ADMINISTRATION OF ISLAMIC LAW OF SUCCESSION, ADOPTION, GUARDIANSHIP, LEGACIES AND ENDOWMENT IN SOUTH AFRICA.

BY

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I dedicate this thesis to the memory of my late parents whose Islamic spirit, dedication and patience in my upbringing have served me well in life.
Likewise do I dedicate it to my wife and children who bore much discomfort during my working on this thesis.
I would also like to dedicate it to all muslims who love their Faith and serve it sincerely and with honour.
I wish to acknowledge my thanks to Professor Dr S S Nadvi, Head of the Department of Islamic Studies, my promoter, Associate Professor S Dangor, my joint-promoter and Attorney MS Omar, my joint-promoter whose advice and guidance offered me towards the completion of this doctoral thesis, were invaluable.

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INTRODUCTION

The ancestors of the South African Muslim community arrived in South Africa from Indonesia and India in 1654. The notable Shaikh Yusuf, whose real name is Shaikh 'Abidin Tadia Tsoessop and who rebelled against Dutch colonial rule in Java, arrived here in 1694 as a political prisoner.¹ He was previously imprisoned in Ceylon (the present day Sri Lanka) and was later transferred from there to the Cape of Good Hope as an exile.² He died in 1699 at Zandvlei at the Cape. Save for his daughter and two companions, all of his accompanying party returned to Bantam, Java, after his death.³

The first Muslim occupation of houses took place in 1790 in the Bo-Kaap where the new growing Muslim community took up residence.⁴

In a country which was hostile to both their race and religion, these new Muslims had to face the challenge of maintaining their identity and devise ways and means to achieve this. Mosques and madaris (sing. madrasah - Islamic religious schools) were to carry out this vital function. Since most of the a‘immah (sing. imam - one who leads the prayers) were poorly versed in shari‘ah (Islamic Law), there was a need for proper 'ulama‘ (scholars) to be trained abroad. The perpetual disputes between a‘immah and legal battles which accompanied it, is evidence of the serious weakness of the a‘immah then.

Mosque a‘immah established the Muslim Judicial Council in Cape Town in 1945, primarily to settle the Jumu‘ah question which had raged for decades and seriously divided the community.⁵ This brought a partial improvement in the situation. The Council later began to concern itself in mosque and Muslim matters which

² Davids A: The Early Muslim at the Cape, Cape Town, Muslim Assembly, 1977, p. 5.
³ Ibid, p. 6.
⁴ Mosques of Bo-Kaap, p. xvi.
⁵ Ibid, p. 56.
necessitated sending men for studies to Islamic institutions in Egypt and Saudi Arabia. The absence of a system of grading and vetting the returning students again brought serious problems. A near parallel system developed in Transvaal (nowadays, Gauteng, Mpumalanga, Northwest and Northern provinces) and Natal (now KwaZulu Natal) with the establishment of the Jam'iyat al-'Ulama', of Transvaal in 1923 and in Natal in 1950.¹ These two bodies look after mosques, madāris and personal law matters. The absence of a vetting and registration system is also causing problems in those regions as well.

The Islamic Unity Convention (IUC), which is a national Muslim body and founded in Cape Town in March 1994, is of the opinion that registration of Muslim jurists will ensure proper application and administration of Muslim Personal Law in South Africa. To this end it had asked the South African government to institute a registration system in the same manner as attorneys and advocates are registered.²

Muslims follow Islam as a way of life. The word "Islam" technically means "submission to Allah (God Almighty)". Islam is thus "the open submission to the shari'ah and following that which the Prophet Muḥammad (s.a.w.s)³ brought".⁴

Islam, thus, regulates all spheres of a Muslim's life - from birth till death. The Islamic legal system is based on revelation

² Islamic Unity Convention News, Rylands Estate, Athlone, Published by the IUC Public Relations Office, Johannesburg, Transvaal, Shawwal 1415 AH corresponding to March 1995, p. 4 - 6.
³ S.A.W.S. is an abbreviation for sal-lallahu 'alaihi wa sallam, which is the Arabic for "the peace of blessings of God be upon him."
of divine origin which regulates all aspects of Muslim existence from worship, ethics and morality, human interaction and laws for all spheres of life, including the law of persons and family law. In an Islamic State, thus, all laws must conform to the Islamic legal system. This makes Islam a religion as well as a political and social phenomenon. Some scholars have realised this and speak of the Prophet (s.a.w) bringing a religious as well as social order into existence while others mention that he was both a prophet and a statesman. A scholar, Professor De Santillana, referred to Islam as follows: "...this law is at the same time a social duty and a precept of faith; whosoever violates it, not only infringes the legal order, but commits a sin, because there is no right in which God has not a share. Juridical order and religion, law and morals, are the two aspects of the same will, from which the Muslim community derives its existence and its direction; every legal question is in itself a case of conscience, and jurisprudence points to theology as its ultimate base."

South Africa has now constitutionally accepted the reality of a permanent Muslim presence in the country and that this community has a peculiar system of family law and way of life. The interim constitution, for instance, recognised this when it stated: "Nothing in this Chapter shall preclude legislation recognising – a system of personal and family law adhered to by persons

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3 Professor David De Santillana was professor of History of Political and Religious Institutions of Islam at the University of Rome.


professing a particular religion; and the validity of marriages concluded under a system of religious law subject to certain procedures.\(^1\) There is no clear and unambiguous statement in the constitution which compels the systems of family law to be restricted to the limitations of the Bill of Rights (BOR) of the South African interim constitution. However, this uncertainty was removed by the working draft copy of the proposed new constitution of South Africa\(^2\) where it is stated: "The Constitution does not prevent legislation recognising the validity of marriages concluded under a system of religious law [or other recognised traditions], or a system of personal and family law adhered to by persons professing a particular religion to the extent that the system is consistent with the Bill of Rights."\(^3\) This last mentioned clause had been accepted and effectively legislated into law\(^4\) which will or might probably force MPL into a modern western liberal democratic jacket permanently, if a change is not made to the constitution.

There had been, to date, no proper testing of Muslims' feelings in this matter. In fact, the issue will apparently be forced onto the Muslim public through the law process which is anything but democratic nor consistent with freedom of choice, the so-called hallmarks of the democratic process. This appears to be the thinking of the constitutional advisers and constitution making politicians who are confronted with the conflict between \textit{shari'ah} and South African law, especially the conflict between these two systems of law as it occurs in situations of Muslims who marry according to \textit{shari'ah} and then either register that marriage in terms of South African law or undergo a civil marriage after the Muslim marriage.

\(^1\) \textit{Act 200 of 1993, Chapter 3 - Fundamental Rights, Section 14 (3)(a)(b).}
\(^2\) \textit{Working Draft of the New Constitution, Cape Town, 22 November 1995.}
\(^3\) \textit{Ibid, Chapter 2 - Bill of Rights - Section 14(3).}
This thesis will, thus, deal with the consequences of marriage, namely, *al-wilayat* (guardianship), *al-tabannā* (adoption), *al-mirāth* (succession), *al-wasāyā wa al-ʾīsā* (legacies and curatorship) and *al-waqf* (endowment) as in *sharī'ah*. The smooth, correct, proper, full and efficient functioning of MPL cannot be achieved unless the laws relating to these are incorporated into the MPL system. The incorporation of MPL into the South African legal system would be a disaster for Muslims. The previous minority white administration apparently proposed this instruction to the South African Law Commission (SALC). The SALC was clearly in favour of incorporation as it states: "The object of this investigation is to determine the extent to which provision can be made in South African law for recognition of rules of Islamic law relating to marriage, matrimonial property, succession, guardianship and related aspects of family law."¹

It appears that the new South African government might follow the previous white minority government's policy in MPL matters in this regard. This will be a serious error as well as breach of international covenants in this matter. This issue will be dealt with in detail in the final chapter of this thesis.

Since most of the sources for this thesis are in Arabic, Arabic terms will be used followed by their English meaning. There is a glossary of these terms at the end of this thesis.

CHAPTER 1

THE ORIGIN AND DEVELOPMENT
OF ISLAMIC LAW

This chapter will deal with shari'ah as to its structure and peculiarities, followed by fiqh (Islamic jurisprudence) and its sources, both primary and secondary and ends with the adwar fiqhiyyah (stages of the development of fiqh).

1 The Shari'ah

1.1. Definition Of Shari'ah:

Islamic Law is called shari'ah. Literally, shari'ah means "the way leading to a drinking place or the drinking place itself where people drink and let their animals drink from."[1] In its legal meaning, shari'ah means "that which the Shāri' (Supreme Legislator i.e God Almighty), legislated as law for His 'ibād (servants)."[2] Another scholar defines shari'ah as "all the commands and laws, both beliefs and actions which Islam commands to be followed and executed with the purpose of achieving a sound social order"[3]. The Qur'an uses the terms shari'ah as the religious law:

"Then We put you on the (right) Way of Religion (shari'ah), so follow that Way..."[4]

"...And follow not their vain desires, diverging from the Truth that has come to you (Muhammad). To each among you

(of mankind) We prescribed a Law (shir'atan) and a Way of life (minhājan)...

The reason why this law is termed shari'ah is due to it resembling the purpose of the watering place, for as water refreshed the physical body and is vital for the sustaining of life, so is the shari'ah for it gives life to and refreshes the rūḥ (soul) and 'aql (mind). There is thus an intimate link between the literal and legal meaning of the word shari'ah.

1.2 Peculiarities Of Shari'ah:

Being a divine based law which embodies theological as well a practical laws, shari'ah aims at the salvation in the Hereafter and achieving a balanced life for human beings in full harmony with their environment and for achieving a proper balance of human life on earth. Islam, being the religion from where the shari'ah is derived, has certain reformative aims in society and they are, principally:

- through belief in an Almighty God, and hidayah (guidance), freeing mankind from superstition and slavish imitation of systems and ways of beliefs and life which are harmful to them in this world and the Hereafter, and encouraging the acquisition of knowledge and clear thinking with proofs.

- reforming the individual, purifying of the human soul and inculcating morality which aims at the spiritual control of physical life, especially greed and passions, the latter of which, if uncontrolled and undisciplined, interferes with the divinely ordained duties and obligations. The system employed by Islam is one of sincere and committed worship which continuously reminds the individual of the existence of his Creator and which instils in him a striving for

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1 Al-Qur'an, Chapter 5: 48.
2 Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah, p. 38.
attaining virtue, righteousness, wholesomeness and abstention from evil, vice and sin.

- reforming society generally through its uniform belief system and communal ceremonies as well as its behaviour and conduct in such a manner that societal peace and justice are embedded in society, protection of all is guaranteed - including acceptable freedoms - and human dignity and honour are respected.¹

Ḥurriyyah (freedom) is, thus, a principle in shari‘ah which the Shari‘ did not restrict. Islām came to free mankind from all forms of ‘ubūdiyyah (worship), whether it be worship of false gods, worship of people to people, worship of lusts and pleasures and the worship of power and wealth. Thus, hurriyyah, in Islām, sprouts from the full obedience to Allāh (God Almighty) while, in secular and atheistic systems, freedom has no relation to God as He is relegated to temples only. Secular and atheistic systems thus depart from the point that the individual is master of the universe and creator of the administrative, political, economic and other disciplines in life. Religion, and thus God, has no place herein as the world and religion are completely and permanently separate.²

1.2.1. A Short History Of The Development Of Shari‘ah:

As may be known, Islām never claimed to be a new religion, but the religion of Ibrahim (Prophet Abraham - a.s.) and of his ancestors.³ It claims to be the religion of the previous Prophets⁴ (a.s) in essence and to rectify the additions and corruptions⁵ that entered the divine texts.

¹ Al-Madkhal al-Fiqhī al-‘Amm, Vol 1, p. 30.
³ Al-Qur‘ān, Chapter 22: 78.
⁴ Ibid, Chapter 3: 84.
⁵ Ibid, Chapter 7: 162.
Muḥammad bin 'Abd Allah was born in Makkah (Mecca) about 570 C.E.1 In about 610 C.E., on a night in Ramaḍān, the 9th Muslim month, he received the first revelation of the Qurʾān2. These revelations continued for 13 years in Makkah and 10 years in Madīnah.3 He died at Madīnah in 632 CE.4 All āyāt (verses) of the Qurʾān were recorded during his lifetime by appointed scribes apart from huge numbers of ṣahābah (companions) of the Prophet (s.a.w.s), during his lifetime, committing the Qurʾān to memory. The Qurʾān was recorded on bark, bones, sheet, skins etc. during the Prophet’s (s.a.w.s) lifetime. It was during Abu Bakr al-Siddiq’s (d. 13 AH)5 reign that it was compiled into one book which went to 'Umar ibn Khattāb, the second caliph, after Abu Bakr’s death and after 'Umar’s death, to his daughter Ḥafṣah bint 'Umar, one of the wives of the Prophet (s.a.w.s). The Prophet (s.a.w.s) allowed his followers to record the Qurʾān during his lifetime, but nothing else of his verbal or practical instructions.6 There were exceptions to people from distant lands visiting

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1 The Muslim Almanac, p. 3.


The Concise Encyclopaedia of Islam, p. 192
The Muslim Almanac, p. 7.


Madinah. This was to prevent people mixing the Qur'an with the prophetic precepts or practice while the Qur'an was still being revealed.

The Qur'an was revealed piecemeal for 23 years; sometimes in answer to a question, sometimes because of a happening and sometimes without any reason. During the time of revelation, when a need arose for a ruling, the Prophet (s.a.w.s) resorted to *ijtihad* (juristic extraction) as in the case of the Battle of Badr when he had prisoners of war and no revelation had yet been received in relation to prisoners of war. He (s.a.w.s) also consulted the *sahābah* in this regard. If his *ijtihad* (juristic extraction) was correct, it would remain law by *sunnah* (prophetic example or practice) and if not, revelation would cancel that prophetic practice. This happened at Badr when the Prophet took prisoners of war, on the basis of his *ijtihad*. This was the wrong decision and he was rectified in revelation soon thereafter. The Qur'an gives the reason as:

"It is not permitted for a Prophet that he should have prisoners of war until he had thoroughly subdued the land. . ." In addition, all problems the Muslim encountered, had to be referred to the Prophet (s.a.w.s) for ruling. He (s.a.w.s) was thus the *marji' al-hukm* (final authority in legal matters) in *shari'ah*. Even if the *sahābah* were outside Madinah, on a journey, they had to refer the problems they encountered to him as well as

1 Al-Madkhal li Dirásah al-Shari'ah al-Islamiyyah, pp. 109 - 110, 117.


3 *Muhammad - The Final Messenger*, p. 162.

what they did under the circumstances. If they were correct he (s.a.w.s.) approved ('aqarra) their actions or rectified their wrong decisions. Thus, in the Prophetic era, the system of *tashri'*(law enactment) was primarily *wahy* (revelation). Even the Prophet's *ijtihād* (juristic inference) was subject to *wahy*. The actions of the *sahābah* were subject to *wahy* all the time. We can thus say that in the era of the Prophet (s.a.w.s) the sources of *shariʿah* were, primarily, the *Qurʾān* with the *ḥadīth* (prophetic precepts) and *sunnah* (prophetic practice) as secondary and supporting, usually explanatory, sources.

After the death of the Prophet (s.a.w.s), in about the year 632 C.E., the pattern of *shariʿah* developed a subsidiary pattern in that the principles enunciated in the *Qurʾān* and the known principles the Prophet (s.a.w.s) laid down in the *ḥadīth* and the *sunnah* were used to solve the "new" issues which occurred in the Islamic State. "New" here means "that which is not mentioned by name in the *Qurʾān*, nor given ruling on it by the Prophet (s.a.w.s) during his lifetime". *Shariʿah* thus expanded tremendously, especially when new territories were conquered and Muslims settled there. This process was characterised by the practice of the first caliph Abu Bakr who, if something "new" came to him, he would first look in the *Qurʾān* and if ruling was given on it, he would judge accordingly. If not found in the *Qurʾān* he would rule by any *ḥadīth* or *sunnah* or he would ask of the people if they knew what the Prophet

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(s.a.w.s) did in such a matter. If someone trusted could answer that and a trusted witness confirmed it, he would rule accordingly. If not, he would resort to *ijtihad* (juristic opinion extraction) and rule accordingly.¹ Abū Bakr would, when a major "new" issue occurred, summon the *mujtahidūn* (legal experts who infer laws) of the *ṣaḥābah* of the Prophet (s.a.w.s) and put the issue to them asking them to give ruling on it. They would study it and weigh it in the light of Quranic law and its principles as well as the *ḥadīth* and *sunnah* and its principles. When they had consensus, it was called *ijma' al-ṣaḥābah*² (consensus of the companions) or as it is also sometimes called, *ijma' al-ummah* (consensus of the Muslim nation). This consensus was and is still binding on all Muslims the world over and no new ruling herein is accepted nor allowed in *sunni* law. This system continued till the death of the second caliph 'Umar ibn al-Khattāb (d. 23 AH)³ as both the first and second caliphs did not allow the *mujtahidūn* of al-Madīnah to leave without their permission. This was especially 'Umar's practice. This system ended during the *khilāfah* (reign) of the third caliph 'Uthman bin 'Affān as he allowed them to go to the Amṣār (conquered territories) as *mu'allimūn* (teachers), *wu'ād* (preachers), *du'āt* (missionaries), *quḍāt* (judges), *muftūn* (sing. *muftī* experts entitled to give legal opinion) etc.

A new pattern now evolved again. New issues occurred frequently due to the Muslims coming into contact with foreign cultures, religions and

¹ *Al-Madkhal li Dirāsah al-Shari'ah al-Islamiyyah*, pp. 120 - 121.
practices. The practice of *ijtihād* now became widely employed, but all subjected to the Qurʾān, the *hadīth*, *sunnah* and its principles as well as not breaking the *ijmāʿ* al-ʿummah (consensus of the Muslims). These patterns of proofs which evolved are usually called *al-maṣādir al-tabaʿiyyah* (secondary sources), while the primary sources are called *al-maṣādir al-asliyyah* (original sources). It is thus quite wrong to state, as do many orientalists especially, that Islamic law was the work of Muslim jurists at various times in Islamic history.

1.2.2. **General Structure Of *Shariʿah*:**

Structurally, *shariʿah* can be divided into two main spheres of operation and they are the sphere of *al-ḥuqūq al-khāssah* (personal rights) which covers both civil and criminal spheres and *al-ḥuqūq al-ʿammah* (public rights) which encompasses both internal and external State matters such as administrative, monetary/fiscal and constitutional matters, amongst others and international matters.

The pattern of lawgiving and process of lawmaking in the above system is the prerogative of the *Shariʿ* which He gave in the Qurʾān, which is the revelation from Him to the Prophet Muḥammad (s.a.w.s), and is the basic constitution of Islam and the *ḥadīth*, which is the Prophetic precepts. *Hadīth* is sometimes called *sunnah*, by some *ʿulamaʿ*.

These two sources are the primary sources of law in Islām. In addition, Islām, in its legal system, legislated for *ijtihād* which is the considered juristic law opinion extracted from existing law principles and precedents by those duly qualified to do so. This allows for Islām and *shariʿah* to fit in with all times with a universal order unknown to

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1 Al-Madkhal al-Fiqhi al-ʿAmm, Vol 1 pp. 177 – 178.
other systems. The Qur’an itself pronounces mostly on principles of law, save in few cases where it goes into details of certain issues to remove any ambiguity or diversified interpretations. Examples of these are mirath and some of the ‘uqubat (prescribed criminal punishments).¹

The shari‘ah is founded on the following:
-  al-`huqūq al-khāssah, broadly, operates in the fields of al-`awâl al-shakhshiyyah (family law and the law of persons in all its branches), al-‘uqūd (contracts), al-`uqūbat (criminal law) and such law as relating thereto.
-  al-`huqūq al-‘ammah, from an internal State point of view, deals with constitutional matters such as freedom of the nation subject to public moral and ethical order and non-curtailment of the freedom of others in the understanding of the shari‘ah.
-  equality before the law.
-  principle of shura (mutual consultation) in matters in which shari‘ah allows shura between the hakim (ruler) and the mahkûm (governed), usually in matters in which there is no text and which in itself is not repugnant to Islam or its principles.

It is striking that Islam never prescribed a fixed system or pattern of government as this will evolve from time to time and be influenced by time and place. It, however, laid down principles which the State, the hakim (ruler) and mahkûm (the governed) must abide by. In governance, the shari‘ah granted unlimited executive and administrative powers to al-imam al-akbar or khalîfah (Head of State) including chief mutawalî (trustee) of the bait al-mal (public treasury), but

¹ Al-Madkhal al-Fiqhi al-‘Amm, Vol 1 p. 32.
restricted him to work only within the boundaries of shari‘ah and made him a subject just like all the other people of the State. Thus, in the case of the bait al-māl, for example, the ḥākim (ruler) must expend revenue for the benefit of the public and its welfare. He does not have special personal powers or rights which distinguish him from other citizens of the State. If anything, he is the servant of the people, serving them through governance by application of shari‘ah. There is, thus, no place for authoritarianism in this setup, but only joint and equal partnership of the ḥākim and the maḥkūm. Allāh is the actual ruler of the Muslims. He appointed a vice-regent on earth to execute this task, the absolute first one being 'Adām (a.s.)¹ as the Qur‘ān states:

"Behold! Your Lord said to the angels: "I will create a vice-regent on earth..."² and the first one in the Islamic order being the Prophet Muḥammad (s.a.w.s) and thereafter the khulāfā‘ (the caliphs or rulers). In this vein the Qur‘ān states clearly and unambiguously:

"Obey Allāh, obey the Messenger and obey the righteous (Muslim) rulers amongst you..."³ This is not blind obedience, but obedience subject to shari‘ah as the Prophet (s.a.w.s) ruled:

1 "a.s" is the abbreviation for the Arabic "'alaihis salām", which means "peace be upon him." This is used for all the Prophets.

2 Al-Qur‘ān, Chapter 2: 30.

3 Ibid, Surah 4: 59.
"There is no obedience required to any person if such of obedience necessitates the disobedience of the laws of the Creator."¹

The classical example of governance in Islam is expressed by Abū Bakr Siddiq, the first khalīfah of the Islamic State, who, on being elected to high office said:

"Behold me, behold me charged with the care of government. I am not the best among you. I need your advice and your help. If I do well, support me, if I err, counsel me. To tell the truth to a person commissioned to rule is faithful allegiance; to conceal it is treason. In my sight the powerful and weak are alike and to both I wish to render justice. As you obey God and His Prophet (s.a.w.s), obey me; if I neglect the laws of God and the Prophet (s.a.w.s), I have no more right to your obedience."²

In international State matters, the shari'ah expounds the following principles:
- all nations are equal in human rights.
- relations between the Islamic State and other States must be based on justice in both peace and wartime.
- the accepted and honourable agreements and treaties between the Islamic State and other States are binding in the same manner as contractual obligations between individuals.
- no war is allowed without an announcement of it.

A Short History of the Saracens, pp. 21 – 22.
retributive action of like nature as an offensive act committed is valid and possible, save if it contradicts shari'ah principles.¹

Shari'ah is thus not a creation of society nor a result of the evolution of societal existence and its interactions with others, as secular societies are, but its author is Allah who perfected every created thing². Shari'ah had now been explained fully and shown to cover the broad spectrum of law in Islam. The part of shari'ah that has to do with the practical laws of human action and interaction is called fiqh. We shall now deal with fiqh as understood and accepted by ahl al-sunnah or ahl al-sunnah wa al-jama'ah, commonly called sunni fiqh (sunni jurisprudence). Sunnis make up the vast overwhelming majority of Muslims in the world.

1.3. AL-FIGH:

1.3.1 Definition of Fiqh:

The word fiqh is derived from the arabic root verb faqaha which means "to be enveloped in knowledge" while faqiha means "to know".³ Some scholars state that fiqh literally means "knowledge of something and understanding it" or "understanding the implication of the speech of the speaker."⁴ The Qur'an uses the literal meaning of fiqh to mean "to understand", as with Musa (a.s) when instructed by Allah (God

¹ Al-Madkhal al-Fiqhi al-'Amm, Vol 1 pp. 33 - 51.
³ Al-Munjid p. 591.
Almighty) to go to Egypt to take Banu Isra'îl (the Israelites) from bondage and praying, saying:

"...and remove the impediment from my speech so that they may understand (yafqahuna) what I say...."1 The same meaning is expressed by the Prophet (s.a.w.s) when he said, as narrated by Mu'awiyah and transmitted by al-Bukhârî, Muslim and ibn Majah:

"He for whom Allâh desires good, (He) grants him understanding of the din (yufaqihu fi al-dîn) (i.e. Islam, the Faith)."2

There is a variation in the shari'ah meaning of the term fiqh, but there is no fundamental differences in this definition, thus, some define it to be "knowledge of the practical applied laws of the shari'ah, with its proofs."3 An example of the variation is that of Abu Hanîfah4 (born 80 AH/699 CE)5 who defines fiqh as "knowledge of what your rights are and what your obligations are."6 We can thus say that fiqh is the body of those laws which the Shari' enacted through his Messenger Muhammad (s.a.w.s) and all those laws which are derived from that source and which has a practical and applied value as far as the daily lives

1 Al-Qur'an, Chapter 20: 27 – 28.
2 Al-Mundhiri A M: Al-Targhib wa al-Tarhib min al-Hadith al-Sharîf, Cairo, Matba'ah al-Sa'âdah, 1960, 1st ed., Vol 1, p.70.
4 Al-Madkhal al-Fiqhi al-'Amm, Vol 1 p. 59.
6 a senior mujtahid (legist) in shari'ah and especially fiqh who was the founder of the Hanafi school of jurisprudence.
8 Al-Madkhal li Dirasa'ah al-Shari'ah al-Islamiyyah, p. 62.
of people are concerned. By way of example, rules of the validity or otherwise of salāh (daily prayers) and al-ta'āqud (contracting of contracts) are all to be found in fiqh for they deal with acts of the daily lives of people.

1.3.2. The Sources of Fiqh:

The sources of fiqh are, for convenience sake, divided into al-maṣādir al-asliyyah (primary sources) and al-maṣādir al-tabā'iyyah (secondary sources). The primary sources are of two kinds, namely, the Qurʾān, which is called al-wāḥyu al-matlū or the directly revealed law and the ḥadīth/sunnah which are the prophetic precepts and called by some fuqaha' (jurists), al-wāḥyu ghair matlū (indirect revelation). The secondary sources are founded on the principle of ijtihad of a mujtahid who is an independent Muslim legist in shari'ah. The disciplines in which ijtihad are used, are ijma' (juristic consensus of Muslim legists) in its various forms (which will be dealt with later on) and ra'i ijtihādī (considered derived juristic opinion of a Muslim legist) of which qiyās (analogy) is the primary source.† The mashru'iyyah (legality) of ijtihād as a source of law is confirmed in both the prophetic era and thereafter.

As for the prophetic era, when the Prophet (s.a.w.s) appointed Mu'ād bin Jabl as governor of Yemen and asked him how he will conduct himself in qada (the judicial process). Mu'ād replied that he would first judge with what is in the Qurʾān and if not found therein, then by what is known to him of hadīth or sunnah and if not found there, he will

exercise *ijtihad*. This the Prophet very gladly accepted and endorsed.\(^1\) Another example in the era of *al-khulafa’ al-rashidun* (righteous caliphs) is that of 'Umar ibn Khattab, the second *khalifah*, who on appointing Abu Musa al-Ash'ari as *qādi* (judge) told him: "...that which is not in the Book of *Allāh* (i.e. the Qur’ān) nor in the *sunnah*, then know those (issues) which resemble on another and make *qiyaṣ*..."\(^2\)

With this practice, specifically, *shari'ah* became permanently relevant to Muslims for all times as issues of any nature can be weighed and judged in terms of *shari'ah*.

### 1.3.3 The Primary Sources Of Fiqh:

#### 1.3.3.1 The *Qur’ān*:

##### (a) Definition of Qur’ān:

The word Qur’ān is derived from the Arabic verb *qara‘a* which means "to read". It is called Qur’ān due to it (revelation) having been gathered in one book and joined one part to the other.\(^3\) It is also called *Kitab Allāh* (the Book of *Allāh*) due to it being the exalted revelation from the Almighty *Allāh*, and it is sometimes called *al-Furqān* which means "that which distinguishes between right and wrong."\(^4\) The Qur’ān itself uses this term to describe itself.\(^5\) The Qur’ān is defined

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\(^3\) Al-Munjīd, p. 617

\(^4\) Al-Qada‘ wa Niẓāmuhu, p. 322.

\(^5\) Al-Munjīd, p. 579.

\(^6\) Al-Qur’an, Chapter 2: 185.
as: "The Divine Word, revealed to the Prophet Muhammad (s.a.w.s) and recorded in the muṣḥaf (the Qurʾān) and transmitted to us by tawātūr (continuous uninterrupted transmission)". This is the definition most of the scholars of both fiqh and Arabic subscribe to.1 A near similar definition is given by al-ʿAmīdī.2 Another scholar defines it as "the revelation from Allāh, revealed to Muḥammad (s.a.w) in Arabic, used as law and transmitted to us by tawātūr, beginning with Surat al-FFFFFF and ending with Surat al-Nṣṣ.3 From these definitions we can state that the Qurʾān is "that Book of Allāh which was revealed to the Prophet Muhammad (s.a.w.s), by Allāh, words and order starting from Surat al-FFFFFF and ending with Surat al-Nṣṣ and which was transmitted to us by tawātūr." Tafsīr (Quranic exegesis) is included herein as it existed from the Prophetic era itself, he (s.a.w.s) being the first exegetist.4 This fact is supported by the Qurʾān itself when it states: "And thus have We inspired in you (Muḥammad) a spirit of Our command. You did not know what the Scripture was nor the


2 Al-ʿAmīdī S D: Al-İhkam fī Usul al-Âhkam, Cairo, Matba‘ah Muṣṭafā al-Halabī, Vol 1 pp. 120 — 121.


4 Al-Mabahīth fī 'Ulim al-Qurʾān, p. 289.
Faith...". The status of Quranic law is ilzam (compulsory status) by consensus of all sects, both kālim (theological) and fiqhi (juridical).

(b) A Short Analysis Of The Qur'an:

Muslims have consensus that the Qur'an is the constitution of the Muslims and the first source of law. A constitution gives law in generality. Details are seldom provided. The Qur'an, which is already 1400 years old, is no exception to this rule. It is thus noted that, for example, two of the basic duties, salah and zakah (annual compulsory alms) are mentioned and prescribed, but virtually no details of its performance given. This the Prophet (s.a.w.s) had to do. The Qur'an states:

"Oh Messenger! Proclaim the (message) sent to you from your Lord."5

"We sent down to you al-dhikr (reminder i.e the Qur'an), so that you may explain to mankind what was sent down to them, so that they may meditate."6 The Prophetic instructions in these cases are the key to the interpretation of the Qur'an.7

As far as the structure of the Qur'an is concerned, it consists of 114 suwar (chapters

1 Al-Qur'an, Chapter 42: 52.
2 Usul al-Fiqh al-Islami, p. 142 - 143.
3 Al-Madkhal Li Dirasah al-Shari'ah al-Islamiyyah, p. 184.
4 Al-Qur'an, Chapter 9: 18.
5 Ibid, Chapter 5: 67.
6 Ibid, Chapter 16: 44.
7 Al-Madkhal al-Fiqhi al-'Amm, Vol 1 p. 70.
surah), each having a name derived from a happening or wording in the surah, like Surah al-Baqarah (chapter of the Cow) taking its name from a happening with a cow in the chapter. These 114 suwar are again divided into 30 ajza' (parts - sing. juz), each getting its name from the first word or phrase of the juz. As far as division of ayat (verses - sing. ayah) are concerned, the main division is ayat Makkiiyyah (verses revealed in Mecca) and ayat Madaniyyah (verse revealed in Medina). This is the indication where revelation took place. Makkı suwar which are usually comprised of short ayat, exhorts to truth, virtue and righteousness, sets the principles of beliefs and theology, speak of the previous Prophets (a.s), Jannah (Paradise) and Jahannam (Hell) and debate with the mushrikun (pagans) on their false and erroneous beliefs. Makkı suwar are usually not long.

On the other hand Madani suwar (Medinite chapters) are long, deal with issues of law in all spheres, including the State, jihad (holy war) and debates with the munafiqin (hypocrites) as well as the Ahı al-Kitab (the People of the Book) etc. Ayat of the Qur’an are, basically, of three major kinds and they are ayat kulliyah which mentions the general principles and bases of law from which other laws flow, like the command of shura (mutual consultation) "...and consult them in their affairs...". Another category is the ayat ijmaliyyah which are ayat (verses) mentioning

2. Al-Qur’an, Chapter 3: 159.
laws generally without supplying any details like "...but Allah has permitted trade and forbade usury." The sunnah explains what kind of trade is valid and what is intended by usury. The last category are the ṣuyāt tafsiliyyah which deal in detail with certain issues like the punishment for qaḍḥ (slander) "and those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty lashes, and reject their evidence ever after; for such men are wicked transgressors." Thus, basically, the Qur'ān consists of ṣuyāt of 'aqīdah (beliefs) and its principles, purification of the soul and human conduct and those dealing with 'ibādat (worship) and mu'amalāt (human dealings in all its spheres).3

1.3.3.2 The Hadith Or Sunnah:

This is the second primary source of fiqih according to all the 'ulama', fuqaha', usuliyun (authorities in the principles of jurisprudence — sing usuli) and other scholars of shari'ah. Hadith is sometimes taken to be synonymous with sunnah and many a time they are used rather loosely. Usually, hadith means the sayings and rulings of the Prophet (s.a.w.s) while sunnah specifically refers to his (s.a.w.s) actions. In this thesis, these meanings will be used as indicated.

1 Al-Qur'an, Chapter 2: 275.
(a) **Definition:**

_Hadith_, literally in Arabic, means "new" as opposed to "old. It also means "a report" of something\(^1\), or a conversation.\(^2\)

The Qur'an uses the word _ḥadīth_, literally, meaning the Qur'an itself, the Message\(^3\), and a narration\(^4\). The Prophet (s.a.w.) used the term to mean a religious communication, a conversation and a secret\(^5\). In the _shari'ah_, _ḥadīth_ means specifically the sayings and actions of the Prophet (s.a.w.s).\(^6\) This automatically include the _iqrārāt_ (affirmation of actions) by the Prophet (s.a.w.s). _Sunnah_, in its literal arabic meaning means "a way of life or pattern of life or existence."\(^7\) In the _shari'ah_, it means "the actions and way of life of the

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   Al-Munjid, p. 121.
4. Ibid, Chapter 68: 44.
5. Ibid, Chapter 6: 68.  
   Ibid, Chapter 20: 9  
   Ibid, Chapter 66: 3.
8. *'Ulum al-Ḥadīth*, p. 6.  
   Al-Munjid, p. 353.  
   *Studies in Hadith*, p. 3.
Prophet (s.a.w.s)". In this sense, thus, *sunnah* is a specialised part of *hadith*.

(b) **Peculiarities Of Hadith:**

*Hadith*, as explained, is the key to the *Qur'ān* and explains its principles and generalities. The Prophet (s.a.w.s) was commanded by *Allāh*:

"Oh Messenger! Proclaim the (Message) which has been sent to you from your Lord."

This he did alone until he died. In *al-hijjah al-wada'*(the farewell pilgrimage), the Prophet (s.a.w.s), according to Jabir bin 'Abd Allāh, gave his final message to the thousands of Muslims assembled on 'Arafat saying after each set of instructions: "Did I deliver the message?"
The multitude answered: "You conveyed, delivered and advised."

We notice the nature of *hadith* in the following *hadith* examples. Maryam's mother prayed for a son, but instead Maryam was born. Her mother prayed:

"...and I seek refuge with You (Allah) for her and her offspring from the accursed

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1. 'Ulum al-Hadith, p. 6.
4. 'Ulum al-Qur'ān, p. 289.
6. Mary, mother of the Prophet Jesus (a.s).
Abu Hurairah narrated that the Prophet (s.a.w.s) said:

"Every new born is touched by Satan at birth causing him to cry save Maryam and her son."

This explains the meaning of the word "refuge" in the Qur’an. Hadith can also be an independent source of law, but concurring with the Qur’an in principles.

Ibn ‘Abbas as well as ibn ‘Umar narrated that the Prophet (s.a.w.s) "obligated zakāh al-fiṭr..." Ibn Mājah and al-Dār Qutnī also transmitted the narration of ibn ‘Abbās. Zakāh al-fiṭr is a welfare charity which agrees with the welfare principles of the Qur’an. ‘Imrān bin Husain narrated that the Prophet (s.a.w.s) also allotted one sixth of the estate of a grandson to his grandfather as no other ascendants were found. This is in accordance of the principle of wilāyāt where parents succeed their deceased children which is a Quranic principle.

Hadith is a secondary source to the Qur’an and does not depart from its general principles. An example is the Prophet’s

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prohibition, as narrated by Jabir bin 'Abd Allah, of trading in any manner with alcoholic drinks, carrion or swine. This is in keeping with the prohibition laws as well as avoiding loopholes being created with usage of these forbidden substances.

Hadīth also complements or explains Quranic duties. The Qurʾān, orders: "And perform (properly) the hajj and 'umrah".

The borders from where pilgrimage rites have to be observed was not mentioned. Ibn 'Abbas narrated that the Prophet (s.a.w.s) gave the mawqīt (sing miqāt - pilgrimage boundaries) as Dhū al-Hulaifah for those from al-Madīnah, al-Juhfah for Syria, Qarn al-Manāzil for al-Najd and Yalamlam for those from Yemen. Besides these peculiarities, hadīth may deal with superogatory acts, which are exhorted to, but which are optional. Examples being the way of eating, drinking, sitting of the Prophet (s.a.w.s). These acts do not enter the realm of tashrīʿ (legislation).

The Qurʾān itself commands with the following of the hadīth and sunnah, thus necessitating its following as law:

1. Mukhtasār Šāhīh Muslim, p. 249.
"Say (Oh Muḥammad): If you (the Muslims) love Allah, follow me, Allah will love you and forgive you your sins..."

"Your comrade does not err, nor is (he) deceived, it is but inspiration that is inspired (in him)."

