²⁶³

Despite these difference, the more interesting issue is the similarity in how Western law has dealt with some of the issues that Islamic law also attempts to deal with. This can be seen in the discussion next.

In the early part of the nineteenth century, women in the West were not yet allowed to control their inherited land. Instead, their husbands were the ones who used to

²⁶⁰ *Ibid* at 5.

²⁶¹ *Ibid*.

²⁶² Lawrence M. Fredman, *Dead Hand: A Social History of Will, Trust, and Inheritance Law* (USA: Stanford University Press) online: Google Books <http://books.google.ca/books?id=8oHcx3KlvsAC&printsec=frontcover#v=onepage&q&f=false> ; Robert, *supra* note 256 at 4.

²⁶³ Fredman, *supra* note 259. “There are several ways in which society can deal with the property of a dead person. One way would be to cut off any rights the dead person might have had and leave the asset up for grabs. Or the state could confiscate the property and use it for whatever purposes it chooses. or, to mention a third possibility, legal rules could dictate what becomes of the property— who gets what, and in what proportions. Fourth, we could let the dead person decide and honor whatever requests or arrangements he or she might have made.” Friedman mentions then that the last two ways are the most common.

take over the property.²⁶⁴ Other common rules included depriving the wife of inheritance if she remarried.²⁶⁵ By the end of the nineteenth century, Western legal systems were allowing for women to inherit wealth as well as leave their estate to whom they chose.

The legal historian Lawrence Friedman attributes the shift in law of succession to different factors. One significant factor was the changes in the family structure.²⁶⁶ More than a century ago, the law of succession was gender biased. What he refers to as the *bloodline* family in the Middle Ages, indicates that the financial power was in the hand of the husband and inherited by his male bloodline; particularly, the oldest son.²⁶⁷ Although the widow might have some sort of protections, she had no right to inherit.²⁶⁸

The law of succession changed in accordance to the change in the family structure over the past century and a half. The meaning of family today, referred to as the “*family of affection and dependence*” by Friedman, goes beyond the blood ties.²⁶⁹ Friedman illustrates an example that shows the big shift from the bloodline family to the family of affection and dependence. Adoption in the nineteenth century was not recognized as a way to inherit.²⁷⁰ Nowadays, adopted children are in no way different from the natural children.²⁷¹

²⁶⁴ Fredman, *supra* note 260 at 17.

²⁶⁵ *Ibid* at 28.

²⁶⁶ *Ibid* at 22. He also indicates that “Changes in family structure, changes in the nature of the legal order, demographic change, and changes in social norms and attitudes have all left their mark on the law of succession.”

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid* at 23.

Equality between men and women in the modern family has its remarkable impact on the change in law of succession.²⁷² Not only that the widow has the right to inherit, she also has the right to claim her share in case a valid will excludes her from inheritance.²⁷³

This feature is closely aligned with Islamic law in that fixes a share for certain heirs even if the deceased did not provide for them in the will. In Islamic law, however, almost all of the close blood relatives have specified shares or methods of inheriting which takes most of the discretion out of the hands of the deceased. Islamic law, as discussed above, places a large emphasis on maintain family ties even after the deceased has passed away. Hence, to prevent the deceased from playing favorites with the children during his or her lifetime, which may cause all sorts of family disputes before and after his or her death, Islamic law makes the division known in advance.

In Western law, if children survive the deceased, they share the estate equally whether there are females or not.²⁷⁴ Another sign of equality between male and female heirs in Western law of succession is that spouses generally may inherit the same share as the child;²⁷⁵ gender is not an issue. Western legal systems, however, do not require male siblings to maintain their female siblings in the event the females have no other source of support. It makes sense in the context of Islamic law to half the share for siblings, since they are expected to receive some financial support.

²⁷² *Ibid.*

²⁷³ Fredman, *supra* note 259 at 23; Robert, *supra* note 256 at 19.

²⁷⁴ Rober, *supra* note 256 at 8.

²⁷⁵ *Ibid.*

Although the rules of intestacy differ from state to another, there are general principles that apply to all intestacy laws.²⁷⁶ First and foremost, close relatives exclude the more remote ones.²⁷⁷ Second, descendants have the right to inherit over the ancestors.²⁷⁸ That is to say “Only when there are no surviving issue (and sometimes when there is also no surviving spouse) does a parent take a share by intestacy.”²⁷⁹ A widowed mother; for instant, may be excluded by the presence of spouse and the issue.²⁸⁰ Moreover, the spouse has an intestate share despite the presence of children.²⁸¹ Third, equality between relatives from both sides is another element of Western law of succession.²⁸²

As stated previously, a widow in the nineteenth century had no inherited share. However, as in the Islamic legal system, the dower was a form of insurance she enjoyed in her lifetime.²⁸³ In definition, dower was “the income from one third of her husband’s landed property.”²⁸⁴ After the widow died, she had no more right and the dower would go to the bloodline heirs.²⁸⁵ This right was exclusively for widows.²⁸⁶ A considerable

²⁷⁶ Fredman, *supra* note 259 at 29.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ Robert, *supra* note at 5.