".....and whatever the Messenger gives you, take it and whatever he forbids you from, abstain (from it).... Similar ʾayat (verses) appear elsewhere in the Qurʾān. These ʾayat are general and do not mention any exclusion according to the rules of tafsir (Quranic exegesis) and usul (jurisprudence principles). The Qurʾān as well as the ḥadīth and sunnah have to be followed. There is also ijma' hereon.

In classification, ḥadīth falls into three classes, namely, al-mutawātir (numerously reported texts which makes lying inconceivable). This grade is again divided into mutawātir bi al-lafẓ (numerously reported by text) and mutawātir bi al-ma'na (numerously reported in meaning). Hereafter follows al-mashhur (famous or well known text) and then the ʾahad (singularly reported texts) category, which has many kinds. Some 'ulama' (scholars) classify al-mashhur with al-

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1 Al-Qurʾān, Chapter 3: 31.
2 Ibid, Chapter 53: 2 - 5.
3 Ibid, Chapter 59: 7.
5 Ibid, Chapter 16: 44 & 64.
6 Usul al-Fiqhi al-Islami, p. 155.
7 Ibid, p. 157.
1.3.4. **The Secondary Sources Of Figh:**

As pointed out earlier, the secondary sources are based on *ijtihad* and as such started after the death of the Prophet (s.a.w). In fact, the principle of *ijtihad* was practised by the Prophet (s.a.w) during his lifetime when no *wahy* existed and a situation needed urgent ruling. It also had the Prophet's (s.a.w) sanction during his era as the *hadith* relating to Mu'ād bin Jabl, previously quoted, indicates. *Ijtihad* is based on Quranic, *hadith* and *sunnah* principles. It is thus the domain of those learned in *shari'ah*. There is, thus, no place for *hawa* (unqualified opinion not based on *shari'ah*). All 'ulama', *fuqaha'* mujtahidun, usuliyun and other Muslim scholars of the different branches of *shari'ah*, universally condemn, reject and rule as inadmissible *hukm wahmi* (rulings based on *hawa* - uninformed opinion).²

The *Qur'an* itself makes a distinction between *ilm* (knowledge) and *hawa*.

"Are those who know equal to those who do not know..?"³

Allah has praised and honoured those who have knowledge:

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"Allāh will raise to (suitable ranks and degrees), those of you who believe and who have been granted knowledge."¹

He has likewise condemned hawa:
"... so judge you between people in truth (and justice) and do not follow your lust (of your heart), for it will mislead you from the Path of Allāh..."²

The Prophet (s.a.w.s) himself warned against the unlearned dabbling in sharī'ah. Abū Hurairah narrated that the Prophet (s.a.w.s) said:
"He who leads to the way of Truth and righteousness, has a reward equal to the reward of those who follow that (guidance) without the reward of the doer lessening. And he who leads away from Truth and righteousness carries the burden of all those who follow that (sinful) way without their sins lessening."³

Abū Sa'id al-Khudari narrated that the Prophet (s.a.w.s) said:
"Do not lie about me... narrate from me (but) he who lies about me (of what I say), deliberately, let him know he will enter Hell." Similar texts are narrated by Samrah bin Jundab and al-Mughirah bin Shu'bah.⁴ The unqualified in sharī'ah are, thus, not allowed to pronounce or work with that law. The learned in sharī'ah are those empowered and recognised in sharī'ah to pronounce on law. The Qur'an states:
"If they would only refer it to the Messenger and those amongst them who hold command, those of them

¹ Al-Qur'an, Chapter 58: 11
³ Mukhtasar Sahih Muslim, p. 492.
⁴ Ibid.
who investigate matters would know about it...\(^1\)

Al-Qurtubi\(^1\) and others state in their celebrated exegesis works that matters which people do not know the ruling of must be referred to the Prophet (s.a.w.s) during his lifetime and to those Muslims who are 'ulama' and fuqaha' for opinion later. In the \(\text{\`ayah}\) mentioned, the verb \(\text{yastanbit\`unahu}\) means "extracting" indicating that those who are empowered to deliver judgment are to be consulted.\(^2\)

1.3.4.1 \textit{Shurut (Conditions) Of The Mujtahid:}

To work with shari'ah and especially the onerous and responsible task of extracting hukm, special persons called mujtahid\(\acute{u}\)n are required. Apart from being a Muslim, a mujtahid must fulfil several conditions. He must have knowledge of the following:

- Arabic as to understand Arabic properly and correctly. This includes the knowledge of \(\text{na\dot{h}w}\) (grammar), \(\text{\`arf}\) (etymology) and \(\text{bal\`ag\`ah}\) (rhetoric) with all its branches.

- the Qur'an as it is the fundamental source of the shari'ah. He must know the ayat of \(\text{ahk\`am}\) (laws) in depth as the laws are extracted from these. He must also know the rulings of the fuqaha' in all these \(\text{\`ayat}\) as well as the \(\text{asbab al-nuzul}\) (reasons for the revelations) and whether an \(\text{\`ayah}\) is \(\text{n\`asikhah}\) (still valid in law) or whether it is \(\text{mans\`ukkah}\) (abrogated).

- the sunnah as to \(\text{\`had\`ith sa\`\=hih}\) (authentic hadith) and \(\text{\`had\`ith da\`i\=f}\) (weak hadith) as well as its grade, namely, whether it is mutawatir, mashhur or \(\text{\`ahad}\) hadith. He must

\(^1\) \textit{Al-Qur'an}, Chapter 4: 83.

\(^2\) \textit{Tafs\`ir ibn Kath\`ir}, Vol 2 p. 347.

\textit{Al-J\=ami' \^\text{\`i} Ahk\`\=am al-Qur\`\=an}, Vol 5 p. 291.
also know the causes for the hadith to be found as well as its meaning and strength of text, selection process of texts, cancellations that occurred in application of these texts, knowledge of hadith dealing with law matters and the law extracted from it. Also to know 'ulum al-hadith (science of hadith) and 'ilm naqd al-hadith (science of criticism of hadith).

- usul al-fiqh (principles of jurisprudence) because every mujtahid must be a faqih. He must know all the proofs in shari'ah and its order of standing as well as the approved way of extraction of hukm such as proofs derived from word usage and its procuring as well as the law of selection of proofs.

- ijma' and know all issues on which there is already ijma' and specifically al-ijma' al-ummah so as not to breach the consensus of the sahabah.

- the maqásid (aims) of the shari'ah. He must know the 'ilal al-hukm (reasons for the laws), as well as the masálih (approved or sanctioned benefits) of the Muslims within the ambit of the shari'ah so that he can extract laws for application to the people by way of qiyas or by masálih (approved benefit) or by 'adat (customs or approved practices) of the people in their dealings with one another.

- finally, he must be naturally inclined to ijtihad for if he is not so, the other shurut
The most important of these *al-maşādir al-taba'iyyah*, is *ijma* of which the *ijma* *al-sahabah* (consensus of the companions of the Prophet (s.a.w.s)) or *ijma* *al-ummah* (the consensus of the Muslims) is the most important.

1.3.4.2. *Al-Ijma* (Juristic Consensus Of Opinion):

*Ijma* literally means 'azm and taşmiş which in turn means "firm of intention". It also means ittifāq which means "agreement". ² In the *shari'ah*, *ijma* is defined as: "the full agreement of the mujtahidun of the entire Muslim ummah (nation) on a shari'ah ruling after the death of Prophet s.a.w.s)". ³ Other scholars have slightly varying definitions which is not fundamentally different from the above one. ⁴ The vast majority of *fuqaha* rule *ijma* as a source of *shari'ah*. The nazzam, *shi'ah* and khawārij reject this.⁵

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(a) **Analysis Of The Definition Of Ijma':**

- all the mujtahidun must concur on the hukm reached. If any one dissents, no ijma' is founded, but a majority and minority view.
- the participants in this process must be mujtahidun. If 'ijma is claimed and the participants or some of them, even one, was not a mujtahid, then no 'ijma is founded. In fact no ruling is founded at all.
- the mujtahidun must be Muslims. Nonmuslims, even if they are jurists in their system of law, cannot found 'ijma. In fact, they cannot partake of any process of shari'ah.
- the hukm of the mujtahidun must be founded after the death of the Prophet (s.a.w.s) as during his lifetime, he was the marji' al-hukm and no one else shared herein.
- the mujtahidun must decide on a hukm shar'i i.e. a matter pertaining to shari'ah which has no ruling yet in shari'ah. A law or ruling in the Qur'an or sunnah precludes the founding of ijma'.
- ijma' must have a mustanad shar'i i.e. a supporting proof of shari'ah. Ijma' based on other than a mustanad shar'i, like wahm (uninformed opinion), is void.¹

Malikis singularly rule that the ijma' ahl al-Madinah (consensus of the mujtahidun of al-Madinah) is also ijma' and necessary to be followed as ijma'.²

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¹ Wajiz fi Usul al-Fiqh, pp. 150 - 152.
² Al-Madkhal al-Fiqhi al-'Amm, Vol 1, p. 71.
³ Usul al-Fiqhi al-Islami, p. 165.
Proof Of The Validity Of Ijma':

The validity of *ijma'* is confirmed by the Shari' in the Qur'an itself. Allah says:

"And whoso opposes the Messenger after the Guidance (of Allah) as been manifested unto him, and follow other than the believers' way, We appoint for him that unto which he himself has turned, and expose him unto Hell – a hapless journey's end."

The *ayah* warns Muslims against following a way other than the way of the Muslims, which is the only correct way for them. Ways other than this are false ways and forbidden. Thus, the *hukm* that the mujtahidun of the Muslim *ummah* agree upon, is the proper and correct way of the Muslims and must be followed and this is exactly what *ijma'* is.

The Types Of Ijma' :

There are two kinds of *ijma'* , namely *ijma' al-sarih* (clear consensus) and *ijma' al-sukuti* (silent consensus). *Al-ijma' al-sarih* is that *ijma'* which is unambiguously clear and known publicly, while *al-ijma' al-sukuti* is not so.

The binding form of *ijma'* which permanently binds the entire Muslim *ummah* (nation) for all times is *al-ijma'* al-*ummah* or the consensus of the *sahabah* the of Prophet (s.a.w.s). This kind of *ijma'* was founded during the reign of the first caliph Abu Bakr

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1 *Al-Qur'an*, Chapter 4: 115.
2 *Al-Iḥkam*, Vol 1, p. 150.   
*Al-Qaḍā Wa Niẓāmuḥū*, pp. 354 - 355.
Siddiq\(^1\) and was a corner stone of legislation during his time as well as that of 'Umar\(^2\), his successor. The climate of governance was such that that was the best way for all, apart from the fact that the sahābah of the Prophet (s.a.w.s) disliked conflicts and disputes amongst the Muslims.\(^3\) Ijma\(^4\) was difficult to procure during the reign of the third and four caliphs of al-khilāfah al-rashidiyyah (reign of the four rightly guided caliphs) as the senior fuqaha\(^5\) and the mujtahidun were allowed to leave for the conquered territories by the third khalifah 'Uthman (d. 34 AH)\(^6\).

Two kinds of al-ijma \(\text{al-sarih}\) are localised forms of ijma and they are ijma \(\text{al-iqlimi}\) (regional consensus) and ijma \(\text{al-mahalli}\) (local consensus). Ijma \(\text{al-iqlimi}\) is the consensus of the mujtahidun of a region like the Middle East and South East Asia etc. Their ijma\(^\circ\) binds their region only while ijma \(\text{al-mahalli}\) binds a specific locality like a country or a province or even a city.\(^7\)

Al-ijma \(\text{al-sukuti}\) (silent consensus) is formed when some or even one mujtahid gives a ruling on a ḥukm shar\(\vec{\iota}\) (shari'ah ruling) and such a ḥukm reaches the other mujtahidun and they do not express any opinion thereon

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5. Al-Wajiz fi Usul al-Fiqh, p. 150.
nor do they criticise the ḥukm. The fuqaha’ differ on the standing and application of such *ijma‘* as follows:

- most *hanafis* and the *hanbalis* rule this as just as binding as *al-ijma‘ al-sarih*.
- some, like Malik⁴ (born 95 AH/713 CE)⁵ and al-Shafi‘i⁶ (born 150 AH/767 CE)⁷, rule it to be plain *ijtiḥad* and not even of the strength of *hadith*.
- others, like some *hanafis* and some *shafi‘is* rule it to be compulsory to be followed, but its degree is like that of *hadith*.⁸

Having dealt with the most important form of *ijtiḥad* above, the other forms of *ijtiḥad* will now be dealt with.

2. a senior School of Sunni *Fiqh* (jurisprudence) founded by Nu‘mān bin Thābit al-Kūfī, commonly known as Abū Ḥanīfah. His followers are called *hanafis*.
3. another senior Sunni *Fiqh* School founded by Abū ‘Abd Allāh Ahmad bin Hanbal bin Hilāl bin Asad al-Shaibāni, commonly called Ahmad in the law works. His followers are called *hanbalis*.
4. His real name is Malik bin Anas al-Asbahi and leader and founder of the Sunni *Maliki* School of *Fiqh*. He was the *Imām* (leader) of *fiqh* (jurisprudence) in Madinah during his time. His followers are called *malikis*.
6. He is Abū ‘Abd Allāh Muhammad Idris al-Shafi‘i and founder of the *Shafi‘i* Sunni *Fiqh* School. His followers are called *shaфи‘is*.
1.3.4.3 **Al-Qiyas (Analogical Reasoning):**

The word *qiyas* is derived from the Arabic verb *qasa* which means *taqdir* or *muqaranah*. Literally, *qiyas* means "to compare or measure or estimate similar things."\(^1\) In the *shari'ah*, *qiyas* is defined as "the application of a known *shari'ah* ruling on another issue, similar to it, due to both issues having the same 'illah i.e. cause for a specific ruling given in *shari'ah*."\(^2\)

Examples hereof are:

- *Allah* prohibited a man marrying a mother and her daughter as well as marriage to two sisters simultaneously due to the nearness of relationship. The Prophet (s.a.w.s) prohibited marriage to a woman and her 'ammah (paternal aunt) at the same time as well as to a woman and her *khālah* (maternal aunt) at the same time. This is a *qiyas* ruling based on nearness of blood relationship.

- *Allah* prohibited the *nikāh* (marriage) to an *umm murdi'ah* (foster mother) and *ukht min al-rada'ah* (foster sister). The Prophet (s.a.w.s) extended the prohibition to include all relatives who are related by *nasab*. This is *qiyas* of the *qarabah nasabiyyah* (blood relations) on the *qarabah bi al-rada'ah*

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   *Al-Munjid*, p. 662.  

   *Buḥūgh al-Sūl*, p. 88.  
(relations through fostering).¹ In similar vein the fuqaha' applied qiyas to al-waqf applying the laws of al-wasâyâ to it due to their similarity, and also applied the laws of al-bai' (sale) on al-ijarah (leasing) by qiyâs as al-bai' (sale ) is the transfer of ownership while al-ijarah (lease) is the transfer of benefit without ownership.²

1.3.4.4 Al-İstihsân (Refined Analogy):

İstihsân is derived from istahsana meaning "to think something to be good".³ In the shari‘ah, al-istihsân means: "the suspension of the hukm by qiyas for a hukm better than it or which necessitates it."⁴ This is a standard definition; there are some variations by fuqaha’ based on the scope of their application of this law. From the above definition, al-istihsân can be seen as the opposite of qiyâs. Al-istihsân are of two kinds;
- istihsân qiyâsî, and
- istihsân darâruah.

İstihsân qiyâsî is actually a form of finer qiyâs which hanafi fuqaha' (hanafi jurists) call al-qiyâs al-khâfi. Al-istihsân is thus the departure from al-qiyâs al-zâhir (apparent analogy) to a more refined form which is stronger and more just. An example of this is that one of the accepted law principles in

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¹ Usul al-Fiqh, pp. 248 - 249.
² Al-Madkhal al-Fiqhi al-'Amm, Vol 1 pp. 77 - 78.
³ Lisan al-'Arab, Vol 2 p. 879.
⁵ Al-Munjid, p. 134.
⁷ Adillah al-Tashri‘, pp. 157 - 158.
⁸ Al-Madkhal al-Fiqhi al-'Amm, Vol 1 p. 83.
shari'ah is that a person's iqra' (admission) of an act is taken as valid for him and not for others. Thus, if someone claims that he and his brother owe someone, the claimant's claim is taken against him as an acknowledgement but not that of his brother until the brother himself acknowledges that. From this rule, if someone claims to be the wakil (agent) of another in the matter of collecting a debt of a da'ain ghā'ib (absent creditor) and the madin (debtor) accepts that wikālah (agency), he is under obligation to hand the money to the wakil as he acknowledged the wikālah. This is by qiyyās. However, by al-istihsan the madin must not pay the wakil, for the da'īn (creditor) might return and disclaim any instruction given to the wakil. This is to protect the rights of the parties involved and prevent fraud. In essence, thus, al-istihsan, is actually another form of qiyyās.

Al-istihsān al-darūrah is the departure from qiyyās due to necessity or maslahah (benefit) demanding it to prevent hardship or need. As the wadi' (depositee) is the same as the amīn (one you entrust with something) in that, if anything is placed in their care and it perishes or is destroyed without negligence on their part, then they are not bound to compensate the owner. On the basis of this principle, the fuqahā' differentiated between the ajir khass who is a permanent employee and the ajir mushtarak who is that employee who sells his labour to different people and is not in their continuous permanent employ, like someone doing carpentry for different people. In the case of the ajir mushtarak, the fuqahā' obligate on him compensation if the goods of the owners are destroyed or lost while in his care save in
circumstances which are beyond his control like a fire not caused by him or by his carelessness. The reason for this ḍaman (liability) is to prevent him taking too much work due to greed for profit and causing harm to the owners. This is by ruling of al-istiḥsān al-darurah. Ḥukm al-qiyyās (ruling by analogy) will absolve him and cause harm and loss to the owners.¹

1.3.4.5 *Al-İstislah Or al-Masalih al-Mursalah* (Public Interest):

*Al-İstislah* literally means "acquiring benefit."² In shari‘ah it means: "founding shari‘ah laws based on the principle of benefit to Muslims where such an issue has no ruling by any shari‘ah text nor ijma‘ and there is a need for such a ḥukm."³ *Al-İstislah* is based on the principle of jalb al-manfä‘ah (procuring benefit) and sadd al-mafsadah (preventing harm and evil) from the Muslims.⁴ In its application, the fuqaha‘ who use *al-İstislah*, use it in all spheres of Muslim life and activity - *al-din* (religious duties), *al-nafs* (persons), *al-‘aql* (the mind), *al-nasl* (offspring), and *al-mal* (wealth and possessions) on condition that *halal* (the lawful) is not made haram (unlawful) and vice versa.

On reviewing the entire shari‘ah structure and its laws, one finds that the shari‘ah is based on the principle of jalb al-manfä‘ah and

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¹ Al-Madkhal al-Fiqhi al-‘Amm, Vol 1 pp. 84 - 89.
² Lisan al-‘Arab, Vol 4 p. 2479.
⁴ Al-Munjid, p. 432.
⁵ Maşadır al-Tashri‘ al-Islami, p. 85.
⁶ Adillah al-Tashrī‘, p. 190.
⁷ Sharh Mukhtasar al-Rawdah, Vol 3 p. 204.
sadd mafsadah. For example, the entire system of the Shari' in al halāl wa al-ḥarām (the lawful and unlawful) is based on this principle in all matters be it theological, like ordering with virtue and abstention from sin, or in economics, like permitting fair trade and prohibiting ribā (usury), commanding with nikāh and prohibiting sīfāh (lewdness) in family life, ruling that the qadā, in the administration of justice, function independently from people's whims to secure fairness etc. In this sense, al-istiṣlaḥ is not bid'ah (an innovation) nor in conflict with shari'ah.¹ The concept of al-istiṣlaḥ, features in the Qur'ān itself:

"Say: My Lord has forbidden only those indecencies (such of them) that are apparent and such as are within (hidden): (and He forbade) sin, wrongful oppression and that you should associate with Allāh that which no warrant has been revealed, and that you say nothing concerning Allāh of which you have no knowledge."²

1.3.4.6 Sadd Al-Dhara'i (Blocking The Ways To Evil And Sin):

Dhara'i is the plural of dhari'ah which, literally, means "a way which is resorted to by a person in any matter."³ In the shari'ah it means: "ways and means of preventing any evil or sin or blocking the ways and avenues which may

¹ Adillah al-Tashri‘, p. 190.
Al-Qadā wa Nizamuhu, pp. 374 - 375.
Al-Madkhal al-Fiqhī al-'Amm, Vol 1 pp. 98 - 100.

² Al-Qur’ān, Chapter 7: 33.

Al-Munjid, p. 235.
lead to evil and sin." Many a time we find in shari'ah that the Shari' prohibited an act, not because the act itself was sinful, but the act is open to abuse and can lead to sin. Examples are: prohibition on reviling the pagans so that they may not revile Allah and He prohibited the mu'taddah (woman in period of waiting) to marry at ṭalāq (divorce) or wafat (death) of her spouse as to prevent mixing or confusion in nasab. There are examples (s.a.w.s) of the practice of sadd al-dhara'i by the Prophet (s.a.w). He (s.a.w.s) prohibited the madīn of paying his da'in (creditor) in kind in addition to repaying his loan to prevent riba from being practised in an obscure way. The saḥābah of the Prophet (s.a.w.s) ruled irtih (inheritance) to be due to the mutallaqah bā'īnah (irrevocably divorced woman) when her husband divorces her in a state of illness from which he eventually dies, in order to prevent him from using ṭalāq as a means of denying his wife her rightful share of his tarikah (estate). Some fuqaha' deal with sadd al-dhara'i under al-istislah as they consider it of that category.

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1 Al-Madkhal al-Fiqhi al-'Amm, Vol 1 p. 106.
2 Al-Madkhal li Dirāsah al-Shari'ah al-Islamiyyah, pp. 203 - 204.
4 Al-Qur'ān, Chapter 6: 108.
1.3.4.7 *Al-'Urf* (Custom):

'Urf literally means *ma'rifah* which means "knowledge".¹ The *Qur'an* uses 'urf to mean "good and virtuous": "Practise forgiveness, (and) command good ('urf)...."³ Some *muʿassirūn* (exegetists) state that *al-'urf* in this *ayah* means "abstention from sin, acknowledging your kin and preparing for the Hereafter".⁴ In the *shari'ah*, *al-'urf* is defined as: "that which the people accept and practice be it by word, practice or abstention."⁵ *Al-'urf* is of two kinds, namely, *al-'urf al-sahih* (proper and lawful custom) and *al-'urf al-fasid* (invalid custom).

*Al-'urf al-sahih* is that kind of 'urf which does not clash with any *shari'ah* laws of *ḥalāl* and *ḥarām* nor does it abrogate any of the *mabādi'* (principles) of *shari'ah*. On the other hand, *al-'urf al-fasid* is that practice which abrogates *shari'ah* laws.⁶ Before *al-'urf* is acceptable by *shari'ah*, it must conform to certain *shurūṭ* which are:

- the 'urf must be practised in the land or locality.

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³ *Al-Munjid*, p. 500.
⁸ *Al-Qāda wa Nizāmuḥu*, p. 375.
⁹ *Al-Madkhāl li Dirāṣah al-Shari'ah al-Islamiyyah*, p. 205.
⁰ *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1, p. 142.
the 'urf must not clash with any shari'ah laws already applicable in shari'ah and must not undo any of the laws of ḥalāl and ḥarām.

One of the peculiarities of al-'urf, is that it changes with changing circumstances while one form may be present in a certain country and not in another. Uniformity in 'urf is thus never found.

Recognising 'urf is beneficial to people and the latter is a principle in shari'ah itself as the Shari' had incorporated 'arāf (customs) of the people into shari'ah when these were not repugnant to shari'ah and its maqāsid (aims). Al-'urf, thus, cannot be a bid'ah (innovation). Non recognition of al-'urf will bring hardship to people which in itself is at variance with the maqāsid (aims) of shari'ah. The Qur'an itself states:

"He (God) had chosen you and has imposed no difficulties on you in the religion (of Islam)."

Elsewhere in Qur'an, a similar meaning is expressed.

The mashruʿiyyah of al-'urf is taken from the aims and qualities expressed in the ayah on 'urf mentioned previously, but most take the text of ibn Masʿud stating: "that which the Muslims see as good, is good for them." Al-qawa'id al-fiqhīyyah (fundamental legal principles) are extracted from or based on al-'urf (custom) namely:

- custom is law.
- word usage is subject to the customary meaning of such words.

1 Al-Qur'an, Chapter 22: 78.
that which is accepted by custom is as that which had been legally set.

specification by custom is as specification by shari'ah text.

An example of 'urf is the usage of traders who register sales in their records without ishhad (witnessing).¹

The Majma’ al-Fiqhi al-Islami² declared in their fatwā that the faqih and the mufti must not just consult and depend on fiqh works, but must take cognisance of the changing al-‘araf in their societies (in matters of a judicial and dispensation nature).³

### 1.3.4.8 Qawl Or Madhhab (School Of Law) Of A Sahabi:

By this is meant the fatwā (legal dispensation) of a sahābi of the Prophet (s.a.w.s) who is a mujtahid. After the Prophet (s.a.w.s) death, the learned in shari'ah of his sahābah, gave fatwa (legal dispensations in shari'ah) to those who asked them for hukm on a given mas'alah (problem). This authority is given in the Qur’an⁴ as previously stated. The narration of a sahābi of the Prophet (s.a.w.s) is hadith or sunnah and not classifiable under qawl al-sahabi. It is the individual fatwā that

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¹ Masadir al-Tashri', pp. 146 - 147.
² Al-Madkhal li Dirāsah al-Shari'ah al-Islamiyyah, pp. 205 - 207.
³ Al-Madkhal al-Fiqhi al-'Amm, pp. 143 - 148.
⁴ Al-Qur’an, Chapter 4: 83.
is under discussion here. It is a rule that a sahābi of the Prophet (s.a.w.s) of equal standing in shari'ah is not obliged to accept the ruling of his counterpart.

The fuqahā' differ on the use of the qawl al-sahābi. Some maintain that the fatwa al-sahābi must take precedence over the ijtihad al-mujtahid (legal opinion of a legist). Their reasoning is that these people were present with the Prophet (s.a.w.s) when the revelation was being revealed and thus their margin of error in judgment is much smaller than those who were not present with the Prophet (s.a.w.s). Abu Ḥanīfah, Malik, al-Shafi‘i and Ahmad bin Hanbal (born 164 AH/780 CE) all subscribe to this. Qawl al-sahābi is one of the principles of the Hanbali madhhab (Hanbali school of jurisprudence). The other group state that it is necessary to follow the Qur‘ān and the sunnah. Ijtihad, according to them, is subject to error as the human factor enters and as such there is no difference between a sahābi of the Prophet (s.a.w.s) and other mujtahidūn of later eras. Some fuqahā’ rule that when qiyas clashes with qawl al-sahābi, the latter is used. Qawl al-sahābi also restricts the meaning of a Quranic ayah of general meaning.

1.3.4.9 Al-Istīṣḥāb (Confirming An Existing Situation):

Al-istiṣḥāb is the noun of istaṣḥaba which literally means "to have something or someone accompanying you or ask someone to accompany

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1 Awda‘ al-Tashrī‘iyyah, p. 124.
   Al-Qada wa Nizamuhu, pp. 370 – 382.
3 Sharh Mukhtasar al-Rawdah, Vol 3 pp. 185.
In the *shari’ah* it means: "the acceptance of a situation which presently exists until there is proof to the contrary or it is the acceptance of the validity of an issue proven to be valid in the past until the contrary is proven." As *al-istishāb* only confirms a previous situation or condition, it is the weakest of all forms of *ijtihad*. It is not allowed to resort to it save after having searched for a proof pertaining to a given situation and only after finding none, may recourse be made to *al-istishāb*. Malikis, most Shafi’is and Hanbalis accept *al-istishāb* as a valid *shari’ah* proof, while Hanafis reject it.

Three of the *al-qawā'id al-kulliyah* emanate from *al-istishāb* and they are:

- all things are *ḥalal* until it is proven *ḥaram* by proper process of *shari’ah*. This principle is supported by the Qur’ān:

  "He it is who created for you all that is on the earth..."\(^4\) and also, "...and has made of service unto you whatsoever is in the heavens and whatsoever is on the earth."\(^5\)

The same rule of validity is found in *al-mu'amalat* in that all *'uqud* are valid when no *shari’ah* text or precedent prohibits it.

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A known or established situation or issue is not ruled invalid by a doubt. Thus, if it is known that someone is married to someone, that nikah is existent and doubt does not cancel it nor interfere with its consequences.

- in the qaḍa process, any person is innocent until proven guilty by due process established by shari'ah. Likewise, if someone claims any right from someone else, he is taken as not to have that right until his claim had been proven by a shari'ah process.
- an existing situation remains. From here the rule that a person known to be alive or to have been alive, is not presumed dead until proven so. This is one of the main laws of the mafqūd (missing person).

1.3.5 Adwar Al-Fiqh (Stages Of Development Of Fiqh):

The development of fiqh has two main spheres, namely the ahd al-nubuwwah (prophetic era) and the ahd ma ba'd al-nubuwwah (the post prophetic era). Both had their peculiarities. These two eras, especially the latter one, took time to develop. These developments will now briefly be dealt with to complete this chapter and give a composite view the development of fiqh.

1.3.5.1 Ahd Nabawi (The Prophetic Era):

This era is characterised by the strong central figure of the Prophet (s.a.w.s) who received revelation and to whom all referred all matters of law. There was, thus, in this era, the completion of revelation with the Prophet

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1 Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah, pp. 213 - 214.
(s.a.w.s) interpreting it by word and deed. The revelation itself had peculiar and interesting traits, like the Makkī revelations having to do with everything besides law, while the Madani (Medinite) era dealt virtually completely with law. The revelation in its entirety of 23 years is noted for its tadarruj (gradual) approach to matters of law, for example, intoxicants being phased out and ruled unlawful by three different sets of āyat at different times. This is the issue of naskh (abrogation). Removing haraj (hardship) from people which the Qur'an itself manifest like exemption for siyam (fasting) in Ramadan and exemption for trade in the absence of witnesses whilst on travel. Ijtihād was very limited and not independent as it was subject to revelation as pointed out earlier. These are the main peculiarities of the prophetic era.

1.3.5.2 Ahd Ba'd Ahd al-Nabawi (Post Prophetic Era):

This era is divided primarily into the era of al-khulafa' al-rāshidun and that after them. The era of the al-khulafa' al-rashidun is characterised by the continuation of the Prophetic style in shari'ah, basing ahkam on

Ibid, Chapter 4: 43
Ibid, Chapter 5: 90.
4. Ibid, Chapter 2: 283.
Al-Madkhal al-Fiqhī al-'Amm, Vol 1 pp. 159 - 166.
Qur'an and sunnah and the founding of al-ijma' al-ummah and the rise of the mujahidun who all founded their rulings on the existing shari'ah principles and precedents set by the Qur'an and by the Prophet (s.a.w.s) himself during his lifetime. The latter two procedures are obvious as wahy had permanently ceased and so also prophethood. There was thus not an independent system of law being invented as is common knowledge amongst so many orientalists and the like, but the "new" (that which was not mentioned by name in existing shari'ah texts) situations that arose were dealt with in terms of the known shari'ah principles and procedures. Ijtihad became very important to bring all acts into shari'ah ambit.1

As for the post al-khulafa' al-rashidun era, this is best explained by the stages fiqh passed through in its accommodation with the lives of people and the State but staying within the spheres mapped out by the fuqaha' of the era of the al-khulafa' al-rashidun.

There were, basically, four main stages this process passed through. The first of these phases is the period of the middle of the first century hijrah to the second century. This saw the dispersing of the sahābah and the fuqaha' through the lands with their al-madaris al-fiqhiyyah (juridical schools). Ibn Mas'ud in Iraq, Zaid bin Thābit and ibn 'Umar in al-Madinah and ibn 'Abbās in Makkah were the main fuqaha' of this era from whom the Muslims

1 Al-Madkhal al-Fiqhi al-'Amm, Vol 1 pp. 167 - 170. 
Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah, pp. 118 - 121. 
Ta'rikh al-Tashri' al-Islāmi, pp. 87 - 90. 
learnt. After them their students, the fuqaha’ al-tabi’in (second generation jurists who graduated from the companions of the Prophet) carried on. Ibn Musaiyib in al-Madinah, 'Ata’á ibn Abi Rabbah in Makkah, Ibrahim al-Nakha’i (one of Abu Hanifah’s teachers) in al-Kufah, al-Hasan al-Baṣrī in al-Baṣrah, Makhul in al-Shām and Tawus in al-Yaman. This era saw the crystallisation of the two major schools of thought in fiqh, namely, ahl al-hadith (followers of the purely textual system of law) and ahl al-ra’i (followers of juristic rulings). The ahl al-hadith having risen in al-Madinah needed virtually no analogical deductions in law as their lives were plain and simple, while the ahl al-ra’i arose in provinces where ancient civilisations existed previously and where a profusion of cultures and customs existed, notably Iraq. Fiqh now became iftirādī (suppositional) as opposed to the only waqī‘ī (law according to actual happenings) model. Instruments of ra’i (analogical deduction) were profusely used such as al-qiyyās (analogy), al-istislah (procuring of public benefit) and al-istihsan (a refined form of analogy). Fiqh al-shi’ah (shi’ah jurisprudence) of which the zaidiyyah, the nearest to ahl al-sunnah (sunnis) and founded by Zaid bin ‘Ali Zain al-‘Abidin from whom Abu Hanifah reportedly learnt, appeared.

1 'Alam al-Muwaqqi’in, Vol 1 p. 21.
2 the old Roman province of Syria.
3 Al-Shari’ah al-Islāmiyyah, pp. 13 - 14.
The next period is from the second century till the fourth century hijrah. This is called the golden era of fiqh in which it became voluminous in content and scope. Many madhahib fiqhiyyah (schools of law) were founded, amongst them the known schools of hanafiyah, malikiyyah, shafi’iyah and hanbalis. Al-fiqh al-iftirādī (suppositional jurisprudence) increased greatly but, at times dealt with issues which were impossible to occur in reality. Substantial recording of the al-madhahib al-fiqhiyyah took place like Muhammad bin Hasan al-Shaibani recording and systemising the ḥanafi madhab (ḥanafi juridical school). Malik’s Muwatta’ as well as al-Shafi’i’s al-Umm also appeared. Usul al-fiqh, previously used by the savants of fiqh but unrecorded was now recorded. The first book on this subject being Risālah al-Usul by al-Shafi’i. The al-qawa'id al-fiqhiyyah formulated from the Qur’ān and sunnah of the Prophet, used by the savants of fiqh (jurisprudence) in previous eras, were also recorded in this era.¹

In the next era, which covers the period of the middle of the fourth century till the seventh century hijrah, ijtihad slowed down considerably. The fuqaha’ al-madhahib (jurists of the juridical schools) now resorted to refinement of their respective sectarian fiqh works. This also applied to the presently known madhahib fiqhiyyah of the ḥanafis, malikis, shafi’is and hanbalis. The door of ijtihad was

closed by the fuqaha’ of the four madhhab\(^1\) fearing the ignorant dabbling in \(ijtihad\) and distorting the entire system of \(shari’ah\) and not that \(ijtihad\) had ended. This fear was based on the general slackening and weakening of the general Muslim public’s attention to \(shari’ah\). Sectarianism arose in this era in that fuqaha’ of each \(madhhab\) paying attention to their own school only and imitating the previous masters and doubting their own juristic capabilities. In this era, also, the Islamic State, began employing sectarian law for administration of the all facets of Muslim life.\(^2\) The Abbasides, for example, used the \(hanafi\) code. Tadwin (recording) of works were minimal as \(ahkam\) arrived at by the predecessors were used which gave rise to \(taqlid\) (imitation) of a specific \(madhhab\). A form of \(ijma’ al-jama’ah\) (group consensus) in \(fiqh\) came to the fore and based on the \(shura\) (mutual consultation) of fuqaha’. Malikis, especially, made use of this and adapted their \(al-ahkam al-ijtihadiyyah\) (laws based on juristic inference) when ‘araf of the people changed but subject to \(shari’ah\) laws herein. \(Kutub fatawa\) (books of legal opinions) also made their appearance. Strong sectarianism prevailed with fuqaha’ of one \(madhhab\) discussing and criticising the rulings and views of other fuqaha’ of other \(madhhab\). This sometimes reached awkward proportions. Noticeably absent from this foray were the \(malikis\).\(^3\)

\(^1\) they are the \(hanafis, malikis, shafi’is, and hanbalis.\)
The next phase covered the period from the seventh century *hijrah* till the appearance of the *Al-Majallah al-‘Adliyyah* in 1286 *hijrah*. During this period, *fiqh* became static and eventually petrified due to the neglect of the application of *ijtihād*. Despite this general trend, some brilliant *fuqaha’* appeared from time to time. A system of rectification and editing of *fiqh* works now continued. *Fiqh* was now studied from a specific book of a *madhhab* and understood as it was with no reference to other *madhahib* nor the *shari‘ah* generally nor *fiqh* in its wide sense. Compilations in *fiqh* were very limited. The system of *mutūn* (texts) appeared in which a huge work was condensed to a very small booklet and sometimes set completely to rhyme. A *faqih* would explain the work which was then called a *sharḥ* (explanation) of the work and another *faqih* would comment on that *sharḥ* (explanatory text) and his work was then called a *khāshiyyah*. Another *faqih* would write notes on the *khāshiyyah* which was called a *taqrīr*. This system gave rise to note writing on texts.

During this era the *al-kutub al-fatawā* became numerous. These works’ subject matter was listed as it appeared in *fiqh* works, but they were always strictly sectarian in content. An example hereof is *Al-Fatāwā al-Tartāriyyah*. During this period the ‘Uthmānī (Ottoman) sultan issued *irādat sultāniyyah* (royal sultanate decrees) where administrative rules for certain *fiqh* issues were introduced, like limiting the time during which a case had to be raised. This is called *taqadum*. Sometimes the *hukm marjūh* (weaker juridical ruling), when the need arose

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1 *Al-Shari‘ah al-Islamiyyah*, p. 15.
for it, was sanctioned by such *iradat* (decrees). The latter right a Muslim ruler has in *shari'ah*. Towards the end of this era, *taqnin* (codification) came into being. *Fiqh* laws were now amended and rulings from other *madhāhib* were used. This came too late to re-enliven *fiqh* and rid Muslim society of the narrowness of negative sectarianism. The *Uthmani* State used, basically, *hanafi* law for centuries.¹

Following the latter *Uthmani* pattern, the Arab States took to codification. In 1920 Egypt codified *fiqh* laws pertaining to Muslim family life and enacted it as Act 25. In 1929 laws of *ṭalaq*, court procedure, *nasab* etc were codified while Act 77 of 1943 dealt with *mīrāth* and Act 71 of 1936 dealing with *waṣāya* (legacies). Act 48 of 1946 as well as Act 180 of 1952 dealt with *waqf*. In Iraq Muslim family law was codified as Act 188 of 1959 and dealt with *nikāh*, *ṣadaq* (dowry), *ṭalaq*, *nafaqah*, *ḥadānah*, *nasab*, *mīrāth* and related matters. Jordan codified its family *fiqh* laws as Act 92 of 1951 and which deals with most aspects of Muslim family life such as *nikāh*, *ṭalaq* etc. Syria codified its Muslim Family Law Act as Act 59 of 1953 wherein both *mīrāth* and *waṣāya* are incorporated.²

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¹ *Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah*, pp. 150 - 152.
² *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1 pp. 197 - 204.
CHAPTER 2

AL-WILAYAT (GUARDIANSHIP) AND AL-TABANNA (ADOPTION)

1 AL-WILAYAT

1.1 Definition:

The word wilayat is derived from the Arabic verb waliya which means naṣir i.e. a helper. Wilayat literally means nusrah, and its noun agent is wali. In shari'ah, wilayat is defined as "the right in shari'ah by which a person has the full authority over another person's affairs."

1.2. Kinds Of Wilayat:

Wilayat is divided into two main divisions, namely:
- al-wilayat al-'āmmah (public guardianship), and
- al-wilayat al-khāṣṣah (specialised or personal guardianship).

Al-wilayat al-'āmmah is the wilayah of al-imam al-akbar (i.e the khalīfah - caliph or ruler of the Muslims), or the sultan (Muslim ruling authority) or the qādi (Muslim judge). Their wilayat encompasses all the persons that fall under their jurisdiction.

Al-wilayat al-khāṣṣah is the wilayat the abb (father) over his walad shari' (legitimate child) or of the jadd, abb al-abb (paternal grandfather) over his hafid shari' (paternal grandchild). It is likewise the wilayat of the wasī (curator) or that of the qaiyim (righteous Muslim

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2 Līsān al-‘Arab, Vol 6 p. 4920.
person) or the wilāyat of the mutawalli\(^1\) (manager) of a waqf.\(^2\)

Al-wilāyat is further classified, as regards its applicable powers and scope into two, namely:
- al-wilāyat al-dhātiyyah (natural guardianship), and,
- al-wilāyat al-muktasibah (acquired guardianship).

Al-wilāyat al-dhātiyyah is that form of wilāyat which is natural to the person and he does not acquire it. This form of wilāyat cannot normally be revoked nor can it be refused. An example hereof is the wilāyat of the father over his walad shari'.

Al-wilāyat al-muktasibah is, as its name indicates, acquired by someone and may be revoked or can be refused. An example hereof is the wilāyat of the wasi (curator) and the qādi.

Al-wilāyat is further classified, as far as its effect on persons are concerned, into two:
- al-wilāyat 'alā al-nafs (guardianship over persons),
- al-wilāyat 'alā al-māl (guardianship over wealth and possessions).\(^3\)

Some, like the late shaikh Abū Zahrah classify it into three, namely al-wilāyat 'alā al-nafs, al-wilāyat 'ala al-māl and al-wilāyat al-tarbiyah or al-wilāyat al-hadānah.\(^4\)

It is, thus, obvious that wilāyat has mostly to do with the wilāyat on persons in its various forms.

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1 Waqf (endowment) property is never owned by a trustee as the case may be in secular law. A mutawalli only manages a waqf and as such the term "manager" is more suitable here.

2 Al-Wilayah wa al-Wisayah, p. 2.

3 Ibid, pp. 2 - 3.

1.2.1 *Al-Wilayat 'alā al-Nafs* (Guardianship Over Persons):

There are two categories under this heading, and they are *wilāyat al-ḥifz wa al-tarbiyyah* (guardianship of protection and upbringing) and *wilāyat al-nikāh wa al-tazwij* (guardianship of marriage) in its various forms. By *wilāyat al-ḥifz wa al-tarbiyyah* is meant the guardianship of protection and upbringing of sagha'ir (minors). The fuqaha' have defined this period of upbringing as from birth and as far as males are concerned, until "he reaches a stage where he has attained some independence like eating, dressing and performing the ablutions by himself". This age is ruled by some of the fuqaha', like hanafis, as seven years\(^1\) while others rule nine years as the maximum. For females, some fuqaha' rule it to be nine years while others rule eleven years.\(^2\) This difference of opinion is due to *ijtihād* as there is no Qur'anic nor sunnah law herein.\(^3\) Wilāyat on persons is based on two important considerations, namely, the protection and upbringing of minors and the special protection for females minors until puberty and till their nikāh.\(^4\)

The expenses incurred in *ḥadānah* is for the father to bear and in his absence the Muslim male who succeeds to the *wilāyat* after him. *Hadanat* is thus a joint kind of care for the *saghir* (minor) by both his *umm* (mother), and father or he who deputises for him by *shari'ah* laws.


\(^2\) *Al-Wilayah wa al-Wiṣayah*, pp. 9 - 10.


\(^4\) *Al-Wilayah wa al-Wiṣayah*, pp. 9 - 10.
(a) **Hadanat al-Saghir (Custody Of The Minors):**

Hadanat al-saghir means the custodial care of a minor. The word hadanat and hidanat is derived from the verb hadana which means "to attach to oneself and protect as does a brooding bird with its eggs when it draws it to its body and spreads its wings over it". The linguist al-Jawhari gives this explanation. It also means "to keep to your chest and embrace." Hadanat al-sabi means "to rear a child". The hadin and hadinat are taxed with the responsibility of bringing up a minor child.1 Hadanat is thus the rearing and upbringing of sagha'ir (minors) while hadanat is the place where this is done.2 The linguistic meaning of hadanat has the attributes of caring, protection, rearing and upbringing which the shari'ah prescribes. The shari'ah sources use the word hadanat in their works as it has the same meaning as hidanat.3 In the shari'ah, hadanat is defined as "the attaching of a saghir to a person due to the latter's capacity to care for himself and for such a (mature) person to protect, care, rear

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2 *Al-Munjid*, p. 139.
and bring up to *saghir*.*\(^1\) Since this *amanah* (trust) is to be entrusted to a responsible person who is to care for a weak and defenceless *saghir*, to shape his early vision of life and matters related thereto, the *shari'ah* has given this right to the *umm* of the *saghir* (minor) and the *maharim* (prohibitive range)*\(^2\) women of her, due to the mother and these *maharim* being best suited for this task.*\(^3\) The *fuqaha* state that the mother has more ability in rearing a *saghir* and is better equipped, more compassionate, and accommodating to a defenceless *saghir* than the father. They further mention that the *maharim* women on the mother’s side precede the *maharim* on the father’s side due to the former being like the mother in nature towards the *saghir*.*\(^4\)

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*\(^1\)* i.e. those women who are permanently prohibited to the male minor in marriage.

*\(^2\)* i.e. those women who are permanently prohibited to the male minor in marriage.


*\(^4\)* Al-Sharih al-Islâmiyyah, p. 404.

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Al-Wilâyah wa al-Wisâyah, p. 4.
The father has the *wilāyat 'alā al-nafs wa 'alā al-māl* over the *saghir* in these formative years.¹ In real terms this is actually more of a responsibility than a right.

(i) **Definition Of A Saghir:**

A *saghir* is also called a *tifl* (fem *tiflah*) if of tender age. This is the *infans* in secular law. There is consensus by the *fuqahā’* that *haḍānat* takes place from birth, but they differ on the termination of this care period as pointed out previously. At the end of this period, *hanafis* rule that both the *saghir* (male minor) and *saghīrah* (female minor) must go and live with their father as he is capable to see to their upbringing from this point of time². The deciding issue here appears to be discipline. *Mālik* rules that the *saghir* may stay with his mother until *bulugh* (puberty) while the *saghīrah* shall stay with the mother until she marries and her *nikāh* (marriage) is consummated.³ *Mālik* is of the opinion that children do not have the ability to choose where to

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¹ *Al-Wilāyah wa al-Wiṣāyah*, p. 3.


³ *Al-Durr al-Mukhtār 'ala Matn Tanwir al-Abṣār*, Vol 2 p. 1054 (No publisher or printer mentioned probably an old Ottoman era work).


live at the end of their hadānat. Al-Shāfi‘ī and Ahmad permit the saghā‘ir, at the end of their hadānat, to choose with which parent they wish to reside. The latter two fuqaha’ based their ruling on a hadith of the Prophet (s.a.w.s) narrated by Abū Hurairah and transmitted by Ahmad, al-Tirmidhi, al-Nasā‘ī and ibn Majah.

When boys reach the end of their custodial period, wilāyat ‘ala al-nafs ends for them by consent of all the fuqaha’. When girls reach bulugh, the fuqaha’ differ on their capacity to contract their nikah. There is no restriction on any other form of ‘aqd they wish to contract. The hanafis rule that a bikr mukallaf (pubescent never married virgin female) has the right to contract her own nikah and that the intervention of the wali is good to avoid accusations of loose morals, but is not required. Her wali has no right of itirad (objection) if she marries within her rank and with a sādaq mithl


Al-Anṣarī Z: Minhāj al-Tullāb, Cairo, Maktabah Mustafa al-Halabi, undated, p. 110.


(customary dowry in a family) or more. Hanafis base their argument on two Quranic texts which, according to their interpretation, attribute the act of nikah to women. They further state that women may contract any contract by consent of all fuqaha' so they should be able to contract their own nikah also. Hadith referring to wilayat on women in nikah must be construed to mean women who have no ahliyyah (legal standing). All the other fuqaha' rule that the bikr mukallaf (never married virgin) may not contract her nikah without the consent of her wali, but she must consent to the nikah herself. A forced nikah without the woman's consent is void in standing according to hadith text of Hansa bint Juth' am and ibn 'Abbâs. They quote Quranic texts that show that wilayat is in male hands as well as hadith texts by 'A'ishah stating that the marriage of a woman without the consent of her wali is void but her sadaq is due to her if that marriage was consummated and if her wali refuses consent, (then) the sultan

1 Al-Qur'an, Chapter 2: 230. 


4 Al-Qur'an, Chapter 2: 221 & 232. 
Ibid, Chapter 24: 32.
(ruling Muslim authority) is the wali of the one without a wali. This text is also transmitted by Ahmad and ibn Majah. This view of wilayat is also the view of 'Umar and 'Ali (d. 40 AH), the fourth khalifah, of the fuqaha' of the sahabah, and ibn Musaiyib and Hasan al-Baṣri of the fuqaha' of the tabi'ün. It is also the view of the fuqaha' al-Thawrī, Malik, ibn Ḥazm, al-Ṭabarī et al.}

Irrespective of the differences between the fuqaha' in this matter, hadīth texts are transmitted by ibn 'Abbās reveal that the Prophet (s.a.w.s) required the consent of women being married off and 'Abd Allāh bin Buraidah narrated the case of a woman whose father had married her off without her consent and the Prophet (s.a.w.s) gave her a choice in the matter – either having it annulled or carrying on with the nikah.

All the fuqaha' agree that the non mukallaf (non pubescent) child and one who is mukallaf, but mentally defective...
in any degree or form, is subject to the al-wilāyat al-ijbar (compulsory guardianship) of their wali who can marry them off without their consent if it is in their interest. This applies especially to the mentally defective. In the case of a saghir 'aqil (sane minor) whether male or female, the nikāh enacted by their wali is valid with the saghir having a choice at becoming mukallaf but not the saghirah. Al-Shāfi‘ī, states that the saghirah should not be married off before she becomes mukallaf so that she can consent to her nikāh. It is conditional in the nikāh of the saghirah that they be married off only if it is in their interest and then to someone of their societal standing and rank.¹

Some fuqaha’ rule that only the father and paternal grandfather may marry off a saghir, the reasoning being here that they will not, usually, place their children’s lives in jeopardy. Inkāh (marrying off) saghirah is now forbidden in the Muslim world due to the fear of materialism intervening in this

matter and *saghāʾir* being subjected to harm. Institutions of State exist for the protection and welfare of *saghāʾir* nowadays. In *hanafi fiqh*, only minors have *wilāyat al-tazwīj* over them. Those who have this right are, the *ibn* (son) how lowsoever followed by the father, the father’s father how highsoever, the *akh* (brother) and the *ʿamm* (paternal uncle), the *shaqīq* (full category) preceding the consanguineous category. If none of these *ʿasabah* (agnates) are found, females succeed and they are the mother and the rest of the *arḥam* (uterine relatives).

Malikis differ amongst themselves on the order of males meriting *ḥadānat* after the meriting females. The most suitable pattern hereof is the father then the *wasi* (curator appointed by the guardian), then the *akh shaqīq* (full brother) followed by the *akh li abb* (consanguine brother), then the *jadd saḥīh* (father’s father). Hereafter the *qādi*. Some Malikis place the *ibn akh shaqīq* (son of the full brother) before the *akh li abb*, but let the *jadd saḥīh* precede the *ibn akh shaqīq*. Then the *ʿamm* (paternal uncles) who is followed by his son. Shafiʿis list them as the


father, then the paternal grandfather how highsoever, then the akh shaqīq, then the akh li abb, followed by their respective sons, then the 'amm shaqīq (full paternal uncle) followed 'amm li abb (consanguine uncle) and followed by their respective sons and thereafter all the 'asabah (residuaries) as in mirāth (Islamic succession law).1 There is no ḥadānāt for the non mahram.2 Ḥanbalis list them as the father, followed by the father’s father how highsoever, then the ibn followed by the ibn al-ibn (son of the son) how lowsoever, then the ikhwah (brothers), first the ashīqqā’ (full category) followed by the consanguine category and finally their respective sons how lowsoever. In another ḥanbālī pattern, the ibn precedes the grandfather and making no distinction in rank between the latter and the ikhwah (brothers). The sultan ranks last in some narrations.3

(ii) The Mashrū’iyyah (Legality) Of Ḥadānāt:

The protection of the saghā’ir and ḍu’afā’ (the weak), in general terms, is a duty imposed by the Qur’ān:

"And why should you not fight in the cause of Allāh and of those who, being

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Parents, specifically, are responsible for the rearing of their children by Quranic law:
"The mother shall give suck to their offspring for two complete years for those who wish to complete the terms (of suckling). But he (the father) shall bear the cost of their (children’s) food and clothing on equitable terms."

Hadānāt is actually founded on sunnah. Bara’ah bin ‘Azib narrated that the Prophet (s.a.w.s) awarded custody of the daughter of Hamza to her khālah after ‘Ali, Ja’far and Zaid contested custodial rights at the Prophet (s.a.w.s). He (s.a.w.s) said: "The khālah is in the place of the mother."

‘Abd Allah bin ‘Amr narrated that a woman told the Prophet (s.a.w.s): "This child I carried (in pregnancy), he drank from me and my house was his shelter. Now his father wants to take him away from me after he had divorced me." The Prophet (s.a.w.s) replied: "You have more right to him (the child) than your husband as long as you do not remarry."
(iii) **Persons Having The Right To Hadānat:**

The established right of hadānat of a saghīr, in shari‘ah, is accorded to women from the earliest age of such minors due to women, according to shari‘ah, being best inclined for this very important duty due to their 'ātf (affection), hanān (compassion) ri‘āyah (guidance), shafaqah (pity and compassion) and ṣabr (patience) in the tarbiyah (upbringing) of the of the saghīr (minor). These qualities are required for the various early stages a tifl passes through to tamyīz (discernment age) which is 7 - 9 years. This right follows a set pattern and there are some differences amongst the fuqahā‘ in the precedence of some persons meriting hadānat. These persons are: the umm al-saghīr (mother of the minor), followed by the umm al-umm (maternal grandmother) how highsoever, then the umm al-abb (paternal grandmother) how highsoever, then the shaqīqāt (full sisters) of the saghīr, then akhawat li umm (uterine sisters) of the saghīr, then the akhawat li abb (consanguine sisters), the latter superseding the khālah due to qurbah (nearness of relationship). If no akhawat mentioned are found, then the banāt of these akhawat come in the same order as the akhawat (sisters), namely, first the banāt shaqīqāt (daughters of the full sisters) then the banāt akhawat li umm (daughters of the uterine sisters). Hereafter follow the khālat
shaqiqat (full maternal aunts i.e full sister of the mother of the saghir), followed by the khālat li umm (uterine maternal aunts) and then the khālat li abb (consanguine maternal aunts) and then the banāt ākhawat li abb (daughters of the consanguine sisters).

If none of these women are found, then the bint akh shāqiq (daughter of the full brother) succeeds to the right of hadānāt, followed by bint akh li umm (daughter of the uterine brother) followed by the bint akh li abb (daughter of the consanguine brother). If none are found, then the khālah umm al-saghir (maternal aunt of the mother of the minor) succeeds, followed by the khālah ābi al-saghir (maternal aunt of the father of the minor) followed by the 'ammāt ābi al-saghir (paternal aunts of the father of the minor). After her follows the khālah ābi li umm li al-saghir (maternal uterine aunt of the father of the minor) followed by the khālah ābi li abb li al-saghir (maternal consanguine aunt of the father of the minor). This is the ḥanafi pattern. In some rulings, the khālat (maternal aunts) precede the 'ammāt (paternal aunts). This pattern of hadānāt favours women which conforms to the hadīth of hadānāt (custodial care) quoted earlier.

There is consensus amongst the fuqaha` that the umm (mother) takes precedence in hadanat.

As mentioned earlier, the fuqaha` differ on precedence in hadanat. Al-Shafi`i and al-Hadi place the father as well as the ajdad (grandfathers) before the khalah. Al-Našir, Mu`aiyid bi Allah and most fuqaha` of the shafi`is and one of Abu Hanifah’s views places the akhawat before the khalah. In the shafi’i and ḥanbalī systems, the mother is followed by all the ummahat al-umm (mothers of the mother) how highsoever, followed by the father and then the umm al-abb (mother of the father), then the jadd (paternal grandfather) followed in turn by his ummahat (mothers) how highsoever. Hereafter follows the akhawat shaqiqat (full sisters) followed by the akhawat li abb (consanguine sisters) and then by the akhawat li umm (uterine sisters), then the khalat (maternal aunts) followed in turn by the `ammāt (paternal aunts). In another ruling, Aḥmad rules that the ukht li umm (uterine sister) and khalah (maternal aunt) precede the father.

Mālik rules that the saghir be returned to his father on reaching tamyiz while the saghirah may remain with her mother till her nikāh marriage, according to one ruling, and till the

2 Al-Mughni, p. 271.
nikah is consummated, according to another ruling. This is subject to the mother not remarrying.\(^1\) Another ruling attributed to Malik states that the saghir remains with the mother until he reaches bulugh when his hadanat ends\(^2\) whether he matures as a sane or mentally defective person. His maintenance is, however, still compulsory on the father.\(^3\) Abu Hanifah allows the saghirah to remain with her mother until she becomes balighah (pubescent) or marries. When she is balighah and unmarried, she returns to her father.\(^4\)

Some fuqaha', like the hanafis, rule, that when the females meriting hadanat are exhausted, the maharim males succeed to this right. They follow in the same line as in mirath and they are, thus, the father, the jadd - abb al-abb how highsoever, the akh shaqiq, the akh li abb, followed by their sons in the order mentioned, then the 'amm shaqiq (full paternal uncle), then the 'amm li abb (consanguine paternal uncle), the ibn 'amm shaqiq (son of the full paternal

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Al-Mughni, Vol 7 p. 616.
uncle) if he merits hadanat (custodial care).¹

When none of the ‘asabat mahārim (agnates of prohibited marriage range) are found, hadanat is transferred to the mahārim of the ghair ‘asabat (non agnate) category. First in line here is the abb al-umm (mother’s father), then her (minor’s) akh li umm (uterine brother), then the ‘amm (paternal uncle) followed by the khāl shaqiq (full maternal uncle), then the khāl li abb (consanguine maternal uncle) and then the khāl li umm (uterine maternal uncle). These persons have the wilāyat al-tazwīj and as such must have the right of hadanat also.³

(iv) Shurūṭ (Conditions) Of Hadanat:

The following shurūṭ must be found in the hadinat (female meriting hadanat).

If one or more of the shurūṭ are missing, the next person in line is considered for hadanat.

- to be a Muslimah (Muslim woman). This is the view the vast majority of fuqaha’ who ruled so due to the tremendous influence of the umm on the child in religious beliefs and
cousins, irrespective of category, when they are entitled to hadanat (custodial care), they may only have a saghir (minor) of their own sex as they (cousins) are not mahārim (persons of the prohibited category in marriage).

¹ Al-Durr al-Mukhtar, Vol 2 p. 1051.
² Al-Wilayah wa al-Wisāyah, p. 5.
³ Al-Wilayah wa al-Wisāyah, p. 5.
practice. Hanafis are the only exception hereto, save that they rule that if the nonmuslim al-umm al-hadinat (custodial mother) appears to influence the Muslim saghir's religion, beliefs or practices, she is immediately relieved of hadanat.

- that she be mahram to the saghir. Thus, the mother, ukht, khalat and 'ammat qualify. The non related mahram woman like the umm al-rada'ah (foster mother) and the ukht al-rada'ah (foster sister) have no natural right to hadanat and, thus, also an ajnabiyyah (completely unrelated woman) has no right to it in the first place.

- that she be mukallafah as someone younger requires the attention of a wali.

- that she be 'aqilah (sane) and not majnunah (insane) nor ma'tu'ah (autistic or mentally deficient) as such a person is incapable of executing the onerous task of hadanat.

- that the saghir is safe in her care. This means he must be in her presence all the time and she does not leave him alone or leave him in the care of other persons who do not look after him properly during her absence from him.

- that she be of sound moral conduct, good manners and habits. If she is not, the saghir will be corrupted which defeats the aim of hadanat.
that she be unmarried or if married, then married to a man who is mahram to the saghirah. This is the hanafi view. The other fuqahā’ have different rulings hereon ranging from the right of hadanat not ending with the remarriage under any condition (mutlaqan), to ending it when she marries him at any time, to the ending of hadanat, to continuation of the right of hadanat even when she marries a relative of the saghirah and even if he is not of the maharim to the saghirah.

- that she does not live with anyone, even a relative, irrespective of what degree or strength of relationship, if such a person angers or upsets the saghir.

- that she not be a murtaddah (an apostate from Islam).

It should be noted, that when a woman lacks a shart (condition) for hadanat and she qualifies later on, the right of hadanat is returned to her. The contrary also applies.¹

(v) **Shurūt Of The Ḥadin (Male Meriting Hadanat):**

The ḥadin must fulfil the following shurūt. If one or more of those shurūt are not found, the next in line takes over the hadanat:

¹ Ahkām al-Awlād, pp. 42 – 43.
Al-Wilāyah wa al-Wiṣāyāh, pp. 6 – 7.
Al-Ahwāl al Shakhṣīyyah, p. 413.
he must be a Muslim, mukallaf and 'aqil for the same reasons as the ḥadīnāt and that he has the qudrah (strength and means) to see to the upbringing of the saghir.

- that he be of sound moral and decent conduct and ways. If he is a fasiq (evil or sinful person) he has no right to ḥadīnāt.

- that he be 'āsib (near blood relation of the agnate category) to the saghir or the nearest in rank as in the mirath scale of precedence.

- that he be mahram to the saghirah placed under his hadānāt. Thus, the ibn 'amm or ibn 'ammah (paternal cousin) or ibn khāl or ibn khalah (maternal cousin) do not qualify for the hadānāt of their female cousin, maternal or paternal. If two persons are found meriting hadānāt, then the one nearest in grade and degree of relationship takes preference. When no one is found meriting hadānāt, the qādi may place the saghir with any Muslim male or female who is capable of looking after the saghir and who is righteous and of sound and moral conduct.

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1 Ahkam al-Awlad, pp. 43 - 44.
Al-Wilayah wa al-Wisayah, p. 83.

2 Ahkam al-Awlad, p. 44.
Al-Wilayah wa al-Wisayah, pp. 5 & 12.

3 Ahkam al-Awlad, p. 44.
The patterns of persons meriting hadanat, mentioned previously, applied in a society where those rules could be applied. Family life had changed considerably these days and the rule of maqalahah al-saghīr (interest of the minor) should be the overriding factor in deciding where to place the saghīr. The qādī should be allowed to decide this. This is not a new rule or departure from shari'ah as rulings in this vein have been mentioned above.

There is also some difference amongst the fuqaha' on the issue of domicile of the hadīn and the hādīnat. The basic rule is that the nasab of the saghīr must be safeguarded, access to the other parent must not be denied when not permitted by shari'ah, nor should the saghīr be disadvantaged by the process nor should there be danger on the route he is travelling on. Only the actual parents of the saghīr has the right to transfer him to another country and no one else. The umm al-saghīr may leave the domicile of the child's father, even without his consent, if she is returning to her own country where she married the child's father, whether such a country is near or far from the domicile of the saghīr. This is ḥanafi law. Maliki, shafi'i and

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1 Al-Fiqh 'ala al-Madhahib al-Khamsah, p. 381.
Hanbali law rules the father having the right over the saghir whether he or his mother wish to travel with him. Hanafi and ja'fari law disallow the saghir's father of migrating with his walad saghir (minor child) when the mother is the hadinat of the child. This is subject to it being in the saghir's welfare and interest. Transfer to any other country, requires the consent of the abb al-saghir (minor's father). An exception to this is a "near" country which is such that the father can travel to it in the morning and return in the evening.

(vi) Hadaanat Between Haqq (A Right) And Wajib (A Necessary Duty):

Hadaanat is a haqq of both the hadinat and the saghir but that the right of the saghir is stronger than that of the hadinat at times. The umm al-saghir (mother of the minor) cannot refuse hadaanat and can be compelled to do so if there are no maharim to the saghir according to some hanafis, while the shafi'is, Malik and Ahmad, in one of the fiqh system of the imamiyyah which does not fundamentally differ from that of ahl al-sunnah (see Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah, p. 176).

1 Fiqh 'ala al-Madhahib al-KhaMsah, p. 381.
2 Ahkam al-Awlad, pp. 46 - 47.
their rulings, rule it a right to the umm al-saghîr.¹

Some fiqh laws emanate from this such as the validity of a zawjâh (wife) foregoing her right to ḥadânanût in return for ṭalâq from her husband when there is no reason for ṭalâq. However, the sâghîr’s father does not succeed to ḥadânanût, but the nearest female in the line of right of ḥadânanût succeeds in this case. If, however, the mother of a sâghîr contractually absolves herself from ḥadânanût, such a contract is invalid as she is usurping the right of someone else, namely that of the sâghîr.

If a āadin or ḥadinat is appointed to the ḥadânanût of a sâghîr and they are entitled to it shar’ân (by shari’ah), he or she cannot refuse that duty and can be compelled to carry it out. This is so due to the right the defenceless sâghîr has to ḥadânanût and his right to his welfare and interest being taken care of. This rule is applicable when there is no one else to assume ḥadânanût. If a murdî’ (wet nurse) is suckling the sâghîr, she is not to interfere with the ḥadânanût of the sâghîr (minor).² The same rule applies when the umm al- murdî’ (nursing mother) suckling her sâghîr remarries (another man) and no one is found to suckle the sâghîr or the sâghîr does not take to another wet nurse. The

² Ahkâm al-Awlad, p. 48.
new zawj cannot prevent his zawjah from suckling her saghir from the previous nikah. This again shows that the interest of the saghir is paramount.

(vii) **Istihqaq Air Al-Hadanat** (Custody Meriting Payment):

The basic rule is that a mother of a saghir, as long as she is the wife of the father of the minor, or a mu'taddah talaq al-raj'i (divorcer in period of stay of revocable divorce), cannot demand payment from the child's father for hadanat as the father of the minor provides for her in these cases. Hanafis, specifically, rule no payment due to a mutallaqah ba' inah (wife divorced irrevocably and still in 'iddah (period of stay in divorce). If her 'iddah of stay) is over, she merits payment as there is no nikah bond present. The latter rule is also applicable to any woman, other than the saghir's mother or woman of her line who has to succeed to hadanat. Payment is calculated from the time of duty of hadanat, even before the qadi had ruled on the hadanat. The one on whom the maintenance of the minor is due, is to pay the costs for hadanat.

Any woman meriting hadanat should be paid for her services to the saghir, save the mother of such a saghir, who is

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still the wife of the child's father.\(^1\) If the child has money, payment is taken from it. If not, the minor's father has to pay.\(^2\) Should a non-related person offer to pay for the \(\text{hadanat}\), it is refused and \(\text{hadanat}\) is given to the woman meriting it with the customary fee paid to her. This is \(\text{hanafi}\) law.\(^3\) Other \(\text{fuqaha}\)'s, like \(\text{shafi'i}\)'s, rule that it is not necessary for the \(\text{umm hadinat}\) to suckle her \(\text{saghir}\) nor can she be compelled if she refuse to do so. The minor's father is, then, under obligation to find a \(\text{murdi}'\) to suckle the \(\text{saghir}\). The majority of the \(\text{shafi'i}\)'s jurists rule that the \(\text{umm hadinat}\) of the \(\text{saghir}\) must suckle him when no \(\text{murdi}'\) can be found.\(^4\) Others, like \(\text{hanbalis}\) rule that suckling is not the mother's duty, but for the minor's father to see to. This right of the mother is such whether she is married to the \(\text{saghir}'s\) father or is divorced from him and is based on \(\text{hanbali}\) concept that suckling is not part of \(\text{hadanat}\). Al-Thawrī endorses this view also.

If the mother of the \(\text{saghir}\) offers to suckle him on payment of the customary fee, she must receive preference whether she is still the \(\text{saghir}'s\) father's wife.

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or not or whether the father procured a 

murdi' free of charge. If the mother's 
fee exceeds the customary fee and the 
minor's father procured a murdi' free of 
charge or for the customary fee, the 

mother loses her right to suckle her 
minor child.¹ Malikis rule no payment 
for the hadinat whether she be the 

mother of the saghir or not. The poor 
mother can take from her minor child's 

money for her maintenance. The minor's 
father is to pay the nafaqah al-saghir 
(maintenance of the minor) which the 
qadi is to determine. If both mother and 
father of the saghir are well off, no 
suknā (lodgings) is paid for by the 
father to the umm hadinat. If she is 
poor, the minor's father is obligated to 
pay for her lodgings and the qadi 
determines this.² This apparently means 
when the mother and father are not 
living in one house. If the husband is 
well off and can afford domestic help 
for his hadinat, and the saghir and 
other sagha'ir (minors) of him by her, 
she and they merit it.³

¹ Al-Mughnī, Vol 7 pp 627 - 629. 
³ Ahkām al-Awlād, p. 51.
(b) Wilāyat al-Fāsiq (Guardianship Of The Non Righteous Person):

A fāsiq is a person who is "sinful, immoral and who acts unlawfully in shari‘ah terms." The opposite of fāsiq is 'ādil (righteous). The majority of the fuqahā' rule that a fāsiq has no right to wilāyat since he does not possess the amanah (trust) which is necessary for wilāyat. The evidence of a fāsiq is also not acceptable in shari‘ah due to his fisq (sinful nature).

Only the hanafis hold that wilāyat of a fāsiq as well as his evidence are valid. They reason that a fāsiq has wilāyat over himself and can thus be wali for someone else. They also claim that the Qur‘ān granted wilāyat to the awliyā without specification as to 'ādil or fisq. However, some of the later fuqahā', specifically the shafi‘is changed their ruling to allowing the fāsiq person wilāyat over his daughter when the sultan was himself a fāsiq, for the latter would, in any case, succeed to the wilāyat. Hanbalis insists that being 'ādil in public is the minimum requirement for right to wilāyat. The ruling of the majority of the fuqahā' in this matter is to prevent the fāsiq from exercising his wilāyat criminally, especially in relation to marrying

2 Al-Qur‘ān, Chapter 24: 32.
off his daughters, and more specifically, the
minors, to irreputable men in exchange for
money or other worldly gains. The majority
view appears to be nearer shari'ah principles
and the interest of minors, specifically. If
the fasiq becomes rashid, he resumes wilayat
normally by consensus.¹

(c) Wilayat Al-Laqit (Guardianship Over The
Foundling):

The word laqit is derived from the arabic
verb laqata which means "to pick up
(something)." It also means "a newly born
child that is discarded."² In the shari'ah, a
laqit (fem laqitah - foundling) is defined as
"a name given to a living infant whose parents
discarded him fearing poverty or escaping the
accusation of adultery or fornication³ or it
is the name attributed to a sabi mumaiyiz
(discerning child), but not mukallaf yet or an
insane person, even if mukallaf as he needs
protection and care."⁴ The laqit, has thus no
known nasab.⁵ The wilayat of a laqit or
laqitah as to person and possessions devolves
on the sultan.⁶ The sultan, thus, has the
wilayat of marriage and taşarruf al-amwāl
(right of disposal of property and

   Al-Wilāyah wa al-Wiṣāyah, p. 31.
   Al-Munjid, p. 730.
³ Al-Shari'ah al-Islamiyyah, p. 384
⁴ Zaidān A K: Aḥkam al-Laqīt Fī al-Shari'ah al-Islamiyyah,
   Baghdād, Matba'ah Salmān al-'Azāmi, 1968, 1st ed. pp. 3
   – 4.
⁵ Tabyin al-Haqā'iq, Vol 5 p. 767.
⁶ Al-Shari'ah al-Islamiyyah, p. 385.
possessions) of the laqīṭ. Thus, if the laqīṭ has no possessions and wealth, the sultan must see to his needs of maintenance from the bait al-mal and if he has wealth of his own, the sultan must use of it for the laqīṭ’s maintenance and needs which includes his sadaq. This kind of wilāyat is called al-wilāyat al-ijbariyyah (compelled guardianship). The founder of a laqīṭ is called a kafīl, meaning "protector or legal guardian, especially of an orphan". He is also called the multaqīṭ (founder of a foundling). He is responsible for the protection and upbringing of the laqīṭ. The same rules applicable to the wali applies to the kafīl al-laqīṭ (protector or guardian of a foundling). The kafīl al-laqīṭ cannot use of the possessions of the laqīṭ save with the permission of the qādi. This is due to the ruling of the Prophet (s.a.w.) who said: "The sultan is the guardian of him who has no guardian." The laqīṭ is

1 Tabyīq al-Haqa’iq, Vol 5 p. 765.
2 Al-Wilāyah wa al-Wisayah, p. 15.
3 Al-Munjid, p. 691.
7 Sunan Abī Dawud, Vol 1 p. 522.
also classified under the general ruling of *birr* (virtuous deeds) and *taqwa* (piety) to which all Muslims are exhorted to. The Qur'ān, thus, says: "Help one another in righteousness and piety." In real terms, the *laqīṭ* is the responsibility of the Muslim community which relegates this to a duty of the *fard kifayah* (communal duty) category. There is consensus amongst the *fuqaha'* that there is no *tawaruth* (succession rights) between the *kafil al-laqīṭ* and a *laqīṭ* due to there being no blood relationship between them. The *laqīṭ* may receive a *wasiyyah* from his *kafil*.

(d) **Wilāyat (Guardianship) Over The Walad al-Zina** (Illegitimate Child):

The *shari'ah* distinguishes between consequences from a valid *nikāḥ* and those besides it. This is due to the fact that ethical and moral laws related to *nikāḥ* are inseparable from the entire corpus law. The Qur'ān states: "...The things my Lord has indeed forbidden are indecent deeds, whether open or secret..." and in another *āyah*: "Those who avoid the greater sins and indecencies..." It has, further, prescribed duties which ensure and assist practically in abstention from these sins and indecencies: "...for prayer restrains from shameful

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5 Ibid, Chapter 42: 37.
deeds... Sexual sins outside and in marriage are serious criminal offences in Islamic criminal law. Lawful sexual gratification and procreation is thus only exercised within a valid nikāh which gives rise to nasab with its resultant obligation of maintenance in all its forms as well as upbringing and protection of the awlād (children).

Protection of nasab is a cornerstone of family life and its inter familial rights and privileges, duties and obligations. Nasab means "to be related to". It specifically means "to be related (lawfully) to your father." A child can, thus, by sunni law, never be illegitimate in relation to his mother as there is no doubt of her motherhood to him as she carries him and gives birth to him. In shi'ah law the child born out of wedlock is illegitimate to both natural parents. A child is thus, by sunni law, legitimate or illegitimate in relation to his father's marital status at his conception. The biological father of an illegitimate child and all his relatives, males and females, have

1 Al-Qur'an, Chapter 29 : 45.
2 Ibid, Chapter 17: 32
3 Ibid, Chapter 24: 2.
4 Mukhtasar Sahīh Muslim pp. 276 – 277.
5 Al-Shari'ah al-Islāmiyyah, p. 368.
6 Lisan al-'Arab Vol 6 p. 4405.
7 Qāmūs al-Muḥīṭ Vol 1 p. 136.
no shari‘ah sanctioned relationship to such a child by the overwhelming majority ruling of the ‘ulama and fuqaha’ in shari‘ah. This is so because no nasab is attributed to that child in relation to them. The wilayat of such an illegitimate child is for the male line of his mother starting with the mother’s legitimate father.¹ There is a pattern of mirath for such a child which will be dealt with under the chapter of mirath later on.

Should an illegitimate child be abandoned by his biological parents, the laws of the laqit will apply to him. It is, thus, noticed that the illegitimate child, although denied nasab of his biological father, is not left to wander the streets and become a nuisance to himself and a danger and liability to society. There is provision for him. This also serves as a warning to would-be trespassers of the sanctity of procreation and sexual gratification, both males and females, of what they will impose on innocent offspring if they transgress the law in this field. There is no legitimisation of illegitimate children in shari‘ah by majority ruling. What was created unlawfully, remains so and cannot be undone.