²⁸⁰ *Ibid.*

²⁸¹ *Supra* note 256 at 7.

²⁸² *Supra* note 259 at 29.

²⁸³ *Ibid* at 33.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

advantage of this dower is that it was the property of the widow no matter if the deceased had debts or not.²⁸⁷

Curtesy, on the other hand, was a lifetime right enjoyed by widower under a significant condition. Precisely, only if there was a child born for this marriage would the widower enjoy curtesy. Furthermore, this right gave widower a total control on all of his late wife's property besides enjoying the income.²⁸⁸

It was until the late nineteenth century when widows started to have fixed inheritance shares.²⁸⁹ That was when the legal status of the dower started to decline at the American state level. One reason for abolishing dower rights is that it did not provide much of protection for widows at the time.²⁹⁰ Indiana was one of the first states that abolished the dower system.²⁹¹ Instead, widows were given the right to inherit a share of the property as a "fee simple" or free ownership.²⁹² Another state, for instance, adapted the right of the fee simple as another option beside the dower that widow could choose from.²⁹³

²⁸⁷ The rights of married women were more complicated than one might imagine from reading Blackstone. Under the doctrine of "coverture," all land that a woman owned passed into her husband's control as soon as she married him. But families with land often created elaborate devices ("settlements" or "separate estates") to get around the doctrine of coverture. The idea was to set up a kind of trust, before the marriage. Legally and officially, the trustee had title to the property, not the daughter. as soon as the trust was created, the property was no longer hers (in a sense); in any event, it did not pass into her husband's grip. Fredman, *supra* note 259 at 33.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid* at 35.

²⁹² *Ibid.*

²⁹³ *Ibid.*

Today, the dower is gone and the distinctions between a widow and widower are gone.²⁹⁴ A fixed share of inheritance is given to the widow and widower in the American states.²⁹⁵ This share might vary at the same state according to different cases. For example, the surviving wife takes the whole estate if her husband leaves no children.²⁹⁶ This is also true if the husband is survived by children from the same wife; the wife takes everything.²⁹⁷ If there are children from a different marriage, the surviving wife takes only half of the estate.²⁹⁸ It is worth mentioning that this rule applies to both widow and widower.²⁹⁹

While the previous example is the law in Oregon, other states may have additional provisions that protect the surviving spouse.³⁰⁰ To illustrate, Florida gives the first \$60,000 of the estate to the spouse and half of the rest if there are children from the same marriage.³⁰¹ The whole estate goes to the surviving spouse if there are no children.³⁰² Similarly, in Oregon, the spouse takes half of the estate of the deceased if survived by children from different marriage.³⁰³ In fact, most of the states are providing laws that are in favor of the surviving spouse.³⁰⁴

²⁹⁴ *Ibid* at 36.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

Further protections are also provided for surviving spouses against any will trying to cut her off from inheritance.³⁰⁵ The spouse has the right to claim her fixed share if the will gives her less than the legal share;³⁰⁶ a right that is not for any other heir.³⁰⁷ According to Friedman, the will is not a way that one can exclude her or his spouse from inheritance without her or his permission.³⁰⁸

The Western legal system shares many of the concerns that Islamic law had with the pre-Islamic traditions, namely ensuring that women (especially widows) receive some share of the estate regardless of whether the deceased dies intestate or with a will. The Western legal system, however, allows the deceased to completely remove all the heirs, but not the widow or widower, from receiving anything in the will. Furthermore, their shares can be unequal.

While the deceased may have particular motives for dividing the estate in a particular way, Islamic law emphasizes uniformity in dividing the estate in order to maintain social harmony before and after the death of the individual whose estate is being divided.³⁰⁹

VI. Conclusion

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ “Accept for the Louisiana legitimate for legitimate children” Robert, *Supra* note 256 at 19.

³⁰⁸ *Ibid* at 36.

³⁰⁹ While this is beyond the scope of this thesis, I should mention that from my anecdotal understanding of Muslim communities in the West, the division of estates by will is becoming an important legal concern. Making the will both compliant with Western law and Islamic law is seen a religious obligation of the pious living in the West.