This shari‘ah system is cardinally and markedly different from secular law systems where the legitimacy and illegitimacy are the same as far as rights (including succession rights) of children in relation to their natural (biological) parents are concerned

such as is the case, for example, in Scotland after 1968.\(^1\)

1.2.2 Al-Wilāyat 'Alā al-Mal (Guardianship Over Wealth And Possession):

(a) **Definition:**

Al-wilāyat 'alā al-mal is also called al-ḥajr. Al-ḥajr, literally, means al-man' which means "prevention".\(^2\) In the shari'ah, al-ḥajr means "the prohibition on certain persons of entering into or executing any form of 'aqd or that which is in its meaning." This is the composite ruling extracted from the definitions of the fuqaha'. Some fuqahā', like the ḥanafis, define al-ḥajr as "a specific prohibition on a certain person from entering into or executing a specific act". Malikis define it as "the prohibition on someone from executing a legal act which exceeds his capacity (quwwatihi). Shafi'is define it as "the prohibition of administering your wealth due to special reasons (asbāb mahṣusah)", while the ḥanbalis define it as "the prohibition of an owner of administering his wealth whether such a prohibition is from shari'ah or the hakim (lawful Muslim ruling authority)".\(^3\) Al-ḥajr is applied in four spheres, namely, al-sughr (minority), al-junūn (insanity), al-safah (prodigality) and al-

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*Al-Munjid*, p. 119.

iflas (insolvency). This is the majority decision.1

(b) **Mashru'iyyah (Legality) Of Al-Hajr:**

*Al-hajr* is valid by Qur'an, sunnah and *ijma*. As for the Qur'an: "To those weak of understanding, give not your property (wealth) which Allah has assigned to you to manage"...2

As for the *sunnah*, what 'Urwah bin al-Zubair narrated that 'Ali ibn Abi Talib requested the *khalifah* 'Uthman bin 'Affān, to place 'Abd Allah bin Ja'far under *al-hajr* due to his incapacity to administer his possessions and property. 'Uthman ordered that this be done. This report is transmitted by al-Shāfi'i.3 Abu Ḥanifah and one of his students, the *faqīh* Zufar rule that only *junūn* (insanity) and immaturity (i.e non pubescence) allows *al-hajr*.4

(c) **Al-Hajr On The Saghir (Minor) And The Mukallaf (Mature) Person:**

There is *ijma* that the *saghir* is a case for *al-hajr*. All *sagha'ir* are *mahjūr 'alaihim* (placed under *al-hajr*).5 There is *khilaf* (difference in ruling) amongst the *fuqahā* on *al-hajr* on a *mukallaf* person. The majority of *fuqahā* rule that if such persons cannot manage their affairs properly, they should be *mahjūr 'alaihim* (placed under curatorship) in their own interest. This is the view of 'Uthmān, 'Ali, 'Abd Allah bin Zubair, 'Abd

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Allāh bin Ja'far, Shuraiḥ, 'Aṭa'a, Abu Yusuf and Muhammad al-Shaibānī of the ḥanafīs. Abu Ḥanīfah and the zāhiriyyah oppose this. The majority base their argument on the ruling of 'Uthmān, previously mentioned.¹ These fuqaha' also applied the Qur'ān in their ruling: "...If the party liable is mentally deficient or weak or unable himself to dictate, let his guardian dictate faithfully..."²

(d) Al-Hair Prior To Taklīf (Maturity):

There is ijma' that a sabī ghair mumaiyiz (non discerning boy) and a sabīyyah ghair mumaiyizah (non discerning girl) are maḥjur 'alaihim due to them not having the capacity to understand the meaning of words and its consequences nor that of their actions.³ The age of discernment is seven to nine years of age. There is difference of opinion amongst the fuqaha' as to the standing of a sabī mumaiyiz and a sabīyyah mumaiyizah (discerning girl). Abu Ḥanīfah rules that an act which may harm such a person like giving a gift to someone or borrowing from someone is not enacted. A beneficial act, like accepting a gift or entering the fold of Islām is acceptable, even if the wali does not endorse it. In 'uqūd in which reciprocity is found like 'aqd al-bai' (contract of sale) etc., the interest of the saghīr must be seen to before such an act is condoned. If there is no interest for the saghīr in that act, it will be null and void.

¹ Nail al-Awtār, Vol 5 p. 277.
² Al-Qur'ān, Chapter 2: 282.
The ḥanafi ruling is basic to rulings of other fuqaha' like ṭalikis, save that with the latter the mentioned 'uqūd are enacted mawqūfan 'alā idhn al-walī (enactment rest on the approval of the guardian to such contracts). Contracts in which there are no dual exchange ('uqūd la 'iwaḍ fiḥa), like 'aqd al-ḥibah (contract of gift) or ṣadaqah (charity) are invalid and have no consequences. Ḥanbalis share the basic rules of ṭalikis ruling that only at rushd (discernment and sound judgment) are the possessions of a person given him to work with.¹ Shāfi'is are singularly distinguished in that they rule that any sabī (minor) mumaiyīz (discerning) or ghair mumaiyīz (non discerning) cannot enact any legal act be it nikāh or any other act as he has no 'ibārah (legal standing) nor wilāyah over himself by himself but is subject to the wilāyah of someone else. His 'ibādah (worship), however, is correct as that is not subject to the wilāyah of his wali.²

(e) Time Of Cessation Of Al-Ḥair:

The vast majority of the fuqaha' are agreed that when a sabī (male minor) or šabiyyah (female minor) reaches puberty and has rushd (discernment) his or her possessions are given to him or her to manage on his or her own. Rushd means ḥusn taqdir (sound mental judgment).³ As stated, the ẓahiriyyah only require sanity and puberty as requirements for

¹ Fiqh 'ala al-Madhahib al-Arba'ah, Vol 2 pp. 263 - 266.
³ Qamus al-Muhīṭ, Vol 1 p. 305.
emancipation of both a ṣabi and sabīyyah as far as taṣarruf (dealings) with their possessions are concerned. Ibn Ḥazm quotes the ḥadīth narrated by 'Umar ibn Kaḥṭab that the Prophet (s.a.w) said: "three persons are not responsible for their actions; the insane until he becomes sane, the sleeping person until he awakes and the minor until he reached puberty." Thus, no al-ḥajr is allowed on a person who reached puberty and is sane.

Taklīf is known by age or by physical signs. Abū Hanīfah rules that signs of puberty in males are physical sexual signs like passing of semen and capable of impregnating a woman, while for females, such signs are ḥaid (menstruation) and ḥaml (pregnancy). If none of these signs are found, age is the deciding factor herein. Ḥanafis rule this age to be fifteen years while Abū Hanīfah rule eighteen years for males and seventeen years for females. Most fuqahā', like shāfī'is and ḥanbalis agree that fifteen years is the age of puberty. They also agree with the general physical signs of puberty mentioned previously, but include genital hairs, but not the first soft initial hairs. Malikis add to these signs, deepening of the voice for males and strong smell of sweat, especially under the armpits. Facial hair is not a sign of puberty as it can precede actual puberty. If no sign of puberty is found, puberty is taken to have been reached when the eighteenth year has been completed. Another view is that the eighteenth year had started. This is also the

1 Al-Muḥalla, Vol 8 p. 279.
view of some of the sahābah and of the fuqahā’ Mujahid and ‘Abd Allāh al-Ḥasan.¹

Abū Hanīfah and his two senior companion fuqahā’, Abū Yusuf and Muḥammad al-Shaibānī agree that puberty is not the only criterion for delivering the possessions of a person to him to manage himself. They insist on what they call la buḍda min thubūt al-rushd ba‘da al-ikhtibār (sound judgment is established by testing). Abū Hanīfah rules that one has to wait till the person reaches twenty five years before handing him his possessions even if he did not yet, by then, reached rushd, but he must be sane. Hurriyyah is also a requirement but there are no slaves anymore now. Safah is not a requirement for Abū Hanīfah. Abū Yusuf and Muḥammad al-Shaibānī rule that al-hajr continues if rushd is not reached, even until the death of the person concerned. Hanbalis share the views of Abū Yusuf and Muḥammad al-Shaibānī, basically.

One hanbali view is that rushd must be attained in both righteousness in the din and in idārah al-mithl (handling and administration of wealth).² Shafi’is share the hanbali view of rushd in both righteousness in din and idārah al-mal (handling and administration of wealth), thus, the person should not exhibit tabdhir (squandering), or ghubn (criminal fraud) nor be guilty of infaq fi al-shahawat al-muḥarramah (spend on immoral and forbidden acts).³ Malikis require rushd for emancipation

¹ Al-Muhalla, Vol 8 p. 280.
and do not differ basically from the shafi'is and hanbalis save that malikis require, in the case of females, that they live with their spouses in the marital home. This is due to the maliki ruling that females, under wilayah al-hifz wa al-tarbiyah, stay with their mother until they marry.

(f) The Safih And The Hukm (Ruling) Relating To Him:

The majority of the fuqaha' rule safah as being ground for al-hajr. The definition of safah differs from madhhab to madhhab. Abu Hanifah defines it as "one who is unable to administer and control his finances and squanders it on nonsensical purchases or on forbidden acts in shari'ah, like gambling". Spending all money on sadqah (charity) is also safah as one is only to spend what is in excess of your needs for charity by Quranic law. The qadi declares someone a safih. There is no al-hajr, according to him, on a mukallaf, 'aqil and hur person even if he is safih. If the person becomes mukallaf and is deficient in the administration of his finances, he is handed possession at age twenty five years. This view of Abu Hanifah is ghair mufta bihi (inapplicable) in hanafi fiqh. Abu Yusuf and Muhammad of the hanafis rule al-hajr on all persons exhibiting safah and such continue until they show rushd. Abu Yusuf insist that the qadi must declare someone a safih while Muhammad is of opinion

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that the exhibition thereof is enough for placing the person under al-ḥajr.¹

The wasḥiyah of a safih is valid. This is probably due to it benefitting him in the Hereafter. All 'uqūd, subject to cancellation are invalidated when enacted by a safih, but other 'uqūd, like nikāḥ and talaq are enacted when the safih is 'aqil, mukallaf and ḥurr. All acts to do with ʿibādat requiring payment, like ḥajj and 'umrah (lesser pilgrimage) as well as kaffarat (penances) must be paid from the safih’s finances by the wali or waṣī. If the safih is married nikāḥ saḥīh (properly and correctly), nafaqah for him and dependants are taken from his own finances.² This is the position of Ḥanāfī fiqh.

Some fuqahā’, like Ẓaliqīs, opine that al-ḥajr is imposed on all saḥāʾir, males and females. If safah appears shortly after taklīf, i.e during a year after taklīf, the abb al-walad (father of the minor) places him under al-ḥajr by himself as he has that right due to the sughr (minority status) of the child. If safah continues for longer than a year after taklīf, the qāḍī must declare him a safih. Females attain rushd on marrying and setting up house with their spouse.³ If they do not marry, Ẓaliqīs differ on their fate. Some rule forty, others fifty and still others sixty years before al-ḥajr is lifted as far as idārah al-māl (administration of wealth) is

¹ Al-Wilāyah wa al-Wisayah, p. 162.
concerned. This is pure *ijtihad*. There is no *shari'ah* text on this.

Still other *fuqahā’*, like *shafī’is* rule that *al-ḥajr* is imposed on all those who spend their wealth on non beneficial causes or on forbidden pleasures - harmful to the body and the *din*, like sensual misdemeanours, wine drinking or on detestable acts, like smoking or bad administration of possessions and wealth. *Sadaqah* of the *safiḥ* is valid, however, on condition such the *safiḥ* is *‘aqil* and *mukallaf*. *Al-ḥajr* continues, as for other *madhāhib* until the *sagīr* reaches puberty and is sane and sound of judgment. The *qādi*’s intervention is not required for declaring someone *safiḥ*. However, when an *‘aqil* and *mukallaf* person becomes a *safiḥ*, the *hukm* *qādi* (ruling of the Muslim judge) is required. This ruling does not affect his actions prior to the *qādi*’s ruling. All contracts affecting personal life like *nikāh*, *talaq* and the like of the *safiḥ* are valid provided his *wali* consents thereto. Any other *‘aqd* enacted by a *safiḥ* is invalid and has no legal consequences, even if the *wali* consents thereto. *Hanbalis* share the *shafi’i* views on validity of *‘uqūd shakhṣīyyah* (contracts of a personal law nature), like *nikāh*, *iqrār bi al-nasab* (acknowledgement of linage) etc but require the *hukm* *qādi* on the *safah* of someone. All *‘ibādat* are compulsory on the *safiḥ* as on other Muslims. *Hanbalis* rule *iqrār bi al-dain* (acknowledgment of debt) of a *safiḥ* as valid.
Some fuqahā' rule that the ḥakim or qādi or their deputy must act for the majnūn and maʿtū, Malik insist that the father or his wasī comes first then the qādi or his appointee. Ḥanafīs, specifically, rule that those who lapse in and out of insanity states are judged as to the state they are in at a specific time.  

2 **AL-TABANNA (ADOPTION)**

2.1 **Definition:**

The word *al-tabannā* is derived from the Arabic word *bana*, from which the Arabic word *ibn*, meaning "a son" is derived. *Tabannā* means "to take someone as your child."  

There are various other definitions of adoption. Some authorities define it as "the institutionalised practice through which an individual belonging, by birth to one kinship group, acquires new kinship ties that are socially defined as equivalent to the congenital ties." Another define it as "the creation of a relationship of a parent and child between individuals who do not naturally have that bond..." Tizard sums it up plainly in her definition when she says that "the essence of adoption is that a child not born to you is incorporated into your family as though he were your...

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   *Al-Munjid*, p. 50.

3 *International Encyclopaedia of the Social Sciences*, USA,  

own." Similar definitions, in principle, are mentioned by other authorities.

From the definitions quoted, it is clear that adoption is an artificial act creating "natural" family ties due to "common social acceptance" thereof. In fact, it is an unnatural act in the sense that it usurps the natural position and rights of natural biological parents and the acquired "parents" are made the real parents. As can be observed later on in this section of this chapter, shari'ah does not accept naturalisation of the unnatural in the matter of nasab, the latter of which is a natural, normal and logical rule.

2.2 Adoption In Judeo-Christian Tradition:

Adoption was an ancient practice in the ancient Near Eastern civilisation of the second millennium. The Bible, according to some scholars, have traces of this custom. Sorgan, founder of Babylon, was an adopted child. Oedipus, Paris and Tristan and other early literary notables were adopted children. The Christian apostle Paul made frequent reference to adoption and placed special significance on the practice. Biblical texts appear to support the occurrence of adoption in the Old Testament times. Of these texts are: "...But Abraham said: Oh Lord God...for I continue childless and the heir of my house is Eliezer of Damascus...thou hast given me no offspring and a slave born in my house will


4 Catholic Encyclopaedia, Vol 1 p. 136.
be my heir". From the text it appears that even a slave could be made heir when there was no son. Another case is that of Sar'ai (Sarah) giving Agar (Hagar) to Abraham as a concubine and to bear him a child that the childless Sar'ai could accept. "...and Sar'ai said to Abram (Abraham), Behold now, the Lord has prevented me from bearing children; go in to my maid, it may be that I obtain children by her..." A similar case is true for the birth of Dan and Nephthali, sons of David whom Bala, Rachel's maid bore. Still other cases of possible adoption were the cases of the sons of Joseph born in Egypt before Jacob came to Egypt, Ephraim and Manas'seh, so adopted by Jacob. Moses was adopted by Pharaoh's daughter and Esther adopted by Mordechai. The latter case is claimed not to be Israelite practice due to occupation in foreign lands.

A further metaphorical adoption is that which existed between Yahweh (God in Hebrew) and the Israelites, they being the children of Yahweh. "And you (Moses) shall say to Pharaoh, thus says the Lord, Israel is my first born son and I say to you; Let my son go that he may serve me", and "Is He not your father who created you..." The New Testament continues this metaphorical theme when

2 Ibid, Genesis 16: 2.
3 Ibid, Genesis 30: 3 - 8.
4 Ibid, Genesis 48: 3 - 5.
6 Ibid, Esther 2: 7 & 15.
7 Catholic Encyclopaedia, Vol 1 p. 136.
8 Holy Bible, Exodus 4: 22 - 23.
Paul says: "...that we are the children of God..."\(^1\) and ",..., so that we might receive adoption as sons."\(^2\) A similar thought is expressed elsewhere.\(^3\) The thought and practice of adoption is thus not foreign to the Judeo-Christian Faith which forms the majority of people in the modern democratic liberal western world. Despite Old Testament narrations, adoption amongst ancient Jews was rare due to polygyny being lawful as well as freedom to divorce and to remarry. Childlessness was thus rare. Rabbis rule that "who ever raises an orphan in his home is deemed by Scriptures as his parent", citing Naomi taking Obed as her son as she reared him.\(^4\)

However, the legal concept of adoption finds no place whatsoever in biblical or talmudic jurisprudence. Voluntary acceptance of another parent's child, rendered him your child and although Jewish law gave no formal recognition to adoption, voluntary assumption of parents existed even in ancient times. According to Jewish tradition, it is a privilege to give proper education and upbringing to parentless boys of unusual ability and promise.\(^5\) Adoption is an unknown legal institution in Jewish law. Halakhah (the legal part of Talmudic and later Jewish literature)\(^6\) rules that personal status of parent and child is based on the natural family relationship only and, thus, there is no way artificial relationships can be created legally or by fiction. A guardian is appointed to look after the welfare and

\(^1\) Holy Bible, Romans 8: 16.
\(^2\) Ibid, Galatians 4: 5.
\(^3\) Ibid, Ephesians 1: 5.
upbringing of a parentless Jewish child, but the rights of the natural parents are in no way affected by this process, which some call "adoption". It is, in practice, fostering.¹

Modern Israel legalized adoption of children under law 5720/1960. All parties, including the natural parents, must agree to the adoption and such an adoption severs all bonds with the natural parents and creates new legal family ties. However, the consequences of blood relationships between the adoptee and his natural parents are not affected by adoption so prohibitions in family law remain.² The Jewish scriptural and religious law had, thus, been breached in this regard, with a palliative of retention of consequences of blood relationships. The Israeli adoption law could possibly be a purely political act to help increase Jewish settlement in occupied Palestine. The continuing prohibition on consequences of Jewish blood relationships appears to support this view.

2.3 Adoption In Pre-Islamic Arabia:

The custom of tabannā was known and prevalent in pre-Islamic Arabia. The practice was to adopt children born from other natural parents and assimilate them into the new family, giving them their name and taking and calling them their children. These adopted children became, thus, like biological children to such an extent that they succeeded to the estate of the adopter and even had the laws of ḥurūmah al-nasab (prohibition of lineage) applied to them. This was the practice when the Prophet (s.a.w) was born. In fact, when he (s.a.w) married Khadijah bint Khuwailid, his first wife, she gave him a slave called Zaid bin al-Ḥarithah, whom the Prophet (s.a.w) immediately set free and adopted calling

² Ibid.
him Zaid bin Muḥammad (Zaid, the son of Muḥammad).\(^1\) Zaid became of the choicest saḥabah of the Prophet (s.a.w) during the prophetic era.

### 2.4 The Abrogation Of Tabannā:

Islam and its family (personal) law only recognises a nikāh shari’ī (Muslim marriage) as the only institution in society in which intimacy and procreation can take place. There is, thus, a system of nasab and descent from and belonging to someone. Family relationships, in Islam, is thus based on affinity and consanguinity.\(^2\) Before proceeding further, it is necessary to understand what nasab really means in Islām.

Nasab has to do with the relationship of children to their father as far as legitimacy is concerned.\(^3\) It is forbidden to claim parentage from a man who is not your real legitimate father. Abu Waqqās narrated that the Prophet (s.a.w) said: "whosoever claims fatherhood from a man and he knows that that man is not his father, Paradise is forbidden for him".\(^4\) Al-Bukhārī and Muslim also transmit: "whosoever claims fatherhood from other than his (own) father, on him is the curse of Allāh and all the Angels and all the people. Allāh does not accept

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4. Mukhtasar Sahih Muslim, p. 19.
from him any repentance nor any penitary compensation".\(^1\) Parentage is thus by valid nikāh and nasab one of its legal consequences. The Prophet (s.a.w) ruled "al-walad li al-firash" - a child is attributed to the married partners.\(^2\) Besides this, an individual's nasab is confirmed if his father does not negate his nasab to him by mula’anah (mutual imprecation) in which case he is actually accusing his wife of zina (adultery), or it is proven by shahadah (evidence) acceptable in shari’ah, that he has nasab to a certain man.\(^3\) His nasab is also established if a man accepts him as his son and he accepts that claim and there is baiyinah shar‘iyyah (acceptable shari’ah proof) for this claim.\(^4\)

The abrogation of al-tabanna, in shari’ah, had to be clear, unambiguous and irrevocable and as such the Shari' took a firm, decisive and unambiguous stand in this regard. Zaid bin al-Harithah, known as Zaid bin Muhammad, who was the mawla (freed slave) of the Prophet (s.a.w) was married off to the maternal cousin of the Prophet (s.a.w), Zainab bint Jaḥsh, a Qurashite, and, thus, of the most noble of Arab ladies in rank and standing. Perhaps the Prophet (s.a.w) intended with that marriage to draw Zaid closer into his (s.a.w) familial line. The marriage was doomed to die due to Arab indifference to freed slaves and their poor standing in

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Arab society then. Divorce was inevitable. The Prophet (s.a.w) tried hard to forestall it but failed. Zainab made the nikah a physical situation and nothing more.

This situation is untenable and uncondonable in shari'ah. One of the basic laws of nikah, in Islam, is imsak bi al-ma'ruf aw tasrih bi al-ihsan — remaining married and keeping the laws of nikah, or to separate amicably if this cannot be done. Talaq had to follow, inevitably, as the case became hopeless, even with the Prophet (s.a.w) trying to save it. This caused anguish to the Prophet (s.a.w). To add to this anguish, on Zainab being divorced, the Prophet (s.a.w) was instructed by Allah that he should marry Zainab, something unheard of in Arab society then as adopted children became your own and as such, their "in-laws" cannot marry the spouse of their adopted children. Thus was it revealed to the Prophet (s.a.w): "Behold! You said to the one who has received the grace of Allah and your favour, retain (in wedlock) your wife and fear Allah. But you (Muhammad) did hide in your heart that which Allah was about to make manifest; you feared the people but it was more fitting that you should fear Allah. Then when Zaid had dissolved (his marriage) with her, We joined her in marriage to you in order that (in future) there may be no difficulty to the believers in (the matter of) marriage with the wives of their adopted sons, when the latter have dissolved (the marriage) with them. And Allah's command must be fulfilled."

The issue of adopted children and their position in law became very clear now. The Shari' revealed: "...and He (Allah) has not made your adopted sons, your (own) sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth and He shows the (right) way. Call them by the names of their fathers;

1 Al-Qur'an, Chapter 2: 229.
2 Ibid, Chapter 33: 37.
that is more just in the sight of Allah. But if you do not know their fathers' names, (then they are) your brothers in Faith or your mawali (protected clients).”¹

The Prophet's (s.a.w) own sons all died before taklif (puberty). He, thus, had no sons. This the Qur'an confirms: "Muḥammad is not the father of any of your men, but (he is) the Messenger of Allah and the seal of all the Prophets..."² With these laws, the Shari' the Legislator, abrogated the system of al-tabannā practised in Arabia since ancient times and recognised only the real and natural ubūwwah (parentage). The Shari' did so for factual and natural reasons for al-tabannā is an imaginary process of family creation and belies actual nature and natural phenomena. Al-tabannā, is not a natural process in essence. Speech or actions in this process does not change the natural reality nor can it make an unrelated stranger a blood relation nor can there be the same parental affection as for natural children nor can the make-up of an adoptee be like that of one's own natural children. Due to this, al-tabannā is an artificial act. This artificiality the shari'ah recognises.³ The natural parents of an adoptee, remains his parents, which is sound biological law, and their mutual rights remain unchanged.

Having ruled as such in this matter, the shari'ah did not overlook the plight of minor children who might be in need of care or the charity of childless couples in giving the gift of substitute parenthood, love and care to those who have never known parentage or whose parents are unknown of those very unfortunate children that had been abandoned and deserted by their own natural parents, nor did the shari'ah overlook the magnanimity

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¹ Al-Qur'an, Chapter 33: 4 - 5.
² Ibid, Chapter 33: 40.
of parents with children who wish to give the gift of love and affection, care and upbringing to a parentless child.

Islam accepts and encourages kafalah al-muhtaj (protection of the needy) or kafalah fi al-ri'ayah wa al-tarbiyah (protection in upbringing and education). In fact, it is a duty of the Muslim society as a whole to see to these children in need. The Shari' points to this in general terms when He speaks of mutual relations between Muslims:

"Muhammad is the Messenger of Allah; and those who are with him are strong against the unbelievers (but) compassionate amongst one another..." Also, "The believers (Muslims) are but a single brotherhood, so make peace and reconciliation between yourselves.

"And they feed for the love of Allah, the indigent, the orphan and the captive."

"...To spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for beggars and for the ransom of slaves...."

The Prophet (s.a.w) himself gave several instructions to Muslims in their social relationships. Of these are what Abu Musa narrated that the Prophet (s.a.w) said:

"The Muslims are like a brick wall, one strengthens and supports the other one."

Abu Hurairah narrated as transmitted by Muslim and al-Tirmidhi that the Prophet (s.a.w) said: "Be the servants of Allah as brothers; the Muslim is the brother of the other Muslim - he does not

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2 Al-Qur'an, Chapter 48: 29.
3 Ibid, Chapter 49: 10.
4 Ibid, Chapter 76: 8.
5 Ibid, Chapter 2: 177.
6 Mukhtasar Sahih Muslim, p. 472.
do him an injustice nor betray him nor despise him....."^1 Anas narrated as transmitted by al-Bukhari and Muslim that the Prophet (s.a.w) said: "Your Faith is incomplete until you love for your brother that which you love for yourself."^2 "A'ishah, wife of the Prophet (s.a.w) said that the Prophet (s.a.w) said: "Verily Allah is most kind and gentle and loves kindness and gentleness, and He rewards for kindness and gentleness..."^3

Islam, thus, while it refuses to accept al-tabanna, meaning the full assimilation into a family of a non-related person, it encourages and exhorts, nay, commands the care and upbringing of parentless children or foundlings. Out of Faith, love and affection, such children are cared for and looked after for the sake of Allah and safe social order and not for any material reason or gain. Islam thus allows fostering. The issue of luqatā' had been dealt with as far as maintenance and upbringing is concerned. Since they are called by the names of their natural parents, they remain those parents' children and all such rights and privileges as well as duties and obligations between them remain intact. Thus, if such a fostered child wish to return to his natural parents there is no prohibition in shari'ah for such a return, neither the foster parent nor the State nor any of its organs can stop that or interfere with that.

A foster child is not a natural child of the fostering parents. Thus, in terms of mirath in Islam, such a child does not inherit from his foster parents by

Minhāj al-Muslim, p. 111.
Mukhtasar Sahīḥ Muslim, p. 473.

^2 Riyāḍ al-Salīḥīn, p. 131.

^3 Mukhtasar Sahīḥ Muslim, p. 474.
way of a nasib (share). A foster child, may, like any other person, receive of the wasiyyah of the müsi (legator). By shari‘ah a muwarrith or muwarrithah must leave a minimum of two thirds of their entire tarikah (estate) to their lawful heirs in shari‘ah. An unrestricted maximum of one third is allowed for wasayā. Thus, a foster child or foundling may even receive, theoretically, more than a lawful heir from a tarikah. The issue of mirath and wasayā will be dealt with later. There can, thus, be no accusation that shari‘ah is cruel and disinterested in the care of children in need. In fact, the sultan is responsible for them as the Prophet (s.a.w) ruled: "Each one of you is a guide and responsible for those he leads, the Imam (leader of the Muslims) is a guide and is responsible for those under his authority..."  

1 Mukhtasar Sahih Muslim, pp. 327 – 328.  
Riyād al-Sāliḥīn, p. 315.
CHAPTER 3

AL-MIRATH (SUCCESSION)

1 Al-Mirath in Shari'ah:

The systemising of al-mirath is one of the most outstanding achievements of the fuqahā' of Islam and its intricacy and balanced laws and rules show legal genius of a nature which has very few parallels in law. The subject matter is vast and technical terminology relatively numerous. The subject matter will be dealt with here in the order it is usually presented in standard fiqh works.

1.1 Definition:

The Arabic word mirath is the noun of the Arabic verb waritha which means "inheriting from someone". Mirath is also termed wirth, wirathah, irth and warithah. The noun agent of waritha is warith (fem. warithah) meaning an "heir". A person leaving behind an estate is called a muwarrith or a muwarrithah (testatrix). When, in this thesis, muwarrith is used, it shall mean both muwarrith and muwarrithah, unless otherwise indicated. The estate of a deceased is termed tarikah. In secular law, the normal secular definition of inheritance is "the devolution of property upon death of its owner". Late Middle English definition of succession is "the process by which a person succeeds to another in the occupation of an estate, throne etc.; the fact of succeeding according to custom or law to the rights and liabilities

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of a predecessor; the conditions under which this is done." Another definition reads as "order or right to succeed to a property, title or throne, the act or process of becoming entitled to a deceased person's property or title." A similar meaning is given by Webster's dictionary. In shari'ah, mirath and its synonyms appear to be used loosely. Some fuqaha' call it 'ilm al-fara'id (science of ordained quotas i.e shares), while others call it tarikah and still others call it irth (succession). Most of the former fuqaha' call mirath al-fara'id and the chapter dealing with it is called kitāb al-fara'id (book or chapter of ordained quotas i.e shares). Ibn Ḥazm calls this section Kitāb al-Mawārith (book or chapter of succession) and not kitab al-fara'id as other fuqaha' call it. In defining the subject matter of mirath, the fuqaha' have the following definitions:

Some fuqaha', like some of the ūhanafis, define irth (i.e mirath - succession) as "the transfer of possessions from a person to another person by way of possession through transfer" while ibn 'Abidin, also a ūhanafi faqih (hanafi jurist), defines it as "that

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5 Al-Muḥalla, Vol 9 p. 252.
6 Al-Ikhtiyar, Vol 4 p. 85.
which a deceased leave behind of possessions (al-amwāl) free from any claim of a third party." Some others, like mālikis define it as "a right (al-ḥaqq) which accepts division and which is confirmed to him who merits it after the death of him (who leaves such a right)". Still others, like shāfi‘is define it as "a fixed share by shari‘ah to an heir". Ibn Qudamah of the ḥanbalis defines it as "the division of an estate" (qismah al-mīrاث).

From the definitions quoted, it is clear that the ḥanafis, generally, exclude rights from mirath (succession) while most of the others include it. The ḥanbalis’ definition apparently includes huquq. There is, thus, basic consensus that mirath has to do with the possessions a deceased left behind to which his heirs succeed. Mirath, in shari‘ah, deals with knowledge of the heir and non heir, the share of each heir and the calculation thereof.

1.2 Mirath Of Ahl al-Kitab:

The ahl al-ḥalāb are the "people of the Book" i.e. those who received divine revelation before. They are the yahūd (Jews) and the nasāara (lit. "helpers" – the followers of Jesus Christ). There is khilāf (difference of opinion) as to whether māsiḥiyūn (Christians) are classified as nasāara. Apparently 80% of South Africans profess Christianity. Since the Muslims and these

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1 Al-Tarikāt wa al-Wāsāya, pp. 7 – 8.
3 Paid al Ala al-Mālik, Vol 2 p. 120.
4 Kifayah al-Akhyar, Vol 2 p. 120.
people form the apparent majority of people in South Africa, it is pertinent to know their stand in *mirath* in terms of their scriptures. Inheritance for Jews, in the Old Testament, was essentially a land holding issue of the promised land allotted to the children of Israel after God brought them out of Egypt. It was a possession of a natural territory where the Jewish theocracy should be practised and maintained.\(^1\) The Bible states: "By faith Abraham obeyed when he was called to go out to a place which he was to receive as an inheritance; and he went out, not knowing where he was to go. By faith he sojourned in the land of promise, as in a foreign land, living in tents with Isaac and Jacob, heirs with him of the same promise."\(^2\) Inheritance for them was, thus, a reward after bondage in Egypt as for, then, being God's chosen people. "And I will bring you unto the land of which I swore to give to Abraham, to Isaac and to Jacob; I will give it to you for a possession. I am the Lord."\(^3\)

This inheritance, obtained by divine infeftment, was to be such and is conditional upon fidelity of their (Jewish) covenant with God. It was defiled by their crimes and impieties. "...and the land became defiled, so that I punished its iniquity, and the land vomited out its inhabitants."\(^4\) "And I will doubly recompense their iniquity and their sin, because they have polluted my land with the carcases of their detestable idols and have filled my inheritance with their abominations."\(^5\) The land (the inheritance) is clearly God's land,

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"...for the land is mine; you are strangers and sojourners with me..."¹ This situation underwent further development and spiritualised another sphere, not only was the land claimed as inheritance, but Jovah (God) Himself.² The priests and Levites were to be inheritors of Jovah (God) and allowed to eat from the offerings made to Him. This thought further developed Israel, the people, becoming the inheritance of Jovah (God) Himself, chosen to be a peculiar people unto Himself and above all other peoples that are on the face of the earth. "For the Lord’s portion is his people..."³ Later universalism even includes the Gentiles "...and the Lord of hosts has blessed, saying, Blessed be Egypt my people and Assyria, the work of my hands and Israel my heritage."⁴ This is the Judaism concept of their most important joint inheritance.

The Qur’an, confirms the original standing of the Jews. "Oh Children of Israel! Call to mind the (special) favour which I bestowed upon you and that I preferred you above all others."⁵ It confirms, like the Bible, that the Jews committed serious sins and iniquities, like worshipping the calf,⁶ their rebellion against God’s law⁷ and their transgressions.⁸ Due to the endless transgressions of Israel, their status of the chosen people was revoked by God. The Qur’an states:

¹ Holy Bible, Leviticus 25: 23.
² Dictionary of the Bible, p. 471.
³ Holy Bible, Deuteronomy 32: 9.
⁵ Al-Qur’an, Chapter 2: 47.
⁶ Ibid, Chapter 2: 51.
⁷ Ibid, Chapter 2: 57.
"Thus they have drawn on themselves wrath upon wrath..."¹ "But because of their (Israel's) breach of their covenant, We cursed them..."²

There is a different physical law of succession between the Israelites. There is a clear system of succession in the deceased's estate. The order of succession is mentioned in the Pentateuch, in revelation to Moses on the query of the daughters of Zelo'phad, the latter who had no sons.³ The situation was: "If a man dies and has no sons, then you shall cause his inheritance to pass to his daughter. And if he has no daughter, then you shall give his inheritance to his brothers. And if he has no brothers, then you shall give his inheritance to his father's brothers. And if his father has no brothers, then you shall give his inheritance to his kinsmen that is next to him of his family, and he shall possess it. And it shall be to the people of Israel a statute and ordinance, as the Lord had commanded Moses."⁴ No mention is made of a father inheriting his son, but the Mishnah lays that down. The Jewish law excludes the daughters of a deceased father if there is a son or sons. A daughter, thus, only inherits when there is no son. However, she was enjoined to marry only into the tribe of her father.⁵ The latter rule is confirmed in the Bible "This is what the Lord commanded the daughters of Zelo'phad; Let them marry whom they think best, only, they shall marry within the family of the tribe of their father. The inheritance of the people of Israel shall not be transferred from one tribe to another; for every one of the people of Israel

¹ Al-Qur'an, Chapter 2: 90.
³ Holy Bible, Numbers 27: 1 - 5.
⁴ Ibid, Numbers 27: 8 - 11.
⁵ Encyclopaedia Judaica, Vol 15 p. 475.
shall cleave to the inheritance of the tribe of his fathers."¹ A father without sons, is under obligation to marry his daughter to one of his kinsmen, violation of which is punishable by death.²

1.2.1 Jewish Law Of Succession:

- Jewish succession law is parenthetic, conferring right of succession on the deceased's kin in theagnate line of descendants and ascendants. Degree of kinship affects inheritance and the nearest in kinship excludes the distant in kinship.

- the mother's family is not kin and thus she does not inherit from her sons nor will her brothers or other relatives of her. Her sons do succeed to her estate.

- illegitimate Jewish relatives of a deceased are kin and legal heirs, but not that of a bondwoman³ or a non-Jewess. The latter follow their mother in status.

- children of a predeceased son, gets his share of inheritance from their paternal grandfather, even if it is one child and even if it is only a female. Sadducees⁴ differ herein. A son predeceasing his mother does not inherit from his mother as it will transmit to his brothers on his father's side.

- the first born Jewish son, even if he is a mamzer (illegitimate child) gets double the share of the estate (primogeniture rule). This is based on biblical text: "...but he shall acknowledge the

¹ *Holy Bible, Numbers* 36: 6 - 7.
³ This is significant as it excludes Ishma'el, son of Abraham by Hagar, from the inheritance of the land of Israel and perhaps explains the central issue of the Palestinian - Israeli problem.
⁴ a Jewish sect which does not believe that there is a resurrection after death. See *Holy Bible* Mark 13: 18.
first born, the son of the disliked by giving him a double portion of all that he has, for he is the first issue of his strength..." The others get an equal share. The predecease rule takes effect when the son predeceases his father. The inheritance is only what the father possess at his death.

- the husband is heir to his wife and he takes precedence over all other heirs, even if his marriage to her was a prohibited marriage. Her inheritance is what she possess at her death. This, in practice, excludes all the wife’s relatives from her estate. Rabbinical rules, and not biblical law, in the form of takkanot (sing takanah - regulations which supplements the Torah) adopted some new rules in this matter limiting the husband’s succession powers to his wife’s estate.

- the wife cannot legally succeed to her husband’s estate as she is not regarded as a legal heir therein. She will only receive her dowry increment, her own property brought to the marriage as well as marriage contractual obligations of her husband to her (i.e his kettubah obligations). In addition, she is entitled to maintenance from her husband’s estate until her death or remarriage. The takkanot of Toledo restricted this to a maximum of a half of the husband’s estate, which strengthened the deceased’s children’s hand in this matter.

- daughters do not inherit when there is a son or sons of the deceased, according to Jewish law. Jewish scholars imposed obligations on the father for his daughters’ welfare. There is no biblical

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1 Holy Bible, Deuteronomy 21: 17.

2 The New Standard Jewish Encyclopaedia, p. 1825.
text to support these rulings. The obligation is for maintenance of the daughters and providing their dowry for marriage. Daughters are maintained until they reach maturity or are betrothed. This maintenance must come from their father’s deceased estate. If they have no brothers, then the daughters inherit the entire estate and the previously mentioned rules lapse.

- sons are obliged to give their sisters part of their father’s estate for their dowry. This is called issar nekhasim. A disputed ruling is that a daughter may also have this right from her mother’s estate. This payment is also necessary to such an extent that she may seize sold assets from third parties.¹

- if a man dies childless, his brother was to marry his widow. The first born from this marriage was taken as the first born of his deceased brother. The brother could refuse to do this. The estate would then go to the kinsmen.

- land could not be sold in perpetuity and if so sold, could be redeemed by the next of kin.²

The modern Israeli law of succession No: 5725 of 1965 had significantly changed Jewish law and introduced new laws which conflict with biblical and other forms of Jewish laws.³

1.2.2 Succession In Christianity:

Though Jewish law should have been continued by Christianity as according to the Bible, Jesus Christ said: "Think not that I have come to abolish the law of the prophets; I have come not to abolish them, ¹

¹ Encyclopaedia Judaica, Vol 15 pp. 475 - 482.
but to fulfil them"\(^1\), it took a new turn in this matter. Christianity developed an eschatological hope and the fulfilment of Christ's inheritance promises.\(^2\) The possession of the Kingdom of God is now the inheritance of the believing people. "Then the King will say to those at his right hand, come, oh blessed of my Father, inherit the kingdom prepared for you from the foundation of the world."\(^3\) "Do you not know that the unrighteous will not inherit the Kingdom of God..."\(^4\) Other New Testament texts have the same theme.\(^5\) This promised inheritance is based on the death of the muwarrith (Christ)\(^6\) and will be received in heaven.\(^7\) Further, the New Testament claims fulfilment of the inheritance process made to Abraham and fulfilled, according to Christian belief, in Jesus Christ in that he inherited the vineyard of Israel.\(^8\) The inheritance of Abraham was thus received by Jesus Christ. "...Now the promises were made to Abraham and to his offspring.....and to your offspring which is Christ."\(^9\) This inheritance Christ shares with believing Christians. "And if you are Christ's, then you are of Abraham’s offspring, heirs according to

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\(^1\) Holy Bible, Matthew 5: 17.

\(^2\) New Catholic Encyclopaedia, Vol 7 p. 516.

\(^3\) Holy Bible, Matthew 25: 34.

\(^4\) Ibid 1 Corinthians 6: 9.

\(^5\) Ibid, Galatians 5: 21 & Ephesians 5: 5.

\(^6\) Ibid, Hebrews 9: 15 - 17.

\(^7\) Ibid, 1 Peter 1: 4.

\(^8\) Ibid, Isaiah 5: 1 - 7.

\(^9\) Ibid, Galatians 3: 16.
Thus, according to Christian belief, the promise to Abraham attained full development from a purely physical promised land as inheritance, which was for sustaining earthly life, being now transformed into the concept of Christian salvation - the sharing in the divine sonship of Christ and the Kingdom of the Father.¹

One notices, in the Jewish law, a natural earthly system of inheritance being present alongside a later developed eschatological concept. In the Christian concept, a new divine inheritance supersedes and blots out the entire divine concept of earthly human succession in any form. This is a radical departure from Jewish law concepts in succession law. In fact, Christianity left all the law making to humans and even to pagans as Christ is alleged to have replied to the Pharisees, according to the Bible; "Render unto Caesar what is Caesar's and to God the things that are God's".³ This theme is reported elsewhere in the New Testament, where, at times, the concept of subjecting oneself to authority is, in the least, encouraged and exhorted to, such as in Ephesians where it is said: "Be subject to one another out of reverence for Christ. Wives, be subject to your husbands as to the Lord...Slaves be obedient to those who are your earthly masters..."⁴

Western civilisation, having drawn from the Judeo-Christian ethic, belief and practice had taken from these principles in many instances of their lives, including laws and politics. Western

¹ Holy Bible, Galatians 3: 29.
civilisation should thus be seen against this background when it comes to its secular law systems and values. In addition, the history and clashing encounters over the ages between the Judeo-Christian system and Islam should be borne in mind when the Islamic system of laws are examined and analysed.

1.3 Pre-Islamic Arabian Practice In Mirāt (Succession):

Before proceeding with mirāth proper, we will review the pre-Islamic Arabian practice in this matter. Pre-Islamic Arabia was pagan, yet the concept of Allah was known to them. The Qur’an bears testimony to this:

“If you (Muhammad) ask them, who is it that created the heavens and the earth. They will certainly say, Allah”. A similar thought is expressed elsewhere in the Qur’an. They were aware that Allah, created them.

If you ask them, who created them, they will certainly say Allah...” Their intercession through idols, made them pagans. "They (pagans) serve besides Allah, who can hurt them not nor profit them and they say: these are our intercessors with Allah...." The prevalent custom in pre-Islamic Arabia, as both al-Ṭabarī and ibn Ḥajr report, was that the tarikah of a deceased person devolved only on the males in equal shares while females never inherited anything. A person had the right to make a waṣliyyah (legacy) or instruct on hadāyā (gifts) to be distributed after his death. Ibn Kathīr states that both females and children were excluded from the tarikah

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1 Al-Qur’an, Chapter 31: 25.
3 Ibid, Chapter 43: 87.
of a deceased in pre-Islamic Arabia. Succession rights were, thus, restricted to males only.

There is a similarity between pre-Islamic Arabia and Jewish law of succession where a father with a son had to exclude his daughter from his estate. This is an interesting similarity, for, Prophet Ibrahim's [Abraham (a.s)] son Isma'il (Ishmael), dwelt in the desert of Arabia and brought the Judaic law with him. "So Abraham rose early in the morning, and took bread and a skin of water and gave it to Hagar, putting it on her shoulder, along with the child, and sent her away. And she departed and wandered in the wilderness of Beer-Sheba." [Isma'il grew up and lived "in the wilderness of Parān...".] The word "Parān" is of Arabic origin. "F" stands for "P" in English, like Falistīn for Palistīn (Palestine). Arabs called the place of residence of Hagar and Isma'il Fārān which means "two refugees" as they believed them to be runaways from their family. Fārān is, thus, the arabic for the Biblical word Parān. On this place becoming a permanent settlement for Egyptian-Syrian trade, it became known as Bakkah to which the Qur'an also refers by that name. This place is mentioned in the Bible as Beth-ar-am which is, in Arabic, Bait al Haram, afterwards called Makkah (Mecca). Prophet Ibrahim's (a.s) presence in Arabia, in Makkah (Mecca) itself, is confirmed in the Qur'an: "Oh our Lord! I have made some of my offspring to dwell in a valley without cultivation by Thy Sacred House in

1 Tafsir ibn Kathir, Vol 2 p. 207.
4 Al-Qur'an, Chapter 3: 96.
order that they may establish regular prayer...".

Makkah (Mecca) lies in an arid valley surrounded by arid hills.

1.4 \textit{Mirath In Islam:}

Islam is not a religion in the normal concept of religion, but is both a religion, a social and a political order as the Prophet (s.a.w) was both a Prophet and a Statesman as stated in the Introduction. Placing \textit{shari'ah} in proper perspective, Dr Zarqā states, in comparative tone, that there are, besides the secular law systems, three other divine systems of law and they are:

- a system that is strictly spiritual, morally inclined and which has no system of law comparable to secular (State) law. This is Christianity as found in the gospels.

- another system which pertains purely to a specific time or group like the laws of Judaism, which has a system of laws which was fitting for its time.

- the last system is a system of law based on firm and complete principles for all times and situations, expected measures (of happenings) as well as spiritual laws for every condition as well as such laws linked to special customs and traditions and which allows for the evolution and progress of such custom based laws as time passes on but which is conditional on '\textit{adl} (justice) and \textit{inṣāf} (equity).

This system of laws is the \textit{shari'ah} of Islam.\textsuperscript{2}

One notices again that Islam and Judaism have commonalities in divine law procedures and application, whereas Christianity, one of the major influences in western society, is singularly distinguished as having virtually none. This, amongst other issues, eventually had to give rise to

\textsuperscript{1} \textit{Al-Qur'an}, Chapter 14: 37.

\textsuperscript{2} \textit{Al-Madkhal al-Fiqhi al-'Amm}, Vol 1 p. 29.
secularism. It is thus clear that the concept of western inheritance law, as well as their secular law, is not related to the religion of the majority of westerners who profess or claim to profess that Faith.

1.5 **Mashru'iyah (Legal Standing) Of Mirath:**

*Mirath* is confirmed by the primary sources of *shari'ah*. The Qur'an states "*Allāh directs you as regards your children's (inheritance)*..." As for the *sunnah*, Abū Hurairah narrated that the Prophet said: "...He who dies and leaves a debt behind and did not leave anything to settle it, (it) is necessary for us to settle it and whoso leaves an estate, such will be for his heirs". Ibn 'Abbās narrated that the Prophet (s.a.w) said: "Give the shares of inheritance to those meriting it (by *shari'ah*) and what remains of it (give it to the nearest 'āśib (agnate residuary male))". The Prophet ordered the Muslims to learn *'ilm al-mirāth* (science of succession). 'Abd Allāh 'Amr bin al-'Āṣ narrated that the Prophet (s.a.w) said: "Three kinds of knowledge are compulsory and others besides that are optional - *āyāt muḥkamah* (law verses of the Qur'an), *sunnah qa'imah* (required sunnah practice) and *fardūdah 'adilah* (fair distribution of an estate)".

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1. **Al-Qur’ān**, Chapter 4: 11.

2. **Jāmi' al-Usul**, Vol 9 p. 630
   *Mukhtasar Sahih Muslim*, p. 263.

   *Subu1 a1-Sa1am*, Vol 3 p. 98.

Khattab is reported to have said: "Learn mirath (succession law) for it is your religion."\(^1\) There is *ijma* by all the fuqaha', as reflected in their works, that *mirath* is a part of *shari'ah*. The known *ayat*\(^2\) on *mirath* was preceded by other *ayat* in the gradual rectification process of the unfair and unjust pre-Islamic era.

1.5.1 **Quranic Revelations On Mirath:**

There were basically three situations affecting *mirath* in the Muslim community of al-Madinah. One was a temporary emergency measure which was later cancelled, one is disputed as to its legal standing presently and the other is the last and permanent law. The cancelled temporary measure was the issue of *ta'akhi* or *mu'akhat* (joining in brotherhood) of a *muhajir* (emigrant from Makkah) to an *ansar* (settled Muslim of al-Madinah) by the Prophet (s.a.w). The purpose here was to let the parties share equally in all possessions, even in succession. This measure was necessary to offset the enormous social problem that would arise with a serious disadvantaged immigrant Makki (Meccan) population amongst a settled community of the Anšār. The believing nature of both parties made this measure easily acceptable and workable. Wives and children, could not be shared. This was a practical expression of the Prophet's (s.a.w) teaching: "A Muslim is the brother of the other Muslim."\(^3\) Dr Khan sums it up accurately when he describes the situation. "It was a rare and unique scene of ideal love, kindness and sympathy which Islam presented by cementing the two people, quite alien in race and culture, along a path of

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fraternity and brotherhood." The Qur'an confirms this issue: "Those who believed and emigrated and fought for the Faith with their property and their persons in the cause of Allah as well as those who gave (them) asylum and aid. These are all friends and protectors of one another." This situation was ended after the Battle of Badr when the muhajirun (emigrants from Makkah) were no longer in need of this arrangement. Revelatiom ended the situation: "But the kindred by blood have prior rights against each other in the Book of Allah (Qur'an)." Ta'akhri thus ended permanently.

As is now known, in pre-Islamic Arabia, females and children were excluded from mirath on grounds that males carried arms and fought for the tribe for its honour and brought in booty. This issue the Qur'an addressed with three laws.

Firstly sex discrimination was removed in the mirath. The Qur'an states: "From what is left by parents and those nearest related, there is a share for men and there is a share for women, whether the property (estate) be small or large - a determinate share." This law is non definitive and was repealed later by the āyat al-mirāth (verses of succession).

1 Muhammad - the Final Messenger, p. 115.
2 Al-Qur'an, Chapter 8: 72.
3 Muhammad - the Final Messenger, pp. 115 - 116.
4 Al-Qur'an, Chapter 8: 75.
7 Al-Qur'an, Chapter 4: 7.
8 Ibid, Chapter 4: 11 - 12, 176.
Secondly, an obligation of wasiyyah for wives when the husband deceases was imposed: "Those of you who die and leave widows should bequeath for their widows a year's maintenance without expulsion (from the residence)...." The majority of the mufassirun (exegetists) state that this āyah is abrogated by the Quranic law of 'iddah al-wafat and āyat al-mirāth (verses of succession) while Mujāhid rule it is still applicable.

Thirdly, there was a wasiyyah benefitting certain near relatives of the deceased. "It is prescribed, when death approaches any of you, if he leaves any goods, that he make a bequest to parents and next of kin according to reasonable usage...."

The mufassirūn and fuqahā' differ on the legal standing and application of this āyah. They all agree that this process was compulsory before the revelation of the āyat al-mirāth. It was, however, cancelled by the āyat al-mirāth. This is the view of ibn 'Umar, Abū Musā, Sa'id bin Musaiyyib, al-Ḥasan, Mujāhid, 'Ata'a, 'Ikramah, al-Rabi' bin Anas, amongst others. Others maintain that the āyat al-mirāth brought clear and specific shares to some persons mentioned in the said āyah of wasiyyah with one third remaining as wasiyyah to the remaining relatives who do not get of the shares mentioned in the final āyat al-mirāth. Those subscribing to this

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1 Al-Qur'ān, Chapter 2: 240.
2 Ibid, Chapter 2: 234.
3 Ibid, Chapter 4: 11 - 12, 176.
5 Al-Qur'ān, Chapter 2: 180.
6 Ibid, Chapter 4: 11 - 12, 176.
7 Ibid, Chapter 4: 11 - 12.
view are ibn 'Abbās, Masrūq, Tawūs, al-Dahhāk, Muslim bin Yasar, al-'Alā bin Ziyād, Sa‘īd bin Jubair, Qatadah and Muqātil bin Ḥayyān. This issue will be dealt with further, later, under wasaya (legacies).

The last āyat which were revealed in mirath matters are those of Surah al-Nisa': "Allāh (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 one (daughter), her share is a half. For parents, a sixth share of the inheritance to each if the deceased left a child. If he left no children and the parents are the (only) heirs, the mother has a third. If the deceased left brothers (or sisters), the mother gets a sixth. (The distribution in all cases is) after the payment of legacies and debts. You know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allāh. And Allāh is All-Knowing, All-wise. In what your wives leave, your share is a half if they leave no child. But is they leave a child, you get a fourth after payment of legacies and debts. In what you leave, their (wives') share is a fourth if you leave no child. But if you 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 or descendants, but has a brother or a sister, each one of them gets a sixth. But if they are more than two, they share in a third, after payment of legacies and debts, so that no loss is caused (to any one). This is ordained by Allāh. And

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1 Tafsīr ibn Kathir, Vol 1 p. 372.
Allāh is All-Knowing, Most-Forbearing. The very next āyah re-emphasises the ordained law: "These are the limits set by Allāh..." and is followed by a serious admonishment for those who disobey this law.

There are sunnah texts on issues expressed above and these will be quoted as the subject matter is being dealt with and discussed.

1.5.2 Technical Terms Pertaining To Mirath:

Before proceeding, it is necessary to explain relevant terminology which will often be encountered in this chapter. These terms and their explanations are as follows:

(a) Ashab al-Furud (Heirs With A Fixed Share):

Ashāb al-furūḍ means persons who have a fixed share from a tarikah. The singular is šāhib al-fard (a person with a fixed share). These are, of the males, abb al-mayyit (father of the deceased), the jadd sahih (true grandfather i.e father's father) how highsoever, theakh li umm (uterine brother), and the zawj (husband). From the females, we have the zawjah (wife), bint sulbiyyah (own daughter), bint al-ibn (daughter of the son) how lowsoever, the ukht shaqiqah (full sister), the ukht li abb (consanguine sister), the ukht li umm (uterine sister), the jaddah sahihah (grandmother) of both the father and all males must be legitimate to the mayyit (deceased). Thus, if you were conceived out of wedlock, you are not related to that person. All the relatives, males and females of that male will then be unrelated to you in terms of shari'ah.
mother's side, i.e. mother's mother and father's mother.

(b) **The Ikhwah (Brothers):**

They are of three kinds, namely, the *banu 'ayān*, the *banū 'alla[f* and the *banū akhyāf*. The *banu 'ayān* are the children from the same *umm* and *abb*. They are called *ashiqqa'* (sing. *shaqīq*) meaning full brothers. The females are called *shaqiqāt* (sing. *shaqīqah*) meaning full sisters. The *banū 'alla[f* are those children from the same *abb* but different *ummahāt* (mothers). The males, of this category, are called *ikhwah li abb* (sing. *akh li abb*) or consanguine brothers. The females of this category are called *akhawat li abb* (sing. *ukht li abb*) or consanguine sisters. The last group is called the *banū 'akhyāf* and they are the children from the same *umm*, but different *'aba'* (fathers). The males are called *ikhwah li umm* (sing. *akh li umm*) or uterine brothers and the females are called *akhawat li umm* (sing. *ukht li umm*) or uterine sisters. The *mirāth* of all these categories are different, hence the categories. Usually these children are referred to, collectively, in *mirath* as *ikhwah*, and if not, the gender type is used if so required.

(c) **The Jadd Sahih (True Grandfather):**

He is the grandfather who relates to the deceased in a continuous male line without a female interrupting that male line. An example is the *abb al-abb* (father of the father), how highsoever.
(d) **The Jaddah Sahihah (True Grandmother):**

She is the grandmother who does not relate to the deceased through a jadd fasid (untrue grandfather). An example being the umm al-umm (mother's mother) or umm umm al-umm (maternal great grandmother) or the abb al-umm (father's mother).

(e) **The Jadd Fasid (Untrue Grandfather) And Jaddah Fasidah (Untrue Grandmother):**

The jadd fasid is he who relates to the deceased through an female like the father of the mother of the deceased and the jaddah fasidah is she who relates to the deceased through a jadd fasid like your mother's father's mother. This makes them of the arham. They usually do not normally inherit, but if they do, they are last in line when all categories had been exhausted. There is a difference of opinion amongst the fuqaha' whether these people should inherit at all.\(^1\) This will be dealt with later on.

(f) **The 'Aśabah (Residuaries):**

The 'aśabah\(^2\) (sing. 'aṣib) are the residuaries of a deceased. 'Asabah, literally, means "the sons of a father and relatives of your father".\(^3\) They are of two main categories, namely, the 'aśabah nasabiyyah (residuaries due to nasab i.e lineage) and 'aśabah sababiyyah (residuaries due to clientage). The latter category includes the

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\(^{2}\) 'asabah refers to both males and females. If only females are spoken of we speak of 'asabât.


*Al-Munjid*, p. 508.
systems of *wala’* *al-‘itaq* (freed slaves system) and the *wala’* *al-muwalat* (contractual clientage) of a free person with no relatives, usually free converts to Islam. The system of *‘asabah sababiyyah* is no longer operable in *mirath* nowadays, due to the abolition of slavery and need for *wala’* *al-muwalat* (contractual clientage) having fallen into disuse, generally. Consequently, the issue of *‘asabah sababiyyah* will not be dealt with in this thesis.

(i) **The *‘Asabah Nasabiyyah*:**

These are the residuaries due to *nasab* to the deceased. They are both males and females and are of categories. The first group is the *al-‘asabah binafsihi* or independent residuaries. This kind of *‘ašib* does not require any one else to create the status of *‘ušubah* (residuary status) with that person. These *‘asabah* are those males who relate to the deceased without a female interrupting that line like an *ibn sulb* (own son) or *ibn al-ibn* (son of the son), the *abb*, the *jadd sahih* the *akh shaqiq* (full brother), the *akh li abb* (consanguine brother), the *‘amm* (paternal uncle) and the *ibn al-‘amm* (paternal male cousin). These *‘asabah* are those *‘asabah bi ghairihi*. These are those *‘asabat* (female residuaries) whose share is half of the *tarikah*, if she is alone and two thirds if they are two and more. If they are found with their

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1 *Kitāb al-Furu’,* Vol 5 p. 12.  
*Al-Tahqiqāt al-Mardiyyah,* p. 108.
ikhwah, they will become 'asabah together with them. These females are four in number and they are, the bint or banāt sulbiyyah (own daughter or daughters), the bint or banāt al-ibn (own daughter or daughters of the son), the ukht shaqiqah or akhawat shaqiqat (the full sister or full sisters) and the ukht li abb or akhawat li abb (consanguine sisters).¹ The last group is the al-'asabah ma'a al-ghair. These are those 'asabah who become 'asabāt with another female like the ukht shaqiqah or the ukht li abb with the bint or banāt sulbiyyah (own daughters of a deceased) or with the bint or banat al-ibn (daughter or daughters of the son).²

1.5.3 Aim Of Shari'ah In The Organisation Of Tarikat (Estates):

The first aim of the Shari'ah is to create a bond, through mirath, between the Muslim members of a family in order that cooperation between them be facilitated and wealth is one of the necessary requirements for this practical cooperation and binding force in affection. Thus nonmuslims and murderers are excluded from this system as the most important principle of mirath is tanāṣur (mutual assistance) and muwa anál (contractual clientage). This issue is clear from the Qur'an: "...those who gave them asylum and aid - these are (all) friends

² Minhāj al-Muslim, p. 475.
Al-Tahqiqât al-Mardiyyah, p. 110.
Al-Wajız fì al-Mirath, p. 29.
and protectors of one another..."1, and "The believing men and women are protectors of one another..."2.

The second aim is that mirath takes care of both the muwarrith3 and the heirs of the muwarrith. The system allows the muwarrith to bequeath a maximum of one third of his tarikah for wasayā without seeking consent from his heirs and, thus, a minimum of two thirds of the tarikah must go to the heirs. Mu‘ād bin Jabl narrated, as transmitted by Ahmad, ibn Majah and al-Dāra Qutni, that the Prophet (s.a.w) said: "Allah allowed you a third of your wealth at the end of your lives (to dispose of in charity) as in increase of your good deeds."4 The heirs are obligated, in shari‘ah, to take their allotted share. What they do with it afterwards is their personal matter.

Further, the Shari‘ had obligated that the debts of the deceased be paid from the tarikah5 and absolved the heirs from it as no one carries the burden of another in shari‘ah — "...nor can the bearer of burdens bear another’s burden."6 The Shari‘ (Allah) has, further, ruled that the heirs can only succeed to what is left of the tarikah after the debts and wasayā (legacies) had been dealt with7, thus protecting the rights of third parties.

1 Al-Qur’an, Chapter 8: 72.
2 Ibid, Chapter 9: 71.
3 in this thesis, the term muwarrith (testator) will also include muwarrithah (testatrix). A matter referring to a specific one of the two will be so indicated.
5 Al-Qur’an, Chapter 4: 11 - 12.
6 Ibid, Chapter 35: 18.
7 Ibid, Chapter 4: 11 - 12.
Thirdly, the Shari' applied the principle of the nearest kin in distribution of a tarikah as the bonds of affection and tanaşur (mutual assistance and help) is strongest in that sphere of the family. Thus, the furu' (descendants) of a deceased comes first, then the usul (ascendants), then the ‘aşabah. The pattern of distribution of a tarikah of a deceased makes that clear.

Fourthly, the Shari' made no distinction between the sexes in the right to succeed to a tarikah they merit. However, He did not rule equal shares to males and females simply because He obligated the males with full maintenance of their zawjat (wives), even if they (the latter) are self-sufficient as well as to their children. This maintenance includes, sukna (lodgings), kiswah (clothing), sustenance (of food and drink) as well as medical care and education expenses. Wives and females do not spend anything in this sphere. Their share is a clear asset for them. To have ruled equal shares in this system would mitigate against justice and equity as males would be seriously disadvantaged in the system. The Qur'an states: "Men are the protectors and maintainers of women." This is not a weapon a zawj has over his zawjah. It is purely a duty on him which he agrees to as part of his marriage contract.

Muslim women are, further, protected by a system of independence in their personal property's administration and there is no such thing, nor had there ever been, marital power and control of a zawj over his zawjah's possessions or its administration.

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1 Al-Qur'an, Chapter 2: 233.

2 Al-Tarikat wa al-Waṣaya, pp. 240 - 245.

3 Al-Qur'an, Chapter 4: 34.
in *shari'ah*. On marrying, the *zawjah* is to receive a *ṣadaq* (dowry) which she specifies, and which should be somewhat substantial as wifehood and motherhood will severely limit her time in enriching herself. She is not required to relinquish it on *talāq* (divorce) or *faskh* (annulment) of her *nikāh*. Only when she has no reason for being relieved from the *nikāh* that she and her *zawj* may negotiate what is to be done with it. He can let her have it or take some of it or all of it. When a *zawj* divorces his *zawjah* he cannot claim the *sadaq* back either.

*Mirath* is, thus, a familial succession (save the uterine category), and is a consequence of a *nikāh sahib* (correct marriage) and not an independent subject matter on its own, as *ṣalāh* (prayer) is, for example. This is the perpetual serious mistake many persons make when comparing shares of males and females in *mirath*.

(a) **Time Of Succession To A Tarikah:**

Since *tarikah* is what a deceased leaves behind of his possessions, his ownership thereof must cease before anyone else can assume ownership thereof. This can, in *shari'ah*, only be done in three different ways, namely, by exchange, such as by *bai'a* (sale) and *hibah* (gift) during your lifetime, and *wasīyyah* and *mirath* on your death. It, thus, stands to reason, that the *muwarrith* or *musī* (legator) must have died ḥaqiqatan (in reality, i.e. physically dying in the presence

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2. Ibid, Chapter 4: 4.
3. Ibid, Chapter 4: 20.
5. Ibid, Chapter 4: 20.
of people) or **hukman** (being declared dead by the competent authority, like the *qādī*) as is the case with the **mafqu’d** (missing person). The *fuqaha* agree that, in the case of **mawt haqiqatan** (physical death in the presence of people), there are two cases. Either the person dies of **al-mawt al-‘adi** (death without a sickbed or sudden death) and death due to a sickbed called **marad al-mawt** (death from a sickbed). In any event, the basic rule is that the *muwarrith* must have died so that succession takes place correctly so as not to have two full owners at the same time.

(b) **Mawt Biduni Marad al-Mawt (Sudden Death):**

This is death without a sickbed. The *fuqaha* differ on the time of succession in this kind of death. Some, like the *hanafis*, have three views in this regard, whilst al-Shafi‘i concurs with one of the *hanafi* views. Muhammad al-Shaibani, the *hanafi* *faqih*, rule that the *tarikah* of one dying a sudden death is transferred to his heirs in the last part of the life of that person (*akhir juz min hayatihi*). This is also the ruling of the *hanafi* *masha’ikh* (shaikhs) of Iraq. Abu Yusuf of the *hanafis* and the other view of Muhammad al-Shaibani states that succession takes place at the actual death of that person. This is also the ruling of the *masha’ikh* (shaikhs) of Balkh. This latter ruling is to offset the confused ownership in this case. The other view of some other *hanafis* is that succession takes place at actual death, not before it nor after it.

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2. Ibid, p. 15.
Succession To The Tarikah In Marad al-Mawt:

The fuqaha’ differ on the time of succession of heirs to the tarikah. Some, like Abu Hanifah, opine that this succession is sometimes attached to the value of the māliyyah al-tarikah (value of the estate), and sometimes to the actual physical assets or ‘ain al-tarikah. His senior fuqaha’ companions, Abu Yusuf and Muhammad al-Shaibānī opine that the heirs’ succession is simple succession to the qīmah (value) of the tarikah to be determined by experts. They all agree that the succession takes place at the beginning of the marad al-mawt. Hanafis further differ on the degree of this right of the heirs in this case. The mutaqaddimūn (earlier) hanafis rule ownership of mulkīyyah al-tarikah (ownership of the estate) while the muta’akh-khirūn (later) hanafis rule it to be only succession (mujarrad haqq fī al-khilūfah). This is to protect the heirs who may intervene to prevent their muwarrith of disposing of more than one third of his tarikah in wasāyā as well as allowing him to dispose of no more than a third for wasāyā.

Succession To A Tarikah Mashghul Bi al-Duyun (Indebted Estate):

A tarikah may be mashghul bi al-duyun (have debts attached to it) which may be partial, i.e. there are still assets free of debt or the debts may exceed the tarikah itself. The fuqaha’ differ on succession of the heirs to the tarikah in these cases. In the case of partial indebtedness of the tarikah, the

1 Al-Tarikat wa al-Wasāyā, pp. 15 - 16.
2 Ibid, pp. 16 - 18.
majority of the ḥanafis, including Abu Ḥanifah, rule that the heirs succeed only to that portion of the tarikah which is free from debt. The debts part remain part of the property of the deceased until they are settled or the creditors absolve the deceased from his duyūn. The basic reasoning here is what is in the āyah "...after the payment of legacies and debts." The settling of debts precede the distribution of the tarikah. This is also the view of the mālikis and ḥanbalis. The shafi'is, ja'fariyyah and the more famous view of the ḥanbalis, states that the heirs succeed to the entire tarikah, debts and all, even if it is mustaghraq bi al-duyun (insolvent) and it is not necessary to first settle the debts. Their reasoning is that the madin (debtor) deceased owned his possessions with the debts and his ownership did not cease with that during his lifetime. Thus, the tarikah can be succeeded to, debts and all.

This ruling is based on the understanding that the rights of the heirs and the creditors must be protected. Thus, the heirs, in this case, has the right of taṣarruf (right of dealing) in the tarikah as they wish subject to such taṣarrufat (dealings) being void when it is muqabil al-naqḍ (invalid) or mafsukh (cancelled) when the heirs fail to honour their obligations attached to the tarikah by way of debts. From this ruling the rights of the deceased, the heirs and the creditors are safeguarded. The right of the creditor is

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1 Al-Qur'ān, Chapter 4: 11.

attached to the value of the tarikah and not the 'ayan al-tarikah (assets of the estate).

(e) Huquq Mu'allaqah Bi Al-Tarikah (Rights Attached To An Estate):

There are four such rights attached to a tarikah and they are:
- tajhiz al-mayyit (burial of the deceased).
- qada duyun al-mayyit (settling of the debts of a deceased).
- tandfidh wasaya al-mayyit (execution of the legacies of the deceased).
- qismah al-tarikah (distribution to the heirs).

The fuqaha' differ as to the order in which these rights should be seen to. They agree that the qada al-duyun (settling of debts) and tajhiz al-mayyit (burial of the deceased) precede the tandfidh wasaya al-mayyit (execution of legacies). They also agree that the qismah al-tarikah (distribution to the heirs) comes after the wasaya (legacies) distribution.

They actually differ whether the tajhiz al-mayyit precedes the qada al-duyun. The hanafis, malikis and shafi'is all rule that the duyun 'ainiyah (debts attached to physical assets) precede tajhiz al-mayyit.

This is due to such debts not forming part of

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1 Al-Tarikat wa al-Wasa'ya, pp. 19 - 22.
4 Al-Wajiz Fl al-Mi'rath, p. 6.
5 Al-Wajiz Fl al-Mi'rath, p. 73.
6 Al-Taqiyya al-Mardiyyah, p. 25.
the *tarikah* specifically for ḥanafis. Malikis and *shafi'is* reason that the creditors have more right to these assets than anyone else. They further reason that, during his lifetime, the deceased did not have more right than the creditor in such assets and he could not do anything, during his lifetime, which would prejudice that creditor's right. Thus, at the *muwarrith's* death, the heirs' position weakened and thus the right of the creditor over such assets is confirmed. These assets are delivered to the creditor.

Other *fuqaha* like the ḥanbalis and some ḥanafis rule *tajhiz al-mayyit*, preceding the *qada al-duyun* as this is the first right seen to. This is also the view of the *ja'fariyyah* who rule *wujūb* (necessity) herein. The latter includes all acts pertaining to burial, like shrouding and perfuming the corpse. The *zāhirīyyah* also rule precedence of *qada al-duyun* over *tajhiz al-mayyit*. Ibn Ḥazm maintains that *qada al-duyun* precede due to the Quranic *ayah* and what is narrated from the *sunnah* that Muṣ'ab bin 'Umair had his *duyun* (debts) settled and he was left with only one sheet in which he was buried.

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1. *Al-Tarikat wa al-Wasaya*, p. 23.
The *fuqaha'* differ when the *zawjah* has deceased as to what right she imposes on her surviving *zawj* in her *tajhiz* (burial). *Abū Ḥanīfah* rules that the surviving *zawj* must pay for it whether he is poor or rich. *Malik* and *Ahmad* rule that he is not responsible for anything of her *tajhiz*, not even the burial shrouds as he is obligated in maintenance during the *nikāh* and since it ended, this falls away. Burial of the *zawjah* is the responsibility of her *wali*. *Al-Shāfi‘i* has a ruling mid-way between the above two views, namely, that if the surviving *zawj* is rich, he is responsible for his deceased *zawjah*’s burial costs and if he is poor, then not.1

(i)  **The Position Of Duyūn Allah (Debts Of God) And Duyūn Al-ʿIbad (Debts Of People):**

The *fuqaha’* agree that *duyūn* are settled before distribution to heirs.2 *Duyūn Allah* means debts owing to *Allah* and *duyūn ʿibād* means debts owing to people, be they Muslim or not. All the *fuqaha’* agree to these divisions. Examples of *duyūn Allah* are outstanding *zakah*, *ḥajj* and *kaffārat* (penance).

The *hanafis* rule that *duyūn Allah* lapses on the death of a person when he dies and did not instruct his heirs, during his lifetime, to settle them. If he did so, these debts are paid from a third of the *tarikah*, after *tajhiz al-mayyit* and qada *duyūn al-ʿibād* had been seen to. The *duyūn al-ʿibād* must be

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1 Al-Tahqiqat al-Mardiyyah, p. 25.
settled before division of the *tarikah* to the heirs. The *hanafi fuqahā'* explain that the basic principle in *'ibadat* is intention followed by the actual act. A deceased person cannot comply with these requirements. On the other hand, the creditor takes his possessions from the deceased's belongings which is due to him. There is no such request as for *'ibadah* due to *Allāh*. Further, *'ibadah* is a test from *Allāh* and He is not in need of any person nor their wealth.\(^1\)

*Malikis*, on the other hand, rule that all debts whether *duyun* *Allāh* or *duyun al-'ibad* must be settled as long as he (the *muwarrith*) acknowledged it in front of witnesses. These debts are settled from the entire *tarikah*. If he did not acknowledge it as indicated, but gave instructions for settling of debts, but gave no acknowledgement of it, then such *duyun* are settled from one third of the *tarikah* only. Ibn *'Arafah* and other *malikis* rule that if a person acknowledges, during his lifetime, that he is indebted to *Allāh*, then such *duyun* *Allāh* are settled from his entire *tarikah*, whether he instructed herein or not.

*Shafi'is* and *hanbalis* share basically these views but they insist that the entire *tarikah* should be used for settling of debts and this must be done before distribution to the heirs. The *zāhiriyyah* agree with the *shafi'is*, but

\(^1\) *Al-Qur'ān*, Chapter 2: 267
rule that the settling of debts, whether 
\( \text{duyun Allah} \) or \( \text{duyun 'ibad} \) be settled before burial expenses are seen to.\(^1\)

(ii) \textbf{Duyun Al-Sihah (Undisputed Debts, Duyun Al-Marad (Debts Incurred During Sickness)}:

\( \text{Duyun sihah} \) are incurred during one’s lifetime and under the following conditions, according to \( \text{hanafis} \):

- either by proof like witnesses to the enactment of a debt whether the person is healthy or sick, even in \( \text{marad al-mawt} \).

- a debt acknowledged by a person during his lifetime when he was not sick.

- debts of \( \text{marad al-mawt} \) which is acknowledged by the sick person and confirmed by proof.

- debts of \( \text{marad al-mawt} \) which the sick person acknowledges and no proof is found for it. This refers specifically to \( \text{marad al-mawt} \).

The latter kind of debts have different rulings in settlement from the \( \text{tarikah} \) when the \( \text{tarikah} \) cannot accommodate all the debts due to \( \text{tazakhum} \) (insolvency of the estate).

It is \( \text{hanafi} \) law that the \( \text{duyun 'ainiyyah} \) (debts attached to objects like something of security) comes first, then \( \text{duyun sihah} \) and followed by the \( \text{duyun marad} \). Debts are thus of degrees.\(^2\)

The \( \text{duyun 'ainiyyah} \) are settled first

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1. \textit{Al-Tarikat wa al-Waṣaya}, pp. 28 - 30.
2. \textit{Ahkam al-Tarikat wa al-Mawārith}, p. 51.
followed by the *duyun sihah* and if there remain anything, it is divided between the other creditors, each according to the value of the debt percentage-wise. The reason is that the *duyun 'ainiyyah* and *duyun sihah* is stronger, due to proof existing of such a debt, while in the case of *dain al-marad* (debt of illness), only the acknowledgement of the debtor is found and no proof and thus the creditor of *duyun sihah* will suffer in repayment if no difference is made between the two kinds of debts. This is against al-*qā'idah al-fiqhiyyah* (the fundamental legal principle) "*la darar wa la dirar*" — "there shall be no harm (existing) and no harm shall be caused."

The majority of the *fuqaha'* make no distinction between *duyun sihah* and *duyun marad*. All the creditors have the right to take from the *tarikah* what is due to them. The explanation given is that a debt acknowledged by a person in *marad al-mawt* is valid as the act is a valid act in *shari'ah*. A person in *marad al-mawt* is nearer to *Allah* and wrong doing is far from him. *Duyun marad al-mawt* (deathbed debts) are thus valid save if there is *dalil shar'i* (accepted *shari'ah* proof) which will mitigate against the acknowledgment of debt. The majority of the *fuqaha'*, thus, make no distinction between the two kinds of *duyun*.