Islam, in general, receives a large amount of criticism in the West, especially when it comes to the question of the rights of women. The Islamic inheritance system is commonly perceived as an oppressive system, because of the perception that women always inherit half of what males inherit. A lack of understanding of Islamic law results in this misunderstanding of the rationales behind its rules. This misunderstanding plus the portrayal of Islam in the popular media can result in physical and legal attacks on Islam and Muslims.³¹⁰

Islamic inheritance system, if anything, is an example of Islamic justice and fairness. It is not only a way to protect women from oppression, but it also a profound way to protect them from any possibility to experience hardships. By providing a share for her in which she is not obliged to spend on any one, Islam financially favors her over men. Islam has honored women by considering her as a core heir after she was not entitled to inherit in anyway. Furthermore, by making her a sharer heir who takes a fixed share, Islam has insured her a secure portion of the property. Unlike male residuaries who only inherit if the estate is not exhausted, women in Islamic inheritance receive their share anyway, as sharer cannot be excluded for the reason of estate exhaustion.

Further objective studies for this system is worthwhile not just to expand the appropriate image of Islamic law, but also to further understand how this system corresponds with other principles of Islamic law such as social solidarity. As Professor Almaric Rumsey states:

“The Moohummudan law of inheritance comprises, beyond question, the most refined and elaborate system of rules for the devolution of property that is known

³¹⁰ The very recent ban by the Swiss on construction of Minarets is a result of such misunderstandings.

to the civilized world, and its beauty and symmetry are such that it is worthy to be studied, not only by lawyers with a view to its practical application, but for its own sake, and by those who have no other object in view than their intellectual culture and gratification.³¹¹

In the future, the goal would be to not only expand on the study of the Islamic inheritance system in the context of the rest of the Islamic legal system, the goal would be to also study the Islamic inheritance system using social science tools such as economics and sociology. While I attempted in this thesis to outline the basics of a socio-economic system, further detailed studies using the economics of the family could be done.

³¹¹ Almaric, *supra* note 174 at iii.

BIBLIOGRAPHY

Treaties

Convention on the Elimination of all Form of Discrimination against Women, 18 December 1979 United Nations (New York,) Audiovisual Library of International Law, online: <<http://untreaty.un.org/cod/avl/ha/cedaw/cedaw.html>>.

Jurisprudence

Grutter v. Bollinger, 539 U.S. 306 (2003).

Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

Secondary Material: Monographs

Abadi, Muhammad. *Awn Almabood Sharh Sunan Abi daood; A Commentary on Sunan Abi Dawood*, ed by Sidgy M. Alattar (Dar Alfikr, 1995).

Abid, Nisrine. *Sharia, Muslim States and International Human Rights Treaty Obligations: A comparative Study*, (London: BIICL,2008).

A critical review of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)(International Islamic Committee For Women And Child (IICWC), 2000).

Al-Asgalani, Ibn Hagar. *Alisabah fi Tamiez Assahabah*, (Egypt: Assadah).

Alasqalani, Ibn Hajr. *Bulugh Al-Maram Min Adilat Al-Ahkam* (The Attainment of The Objective According to the Evidences of the Ordinances) transl. Muhieddin Al-Selek (Beirut: Lebanon, 1993).

Albukhari, Muhammad. *Saheeh Albukhary* (The authentic of Albukhari) 2nd ed. by Khalil M. Shiha (Beirut: Dar Alma'refah, 2007).

Aldarkutni, Ali. *Sunan Aldarkutni*, 1st ed Almaso'ah Alhadethiah (Beirut: Alresalah, 2004).

Alemam, Muhammad. *E'lam Alnobala' BeAhkam Mirath Alnesa*, 1st ed. (Yemen: Almutakhasas, 2004).

Alhebri, Azizah *Women and Islam*, 1st ed. (Ontario, Canada: Pergamon Press, 1982).