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1 *Al-Tarikat wa al-Wasaya*, pp. 32 - 33.
(iii) Tazahum al-Duyûn Fi al-Tarikah (Debts In An Insolvent Estate):

This is an insolvent estate. The fuqahā’ differ on the procedure of settling the debts in this case. The ḥanafis rule that duyun šiḥah (undisputed debts) be settled first, followed by duyun maraḍ al-mawt. Malikis rule precedence of duyun ʿibād (debts owing to people) which must be settled first and then duyun Allah, starting with the biggest of debts and proceeding in descending order of amounts owing. Their ruling is such, as, according to them, Allah is not in want of possessions of his creations as He expresses in the Qur’ān.¹

The shāfiʿis rule precedence of duyun Allah in this case. The ḥanbalis rule that duyun ʿainiyyah, like rahn (something physical given as security) precede followed by duyun mutlaqan (debts of the deceased himself) with no distinction between duyun Allah and duyun ʿibād. If insolvency is found due to both duyun Allah and duyun ʿibād, both are settled from what remains of the tarikah with no distinction between the two kinds of debts. The zahiriyah rule that the duyun Allah be settled first without distinction being made between such debts. What remains must be used to settle the duyun ʿibād debts owing to the people, being divided

¹ Fiqh al-Mawārith, p. 27.
² Al-Qurʾān, Chapter 29: 6.
between them proportionally, each of them to according to the value of his debt. The latter ruling is also the ruling of the zaidiyyah.¹

(iv) Mulkīyyah (Ownership) Of A Tarikah al-Madyūn (An Estate With Debts Attached To It)

All the fuqahā' agree that the heirs own the tarikah but cannot succeed to it in proper and full ownership until the debts had been settled. They cannot, thus, in a tarikah madyūn (debt ridden estate) do anything which will give them de facto ownership of the tarikah, like selling something of it for himself. Some fuqahā' allow the heirs to sell of the tarikah to settle the debts of the deceased, like the ūnafīs, in one of their rulings.² Shāfi'īs share this ruling. Hanbalis allow this only with the consent of the creditors, in one of their rulings, while in another hanbali ruling, dealing with the tarikah in disposing of some of the assets is forbidden. The latter ruling is also one of the views of the ja'fariyyah. Other fuqahā' (jurists) allow the heirs to deal in the tarikah on condition that the rights of the creditors are not prejudiced. This is also one of the rulings of the ūnafīs.³

¹ Al-Tarikat wa al-Wasāya, pp. 33 - 35.
² Ahkam al-Tarikat wa al-Mawārith, p. 65.
³ Al-Tarikat wa al-Wasāya, pp. 38 - 41.
1.5.4 *Mabab al-Mirath (Causes Of Succession):*

There are two general principles *mirath* is based on and they are, the limitation to a certain circle of heirs and prevention of amassing of wealth in the hands of a few. As for the first principle, *mirath* restricts the heirs to three categories, namely, *qarabah* (familial relationship), *zawjiyyah* (marriage) and *wa‘la’* (clientage), the latter being of a disputed issue amongst the *fuqaha*.\(^1\) The principle of *qarabah* is based on *nasab* and the protection of it in relation to the descendants of a deceased. Furthermore, the issue of *silah* (blood relationship) and *mawaddah* (affection) necessitate that *mirath* give practical expression to these issues in Muslim community life. Needless to say, these near relations of a person are those who rejoice in your happiness along with you and share in your grief and loss.

As far as *zawjiyyah* is concerned, the *azwaj* (spouses), in the Islamic concept of *nikah*, are "covers" for one another’s chastity. The Qur'an says: "Permitted for you on the night of the fasts is the approach to your wives. They are your garments and you are their garments..."\(^2\) as well as closeness of relationship. As for *al-wa‘la’,* the nearest of an acquired familial relationship, in the absence of any natural one, brings forth a close relationship in which *tanāsur* (mutual help) and *ta‘awun* (cooperation) features prominently, thus giving rise to *mirath* between the two parties.

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\(^1\) *Minhaj al-Muslim*, pp. 469 - 470.  
*Al-Iqna’,* Vol 2 p. 47.  

Islam does not allow nor support a system where wealth is concentrated in the hands of a few. This unsatisfactory and unjust system inevitably gives rise to serious problems in society. The Qur'an is clear herein — "...in order that it may not (merely) make a circuit between the wealthy among you...". Progenitor succession is, thus, forbidden in Islam. Mirath distributes wealth and spreads it amongst the community and creates economic activity in a wide sphere. This distribution includes women. The shari'ah rule is a calculated fragmentation of estates to prevent the formation of huge single owned entities and concerns and the vices that usually go with it. Social justice is, thus, the norm. The asbāb al-mirath (causes of succession) will now be dealt with.

(a) Al-Qarabah (Familial Relationship):

Qarabah is derived from the arabic verb qaruba (also qariba) meaning "to be near". Qarabah is, thus, the lineage of ascent or descent of a person through birth. The qarabah (relatives) of a person share rights and obligations amongst themselves despite the wide divergence between their darajah (degree) and quwah al-qarabah (nearness of relationship) to the person concerned. Mirath has, largely, to do with these persons and

1 Al-Qur'an, Chapter 59: 7.
their eligibility for *mirath*. These categories will be dealt with later on.

(b) *Al-Zawjiyyah (Marriage):*

Zawjiyyah, here, refers to two people married correctly with a proper *'aqd al-’nikāh* (marriage contract). As far as *mirath* is concerned, it is the enactment of a *nikāh* which confers the right to *mirath*. Consummation and living together after the *nikāh*, is not a requirement. This rule is taken from the Qur’ān: “and you (husbands) shall halve half of what your wives leave.”² There is no specification which requires more than what the definition states. This view is further complemented by the *sunnah* in that the Prophet (s.a.w) granted bint Washiq inheritance from her spouse who married her and did not specify her dowry nor consummated the *nikāh*.³ This is so due to consummation of a *nikāh* not being necessary for its validity. All the *fuqaha* agree that enactment and contracting of a valid *nikāh* brings forth the right to *tawaruth* (mutual succession) between the *azwaj* and this right remains as long as the *nikāh* subsists.⁴

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¹ only males born as males and females born as females may marry according to *shari‘ah*. Artificial sex changes by surgical or other physical means do not change the natural male and natural female status in *shari‘ah*.

² Al-Qur‘ān, Chapter 4: 12.

³ Al-Tarikat wa al-Wasa‘ya, p. 50.

⁴ Athar *'Aqd al-Zawaj*, p. 110.

(c) **Al-Wala' (Clientage):**

*Al-wala'* means "clientage" and are of two kinds, namely, *wala' al-'itâq* which is the clientage of a free slave who becomes a client with his former master. This system is now extinct and will not be dealt with in this thesis. The other system is *wala' al-muwâlât* or *wala' al-mu'aqqad* which is the clientage of a nonmuslim converting to Islam by the hand of a Muslim and the two contract that the one will inherit from the other, amongst other things.¹ This system was found in the Prophetic era in Arabia and in early Islam. Some fuqaha', like the ḥanafis, who rule the continued permissibility of the system, quote from the Qur'an, in support of their argument:

"To (benefit) everyone, He (Allâh) have appointed sharers and heirs to property left by parents and relatives. To those, also, whom your right hand pledged, give their due portion, for truly Allâh is witness to all things."² Ḥanafis opine that this is a reference to *wala' al-muwâlât* (succession through clientage). Hadîth texts are also quoted in support of this argument. Tamîm al-Dârî narrated, as transmitted by Abû Dawûd, that he asked the Prophet (s.a.w): "Oh Messenger of Allâh, what is the sunnah (law) of a man who becomes Muslim through me? The Prophet replied: "You are rightful over him during his lifetime and his death"³ This text is criticised as one of the reporters is 'Abd

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² *Al-Qur'an*, Chapter 4: 33.
Allāh bin Wahb and he is not a refined reporter. Another variation of this text states that the Prophet (s.a.w) said "He is your brother and your client and you have right over him during his lifetime and at his death." Ḥanafis, further, reason that the 'aqd al-muwalāt (contract of clientage) is a valid contract and resembles wasiyyah as a person who has no heir can give away his entire tarikah as a wasiyyah. The same is applicable to the 'aqd al-muwalāt.

The majority of the fuqahā reject this, ruling the 'aqd al-muwalāt as invalid as the heirs are either ashab al-furūḍ or 'asabah which are based on qarābah or zawjīyyah. There is, thus, no place for the 'aqd al-muwalāt in mirāth. These fuqahā further assert that the validity of the 'aqd al-muwalāt was abrogated by the āyat al-mirāth in the Qurʾān. This is the view of Al-Hasan al-Baṣrī, al-Sha'bi, Mālik and al-Shafīʿi. The Ḥanāfī stand is taken from the ruling of 'Umar ibn Khattab and ibn Musaiyib and others in this matter. The mālikis and shafīʿis give a fourth cause of mirāth, namely, jiḥah al-īslām which is the bait al-māl [(Muslim)
public treasury] making it an heir for all the Muslims by way of ‘uṣūbah.¹

The ja'farīyah has another form of wala’ al-muwalat in that they rule, that if a person has no heir, the Imam al-Shi‘ah (leader of the shi‘ah), succeeds to this tarikah and can do with it what he so wish. The Imam’s heirs’ do not inherit this (wealth), but it passes on to the next Imam on condition he is physically present. If he is hidden, it is divided amongst the poor. The shi‘ah claim that ‘Ali used to spend this kind of money on the poor.²

This ja'farīyah ruling is akin to the bait al-mal in sunni law of mirāth.

1.5.5 Mirāth al-Anbiya (Succession Of The Prophets (A.S):

The above asbāb al-mirāth are applicable to all people, save the anbiyā (prophets). The Prophet (s.a.w) also instructed that his possessions, at his death, is to be given away as ṣadaqah. This is the sunni view. Abu Hurairah narrated, as transmitted by al-Nasa’i that the Prophet said: "My possessions are not to be inherited by my heirs. What I leave after the maintenance of my wives and servants, is for charity." Another text by ‘A’ishah narrating that Fatimah bint Muhammed (s.a.w) asked the Khalifah Abu Bakr for her share of her father’s (s.a.w) estate. Abu Bakr replied that the Prophet (s.a.w) informed: "We do not inherit and what we leave is charity."³

A similar text in meaning is reported by ibn 'Umar.⁴ ‘A’ishah also narrated "that the Messenger of Allah

² Al-Qawānin al-Fiqhīyyah, p. 253.
³ Al-Tarikat wa al-Wasaya. pp. 75 - 76.
⁴ Sahīh al-Bukhari, Vol 8 p. 185.
⁵ Jāmi’ al-Usūl, Vol 9 p. 636.
left no dinar (old Arabian gold coin) nor dirham, (old Arabian silver coin) nor sheep nor camel (i.e. no animals) nor did he leave any legacy. ¹

1.5.6 Shurūt al-Mīrah (Conditions Of Succession):

It is necessary that certain shurūt be met before the process of mirath can be enacted. As previously mentioned, there are three main causes for mirath, namely qarābah, zawjīyyah and for some, wala'. There are also three main shurūt which have to be met for all the three causes of mirath. These are:

- that the muwarrith had definitely died (mawt haqiqatan) or that he is ruled as dead by the judicial process of shari'ah (mawt ġukman - ruling of presumption of death), like in the case of the mafqūd.

- proof of the existence of the heir of the muwarrith at the death of the latter. Most fuqaha' also rule that the unborn heir must be found at the time of the death of the muwarrith and proof hereof is his live birth later on. The heir should, thus, exist, haqiqatan (in reality), like a person, or taqdiran (assumed existence) like a foetus, for example.

- that the heir continue to exist after the death of the muwarrith. This shart al-Shafi‘i specifically ruled. Malikis insist that if the death of a muwarrith and his heir is in such a manner as to be impossible to determine who died first, none of the two inherit from one another.²

All fuqaha', have besides the above shurūt, additional shurūt. Hanafis have the above first


two conditions and a shart that it be known on what grounds an heir will inherit.\footnote{\textit{Al-Tarikat wa al-Wa{	extasciiacute}y{	extasciiacute}a}, p. 77.}

\textit{Malikis} require the following shurut:

- that the heir be not the murderer of his muwarrith by \textit{al-qatl al-\'{a}amd} (intentional homicide) nor even \textit{al-qatl shib al-\'{a}amd} (homicide resembling intentional homicide), the latter of which does not require the penalty as for the first.
- that both the muwarrith and the heir be of the same religion.
- that the heir be a free person. (This is now in disuse as slaves are no longer found).
- the confirmed existence of the heir after the death of his muwarrith. The shafi'i\textit{'is} require the following shurut (conditions):
- the above \textit{maliki} shart.
- knowledge of relationship of the heir to his muwarrith such as \textit{qarabah}, \textit{zawjiyyah} and \textit{wala'}. Also the grounds on which heir will succeed. This is for the \textit{qadi} to decide. Some of these shurut are easily dealt with nowadays with advanced State registrations of persons' personal details.

The \textit{ja'fariyyah} and \textit{zaidiyyah} of the \textit{shi'ah} groupings, basically, share the shurut as \textit{ahl al-sunnah}, like shurut pertaining to the heir and muwarrith, absence of a \textit{mani'} (prohibition) to \textit{mirath} and the like.\footnote{\textit{Ibid}, pp. 80 - 81 & 96 - 97.}
(a)  *Shurut Mirath al-Haml* (Conditions For The Succession Of A Foetus):

The fuqaha' deal with the *mirath al-haml* (inheritance of the unborn) under the *shurut al-mirath* in their works. It is deemed expedient to follow the same pattern here.

There is *ijma* by the fuqaha' that if a child is born and is alive at birth and continues to live after his birth, that such a child can be a *muwarrith* as well as being an heir. They prescribe signs which indicate life and these are a shout, a sneeze, or taking to the breast and the like signs. These signs are, obviously, derived from the limited medical knowledge available when these rulings were made.

The fuqaha' differ as to the necessity of *istihlal* (birth shout) and amount of physical appearance outside the mother, at birth, as to constitute a live child. Some, like Thawri, al-Awza'i, Abu Hanifah and Abu Sulaiman, rule that if a child is born completely and is alive or is partially born and is alive and died after full emergence from his mother or before his full emergence, or sneezes or not and life is observed, like a movement of an eye or hand or breathing or any sign taken as a sign of life, then such a child is a *muwarrith* as well as an heir. They cite the Qur'an as proof and quote: "Allah directs you as regards your children's (inheritance)." The child, as described above, is classifiable as a child under this *āyah.*

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1. Al-Tarikat wa al-Waṣaya, p. 82.
2. Al-Qur'an, Chapter 4: 11.
Some other fuqaha’, like al-Shafi’i, rule that the entire child must be born fully and completely and have emerged alive at birth, before he can be muwarrith or an heir. This is also the view of Dawud and the zahiriyyah. Others, like Malik, rule that the child has to emerge fully at birth and utter a shout (yastahil šarikhān). If he does not and even if he eats and drinks, he is not a muwarrith nor an heir. Malikī fuqaha’ support this ruling of their Imam on grounds of the precedent of 'Umar ibn Khattāb and others who ruled and allotted a share to such a child who shouted at birth.

Another group of fuqaha’, like al-Nakha’ī, Shuraiḥ, al-Qasim ibn Muḥammad, ibn Sirīn, al-Sha’bī, al-Ḥasan bin ‘Alī, al-Zuhrī and Qatadah rule istihlāl a necessary requirement. This is also a reported view of Malik and one view of Abu Ḥanīfah. Ahmad and the Ḥanbalis rule any sign of life as proof of life and entitles that child to all the laws of mirāth. The ra’i mashhūr (famous view) of Ahmad is istihlāl at birth. This is also the ruling of ibn ‘Abbās, Abu Hurairah, Jābir, Sa’īd ibn Musaiyyib, Abu Salamah and others. The zaidiyyah and the ja’fariyyah prescribe life and a sign indicating it as sufficient for

1 Al-Muḥalla, Vol 9 p. 309.
2 Al-Tarikāt wa al-Waṣaya, p. 92.
declaring a child alive, at birth. It is not a specific requirement that *istihlal* be occur.¹

These differences of rulings all centre around the meaning of the word *istihlal*. *Istihlal* is the verbal noun of *istahalla* and its original usage was to see the appearance of the new moon whereat the people rejoiced (especially for the beginning of the fast of *Ramadan* and the 'Idān²). The application of the term at birth has a similarity in that, when a child is born and shout at birth, people gather and rejoice at the live birth.

Thus, *istihlal* means the first shout of a child at birth.³ The ḥadīth of the Prophet (s.a.w), herein, is clear. Abu Hurairah narrated that the Prophet (s.a.w) said; "When a child is born and shouts, he is an heir."⁴ Ibn Mājah transmitted a similar text narrated by Jabir.⁵ The differences are further compounded by what is reported from the Prophet (s.a.w) that "every child born is touched by Satan at birth and shouts, save ibn Maryam (Jesus) and his mother".⁶ Some fuqaha’ made *istihlal* a shart while others state its merely a statement of an occurrence for there

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1 *Al-Tarikat wa al-Wasa′ya*, pp. 96 – 97.
2 the two ‘Id celebrations marking the end of the fasting month *Ramadan* on the first of Shawwāl and the culmination of hajj as well as the commemoration of the sacrifice of prophet Ibrahim (a.s) (i.e the patriarch Abraham) on the tenth of Dhul Hijjah.
might be a newly born child who does not shout but has other life signs or just simply take to the breast. Denying such a child the fruits of "mirāth" will be an injustice. Such a child cannot be dead. The main issue amongst the fuqaha', here, appears to be the ascertaining of life at birth and through it, the existence of a live foetus at the death of his "muwarrith". This matter can now be factually ascertained by medical test and instrumentation.

The issue of multiple births featuring in the above issue of the fuqaha' gives no problems to those prescribing life at birth through signs of life. For those who prescribe "istihlāl sarikhan" if, for example, only one shout is heard and its known from whom it came, that child will be a "muwarrith" and an heir. If nothing is heard from the other one and he dies later, he is not a "muwarrith" nor an heir. This issue is also, nowadays, purely academic. When a pregnant wife is left behind, a different procedure is used in the process of distribution. This will be dealt with in the section of distribution of the tarikah.

(b) Mawāni' al-Miṟāth (Prohibitions Of Succession):

Mawāni' is the plural of "miṟāth" which is derived from the arabic verb "mana'a meaning, amongst other things, "to prohibit".1 Mawāni' al-miṟāth, thus, means, "prohibitions of succession" i.e acts or conditions which prohibit a person from succeeding to a tarikah. The principle "miṟāth" functions on is

nuṣrah between members of Muslim society. Any factor which upsets this pattern nullifies the right to mirāth, like an heir murdering his muwarrith to speed up receipt of his share of the tarikah, for example. The mawāni' al-mirāth are:

1. al-qatl or homicide.
2. ikhtilaf fi al-dīn or difference in religion.
3. ikhtilaf fi al-dār or difference of domicile.
4. al-rīqq or slavery, which is non existent now and will not be dealt with here.

Some fuqāḥā have more mawāni' but these are either extensions of the mentioned ones or are dealt with in fiqh works under special headings. The mentioned factors need explanation as they have a strong prohibitory effect on a person's right to mirāth.

1. Al-Qatl: (Homicide):

There is overwhelming agreement amongst the fuqāḥā that the murderer committing an al-qatl al-'amd (deliberate homicide) does not succeed to his share of the tarikah of his muwarrith whom he murdered. Only Sa'id ibn Musaiyib and ibn Jubair of the fuqāḥā and the khawarij rule necessity of succession of a murderer of his muwarrith stating that the Qur'ān made no such

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Al-Fawā'id al-Jalīyyah, p. 8.
'Umdah al-Fiqh, pp. 107 - 108.
Al-Tarikāt wa al-Waṣāyā, p. 114.

exception. The majority of the fuqaha' claim proof from the sunnah in prohibiting a murderer succeeding to the tarikah of his muwarrith. 1 Al-Nasawi transmitted a report by Abu Hurairah the Prophet (s.a.w) said: "The murderer does not succeed to the estate (of his muwarrith)." 2 'Urwah bin Zubair narrated that 'Uhaihah bin al-Julah murdered his minor 'amm in order to succeed to his tarikah adding "a murderer does no succeed to the tarikah (estate) of his victim, his muwarrith." Malik quotes that the ahl al-'ilm (scholars shar'i'ah) did not allow succession of the fighters in the battles of al-Jamal, al-Siffin, al-Harrah and Qadid. Likewise is it the rule that the murderers do not succeed to the tarikah of their victim. 3 'Amr bin Shu'aib narrated that the Prophet (s.a.w) said: "A murderer does not inherit anything from the estate (of his testator)." 4

There are different degrees in homicide and there is quite a difference of opinion amongst the fuqahā' as to what kind of killing necessitate prohibition of succession to the tarikah of the muwarrith. The kinds of killings found in al-qisas (homicide) are:

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1 Al-Mughni, Vol 6 p. 291.
3 Al-Suyuti J D: Tanwir al-Hawalik - Sharh 'ala Muwatta' Malik, Cairo, Maktabah al-Mashhad al-Husaini, undated Vol 2 p. 60.
Nail al-Awtār, Vol 6 p. 84.
- *al-qatl al-‘amd* (intentional homicide).
- *al-qatl shib al-‘amd* (homicide resembling intentional homicide).
- *al-qatl al-khata’a* (accidental homicide).
- *al-qatl al-jari majra al-khata’a* (homicide resembling accidental homicide).
- *al-qatl bi al-tasabbub* (homicide due to a cause).1

Besides these, other forms of killings do not fall under this heading and as such do not exclude the perpetrator from succession of his *muwarrith*, like:

- executing someone lawfully in accordance with law.
- killing in legitimate right of self defence. It is justifiable, in *shari‘ah*, to protect your person and property as well as the person and property of someone else from unlawful attack.2
- death resulting from an act intended to benefit someone’s health and so performed on his request but from which he dies, like a surgical operations. Qasd (intention) is absent.

These acts are all classifiable under the Quranic ‘ayah: "...nor take the life which Allah has made sacred, except for a just cause..."3

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2 Al-Tarikat wa al-Wasaya, p. 115.  
3 Al-Qur’an, Chapter 17: 33.
Definition Of The Various Forms Of Qatl:

It is necessary to know the different kinds of qatl as to know who and when someone is not entitled to succession rights. There are different kinds of qatl and the fuqaha' differ on their definitions.

Abū Hanifah defines al-qatl al-'amd as killing intentionally with an instrument which breaks the body (yufarriq al-ajzą'), like a sword, or fire. Abū Yusuf and Muḥammad al-Shaibānī defines this kind of killing as killing intentionally with something which, generally will kill, like a big stone or a big stick. This kind of killing is al-qatl shib al-'amd for Abū Hanifah. Al-qatl shib al-'amd for Abū Yusuf and Muḥammad al-Shaibānī is striking someone with something that usually does not kill someone, like striking with a small stone or with a whip.¹ The difference in the definitions of al-qatl al-'amd by Abū Hanifah on the one hand and Abū Yusuf and Muḥammad al-Shaibānī on the other hand is that if someone, for example, pushes someone else from a roof or strike him with a big stone or a huge stick, for Abū Hanifah this will be al-qatl shib al-'amd while

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¹ Bada'i' al-Sană'i, Vol 7 p. 233.  
for the other two it will be ‘al-qatl al-'amd.¹

Malik, in his accepted view, does not differentiate between al-qatl al-'amd and al-qatl shib al-'amd, save in the case of a son with his father.²

The shafi'i definition of al-qatl al-'amd and al-qatl shib al-'amd is like that of Abu Yusuf and Muhammad of the hanafis save that they call the latter kind of homicide, al-qatl al-'amd al-khat'a.³

Hanbalis, share the shafi'i definitions save that they also classify continuous striking until death with an object which normally does not kill, like a small stone or stick, as al-qatl al-'amd.⁴ Many fuqaha' classify al-qatl al-jari majra al-khat'a and al-qatl bi al-tasabbub as al-qatl al-khat'a due to intent being absent. Al-qatl al-khat'a are of two kinds; either khat'a bi al-qasd (error in aim) like intending to shoot an animal and it actually is a person (like movement in a thicket thought to be

² Al-Tarikat wa al-Waṣāyā, p. 116.
⁴ Minhaj al-Ṭalibin, p. 122.
⁶ Minhaj al-Ţullāb, pp. 110 - 111.
⁷ Al-Mughni, Vol 7 pp. 637 & 650.
that of an animal and it turns out to be a person) and khāṭa‘a fi āl-fi‘l (error of act) in that he aims at an object but strikes a person instead. Al-qatī al-jārī majrū al-khāṭa‘a is presented as a sleeping person falling, during his sleep, onto another person killing him while al-qatī bi al-tasabbub is presented as a person digging a well or placing a stone somewhere as to cause an obstruction and this causes some person’s death.¹

(ii) Views Of The Fuqaha’ On Al-Qatī (Homicide):

There is quite a divide between the fuqaha’ on the definitions of the levels of qatī that prohibits the perpetrator thereof from succeeding to the tarikah of his muwarrith. Mālikis rule that al-qatī al-‘amd whether it be by any intentional act or omission, directed against a human being which is either a hostile act or intrinsically likely to kill, as being qatī that prohibits the killer from succeeding to the tarikah of his muwarrith should the victim be the latter. It should be noted that al-qatī shīb al-‘amd falls under al-qatī al-‘amd in mālikī law. However, al-qatī al-khāṭa‘a of one’s muwarrith does not preclude the

¹ Al-Hidayah, Vol 4 p. 159
Al-Ikhtiyār, Vol 5 p. 26
Al-Mughnī, Vol 7 p. 637.
perpetrator from succeeding as an heir to the muwarrith's tarikah.

Malikis differ when the perpetrator of al-qat' al-'amid is a minor or an insane person whether such a person is prohibited from succeeding to his victim's tarikah, when he is an heir to that tarikah. A group of maliki fuqaha' permitting succession and the others prohibiting that.¹ Those allowing it possibly do so due to intent being absent, while those prohibiting it take the killing act as the prohibiting factor and the standing of the person has nothing to do with it. Abu Hanifah rule that al-qat' al-'amid, qat' shib al-'amid, al-qat' al-khatta'a and al-qat' al-jari majra al-khatta'a all prohibit the perpetrator heir from succeeding to the tarikah of his victim, his muwarrith. These are subject to the following shurūṭ:

- that the killing was direct, thus death by sabab (cause), even if it is fi'il 'amid (deliberate act), does not prohibit the perpetrator heir from succeeding to the tarikah of his victim, his muwarrith.
- that the perpetrator be pubescent and sane, thus, a minor or an insane person does not fall under the above mentioned prohibition.

¹ Al-Tashri' al-Jana'î, Vol 2 p. 186.
that the *qatl* in both cases of *al-qatl al-'amd* and *al-qatl shib al-'amd* be carried out *udwanan* (in transgression of *shari'ah*), thus no homicide is ruled for self defence.¹

The *shafi'i* accepted ruling on prohibition of succession to *tarikah* in the case of one killing one's *muwarrith*, is that irrespective of what kind of homicide is committed, and irrespective of who committed it, whether minor or not, whether the perpetrator is insane or not, the perpetrator is prohibited from succeeding as an heir to the *tarikah* of his victim, his *muwarrith*.² The *shafi'i* accepting this view base their ruling on the point that *man'al al-mirāth* is to prevent the heir of hastening the death of his *muwarrith*. There are two other views in the *shafi'i* madhhab, which state that justifiable homicide does not prohibited the heir from succeeding to the *tarikah* of his victim, the *muwarrith* and if not justifiable, *man' min al-mirāth* is applied.³

Hanbalis share the accepted *shafi'i* ruling. The rule is that any *qatl* obligating *qawad* (death penalty) or *diya* (blood money) or *kaффarah*

(penance) prohibits succession of the heir to the tarikah of his victim, his muwarrith. Since qatîl is a criminal offence in shari‘ah and the punishment of it exacts, at times, fines, like diya and kaffarah to which an heir may not succeed or will have to pay into the tarikah account of his victim, his muwarrith, punishment of al-qatl shall be dealt with briefly.

(iii) **Punishment Of Al-Qatl (Homicide):**

Qatl is a very serious and major sin and crime in shari‘ah. The Qur‘an seriously warns against it. "Whoever kills a believer (mu‘min) intentionally, his recompense is Hell, to abide therein (forever) and the wrath and curse of Allah are upon him and a dreadful chastisement is prepared for him. Recourse to justice is granted in this matter. "And if anyone is slain wrongfully, We have given his heir authority (to demand) qisas (retribution) or to forgive; but let him not exceed bounds in the matter of taking life for he is helped (by the Law). There is ijmâ‘ by the fuqaha' that in the case of al-qatl al-‘amd, the following will be resorted to:

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2 Al-Qur’an, Chapter 4: 93.
3 Ibid, Chapter 17: 33.
that the murderer is prohibited from succeeding to the tarikah of his victim, his muwarrith. This prohibition includes the muṣālahu (legatee) when he murders his musi (legator).

kaffarah which the wali of the heirs of the murdered victim may demand for pardoning the murderer.

qawad (death penalty) if found guilty or if found guilty he may be spared if the wali of the murdered victim, pardons him. If he is spared, the ḥākim (governing authority) must apply taʿzīr (punishment) to the murderer, both as punishment and deterrent, Malik and Laith rule that he be given 100 strokes and imprisoned for a year. This is, of course, ijtihad. The prohibition to succession of the murderer is based on the qaʿidah fiqhiyyah (fundamental legal principle) which reads: "he whoso hasten on an act before its time, is punished by being prohibited from obtaining it." Hadith texts exist in this prohibition also. Such texts are transmitted by Malik, Ahmad, Abu Dawud, ibn Majah and

al-Tirmidhi. These *ahadith* have various degrees of weakness due to technical difficulties in their standing.¹

As for *al-qatl shib al-'amd*, the penalties are, sin for killing without valid cause which is prohibited in the Qur'ān and *diya mughallazah* (heavy compensation) from the *‘aqilah* (family, relatives and kinsmen) of the murderer. In *al-qatl al-khaṭa‘a*, *diya mukhaffafah* (light compensation) from the *‘aqilah* of the killer and *kaffārah*. This *kaffārah* is freeing of a Muslim slave and if not found, fasting for two lunar months consecutively in penitence. This is due to Quranic law "...and whoever kills a believer (mu‘min) by mistake, it is ordained that he should free a believing slave and pay blood money to the deceased’s family unless they remit it freely..."²

The majority of the *fuqaha’* rule that the blood money in the case of *al-qatl al-‘amd* need not be paid immediately if pardon is granted by the guardian of the murdered person. Abu Ḥanīfah differ, ruling three years grace

² *Al-Qur‘ān*, Chapter 4: 92.
in paying off the blood money. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and mercy from your Lord.

Malik ruled that the killer in al-qatl al-khat'a'a, succeeds to the tarikah of his victim, his muwarrith, but not to any of the blood money. All the other fuqaha' rule the total exclusion from the tarikah, in this case, for al-qatl al-'amd, shib al-'amd and al-qatl bi al-khat'a'a. Hanafis rule that any qatl that has no sin attributed to it, does not preclude the killer from succeeding to the tarikah of his muwarrith like a minor or insane killer or a sane person causing the death of someone else unintentionally like a sleeping person rolling onto another person and killing him.

The blood money for deliberate forms of homicide is diya mughallazah (heavy compensation) and is defined as 100 camels or

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1 Tashri' al-Jana'i. Vol 2 p. 181.
2 Al-Qur'an, Chapter 2: 178.
1000 gold *dinars* each *dinar* being a *mithqāl* of pure gold and with *waraq* (money equivalent) being 12 000 *dirhams*. This is the ruling of Malik and Ahmad and is the old view of al-Shafi’i. Abu Hanifah rule, for *waraq* 10 000 *dirhams*. The blood money or *sulh* (agreement money) agreed on when the guardian of murdered victim in the case of *al-qatl al-‘amd*, is paid by the murderer himself. This is the *ijmaʾ* of all the *fuqahaʿ*.'

The *diyā shib al-‘amd* (blood money of probable deliberate homicide) is payable by the *‘aqilah* of the killer. This is the view of Abu Hanifah, al-Shafi’i and Ahmad. Ibn Sirin, al-Zuhri, ibn Shubramah, Qatadah, Abu Thawr and others rule penalty and liability for the perpetrator of the homicide and not on the *‘aqilah* of the perpetrator of the homicide due to it being of the category of *al-qatl al-‘amd*. Abu Hanifah and those agreeing with him, take their ruling from *hadith* text narrated by Abu Hurairah. Blood money forms part of the *tarikah* of the *maqtūl*.

(2) \textit{Ikhtilaf Fi al-Din} (Difference In Religion):

\textit{Ikhtilaf}, literally, means "disagreement".\textsuperscript{1} \textit{Ikhtilaf fi al-din}, thus means, difference in religion i.e. having different religions. \textit{Ikhtilaf fi al-din} is a prohibition to \textit{mirath} in \textit{shari'ah}.\textsuperscript{2} The \textit{shari'ah} is based on \textit{nuşrah} and \textit{tanaşur} between its adherents, the Muslims. They are required to support this principle in all their doings and dealings within the brotherhood of Islam. It is a manifestation common to all other societies too, in practice. The \textit{Qur'an} makes this clear. "And the believing men and the believing women are guardians to one another; they command with righteousness and forbid sin."\textsuperscript{3} "Verily this ummah (nation) of yours is a single brotherhood and I (Allāh) am your Lord and Cherisher, therefore serve Me (and no other)."\textsuperscript{4} "The believers are protectors of one another; unless you do this (protect one another) there would be tumult and oppression on earth and great mischief. Those who believe (in Islām) and emigrate and strive for the Faith in the cause of Allāh as well as those who give (them) asylum and aid, those are

\textsuperscript{1} Al-Munjid, p. 193.

\textsuperscript{2} \textit{Aḥkām al-Tarikāt wa al-Mawārith}, p. 93. \textit{Al-Mudawwanah al-Kubrā}, Vol 3 p. 87.

\textsuperscript{3} \textit{Al-Qur'ān}, Chapter 9: 71.

\textsuperscript{4} Ibid, Chapter 21: 92.
all the believers. A similar thought is expressed elsewhere in the Qur'ān. The Prophet (s.a.w) further expanded on this theme in hadith. Anas narrated that the Prophet (s.a.w) said: "Your Faith is incomplete until you desire for your brother that which you desire for yourself." Ibn Mas'ūd narrated that the Prophet (s.a.w) said: "It is a sin for a Muslim to insult another Muslim and fighting him (unjustly) is disbelief." Similar texts, in meaning, are reported by Nu'mān bin Bashir and 'Umar.

There is ijma' by the fuqaha' that a non-muslim does not succeed to the tarikah of a Muslim and the majority of the fuqaha' rule that a Muslim does not succeed a non-muslim's either. This is the view of the majority of the Prophet's sahabah, like Abu Bakr, 'Umar, 'Uthman, 'Ali, 'Usāmah bin Zaid and Jabir. It is also the view of the fuqaha' of the tabi'un like 'Urwah, al-Zuhri, 'Ata'ā, Tawus, al-Thawrī as well as that of Abu Hanīfah and the Ḥanafīs, Malik, al-Shafi'i and Ahmad. Their proof

1 Al-Qur'ān, Chapter 8: 74.
2 Ibid, Chapter 49: 10.
4 Mukhtasar Sahīḥ Muslim, p. 23.
5 Riyād al-Ṣalihīn, pp. 129 & 131.
is the hadīth of the Prophet (s.a.w) narrated by 'Usamah bin Zaid: "The nonmuslim does not inherit from a Muslim and the Muslim does not inherit from the nonmuslim."\(^1\) Abū Dawud transmitted from ibn Shu‘aib that the Prophet (s.a.w) said: "The followers of the two religions do not inherit from one another."\(^2\) The "two religions" are the Muslim and nonmuslim faiths and the reason for this is that there is no nuṣṣrah and tanāṣur (assistance and mutual help) based on shari‘ah between these two groups.\(^3\)

It is narrated from 'Umar, Mu‘ād and Mu‘awiyah that they allow the Muslim to succeed to the tarikah of nonmuslim but not vice verse.\(^4\) This is also the view of Muḥammad al-Ḥanafiyyah and 'Alī bin Husain of the shī‘ah, and, of ahl al-sunnah, ibn Musaiyyib, Masrūq, al-Sha‘bi, al-Nakha‘ī and others.\(^5\) Ahmad says that this transmission is incorrect as there is ijma' that a Muslim does not

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1. Ṣaḥīḥ al-Bukhārī, Vol 8 p. 194.  
Mukhtasār Ṣaḥīḥ Muslim, p. 262.  
Minhāj al-Muslim, p. 470.

Nail al-Awātār, Vol 6 p. 82.  


4. Fiqh al-Mawarīth, Vol 1 p. 216

succeed a nonmuslim. The said transmission is based on the *hadith* text "*I*slam increases and does not decrease"\(^1\) which is a disputed text as well as open to different interpretations. In succession between nonmuslims, *I*slam does not interfere and they succeed as they practice amongst themselves. Some *fuqahā'* further rule that if the nonmuslims' religion differ, then each person inherits from his own religion. This is a view reported from Abū Bakr, Mālik and Aḥmad. There are further views hereon which are not applicable to here.\(^2\) The *zaidiyyah* share the view of 'Umar and others while the *ja'fariyyah* agree with the view of Mu'ād and Mu'āwiyyah.\(^3\)

(3) **Ikhtilaf Fi al-Darain (Difference In Domicile):**

By *ikhtilaf fi al-darain* is meant difference in domicile in that one lives in the *Dar al-Islam* (Islamic territory) and other in the *Dar al-Ḥarb* (nonmuslim territory). The question arising now is whether a person living in the one territory inherits from the other living in the other. The majority of the *fuqahā',* like *mālikis,* *shaфи's* and *ḥanbalis* as well as the *zaidiyyah* and *ja'fariyyah* of the *shi'ah* rule that *ikhtilaf fi al-darain* is not a

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prohibition to *mirath* between Muslims. They only rule that the religion of both parties succeeding one another must be the same.