- Alkhaldi, Salah. *Syed Qutb From birth to martyrdom*, 2nd ed. (Damascus: Dar Alkalam, 1994).
- Al-maamiry, Ahmad. *Economics in Islam*, 1st ed (New Delhi: Lancers Books, 1987).
- Al-Misri, Ahmad. *Reliance of the Traveller: A Classic Manual of Islamic Scard Law*, trans. Noh h. Mim (Maryland, USA: Amana Publications, 1994).
- Al-Naisabori, Muslim. *Sahih Muslim*, 1st ed. (Riyadh, Saudi Arabia: Dar E'Im Alkotob, 2003).
- Al-Qaradawi, Yusuf. *The Lawful and The Prohibited in Islam*, 2nd ed. (Cairo: Al-Falah Foundation for Translation, Publication & Distribution, 2001).
- Alqurtobi, Muhammad. *Algame' Leahkam Al-Qur'an* ed by Hisham S. Albukhari (Saudi Arabia: Dar Alam Alkotob, 2003).
- Alsadr, Moheemmed. *Iqtasadona*, 20th ed (Beirut: Dar Alta'aruf, 1987).
- Alshoukani, Muhammed. *Nil Alawtar min Asrar montaqa alakbar*, 1st ed (Birot, Lebanon: Dar Ibn Hazm, 2000).
- Alsajistani, Suliman. *Sunan Abi Dawood*, ed by Muhammad M. Abdulhamid (Beirut, Almaktabah Alasriah).
- Alsajistani, Suliman. *Sunan Abo_Dawood*, (Cairo, Egypt: 2000).
- Alsayeid, Sabeq. *Fiqh Alsunnah* (Cairo: Alfath for Arabic Media, 1982).
- Becker, Gary S. *A Treatise on the Family*, Enlarged edition (Cambridge, MA: Harvard University Press, 1991).
- Engineer, Asghar. *The Status of Women in Islam*, (South Randel: Down Press Group, 2004).
- Haddad, Tahir. *Muslim women in Law and Society*, trans by Rnak Husni and Danial L. Newman (New York, USA: Routledge).
- Hallq, Wael B. *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh 1* (New York: Cambridge University Press, 1997).
- Hassan, Farazana. *Islam, Women, and the Challenges of Today* (Toronto, Canada: White Knight Books, 2006).
- Hassan H. El- Yacoubi and El-Yacoubi, Jane M. *The Arabic, Qur'anic and Islamic Paradigm: light, Jewels and pearls* (Boulder: H. and J. El-Yacoubi, 1991).

- Hoffman, David. *A Course of Legal Study Addressed to Students and the Profession Generally* (Baltimore: Joseph Neal, 1936).
- Holly Qur'an, trans by Yusuf Ali online: Sacred Texts < <http://www.sacred-texts.com/isl/quran/index.htm>>.
- Ibn-Authimeen, Mohammed. *Ashab Alforodh (Sharers Inheritors)*, Online: Muhammad Ibn Authimeen Association <http://www.ibnothimeen.com/all/books/printer_17834.shtml>. (accessed Nov, 20 2009).
- Ibn Katheer, Ismaeel. *Albedaiah wa Alnehaia*, 1st ed. by Abdullah Alturki (Jiza, Egypt: Hajr, 1997).
- Ibn Katheer, Ismaeel. *Almesbah Almoneer: Editing Work of Tafseer Ibn Katheer*, ed. by Safie A. Almubarakfory (Riyadh, Saudi Arabia: Dar Assalam, 1990).
- Ibn Katheer, Ismaeel. *The Battles of The Prophet*, trans by Wa'il A. Shihab 1st ed. (Almasura, Egypt: Googl Book, 2000).
- Ibn Qasim, Abulrahman. *Hashiat Alroudh Almorbe' Sharh zad Almostakne*, 2nd ed. (Beirut: Besat, 1989).
- Izz al-Din, Muil. *Islamic Law: from Historical foundation to contemporary practice* (Edinburgh: Edinburgh University Press Ltd, 2004).
- Kamali, Mohammad. *Principles of Islamic Jurisprudence*, 2nd ed. (Kuala Lumpur: Ilmiah Publishers, 1998).
- Khan, Mohammad. *Status of women in Islam* (New Delhi, India: S.B. Nagia, 1996).
- Koylu, Mustafa. *Islam and its quest for peace: Jihad, Justice, and Education*, vol 15 (Washington, DC: The Council for Research in Values and Philosophy, 2003).
- Lawrence M. Fredman, *Dead Hand: A Social History of Will, Trust, and Inheritance Law* (USA: Stanford University Press) online: Google Books <<http://books.google.ca/books?id=8oHcx3KlvsAC&printsec=frontcover#v=onepage&q&f=false>>.
- Maqsood, Ruqaiyya. *Examining Religions: Islam* (Oxford: Heinemann educational, 1995).
- Mennell, Robert. *Wills and Trust in a Nut Shell* (ST.Paul: West Publishing co., 1979).
- Naseef, Ftima. *Women in Islam; A Discourse in Rights and Obligations*, trans and ed. by Saleha Mahmood Abdin (Egypt; International Islamic Committee for Women & Childe, 1999).