The *hanafis* oppose this stating, as ibn 'Abidin puts it, that two sovereign and independent nonmuslim States have separate sovereignties, power and administrative structures and war can erupt between them and the Muslims. In such a situation (separate sovereignties and the possibility of war), no *tawaruth* (mutual succession) can take place. The majority of the *fuqaha* reject this reasoning, like Ahmad of the *hanbalis*, who state that there is no text in the *Qur'an*, nor *sunnah* nor *ijma* supporting this stand of ibn 'Abidin. In fact, Ahmad says, the general meaning of the *āyāt al-mirāth* in the *Qur'an* supports *mirath* between inhabitants of the *darain* (two domiciles) on condition that their *dīn* is the same. For as Muslims succeed to the *tarikāt* (estates) of Muslims irrespective of *dar* (domicile), this must also be applicable to nonmuslims.

This now brings us to the *murtadd*.

**Mirath Al-Murtadd (Succession Of The Apostate):**

The word *murtadd* is the noun agent of the arabic verb *irtadda* which means "to return to your former Faith after having..."
been a Muslim."¹ It is also used for anyone leaving the fold of Islam. The Qurʾān seriously warns against riddah (apostasy) "...and if any of you turn back from their Faith and die in disbelief, their deeds will bear no fruit in this life and in the Hereafter..."² There is thus a complete break with the Faith of Islam when a Muslim apostatises. Since Islam is both Faith and system of life, riddah, in the Islamic concept, is more akin to treason against the State rather than pure personal religious apostasy as understood in other Faiths, especially Christianity. Since tawaruth is based on tanasur amongst Muslims, the murtadd from Islam severs that link as he becomes of the disbelievers and there is no mirath between them and Muslims.³

The fuqaha’ differ on the ruling as to the tarikah of a murtadd. Abu Hanifah rule that all his possessions during his period of his Islam is devolved upon his Muslim heirs and all those procured during his apostasy goes to the bait al-māl. The reason for this ruling, is that a murtadd is dead huqman (in terms of shari‘ah) and thus his Muslim heir succeeds to that part of his tarikah acquired during his Islam. In his apostasy, the rule of prohibition of

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² Al-Qur’an, Chapter 2: 217.
tawaruth between Muslim and nonmuslim is applicable. This part of the tarikah is, thus, for the general Muslim public.

Abū Yusuf and Muḥammad of the ḥanafis rule that all the possessions of the murtadd including his period of apostasy is for his Muslim heirs. Their reasoning is that all the possessions of such a person will eventually be for the bait al-māl which will land in the hands of Muslims. The Muslim heirs have more right hereto due to familial relationship. They further contend that the Prophet (s.a.w) distributed the tarikah of the apostate from Islam, 'Abd Allāh bin Ubai bin Salūl, after his death, to his Muslim heirs. 'Alī did the same in the case of the apostate from Islam, Mustawwīd al-'Ijli who was killed for apostasy. This is reported by ibn Mas'ūd and Mu'ād. This is also the view of ibn Musayyib, 'Atā'a, al-Sha'bi, al-Ḥakam, al-Awzā'ī and al-Thawrī.1 Other fuqaha' like ibn 'Abbas, Rabi'ah, Malik, ibn Abī Lailā, Abū Thawr, al-Shāfi'i and ibn Mundhir, rule that the possessions of the murtadd is for the bait al-māl. Another view of Aḥmad agrees with that of 'Ali, namely that the Muslim heirs of the murtadd succeeds to his tarikah.2

Al-Tarikāt wa al-Waṣāyā, p. 177 - 180.  

2 Al-Muḥallā, Vol 9 p. 304.  
Al-Muğhnī, Vol 6 p. 300.  
The same rules, as above, generally, apply to the zanadiqah (sing. zindiq - atheists) and the munāfiqun (sing. munāfiq - hypocrites), the latter who show Islam in public, but are actually non believers at heart. ¹ Malik differs ruling that the tarikah of these people devolve upon their Muslim heirs. ² A murtadd does not succeed to anyone's tarikah. ³ This applies when both the zawjān (married partners) apostatise. If only one of them apostatises after the 'aqd al-nikah had been enacted, but before consummation of the nikah, the nikah is immediately ended and no mirātath takes place between the two as there is no zawjiyyah.

When apostasy takes place after consummation of the nikah, Ahmad has two rulings; one is of immediate ending of the nikah and the second of waiting until the 'iddah of divorce had ended and whoever dies of the parties during that time, does not succeed to the other's tarikah. ⁴ When the zawjān (the two spouses) apostatises together, there is no tawaruth between them whether they remain in the Dar al-Islām or migrate to the Dar al-Ḥarb. This is the view of Malik, al-Shāfi‘i and Ahmad. Abū Ḥanifah

¹ Al-Mughni, Vol 6 p. 301.
² Al-Tarikāt wa al-Waṣaya, p. 181.
³ Al-Muhalla, Vol 9 p. 304.
precludes *tawārīth* between the two in the *Dār al-Islām* but not in the *Dār al-Harb*.

Should a *murtadd* return to the fold of Islam, the normal pattern of *tawārīth* resumes as the prohibition had been removed. The same rule applies when the *murtadd* reverts to Islam after the death of his *muwarrith* but before the distribution of the *tarikah*. This is the view of 'Umar, 'Uthmān, Hasan bin 'Alī, ibn Mas'ūd, Jabir bin Zaid, Makhul, Qatadah, Humaid, Ishaq and others. Other *fuqaha*'s rule that if a *murtadd* reverts to Islam after the death of his *muwarrith*, he cannot succeed to the *tarikah* of his *muwarrith*. This is the ruling of 'Alī, Sa'īd ibn Musaiyib, 'Aṭā'ā, Tawūs, al-Zuhri, Sulaimān bin Yasar, al-Nakha'ī, al-Ḥakam, Abū Zunādah, Abū Ḥanīfah, Mālik, al-Shāfi'ī and its the general ruling of the *fuqaha*' in shari'ah. This is due to the Muslim and nonmuslim not succeeding to one another's *tarikah* a previously reported in *ḥadith* texts.

1.5.7 The Islamic Philosophy In *Mirath*:

Death is accepted, universally, as the end of the earthly sojourn and also the time of allotment of new ownership of possessions. In Islam, the person, while alive, is free to dispose of his belongings as

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2. *Ṣaḥīḥ al-Bukhārī*, Vol 8 p. 194
   *Muwatta’*, Vol 2 p. 60.
   *Mukhtasar Ṣaḥīḥ Muslim*, p. 262.
he pleases provided it is in conformity with the shari'ah. At death, the Shari's law takes over and mirath takes place according to the laws laid down by Him. The deceased usually leaves relatives behind, sometimes many, and it may cause a problem in distribution of the tarikah. In this kind of situation, the pre-determined laws of shari'ah is a help to the muwarrith as well as the heirs as they will know the fixed law that will be applicable. This causes less problems in succession.

The economic significance of mirath is that it is anti-capitalistic. The muwarrith may only dispose of one third of his entire estate freely for wasaya in expression of piety and virtue and the remaining two thirds must go to the prescribed heirs in prescribed shares as in shari'ah. Since there could be many heirs, at times, the principle is that a larger number of people should benefit instead of only one or a few as is the case in certain nonmuslim situations where virtual absolute freedom of testation exists. Distributive effects are generated by the inter-reaction of the systems of nikah and mirath. If the coefficient of the relationship between the levels of wealth of the parents is weak, the redistribution impact by mirath of all the children succeeding to the estates of both their father and mother increases the redistribution of wealth. "It is pointed out by K E Boulding that, if a person lives till age seventy and wealth is distributed across age barriers, approximately 1/70 of wealth will be distributed at death. If the out capital ratio is 3, then the


zawj’s wealth, through "mirath, will generate 3/70 of income annually which is approximately 4%. This ratio may reach between 8 and 10% as older people are usually wealthier than the newly born.

Islam, in its economic philosophy, is against centralisation of wealth as well as its concentration in a few hands. The Qur’an states, "What Allah has bestowed on his Messenger (and taken away) from the people of the towns, belong to Allah, to His Messenger, and to kindred and orphans and the needy and the wayfarer in order that it may not (merely) make a circuit between the wealthy among you."

Further, Muslims are exhorted and commanded to pay annually a certain percentage on many kinds of possessions and wealth which was in their ownership for a full lunar year, from such possessions as ranging from gold and silver, to certain kinds of land produce, from production of mines to accumulated money accounts. This is called zakah. Besides this, Islam exhorts to giving in the way of charitable causes and establishing ways and means as well as instances of virtue, goodness and righteousness. The Qur’an refers to these issues. "Alms are (only) for the poor, needy and those employed to administer (the alms), for those whose hearts have been (recently) reconciled to the Truth, for those in bondage (in order to render themselves free persons), for those in debt and for the wayfarer." Also, "...and in their wealth there is a

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2 Ibid.

3 Al-Qur’an, Chapter 59: 7.

4 Ibid, Chapter 9: 60.
due share for the beggar and the deprived..."1 The virtue of charity is further praised "...and for men and women who humble themselves and for men and women who give in charity...for them Allah has prepared forgiveness and a great reward."2 "But if you remit it by way of charity, that will be best for you, if you but knew."3

The mirath pattern follows the philosophy of wide distribution, which it does in a framework which secures justice and fairness as well as seeing to the rights of all equitably within the mapped framework. Possessions and property have become highly individualised and families more of a social than an economic unit in modern industrialised societies. The tendency in this sphere is to leave the inheritance system unfettered and as free as possible from governmental rules and regulations. This necessitates giving a free hand in inheritance and bequests, which at times is harmful and disadvantageous to even near relatives of the deceased. An imbalance between individual freedom and responsibility and even fairness and justice then inevitably occurs. This facet is absent in mirath al-Islami (Islamic law succession). In fact, mirath can give the heirs a start in life which can be an asset in helping to solve the problem of under development and unemployment.4 This in turn helps to improve social conditions and prevent anti-social behaviour and traits which any responsible government aims to achieve.

1 Al-Qur'an, Chapter 51: 19.
2 Ibid, Chapter 33: 35.
3 Ibid, Chapter 2: 280.
As pointed out earlier, *mirath* is not an independent subject itself, but rather a consequence of a previous situation, namely, *nikah* and resultant *qarabah*.

There is a universal outcry against certain rules of *mirath* due to females, at times, receiving half share of males. This is classed as sexist discrimination, nowadays. These critics look at *mirath* partially or as a complete and independent branch of *shari'ah*. This is a serious mistake. It is completely wrong to state that it is a permanent feature that females receive half share in *mirath*. A female may, in certain circumstances, according to *shari'ah* or juridical rulings, receive the entire *tarikah* or share equally with a male. This will be dealt with later on in this chapter. On the other hand, wives, mothers, daughters and sisters receive half the share of their male counterparts, not because they are females but because males are compelled by *shari'ah* to provide for them, even, in the case of wives, if they are rich. This provision, called *nafaqah* includes *sukna* (lodgings), *kiswa* (clothing) and food and drink as well as medical care and education for the wives and children.

Sisters and daughters as well as other females, invariably become wives and receive *sadaq* (dowry) on marrying\(^1\). They determine what they want and *shari'ah* had not prescribed to them herein. This remains their property as well as all gifts they receive during their *nikah* and what they acquire by themselves as well as *tarikah* they might succeed to. Whatever they acquire of fixed assets remain theirs too. In addition to this, they must inherit from their husbands. If equal shares were to be given

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\(^1\) *Al-Qur'an*, Chapter 4: 4.
under these circumstances, an injustice will be done to males.

The rule, thus, in mirath is that where a female is entitled to maintenance, she receives half the share of a male. If this issue is not found, then there is no discrepancy between the shares of males and females. This is a fair and just system. The Qur’ān says "Allah commands with justice, the doing of good and giving to kith and kin and He forbids indecent deeds, evil and rebellion." Mirath practically expresses this point.

1.5.8 Ahkām al-Mirath (Laws Of Succession)

A) Ansibah al-Mirath (Shares In Succession):

All fixed ansibah (sing nasib - shares) are mentioned in the Qur’ān and these are a half, a quarter, an eighth, a third, two thirds and one sixth. The share of the jadd and jaddah is by hadith text and ijma' of the sahabah. These shares are for the following persons of the ashab al-furūd (persons with a fixed share) category. These are:

(i) Nisf al-Tarikah - Half Of The Estate:

- for the zawj when his zawjah dies and leaves no walad (child) whether male or female. Walad means a child from her present zawj or from a previous nikāh.
- for the bint sulbiyyah (own daughter) when she is the only child and you leave behind

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1 Al-Qur'ān, Chapter 16: 90.
2 Ibid, Chapter 4: 11 - 12, 176.
Al-Wajīz fi al-Mirath, p. 10.
Subul al-Salam, Vol 3 pp. 99 & 100.
no 'asabah (male residuaries) of the father.
- for the bint al-ibn, how lowsoever, when there is no bint sulbiyyah of the deceased nor any 'asabah.
- for the ukht shaqiqah of the deceased when there is no bint sulbiyyah, nor bint al-ibn, how lowsoever, nor any 'asabah.
- for the ukht li abb when there is no bint sulbiyyah nor bint al-ibn, how lowsoever, nor an ukht shaqiqah, nor 'asabah to the deceased. 

(ii) Rub’ al-Tarikah – A Quarter Of The Estate:
- for the zawj when the zawjah leaves a child male or female and no ibn al-ibn (son of the son), how lowsoever, or a bint al-ibn (daughter of the son) how lowsoever.
- for the zawjah when the zawj deceases and leaves no child as stated immediately above.

(iii) Thumun al-Tarikah – An Eighth Of The Estate:
- for the zawjah or zawjat (wife or wives) when the zawj leaves a child.

(iv) Thulth Al-Tarikah – A Third Of The Estate:
- for the umm when there are no furu’ (descendants) of the deceased nor ikhwah (brothers or sisters) or only one brother or one sister of the deceased.

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1 Minhaj al-Muslim, p. 472.
Al-Tarikat wa al-Wasayya, p. 252.

2 Minhaj al-Muslim, p. 472.
Al-Tarikat wa al-Wasayya, p. 252.

Minhaj al-Muslim, p. 473.
- for the *awlād al-umm* (uterine children - two and more) when the deceased leaves no *wālid* (father) nor a *walad* (a child, male or female), how lowsoever, nor *jadd sahih*.¹

- for the *jadd sahih*, under certain circumstances, when found with *ikhwah al-mayyit* (brothers and or sisters of the deceased).²

(v) **Thulthā Al-Tarikah – Two Thirds Of The Estate:**

- for two or more *banāt sulbiyyah* and there are no 'asabah of the deceased.

- for two or more *banāt al-ibn*, how lowsoever, when there is no *bint sulbiyyah* nor 'asabah of the deceased.

- for two or more *akhawāt shaqiqat* when there is no *bint sulbiyyah* nor *bint al-ibn*, how lowsoever nor 'asabah of the deceased.

- for two or more *akhawat li abb* when there is no *bint sulbiyyah* nor *bint al-ibn*, how lowsoever, nor *ukht shaqiqah* of the deceased.³

(vi) **Sudus Al-Tarikah – A Sixth Of The Estate:**

- for the *abb* when the deceased leaves a descendant, male or female.

- for the *umm* when the deceased leaves a descendant, male or female or the deceased leaves *ikhwah* (two or more brothers) or

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² *Minhāj al-Muslim*, p. 473.
³ *Al-Tarikat wa al-Wasāyā*, p. 253.

² *Minhāj al-Muslim*, p. 473.
⁴ *Al-Mawsū’ah al-Fiqhīyyah*, Vol 3 p. 34.
⁶ *Al-Tarikat wa al-Waṣāyā*, p. 252.
⁷ *Minhāj al-Muslim*, p. 473.
akhawat (two or more sisters) or a mixture of the two, two and more.

- for a single akh li umm or ukht li umm when the deceased leaves no abb nor a walad (a child, male or female), how lowsoever, nor jadd sahih.
- for the bint or banat al-ibn, how lowsoever when there is a bint sulbiyyah with her or them and no 'asabah of the deceased.
- for an ukht shaqiqah when found with a bint sulbiyyah or bint al-ibn, how lowsoever, and there are no 'asabah to the deceased.
- for the ukht li abb or more when found with an ukht shaqiqah in the absence of a bint sulbiyyah or bint al-ibn, how lowsoever or 'asabah to the deceased.
- for the jadd sahih when there is no abb to the deceased.
- for the jaddad sahihah or more when there is no umm to the deceased.

It should be remembered that when we speak, later on, on these shares, it will mean the shares of the heirs of the deceased. Thus, hereafter, umm would mean mother of the deceased etc.

(1) Mirath al-Abb (Succession Of The Father):

The abb succeeds in the following cases:

- mirath by fard (fixed share). In this case he gets a sixth of the entire tarikah if the deceased left a far' warith (descendant

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2 by "entire" tarikah, hereafter, shall mean the nett estate after all expenses had been met in paying for the tajhiz al mayyit (burial expenses), payment of duyun (debts) and wasaya (legacies).
heir), whether male or female or an *ibn al-ibn* how lowsoever. The Qur'an states: "For parents, a sixth share of the inheritance to each if the deceased left a child." The word *walad* in the Quranic text is non definitive and, thus, includes both sexes. *mirāth* by *fard* and *ta'sīb* (residuary status). This is the case when the deceased leaves a female child, like the *bint *ṣulbiyyah or, in her absence, a *bint al-ibn*, how lowsoever, as the only heir of the descendant category. The division is first by *fard*; the *abb* receiving a sixth and the *bint* receiving a half. The shares out of 6 will be 1/6 for the *abb* and 3/6 for the *bint*, leaving 2/6 as a residue, which is called the *bāqī* in *mirāth*. This goes to the *abb* as the nearest *'asib* of the deceased by way of *ta'sīb*. His *ta'sīb* is from the *ḥadīth* narrated by ibn 'Abbās: "Give the due shares of the inheritance to its rightful heirs and what remains (of the estate) give it to the nearest male residuary." He sometimes succeeds only by way of *ta'sīb*. This case arises when the deceased leaves no heir whatsoever, save his *abb* and *umm*. In such a case the *umm* receives 1/3 of the *tarikāh* and the *abb* succeeds to the residue which is 2/3 by way of *ta'sīb*. The Qur'an states: "If no child (is left by the deceased) and the parents

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are the (only) heirs, the mother has a third (of the estate).\(^1\) No direct mention is made of the abb’s share and being the only other heir, succeeds to it. The logic here, in share value, is that the abb is responsible for the maintenance of his zawjah, the umm, of the deceased.\(^2\)

(2) **Mirath al-Umm (Succession Of The Mother):**

The umm has three cases in \(\text{mīrāṭh}\), all by way of fard and they are:

- a sixth share of the tarikah when the deceased leaves a descendant heir, whether male or female.\(^3\) She also gets a sixth when the deceased left ikhwah (two and more brothers and or sisters of any degree).\(^4\) There is a difference of opinion amongst the fuqaha’ as to how many ikhwah (brothers and sisters) reduce her share from a third to a sixth.

The majority of the fuqaha’ rule that two ikhwah, whether only brothers or sisters or one of each, reduce the umm from a third to a sixth. Ibn ‘Abbas and ibn Hazm rule three or more of them reduce the umm’s share. The issue of dispute is the word ikhwah, which is plural of akh and the dual is akhawan.

\(^1\) *Al-Qur’ān*, Chapter 4: 11.


\(^3\) *Tashīl al-Fara’id*, pp. 43 - 44.


*Ahkām al-Tarikāt wa al-Mawāriţh*, pp. 127 - 128.

Ibn 'Abbas and those agreeing with him, rule that three and more is plural, while the majority state that dual is a plural\(^1\) (probably because it is not singular). The Quranic rule in this share of the umm is "If the deceased left brothers (or sisters), the mother has a sixth..."\(^2\) The zaidiyyah agree with the majority ruling of ahl al-sunnah.\(^3\) The ja'fariyyah has a striking division system for the umm in this case. They rule that the abb and umm are first category heirs and she takes the place of the abb at times. Thus, if she is the only heiress of the deceased and there is no surviving zawj nor descendant heir, male or female, how lowsoever, nor any ikhwah (brothers and or sisters), she succeeds to the entire tarikah just like an abb would.\(^4\)

She gets a third of the entire tarikah when the deceased leaves only parents and no other heirs. She gets one third of the residue of the tarikah after the surviving zawj's share had been deducted. This is the mas'alah al-gharāwin which occurs when a deceased leaves a zawj, an umm and an abb. In this case, the surviving zawj's share is first deducted, then from the residue, the

\(^1\) Al-Muḥalla, Vol 9 p. 258.  
Al-Tarikāt wa al-Wasayā, p. 295.  

\(^2\) Al-Qur'an, Chapter 4: 11.

\(^3\) Aḥkām al-Tarikāt wa al-Mawārīth, pp. 130 - 132.  
Al-Qawānīn al-Fiqhīyyah, pp. 256 - 257.  
Al-Tarikāt wa al-Wasāyā, p. 294.

\(^4\) Al-Tarikāt wa al-Wasāyā, p. 299.
umm gets a third and the final residue goes to the abb as the nearest 'āsib. This is the ruling of the majority of the fuqaha' and that of 'Umar, 'Uthman and one of 'Ali's rulings, ibn Mas'ūd and Zaid bin Thabit. This ruling is based on the mirath principle that the umm receives half the abb's share as he is responsible for her full maintenance. Thus, in the case of a zawjah deceasing, leaving her zawj and both her parents as only heirs, the division is 1/2 of the entire tarikah for the zawj as there are no descendant children. The umm receives a 1/3 of the remaining half which is 1/6 and the remaining 2/6 goes to the abb. Ibn Sīrin allows the umm a 1/3 of the entire tarikah when the zawjah survives and not when the zawj survives.1

Ibn 'Abbās and the zahiriyyah rule that the umm receives a third of the entire tarikah in both cases in this problem due to the general meaning of her share in the ayat al-mirath in the Qur'ān.2 The ja'fariyyah again, in the case of the umm surviving a deceased and one of the azwaj (spouses) then the surviving zawj (spouse) receives his or her share from the entire tarikah and the umm a 1/3 of the entire tarikah also. The umm also gets the residue.3

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Kitāb al-Furū', Vol 5 p. 8.


3 Al-Tarikāt wa al-Wasāya, p. 299.
**Mirath al-Jadd (Succession Of The Grandfather):**

When we speak of the *jadd* in *mirath* we mean the *jadd sahih* – *abb al-abb* (true grandfather i.e father’s father) only, how highsoever. The term *jadd* will only be used hereafter. The *jadd* is like the *abb* in *fiqh*.¹ The *fuqaha‘* derived this meaning from the *Qur’an* and other *shari‘ah* texts. "Oh children of *Adam*! Wear your best apparel to every place of worship."² *Adam* is, thus, the great ancestral grandfather of all mankind. "I follow the way of my *fathers* – *Abraham*, *Isaac* and *Jacob*..."³ The Prophet (s.a.w) reportedly said: "Teach your children archery, children of *Isma‘il*, for your *fathers* were archers."⁴ In the general pattern of *mirath* of the *jadd*, he succeeds just as the *abb* (the father, who is his son), when the latter is not found and thus, succeeds to a sixth *fardan* when the deceased i.e. his grandchild, deceases and leave a descendant heir, whether male or female, or a sixth *fardan* and the residue by *ta’sib* when the deceased leave only a *bint sulbiyyah* and no other heir nor *‘asabah* or only by *ta’sib* when there is only him and the *umm* of the deceased as heirs⁵.

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⁴ Ibid, Chapter 12: 38.
⁵ *Al-Tarikat wa al-Wasaya*, p. 259.
   *Al-Qawānin al-Fiqhiyyah*, p. 257.
   *Al-Tarikāt wa al-Waṣāyā*, pp. 258 – 259.
There are, however, exceptions, when the jadd differs from the abb in mirath. This occurs when the jadd is found with the umm and one of the surviving azwaj. The umm receives a 1/3 of the entire tarikah and not a 1/3 of the remainder as is the case when she is found with the abb, her zawj, and one of the surviving azwaj (spouses).\textsuperscript{1} If the heir found with the jadd is a sahib al-fard, this fixed share is first deducted, thereafter the jadd gets whatever is the greater, either 1/3 of the residue after the sahib fard's share had been deducted, or 1/6 of the entire tarikah. If, after deductions, only 1/6 remains of the tarikah, the jadd succeeds to it and the ikhwah are all excluded from the tarikah, save in the mas'alah al-akdariyyah (the akdariyyah problem), which will be presented later on.\textsuperscript{2}

(a) *Mirath (Succession) Of The al-jadd (Grandfather) With The Ikhwah (Brothers And Sisters Of The Deceased):*

There is no Quranic or sunnah text on this form of mirath. Ruling hereon is by ijtihad of the sahabah. There is agreement by the fuqaha' that the jadd excludes the ikhwah and akhawat li umm (uterine brothers and sisters) when found with him as heirs\textsuperscript{3}.

As for the ikhwah ashiqqā and akhawat shaqiqa as well as the ikhwah li abb and akhawat li abb, the senior fuqaha', Malik,

\textsuperscript{1} Ahkām al-Tarikat wa al-Mawārith, p. 135.
\textsuperscript{2} Tashil al-Fara'id, p.45.
Al-Qawānīn al-Fiqhiyyah, p. 257.
\textsuperscript{3} Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 34.
Al-Tarīkat wa al-Wasayā, p. 256.
Al-Qawānīn al-Fiqhiyyah, p. 257.
al-Shafii, Ahmad, Abu Yusuf and Muhammad al-Shaibani of the hanafis, rule that the mentioned ikhwah and akhawat are not excluded from the tarikah when they are found with the jadd. Abu Hanifah and some shafiis rule that the jadd, like the abb excludes these ikhwah and akhawat of the deceased, because he stands in his place.

Sharing Abu Hanifah's ruling are ibn Jarir al-Tabari, al-Muzani and Abu Thawr. It is also reported to be the ruling of Abu Bakr, ibn 'Abbás, ibn'Umar and others. Malik and those agreeing with him, quote the ayah "...if there are brothers and sisters (they share); the male having twice the share of the female", in support of their ruling. The above mentioned ikhwah and akhawat, thus, have, a share, and cannot be denied their share. They also share the degree of qarabah with the deceased as the jadd is his abb and the ikhwah and akhawat are his brothers and sisters. Abu Hanifah and those agreeing with him submit the following in proof of their ruling. Firstly, the jadd is called

1 Fatḥ al-Qadir, Vol 1 p. 432.
   Al-Tarikat wa al-Wasāya, p. 267.
   Al-Qawānīn al-Fiqhīyyah, p. 257.


   Al-Tarikat wa al-Wasāya, p. 266

5 Al-Qur'an, Chapter 4: 176.

abb both in the Qur'an and sunnah as well as taking the hukm of an abb in many shari'ah laws. He must, thus, have the same standing as the abb in mirāth also and must thus exclude all the mentioned ikhwāh and akhawāt. Also, the jādd is the highest level of the family tree and the ibn al-ibn, the lowest. They, thus have the same degree of qarābah to the deceased, the jādd being the grandfather and the ibn al-ibn the grandson. There is ijma' by the fuqahā that the ibn al-ibn, excludes the ikhwāh and akhawāt of the deceased and thus the jādd must also exclude them.

Secondly, the Prophet (s.a.w) said: "Give the fixed shares of the estate to those meriting it and give what remains to the 'āsib". The jādd is an 'āsib and is nearer in relation to the deceased than the akh or ukht as he is his abb which is stronger than ukhuwwah (being a brother or sister). He also succeeds to the wilāyah of the minor children of his deceased son as well as to never being excluded from the tarikah save by his son, the abb. The ikhwāh and akhawāt on the other hand, are excluded from the tarikah by three persons namely, the abb, ibn and ibn al-ibn, how lowsoever, of the deceased. The jādd also succeeds by way of fard and ta'sib, while the ikhwāh and akhawāt succeed by way of ta'sib only.

1 Al-Tajrid, Vol 2 p. 150
Jāmi' al-Usūl, Vol 9 p. 624
Mukhtasar Sahih Muslim, p 262.

Ahkām al-Tarikāt wa al-Mawārith, p. 138.
(b) *Nasib (Share) Of The Jadd (Grandfather)
With The Ikhwah (Brothers and Sisters):* 

This system is somewhat complex. There is no direct *shari‘ah* text, neither *Qur‘an* nor *sunnah* which prescribes the share of a *jadd* when found with the *ikhwah*. His share, is founded on rulings of the *sahabah* as stated previously.¹ The *fuqaha‘* differ on this arrangement.

The best and accepted ruling of 'Ali is that the *jadd* receives the residue after the *fard* of the *akhawat* had been given when they are found alone with the *jadd* as heirs. This is conditional that the residue is not less than one sixth of the entire *tarikah*. If he will get less than a sixth of the entire *tarikah*, then *muqasamah* (coinheritance) is resorted to on condition that his share is not less than one sixth of the *tarikah*. If the *akhawat* reduces the *jadd’s* share to less than a sixth of the

When there is a bint sulbiyyah or bint al-ibn, with the jadd, as heirs then he is given a sixth of the tarikah.\(^1\) If the jadd is found with an akh shaqiq or akh li abb, he is treated as one of them and muqasamah is resorted to on condition that he does not get less than one sixth\(^3\).

Zaid bin Thabit, the acknowledged expert on mirath amongst the sahabah, and other senior fuqaha' of the sahabah deal with the mirath of the jadd with the ikhwah as follows: Zaid rules that the share of the jadd must not be less than one third of the tarikah in muqasamah with the ikhwah. This is due to Zaid making the jadd an 'asib with the ikhwah and akhawat of the deceased, whether, in this case, there are only ikhwah or only akhawat or a mixture of both. Zaid further rules that if the jadd is found with the ikhwah ashiqa' (full brothers), he is taken as a shaqiq as far as distribution is concerned or if he is

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\(^1\) this is the case when the deceased leaves a descendant female heir, like a bint sulbiyyah (own daughter) or bint al-ibn (daughter of the son), how lowsoever, and an ukht shaqiqah (full sister) or ukht li abb (consanguine sister) or more. In this case the akhawat (sisters) becomes 'asabah (residuaries) with the bint sulbiyyah (own daughter) or bint al-ibn (daughter of the son), how lowsoever, and these akhawat (sisters) merit the residue, which will exclude the jadd (grandfather) from the tarikah (estate), so he is given 1/6 of the entire tarikah (estate) fardan (fixed share). See Al-Tarikat wa al-Wasaya, p. 269.

\(^2\) Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 34. Al-Tarikat wa al-Wasaya, p. 269.

found with *ikhwah li abb*, he is taken as one of them in the distribution but on condition that his share is not less than one third.\(^1\) This is also the ruling of Malik, Ahmad, Abu Yusuf, Muhammad al-Shaibani.

Al-Shafi'i makes a further rule that if a *sahib fard* (heir with a fixed share) is found along with the *jadd* and the *ikhwah*, then the *jadd* has three options. He can either accept *muqasamah* with the *ikhwah* or take a third of the remainder of the *tarikah* or take a third of the entire *tarikah*.\(^2\) Ibn Qudamah of the Ḥanbalis, gives an example of this, stating that, if the *jadd* is found with *akhawan* (two brothers) or four *akhawāt*, he is given one third of the entire *tarikah* because *muqasamah* will give him the same amount and one third of the entire *tarikah* will be the same. If they are less than the mentioned numbers, then a third of the entire *tarikah* is better for the *jadd*. If they are more than the specified numbers, then he gets a third which is the better option for him, whether these *ikhwah* are *ashiqqa* or *ikhwah li abb*.\(^3\)

'Abd Allah ibn Mas'ud, another senior *faqih* of the *sahabah* and an authority on *mirath*, rules that the *jadd*, if found with

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*Al-Umm*, Vol 4 p. 81.
*Ahkām al-Tarikāt wa al-Mawārith*, pp. 139 – 140.


*Al-Qawānīn al-Fiqhīyyah*, p. 257.
the akhawat only or with a descendant heir, becomes an 'asib with them and succeeds to the residue of the tarikah on condition that it is not less than one third of the entire tarikah. If this residue is less than a third of the entire tarikah, he is given one third of the entire tarikah. Ibn Mas'ud's ruling is based on the application of mirath rules stating that if a jadd is found with banat al-mayyi\textit{t} (daughters of the deceased), he gets a third of the tarikah. The same should apply when the deceased leaves no ban\textit{t} but only akhawat, especially since the rule is that the nearest to the deceased are stronger in contention for mirath than those further removed. The ban\textit{t} are, of course, nearer to the deceased than his akhawat.

Two occurrences are excluded by Abu Hanifah in the succession of the jadd. These are where he takes the place of the abb and the case where diminishing shares occur. In the case of the heirs being the zawj, umm and jadd of the deceased, the umm gets one third of the entire tarikah. But if the jadd falls in the place of the abb, the umm receives a third of the residue of the tarikah after the share of the zawj had been deducted. The jadd then succeeds to the entire final residue of the estate.

\begin{itemize}
  \item[1] \textit{Al-Tahqiqat al-Mardiyyah}, pp. 136 - 137.
  \item[2] \textit{Akh\textacute{a}m' al-Tarik\textacute{a}t wa al-Mawar\textacute{\i}th}, p. 139.
  \item[3] \textit{Al-Mawsu'ah al-Fiqhiyyah}, Vol 3 p. 34.
\end{itemize}

\textit{this is called al-'awl and will be dealt with later in this thesis.}
being the only 'āṣib. When the heirs are the zawjah, umm and jadd of the deceased, in this case, according to Abū Ḥanīfah, the umm receives a third of the entire tarikah. Abū Yusuf rule that the umm, in this example, receives a third of the remainder of the tarikah in both situations mentioned by Abū Ḥanīfah. This is according to the ruling of Abū Bakr. Ahl al-Kūfah also reported this from ibn Mas'ūd. Ahl al-Baṣrah reported from ibn 'Abbās that in the case of the heirs being the zawj, umm and jadd that the zawj get one half (as there are no children) and the rest is equally divided between the umm and jadd.¹

(4) **Mirath al-Jaddat** (Succession Of The Grandmothers):

Jaddat (grandmothers) are of two kinds, namely, jaddat sahihah (true grandmothers) and jaddat fasidah (untrue grandmothers). The jaddat sahihah are those grandmothers whose nasab to the deceased contains only females, or she is linked to a sahib al-fard or an 'āṣib, like the umm al-umm (mother of the mother) and the umm al-abb (mother of the father). The jaddah fasidah is the grandmother that is linked in nasab to a person other than an 'āṣib or sahib al-fard.² Hereafter, the jaddah sahihah will be termed jaddah only.


2 *Al-Wajiz Fi al-Mirath*, p. 20.
*Tashīl al-Fara'id*, p. 54.
4(a) *Nasib Jaddat al-Sahihah (Share Of The True Grandmothers):*

There is no text in the Qur'an on the share of the *jaddah*. Her share is established by *sunnah mashhurah* (known *sunnah*). Ibn Buraidah narrated that the Prophet (s.a.w) gave the *jaddah* a sixth (of the estate) when there was no mother (to the deceased).\(^1\) Qubaisah bint Dhu'aib narrated that Abu Bakr was approached by a *jaddah* requesting her share of the *tarikah*. Abu Bakr informed her that there was nothing about her in the Qur'an, nor, to his knowledge, in the sunnah. On enquiry, Mughirah bin Shu'bah and Maslamah al-Anṣārī testified that the Prophet (s.a.w) awarded the *jaddah* a sixth.\(^2\) There is *ijma‘* by the saḥabah as well as the salaf (early scholars of shari‘ah) and the khalaf (later scholars of shari‘ah) herein.\(^3\) The *jaddah* is, thus, of the *ashab al-furud* while the *jaddah fasisah* is of the arham.

The *jaddah* has two cases of *mirath*. Firstly, when she succeeds by way of *fard*, in which case she inherits a sixth.\(^4\) This is the share for a single *jaddah* or more,

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\(^{1}\) *Sunan Abī Dawud*, Vol 1 p. 121.


\(^{3}\) *Fatḥ al-Qadīr*, Vol 1 p. 433.

if they all qualify, in the latter case, they will share equally in a sixth. The jaddah can be from the mother’s side, like umm al-umm (mother’s mother) or from your father’s side, like umm al-abb (mother of your father) or a jaddah who is from both sides like the jaddah of both your parents, in which case, your umm and abb are cousins and granddaughter and grandson of one grandmother. The general rule is that if there is more than one jaddah, the nearest exclude the furtherest removed from the deceased.\(^1\)

The fuqaha’ differ on the issue of quwwah al-qarabah (strength of relationship) of the jaddah and her share under such circumstances. Abu Yusuf of the hanafis rule that if there are jaddatan (two grandmothers) and one is related to both the mother’s and father’s side, and the other only related to one side, they share the sixth equally. This is also the more correct ruling of the shafi‘is\(^2\) and one ruling of Malik. The reason being that a new category of jaddah is not created by relationship to two sides i.e. maternal and paternal sides.

Muhammad, Zufar and al-Hasan bin Ziyad of the hanafis and the minority view of the shafi‘is and the hanbalis, state that in the case mentioned, the jaddah with the double relationship receives twice the

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1 Tashil al-Fara‘id, p. 45.
Al-Ikhtiyar, Vol 5 p. 104.

2 Al-Tahqiqat al-Mardiyyah, p. 104.
share than a jaddah with only one relationship to the deceased. The sixth is, thus, divided into three equal parts; two parts for the jaddah with double relationship to the deceased and one for the jaddah with one relationship to the deceased. This is based on the rule that if a person has more than one cause for inheritance, he succeeds to both, like when a zawjah deceases leaving her zawj who is also her ibn 'amm shaqiq (full paternal cousin). In this case the zawj receives half of the tarikah as there are no children and the residue as the only 'asib. The jaddah with a double relationship resembles this case and the rule is applied to her.