- Nasir, Jamal. *The Islamic Law of Personal Status*, 2nd ed (London: Graham & Trotman Ltd., 1990.).
- Nasir, Jamal. *The Status of Women under Islamic Law and Modern Islamic Legislation*, 3rd ed (Danvers, USA: Martinus Nijhoff Publishers, 2009) online: ebrary <<http://site.ebrary.com/login.ezproxy.library.ualberta.ca/lib/ualberta/docDetail.action?docID=10349188>>.
- Qureshi, M. *Status of women in Islam* (New Delhi, India: Reference Press, 2003).
- Qutb, Sayed. *Fi Thilal Al-Qur'an*, 9th ed (Beirut: Dar Alshorog, 1980).
- Ramadan, Hisham. *Understanding Islamic Law; From Classic to Contemporary* (Oxford: Altamira Press, 2006).
- Rumsey, Almaric. *Moohummudan Law of Inheritance and right and relations affecting it: Sunni Doctraine*, 3rd ed (London: W.H. Allen, 1880).
- Salah Soltan, *Woman's Inheritance in Islam: Discrimination or Justice?*, trans. Gihan ElGindy (Hilliard, Ohio: Sultan Publisher, 2004).
- Sayed, Khatab & Bouma Gary, *Democracy in Islam*, 1st ed. (New York: Routledg, 2007).
- Spectorsky, Susan. *Women in classical Islamic law: A Survey of the Sources*, (Leiden, Boston: Brill, 2010).
- The Noble Qur'an: English Translation of Meaning and Commentary, trans by Muhammad Al-Hilali & Muhammad Khan (Madinah, Saudi Arabia: King Fahad Complex for the Printing of The Holy Qur'an).

Secondary Material: Articles

- Anderson, Siwan "The Economic of Dawry and Brideprice" (2007) 21 The Journal of Economic Perspectives 151- 174.
- Ansari, Muhammed. "Islamic perspectives on Sustainable Development" (1995) 11 The American Journal of Islamic social sciences 349.
- Carcieri, Martin. "Ten Fallacies Of The Affirmative Action Debate" (2000) 1 Fla. Coastal L.J. 385.
- Chaudhry, Zainab. "The Myth of Misogyny: A reanalysis of Women's Inheritance In Islamic Law" (1997-1998) 61 Albany Law Review 511.

- El-Tobgui, Carl. "The Epistemology of Qiyas and Ta'lil Between the Mu'tazilite Abu 'L-Husayn Al-Basri and Ibn Hazm Al-Zahiri," 2 *UCLA Journal of Islamic and Near Eastern Law* 281, 282 (2003).
- Honarvar, Nayer. "Behind the Veil: Women's Rights in Islamic Societies" (1988) 6. 2 *Journal of Law and Religion* 355-387 online: <<http://www.jstor.org/stable/1051156>>.
- Khaliq, Urfan. "Beyond the Veil: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah" (1995-1996) 4.2 *Baffalo Jurnal of international law*.
- Khan, Mohammad. "The philosophical foundation of Islamic political economy" (1996) 13 *American Journal of Islamic Sciences* 389.
- Metwally, M. "Economic consequences of applying Islamic principles in Muslim societies" (1997) 24: 7 *Int Jour of Social Economics* 941- 957 (Emerald).
- Patriquin, Martin. "Is Canada Becoming a Nation of Bigots" (15 October 2007) online: MacLeans <<http://www.montrealmuslims.ca/module-pagesetter-viewpub-tid-7-pid-1980.html>>.
- Roy, Kristin. "The New York Convention And Saudi Arabia: Can A Country Use The Public Policy Defense To Refuse Enforcement Of Non-Domestic Arbitral Awards?" (1995) 18 *Fordham Int'l L.J.* 920.
- Saracen. "Islam: A Misogynist Religion? A Look at Family Law, Inheritance and Divorce Rights in Islam." (28 Aug 2007) online: Saracen's Corner. <<http://saracenarabianknight.blogspot.com/2007/08/islam-misogynist-religion-look-at.html>>.
- Schooley, Kimberly Younce. "Cultural Sovereignty, Islam, and Human Rights – Toward a Communitarian Revision" (1994-1995) 25 *Cumbreland law review* 651 (Lexis).
- Yekini, A. O. "Women and Intestate Succession in Islamic Law" (May 3, 2008). *Islamic Law and Law of the Muslim World Paper No. 08-49* online: <<http://ssrn.com/abstract=1278077>>.

Other Documents

- News Release, "The Women defying France's full-face veil ban" (22 September 2011) online: BBC <<http://www.bbc.co.uk/news/world-europe-15023308>>.