In the second case of the jaddah, the mother of the deceased excludes all the jaddat from the tarikah of any of her children, whether the jaddah is abawiyyah (paternal) or umamiyyah (maternal). This is due to no text existing where both they and the umm succeed together. Also because they relate to the deceased through the mother and in the former i.e. jaddah abawiyyah because they are like the former. In reality, the jaddat abawiyyah are weaker than the jaddat umamiyyah as is apparent in hadanat where they come after the jaddat

3 Ahkam al-Tarikat wa al-Mawārith, p. 145.
umamiyyah who precede them. The jaddat abawiyyah are excluded from the tarikah by the abb of the deceased.\(^1\) This is the ruling of 'Uthman, 'Ali, Zaid bin Thabit and others while 'Umar, ibn Mas'ud and Abu Mas'ud, ibn Sirin and al-Hasan allow the jaddat abawiyyah of the deceased to succeed along with the abb. They quote ibn Mas'ud narrating that the Prophet (s.a.w) gave the umm al-abb a sixth as an heir with the abb being present.\(^2\) The rule is that the near jaddat in qarabah exclude the further removed ones irrespective of which side the near jaddat are.\(^3\) This is one of the rulings of Zaid bin Thabit as well as the hanafis. The other view of Zaid is that the near jaddat abawiyyah and the further removed jaddat umamiyyah are taken as succeeding jaddat. Both Zaid's views are quoted in shafi‘i works, but the more correct shafi‘i ruling is that the near jaddat abawiyyah do not exclude the far removed jaddat umamiyyah. The first quoted ruling of Zaid is the ruling of Malik, the more correct ruling of al-Shafi‘i and its the ruling of Ahmad.\(^4\)

\(^1\) Al-Tarikat wa al-Wasaya, p. 305.


\(^3\) Sunan al-Tirmidhi, Vol 3 p. 275.

\(^4\) Al-Mughni, Vol 6 p. 211.
There are views of the fuqaha' on how many jaddat can succeed to the 1/6 allotted, like Malik limiting it to two (paternal and maternal grandmothers only), Ahmad to three etc.¹

(5) Mirath al-Zawjain (Succession Of The Husband And Wife):

Their mirath is confirmed by Qur'an. "In what your wives leave, your share is a half if they leave no child; but if they leave a child, you get a fourth, after payment of (their) legacies and debts. In what you leave, their (wives’) share is a fourth if you leave no child, but if you leave a child, they get an eighth, after payment of (your) legacies and debts."² The two, thus, succeed to one another’s tarikah by farāḍ.

When the zawjah has no descendant heir, like an ibn, how lowsoever, or bint (daughter), irrespective if such a descendant heir is from the nikāh with the surviving zawj or from a previous nikāh, the surviving zawj receives one half of the entire tarikah.³ He will also receive this amount if the zawjah mutawaffa (deceased wife) leaves a bint al-bint (daughter of the daughter) or an ibn al-bint (son of the daughter) as these are of the arḥām and not ashāb al-farāḍ nor are they ‘asabah. If the zawjah mutawaffa leaves a

¹ Al-Tahqiqat al-Mardiyah, Vol 1 p. 99. 
² Al-Qur’an, Chapter 4: 12. 
Minhāj al-Talibin, p. 85.
descendant child, whether one or more, the surviving zawj receives a quarter of the entire tarikah. The surviving zawjah receives a quarter of the entire tarikah of the zawj mutawaffā (deceased husband) if he leaves no child. The same qualification of a child, as for the zawjah mutawaffā (deceased wife) applies here. In his case the descendant heir must be a wadad shar‘ī (legitimate child) to him. The presence of a bint al-bint (daughter of the daughter) or ibn al-bint (son of the daughter) of the zawj mutawaffā does not affect the share of the surviving zawjah.

In the case where a child is left by the zawj mutawaffā, the surviving zawjah receives an eighth of the entire tarikah. If there are more than one zawjah, they share in the mentioned quarter or eighth of the entire tarikah as the Qur‘ān did not distinguish between one or more zawjāt in their shares as it did with the banat and akhawāt. The tawaruth of the zawjān is affected by certain situations, at times, which will be dealt with now.

(a) *Shurut Mirath Bi al-Zawjiyyah*(Conditions Of Succession By Marriage):

The first *shart* is that the *nikaḥ* must be enacted correctly according to the *ahlkām al-nikaḥ* (laws of marriage).\(^1\) Thus, if a *nikaḥ* is ruled *bāṭil* (void) or *fasid* (voidable) and one of the *zawjan* dies, then there is no *tawaruth* between them, even if they lived together for years. This is the ruling of Abu Hanifah, al-Shafī‘i and Al-Imad. Malik differs ruling that if the *fasād* (voidability) of the *nikaḥ* is agreed upon, like a man marrying a fifth wife whilst being married to four or marrying his *ukht bi al-rada‘ah* in ignorance, then there is no *tawaruth* between them, whether one of them dies before or after the division of the *tarikah* or before annulment of the *nikaḥ*. In the case of *fasād* of the *nikaḥ* being a point of disagreement between the *fuqahā‘*, like a woman marrying without a *wali*, and she is ‘*aqilah* and *mukallafah* or the like cases, then, if one of the *zawjan* dies after the annulment of the *nikaḥ*, there is no *tawaruth* between them. If death takes place before annulment of the *nikaḥ*, *tawaruth* takes place due to a *nikaḥ* existing in the eyes of those who see it that way. This ruling applies to the parties who were unaware that their *nikaḥ* was *fasid* (voidable).

The second *shart* is that the *zawjiyyah* must still exist intact at death of one of the *zawjan*. This *zawjiyyah* can be existent

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\(^1\) *Athar ‘Aqd al-Zawaj*, p. 110.  
*Al-Tarikat wa al-Wasāya*, p. 100.
haqiqatan (in reality an existing one) or existing ḥukman (existing in law) like a zawj divorcing his zawjah talāq rajʿī (revocable divorce) and dies during her 'iddah al-talāq (period of stay of divorce). In both these cases the zawjah succeeds to her share of the tarikah of her zawj. If he dies after her 'iddah al-talāq, she does not succeed to his tarikah as zawjiyyah is non existent. If the zawj divorces her talāq baʿīn (irrevocable divorce), irrespective of the grade, she does not succeed to his tarikah, she does not succeed to his tarikah when he dies during her 'iddah al-talāq (period of stay of divorce) or thereafter.¹

(b) Consequences Of Talāq al-Far (Divorce During Fatal Illness:

Talāq al-far means divorce given by a zawj when he has marad al-mawt (fatal sickness from which he dies) intending thereby to prohibit his zawjah for succeeding to his tarikah.² Hanafis rule that if a zawj divorces his zawjah talāq baʿīn during marad al-mawt, then she succeeds to her share of his tarikah when he dies during her 'iddah. If he dies after the expiration of her 'iddah al-talāq, she does no succeed to his tarikah as there is no zawjiyyah present.³ Excluded from this kind of talāq is the talāq given by him

¹ Al-Mawsuʿah al-Fiqhiyyah, p. 37.
³ Al-Shariʿah al-Islamiyyah, p. 298.
before his illness but he dies during her 'iddah al-talaq.

However, the zawj in maraḍ al-mawt does not succeed to his divorced zawjah's tarikah should she die during her 'iddah al-talaq. The reason why hanafis allow the zawjah mutallaqah (divorced wife) to succeed to the tarikah of her zawj, during her 'iddah of ṭalaq bā'in is that 'iddah is a consequence of the nikāh and to retaliate against his intended criminal act. If the zawjah divorces herself from her zawj (tallaqa nafsaha) and he approves of it (ajazahu), while he is in his maraḍ al-mawt and he dies in that state, she does not succeed to any of his tarikah because she initiated ṭalaq (divorce) freely by herself and he approved it.¹

Malik again rules that if a zawj divorces his zawjah ṭalaq bā'in while in maraḍ al-mawt, she succeeds to his tarikah whether he dies during her 'iddah al-talaq or after its completion, or whether she remarries or does not remarry. This ruling is based on sadd al-dhira'ah (closing the loophole rule in jurisprudence) and raddan li maqāsidīhi al-sai' (in retaliation to his evil intention). This is also the ruling of al-Laith bin Sa'd, shaikh of the fuqahā' in Egypt during his time.²

¹ Al-Talaq wa al-Wisayah, pp. 277 - 278.  
² Muwatta' Malik, Vol 2 p. 93.  
Al-Šari'ah al-Islāmiyyah, pp. 298 - 299.  
Al-Tarikāt wa al-Wasāyā, pp. 102 - 103.  
Al-Tarikāt wa al-Wasāyā, p. 104.
The shafi'is have two rulings in this case. One ruling rule the *talaq marađ al-mawt*, of the *ba'in* (irrevocable) category as valid and severs the cause of *tawaruth* between the *zawjan*. This kind of *talaq*, thus, resembles *talaq fi al-siḥah* (divorce in a healthy state). Al-Shirāzī says this is the correct shafi'i ruling. The second shafi'i ruling grants her the right of *tawaruth* if she is irrevocably divorced by the *zawj* during his *marađ al-mawt* on condition that he dies during her 'iddah al-*talaq* and subject to her not initiating the *talaq* and that she is a Muslimah. The *talaq marađ al-mawt* stands as executable when the *zawj* recovers from the sickness it was feared he would die from.

The ḥanbalis rule that the *zawjah* divorced by her *zawj* during his *marađ al-mawt* succeeds to her share of his *tarikah* if he dies during her 'iddah al-*talaq* or after the expiry thereafter on condition that she does not remarry. He does not succeed to her *tarikah* when she dies during her 'iddah al-*talaq* of his *marađ al-mawt*. Another ḥanbalī ruling states that she only succeeds if he dies during her 'iddah al-*talaq*.

The zaidiyyah rule that *talaq marađ al-mawt* as valid and the *zawjah* does not succeed to the *tarikah* of her *zawj* when he

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1 Al-Tarikat wa al-Wasaya, p. 105.
   Al-Wilayah wa al-Wisayah, p. 279.
2 Al-Wilayah wa al-Wisayah, p. 282.
dies in her 'iddah. Their reasoning is that their tawārīth is based on nikāh ṣāḥīḥ and when this is not found, they cannot succeed to one another's tarikah. The ja'fariyyah agree with the ḥanbalīs that an irrevocably divorced woman so divorced by her zawj during his marāḍ al-mawt, succeeds to his tarikah on condition that she does not remarry. This implies that she succeeds to his tarikah, whether he dies during her 'iddah al-ṭalāq or not.¹ The meaning of "her not remarrying", in this form of talāq (divorce) implies that she should be an unmarried widow when the qismah (division and distribution) takes place and not that she remain unmarried until she dies.

The zahirīyyah rule no mīrāṭh to the zawjah divorced by her zawj during his marāḍ al-mawt, even if he states he is doing so to prevent her from succeeding to his tarikah. Their argument is based on the rule that a nikāh is ended by talāq ba'īnah and as such no tawārīth can take place between them. The muṭallaqaḥ rajīyyah (woman divorced revocably), succeeds to the tarikah her zawj if he dies during her 'iddah al-ṭalāq and not after it.²

The issue of talāq al-far or talāq marāḍ al-mawt is not mentioned in the Qur'ān. The ruling is derived from the ruling of the sahābah. 'Abd al-Rahmān al-‘Araj narrated that the khalīfah 'Uthmān bin 'Affān gave the wives of ibn Mukmil their share of his

¹ Al-Tarīqat wa al-Wasaya, pp. 105 - 110.
tarikah when he divorced them during his maraq al-mawt. Rabi‘ah bin Abī 'Abd al-Rahman narrated that the zawjah of 'Abd al-Rahman al-'Awf told him that she was divorced irrevocably (al-batt) by him during his maraq al-mawt. 'Uthmān gave her her share of his tarikah. 'Uthmān did the same with the zawjah of Habban who divorced her irrevocably during his maraq al-mawt.1

‘Ā’ishah narrated that the mar’ah al-farah (woman divorced by her husband irrevocably during his fatal sickness), succeeds to her share of his tarikah as long as he dies during her ‘iddah al-talaq.2

The issue of talāq ba‘in in maraq al-mawt of the zawj should, according to the principles of fiqh, preclude a zawjah from succeeding to his tarikah, for an ‘ajnabiyyah does not succeed to the tarikah of an ‘ajnabi. By qiyyās, the irrevocably divorced woman is strange to her zawj and he to her as the nikāh had ended by talāq. However, resort is made to finer qiyyās, namely, al-istihsān to avoid the sinful situation qiyyās would bring forth; a situation where a sinful act denies another person of a right ordained by Allāh in the Qur‘ān. The Qur‘ān states: "...be just, that is next to piety...", and "Allāh commands with justice, the doing of good and giving to kith and kin and He forbids

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1 Muwatta’ Malik, Vol 2 p. 93.

2 Al-Tarikat wa al-Wasāyā, p. 102.

3 Al-Qur‘ān, Chapter 5: 8.
all indecent deeds, evil and rebellion..."

Needless to say, talaq al-far flies in the face of these Quranic principles.

(6) **Mirath al-Banat (Succession Of The Daughters):**

The *mirath* of the *banat* is mentioned in the Qur'an. "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 (daughter), her share is a half..." This *ayah* shows that the *banat* have three cases in *mirath*.

**Case 1:**

In this case the *banat* are 'asabah with the *abna'* (sons) of the deceased. They share the *tarikah* of the deceased in the ratio of two to one in the favour of the *abna*, the latter of which are taxed with maintenance of the *banat*. Their shares, in this case, are distributed to them after the *ashab al-furud* had received their due shares. If there are no *ashab al-furud*, the *banat* and *abna* of the deceased receive the entire *tarikah* in the portions mentioned.¹

**Case 2:**

In this case, the deceased leaves *bintan sulbiyyatan* or *banat sulbiyyah* and there is no *ibn* or *abna* of the deceased with them. In this case, the *banat sulbiyyah* share equally

¹ *Al-Qur'an*, Chapter 16: 90.
² Ibid, Chapter 4: 11.
in two thirds of the entire *tarikah*. There is *sunnah* in this distribution in that Sa‘d bin Rabi‘ was martyred in the Battle of *Uḥud* and his brother took all his possessions giving nothing to Sa‘d’s *zawjah* nor his *banat*. She complained to the Prophet (s.a.w) who sent her away as there was not yet revelation on the matter. When the revelation came, he (s.a.w) called them all in and ruled that the *banat* share equally in two thirds of the *tarikah*, to the widow of Sa‘d an eighth and the rest to Sa‘d’s brother.

On this issue there is difference of opinion between the majority of the *fuqaha‘* and ibn ‘Abbās. All the *saḥabah* and the majority of the *fuqaha‘*, save ibn ‘Abbās, rule that *bintan sulbiyyatan* or more, share equally in two thirds of the entire *tarikah* when there is no *ibn* or *abnā* of the deceased with them. Ibn ‘Abbās rules that a *bint sulbiyyah* or *bintan sulbiyyatan* share in a half of the entire *tarikah*. Ibn ‘Abbās maintains that the *āyah* states “...and if they are more than two — *fawqa ithnatain* — they share in two thirds of the (estate) and if there is (only) one, she receives a half.”

1 *Al-Taḥqiqat al-Mardiyyah*, p. 78.  

2 *Sunan Abī Dawūd*, Vol 2 p. 120.  

3 *Al-Qur‘ān*, Chapter 4: 11.
'Abbas, the bintān sulbiyyatān share in a half of the tarikah of their parents.¹

The majority say that the word fawqa (above) in the said āyah is za‘idah (superfluous) as in another āyah (verse) "...smite them above (fawqa) their necks..."², which actually means "smite their necks".³ The majority further argue that since, in the case of an ibn and bint, the former gets two thirds and the latter a third, bintān sulbiyyatān must get two thirds.

Case 3:
If the deceased left only a bint sulbiyyah, and no ibn or abnāʾ, she receives a half of the entire tarikah due to the āyah "...and if there is (only) one daughter, she gets a half..."⁴

(7) **Mirath Banat al-Ibn (Succession Of The Daughters Of The Son):**

The bint al-ibn is she who relates to the abb in a direct male line irrespective of distance from the deceased, which, in this case, is the abb. Thus, the bint al-ibn and the bint ibn al-ibn (daughter of the son of the son), all fall in this category of banat al-ibn (daughters of the son). The bint al-ibn has six cases in mirāth. Cases one to three is

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² Al-Qur’an, Chapter 8: 12.
³ Al-Tarikat wa al-Wasaya, p. 330.
⁴ Al-Mugni, vol 2 p. 172.
when she stands in the place of the *bint sulbiyyah* when the latter is not found. Thus, in the absence of a *bint* or *banat sulbiyyah* of the deceased, if there is a mixture of *ibn al-ibn* and *bint al-ibn*, they succeed by *ta'šib* and share in the ratio of a male receiving twice the share of a female in that part of the *tarikah* that remains, after the *ashab al-furud* had their shares given to them. If there are no *ashab al-furud*, then they succeed to the entire *tarikah* in the ratio mentioned. If there are two or more *banat al-ibn*, they share equally in two thirds of the entire *tarikah* and when there is only a *bint al-ibn*, she receives a half of the entire *tarikah*. *Mirath* of the *bint al-ibn* is conditional that there is no heir, male or female, nearer to the deceased. In this case, the *bint al-ibn* does not fill the place of the *bint sulbiyyah*, like when an *ibn sulb* of the deceased is found with her.¹ The *bint al-ibn*, when found with the *bint sulbiyyah* has the following three cases.

**Case 1:**

The *bint al-ibn*, if found with a *bint sulbiyyah* receives a sixth of the *tarikah* to complete two thirds of the *tarikah* allotted for *banat*, as the *bint sulbiyyah* will receive a half. This rule is conditional that there is no heir who will make the *bint al-ibn* an 'asabah with her. If found, she, the *bint al-ibn*, shares with that heir by way of *ta'šib* only and not by *fard*.

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Case 2:

If a deceased leaves bintan sulbiyyatan and a bint al-ibn or banat al-ibn, then the bint al-ibn or banat al-ibn are excluded from the tarikah as the two thirds allotted for bintan (two daughters) have been exhausted. This is the ruling of the majority of the fuqaha'. Ibn 'Abbās rule that if bintan sulbiyyatan are found long with a bint al-ibn or banat al-ibn, then the latter will receive a sixth if there is one bint al-ibn or they will share equally in it, if they are more than one. The bintan sulbiyyatan share equally in a half of the entire tarikah and not two thirds, according to ibn 'Abbās. Ibn Mas'ud again ruled that if there are bintan sulbiyyatan and a bint al-ibn or banat al-ibn, and an ibn al-ibn, or their son or sons, then the bint al-ibn or banat al-ibn receives nothing as the ibn al-ibn how lowsoever, will receive the residue of the tarikah as they are then 'asabah entitled to the residue of the tarikah. His ruling is based on the fact that the Qur'an had limited two thirds to the banat and the banat sulbiyyah had exhausted that.

Case 3:

In this case the bint al-ibn will receive nothing from the tarikah, whether there are 'asabah with her or not. This occurs when there is found with her or with them, an ibn sulb or ibn al-ibn of the deceased who is higher in degree then the bint al-ibn. The ja'fariyyah has a cardinally different rule here in that if a bint sulbiyyah and a

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Al-Taqīqāt al-Mardiyah, pp. 92 - 94.
Al-Tarikāt wa al-Wāṣayā, pp. 341 - 348
bint al-ibn are found, then the former receives a half fardan and the other half raddan (by redistribution). The bint al-ibn receives nothing. This is due to ja'fariyyah rules that the first category of heirs succeed before the second.¹

(8) Mirath al-Akhawat al-Shaqiqat (Succession Of The Full Sisters):

They have five cases of mirath and they are:

Cases 1 & 2:
In these two cases, if only an ukht shaqiqah is found and no heir which will either exclude her from the tarikah or reduce her share, or there is no other ukht shaqiqah with her, she receives half of the entire tarikah. If there are two or more of these akhawat shaqiqat and no akh shaqiq with them nor any other heir which will either exclude them or reduce their share, then these akhawat shaqiqat share equally in two thirds of the entire tarikah². These rulings are based on the Qur'an. "...Allah directs you (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child (of his), she shall have half of the inheritance. If (such a deceased was) a woman who left no child, her brothers takes her inheritance. If there are two sisters, they shall have two thirds of the inheritance (between the two of them)..."³ This pattern of

¹ Al-Tarikat wa al-Wasaya, p. 349.
³ Al-Qur'ān, Chapter 4: 176.
mirath is by fard. The meaning of ukht in the quoted ayah refers to the ukht shaqiqah and ukht li abb. It cannot refer to the ukht li umm as her and her sisters' share is by fard only, while the mirath of the ukht shaqiqah and the ukht li abb is by fard and sometimes by ta'sib. When the akhawat are two or more, they share equally in the allotted share of the tarikah. This is due to the ayah "...and if the daughters (nisa') are more than two, then they share in two thirds..." This principle is applicable to all cases resembling the daughters' mirath.

Case 3:
In this case, the ukht shaqiqah or akhawat shaqiqa' are found with an akh shaqiq or ikhwah ashiqqa' (full brothers). The tarikah due to them is divided by ta'sib, the akh shaqiq receiving twice the share of the ukht shaqiqah. The Qur'an states, in their case, "...if they are brothers and sisters, (they share); the male having twice the share of the female..." This is the same pattern as with the awlad al-mayyit as in Surah Nisa'.

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3 Al-Qur’an, Chapter 4: 11.  
5 Al-Qur’an, Chapter 4: 176.  
6 Ibid, Chapter 4: 11.
The *malikis* and *hanbalis* rule that the *ukht shaqiqah* or *ukht li abb* are made 'asabah with the *jadd sahih* where there is no akh with them. In this case, the *jadd sahih* receives twice the share of the *ukht*.

**Case 4:**

In this case the *ukht shaqiqah* or *akhawat shaqiqat* have no akh *shaqiq* with them, but the deceased left a descendant female heir. In this case, the descendant female heir takes her farḍ from the *tarikah* and the residue goes to the *ukht shaqiqah* or *akhawat shaqiqat* who became 'asabah with the descendant female heir, all sisters sharing equally. This is so done due to the ruling of the Prophet (s.a.w) who said: "Make the sisters with the daughters residuaries." Hadith texts are reported by al-Aswad bin Yazīd, Huzail and ibn Masʿūd on the *bint ʾulbiyyah* receive a half of the *tarikah* and the remaining half to the *ukht shaqiqah*. This is also the ruling of ibn Masʿūd.

**Case 5:**

The *ukht shaqiqah* or *akhawat shaqiqat*, in this case, is/are found with a farʾ *warith dhakr* (descendant male heir) like son of deceased or son of the son of the deceased, how lowsoever or male *warith ʾasl* (ascendant heir) like an

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abb al-mayyit. The ukht shaqiqa or akhawat shaqiqa are totally excluded from the tarikah, in this case as the 'asib takes the entire tarikah.¹

(9) Mirath Akhawat Li Abb (Succession Of The Consanguine Sisters):

They have seven cases in mirath.

Case 1:
The ukht li abb succeeds to half of the tarikah of the deceased on condition that the deceased left no far' warith mudhakkar how lowsoever, nor bint sulbiyyah, nor bint al-ibn, nor ukht shaqiqa nor has she an akh li abb with her to make her an 'asib with her.

Case 2:
If there are only ukhtan li abb (two consanguine sisters) or more, in place of the one as in Case 1, above, and with all the conditions mentioned, they succeed to two thirds of the entire tarikah which is equally divided between all of them.²

Case 3:
The ukht li abb succeeds to one sixth of the tarikah completing two thirds thereof, when she is found with an ukht shaqiqa, the latter succeeding to a half of the entire tarikah. This is subject to the conditions set in Case 1, above. If they are more than one, they share equally in the sixth. If the ukht li abb is found with her brother, the akh li abb, they share the sixth; the akh li abb receiving

² Al-Tarikat wa al-Wasaya, p. 367.
² Minhaj al-Muslim, pp. 472-473.
² Aḥkam al-Tarikat wa al-Mawāriṯ, p. 126.
twice the share of the ukht li abb. If they are more, they share in the ratio mentioned. The akh li abb and the ukht li abb are excluded from the tarikah when the ašhāb al-furūd exhausted the tarikah.\(^1\) An example being when the deceased leaves ukhtān shaqīqatān for they take two thirds of the tarikah and thus exhausted the share of the akhawat. The Qur'ān, limits their share to two thirds.\(^2\)

**Case 4:**

The ukht li abb, if found with the akh li abb, succeeds to the tarikah by ta'sīb, the male receiving double the share of the female.\(^3\)

**Case 5:**

An ukht li abb or akhawat li abb is/are 'āṣabah to the residue of a tarikah if found with a bint or banāt sulbīyyah or, in her/their absence, a bint al-ibn or banāt al-ibn of the deceased on condition that there is no ukht shaqīqah present. However, if there are ašhāb al-furūd and they exhausted the tarikah, then the ukht or akhawat li abb are excluded from the tarikah.\(^4\)

**Case 6:**

An ukht li abb or akhawat li abb is/are excluded from the tarikah by the presence of ukhtān shaqīqatān save when the ukht li abb or more are found with an akh li abb in which case the ukht li abb or akhawat li abb become

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\(^{2}\) *Al-Qur‘an*, Chapter 4: 176.


′aṣabah with him (or more of them, if there are more ikhwah li abb – consanguine brothers). In this case, their mirath is by taṣib, the male receiving twice the share of a female.

Case 7:
The ukht li abb or akhawat li abb will be excluded from the tarikah by the presence of an abb, or ibn or the ibn al-ibn, how lowsoever, or the akh shaqiq or an ukht shaqiqa being an ′aṣabah with a bint sulbiyyah or bint al-ibn of the deceased, whether or not she or they have an akh li abb or ikhwah li abb (consanguine brothers) with them. The ukht shaqiqa, in this case, is as if she is an akh shaqiq as she is the nearest ′asabah to the deceased.1

(10) Mirath Ikhwah Li Umm (Succession Of The Uterine Brothers And Sisters):
The ikhwah li umm are the brothers and sisters of the deceased from their mother. The mirath of the ikhwah li umm (both brothers and sisters) of the deceased is by farq only. They are, thus, never ′aṣabah, even if they are ikhwah (brothers) and akhawat (sisters). The mirath of the akh and ukht li umm is by equal shares, whether they succeed singly or as a group.2 It is thus incorrect to claim that shari′ah discriminates against women in mirath. Their mirath have three cases.

1 Al-Fiqh al-Islami wa Adillatuhu, Vol 8 p. 324.
Case 1:
A sixth of the tarikah is given for either an akh li umm or ukht li umm if each is found alone. This is subject to the deceased, who will be their brother or sister from the same mother but different fathers, leaving no descendant heir, whether male or female or an ascendant male heir, like an abb or in his absence, a jadd sahih, how highsoever.

Case 2:
If the ikhwah li umm are more than one, whether only ikhwah or only akhawat or a mixture of both, they succeed to one third of the entire tarikah, each receiving an equal share.¹ This is conditional that the deceased did not leave an ascendant male heir like an abb or jadd sahih or descendant heir, male or female, how lowsoever.²

Case 3:
These ikhwah li umm are excluded from the tarikah of a deceased if such a deceased left an ibn sulb (own son) or more, or ibn al-ibn, how lowsoever or more, or a bint sulbiyyah or more or a bint al-ibn, or more, how lowsoever. In addition, the abb and jadd sahih, how highsoever of the deceased, exclude the ikhwah li umm from the tarikah.³ The proof hereof is from the Qur'an and the ijmā'. "If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but

¹ Al-Qur'an, Chapter 4: 12.
³ Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 41.
left a brother or sister, each of the two gets a sixth, but if more than two, they share in a third after payment of legacies and debts...\(^1\)

There is *ijmāʿ* that the above *āyah* refers to the *ikhwah li umm* of a deceased.\(^1\) The following very interesting *masʿalah* (problem) arose in matter of these *ikhwah li umm*:

(a) **Masʿalah al-Sharikah (Problem Of The Partnership):**

This issue arises when a deceased *zawj* left a *zawj*, an *umm* or *jaddah sahihah* and *akhawan li umm* (two uterine brothers or two sisters) and one or more *ikhwah ashiqqaʾ* (full brothers). The agreed rule in *mirاث* is that *ashab al-furud* receive their shares first and the *'asabah* take the residue. In this case, all the heirs are *ashab al-furud* save the *ikhwah ashiqqaʾ* who are *'asabah*. The division is thus, half of the entire *tarikah* goes to the *zawj* as there are no children, one sixth of the entire *tarikah* for the *umm* or the *jaddah sahihah* as the deceased left brothers and the *akhawan li umm* receive a third of the entire *tarikah*. The equation is from 6 - 3/6 for the *zawj* which is a half, 1/6 for the *umm* and 2/6 for the *akhawan li umm*, which is a third. The *tarikah* is exhausted and nothing is left for the *'asabah*, the *ikhwah ashiqqaʾ*. The *fuqahaʾ* differed in this kind of distribution. 'Ali, the fourth of the *al-khulafaʾ al-rashidun*, did not give anything

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1. *Al-Qurʾān*, Chapter 4: 12.
to the 'aṣabah, the ikhwah ashiqqa’ in this case, retaining the rule of aṣḥāb al-furūḍ preceding all other heirs. This is also the ruling of Ubai bin Ka‘b, Abu Musa al-Ash‘ari of the saḥābah as well as being the more famous ruling of ibn ‘Abbas, another saḥābi. It is also the ruling of al-Sha‘bi, ibn Abi Laila, Abu Hanifah, Abu Yusuf and other senior ḥanafi fuqaha’ as well as that of Ahmad and Dawūd al-Zāhirī. Initially, ‘Umar, the second caliph who preceded ‘Ali, also subscribed to this view, whereupon the ikhwah ashiqqa’ told him: "show us that our father was an ass (himār)! Are we not from one mother?" From here this mas‘alah (problem) is also called the mas‘alah al-himariyyah (problem of the ass). ‘Umar then ruled that the ikhwah li umm and the ikhwah ashiqqa’ share equally in the one third and not only the akhawan li umm on grounds of having the same mother. This is also the ruling of ‘Uthman, the third caliph, who succeeded ‘Umar, ibn Mas‘ūd, the other ruling of ibn ‘Abbās, Zaid bin Thabit as well as that of Sa‘īd ibn al-Musaiyib, Shuraih, Tawus, al-Nakha‘i, al-Thawri, Mālik, al-Shafi‘i and Ishaq al-Rahawaih.1

If an akh li abb, or more, is/are found, instead of an akh shaqiq, the same ruling as for the ikhwah ashiqqa’ applies/apply to him or them.2 The ruling of ‘Ali and those agreeing with him, appears to be based on

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Muwatta’ Mālik, Vol 2 p. 50.

the normal rules of mirath as well as the fact that the ikhwah li umm are excluded at times from the tarikah, while that of 'Umar and those agreeing with him, on the common bond of relationship through the umm, the deceased wife in this mas'alah al-sharikah.

(11) **Mirath al-'Asabah** (Succession Of The Residuaries):

An 'āsib (pl 'āsabah) is a residuary and is that heir who has no fixed farq nasib (fixed share), but who succeeds to the residue of the tarikah or is excluded from the tarikah when the ashab al-furūq had exhausted the tarikah. As stated previously, the 'āsabah are of two kinds, namely, al-'āsabah al-nasabiyyah and al-'āsabah al-sababiyyah, the latter of which clientage is a part. As the latter is now no longer valid, by the majority ruling in fiqh, only al-'āsabah al-nasabiyyah will be dealt with.

(a) **Al-‘Asabah bi Nafasihi** (Independent Residuaries):

There are four main categories in this form of 'āsabah and they are al-bunuwwah (deceased's children), called juz al-mayyit (part of the deceased), al-ubuwwah (fatherhood) or asl al-mayyit (origin of the deceased), al-ukhūwwah (brotherhood), or the brothers and sisters of the deceased and finally al-juduwwah (grand parentage)

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   Tashil al-Farā'īd, p. 68.
   Al-Tarikāt wa al-Wasāyā, p. 246.
or jadd of the deceased. The order in which these 'ašabah succeed, are:

- banū al-mayyit (children of the deceased) followed by the abnā' banī al-mayyit (children of the deceased's children), how lowsoever.

- then the aṣl al-mayyit (origin of the deceased) who is the abb followed by his abb the jadd sahih, how highsoever.

- then the juz abihi (part of his father) who are the ikhwah (brothers and sisters), followed by their abna' only.

- then juz jaddihi (part of his grandfather) who are the 'ummumah (paternal uncles) followed by their abna' only.

There are some difference amongst the fuqaha' on these classifications. Abu Hanifah ruled that the jadd sahih precede the ikhwah, while Abu Yūsuf and Muḥammad of the Ḥanafis hold the opposite view. The previously mentioned kinds of 'ašabah are called 'ašabah binafsihi as they do not require anyone else to make them 'asabah.

There is a difference amongst the fuqaha' as to the actual number of these 'ašabah. According to the Ḥanafis, there are five, namely, al-bunūwwah (children), al-ubūwwah (fathers), al-ukhuwwah (brothers), al-'ummumah (paternal uncles) and then al-wala' (clientage). Malikis and shafi'is have

1 Al-Fiqh al-Islāmi wa Adillatuhu, Vol 8 p. 335.
2 Ahkam al-Tarikat wa al-Mawarith, p. 160.
seven, and they are; al-bunuwwah (children), al-ubuwwah (fathers), al-juduwwah (grandfathers), al-ikhwah (brothers), banū’ al-ikhwah (sons of the brothers), al-‘ummumah (paternal uncles) and the bait al-māl (Muslim public treasury). Ḥanbalis have six, namely, al-bunuwwah (children), al-ubuwwah (fathers), al-juduwwah (grandfathers), al-ikhwah (brothers), banū’ al-ikhwah (sons of the brothers), the al-‘ummumah (paternal uncles) and finally al-walā’ (clientage).¹

(b) Al-‘Asabah bi Ghairihi (Female Residuaries):

They are four in number, namely, the bint sulbiyyah, bint al-ibn, the latter in the absence of the bint sulbiyyah, ukht shaqiqah and the ukht li abb, the latter in the absence of the ukht shaqiqah. These female heirs become ‘asabah with their respective ikhwah of their darajah and qurbah to the deceased.² The banāt al-ibn, are also made ‘asabah with the abnā’ al-‘amm who are in their degree of relationship to the deceased. They (the banāt al-ibn) are also made ‘asabah with the banū ikhwatihinn (sons of their brothers) i.e the ibn ibn al-ibn as well as the abnā’ ibn ‘amm, should they require them to succeed to a tarikah.

Mālik and Ḥanbalis allow the ukht shaqiqah, or, in her absence, the ukht li abb of becoming ‘asabah with the jadd sahiḥ

² Ṣāhābīs al-‘Ulamā’ wa al-Mawārith, p. 160.
of the deceased so that they can succeed to a part of the tarikah of the deceased. This is so when these akhawat have no akh who would make them 'āṣābah.¹

It must be noted here that any female who is not a șāhibah farq (female with a fixed share) cannot become 'āṣibah with another 'āṣib as the shari'ah only created al-'āṣabah bi ghairihi for the bint șulbiyyah, bint al-ibn and the akhawat to become 'āṣabah with their respective ikhwah in their degree and qurbah to the deceased. Thus, the 'ammah (paternal aunt) cannot become 'āṣabah with the 'amm, although the 'amm is of the 'āṣabah.² This pattern is clear from the Qur'an: "Allah (thus) directs you regarding your children's inheritance; to the male a portion equal to that of two females..."³, and "...if there are brothers and sisters, they (share); the male having twice the share of the female...."⁴ In these cases, the akh renders his ukht or the 'āṣabah to succeed along with him in the tarikah.⁵

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¹ Muwatta’ Malik, Vol 2 p. 56.
⁵ Al-Mawsu’ah al-Fiqhiyyah, Vol 3 pp. 44 – 45
Al-‘Asabah Ma‘a Ghairihi (Assisted Residuaries):

These are those female ‘asabat who become ‘asabah with another female. They are the ukht shaqiqah or the ukht li abb with the bint sulbiyyah of the deceased or with the bint al-ibn, in the absence of a bint sulbiyyah of the deceased. This is due to the Prophet’s ruling: "Make the sisters residuaries with the daughters..."

Bait al-Mal (Muslim Public Treasury):

The bait al-māl is the depository where all the wealth and possessions which have no owner, is deposited for the benefit of the Muslims. Hanafis and ḥanbalis rule that the bait al-māl is not an heir but a depository where ownerless property is deposited. This deposit is in the same meaning as luqatāh (ownerless lost wealth) which is deposited in the bait al-māl. These deposits are used for the benefit of the Muslim public. Al-Muzani and ibn Suraij of the shafi‘is concur herewith as well as it being a shādh (weak) ruling of Malik. According to this view, any Muslim who has no heir can dispose of all his wealth and possessions by way of wasiyyah or have it given to any one person or a number of persons on his or her death.

Malik and al Shafi‘i rule that the bait al-māl follows after al-mu’taq (the freed slave

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1 Fiqh al-Mawarith, Vol 2 p. 16.
   Al-Mawsū‘ah al-Fighiyyah, Vol 3 p. 44.

2 Nail al-Awṭar, Vol 6 p. 66.
   Al-Mawsu‘ah al-Fiqhīyyah, Vol 3 p. 44.

category succession pattern), which, of course, is no longer in operation. Malik means by *bait al-māl* that treasury which is in his, i.e. the deceased's domicile. If he has no domicile, then either the one he died in or where his wealth and possessions are found in and on condition that such a *bait al-māl* is *muntaziman* which means, properly constituted and administered. If the latter rule is not found, it does not qualify as a *bait al-māl*. Al-Shafi'i also ruled that *bait al-māl* can accept the *tarikah* of an heirless person or the residue of a *tarikah* when there is no heir to succeed to it. He did not lay down any regulation for the *bait al-māl* as Malik had done. However, the later shafi'i fuqaha ruled that if the *bait al-māl* is *ghair muntaziman* (improperly constituted and administered), the residue of a *tarikah* is redistributed to the heirs in their allotted proportions till the *tarikah* is exhausted.¹

Thus far, the normal circumstances under which *mirath* functions, had been mentioned. There are other rare circumstances in *mirath* which will be dealt with now, followed by the *mirath dhawi al-arḥam*.

(13) *Mirath al-Mafqud* (Succession Of The Missing Person):

The word *mafqud* is derived from the arabic verb *faqada* meaning "to be absent from or to be non-existent"² In the shari'ah, the *mafqud* is the one who is absent and from whom no news

1. *Al-Tahqiqat al-Mardiyyah*, pp. 249 - 250
   *Al-Munjid*, p. 579.
is received of his whereabouts and it is not known whether he is alive or dead. Such a person is assumed alive and only the qa’di can declare him dead. By al-istishāb he is assumed to be alive.

There is virtual complete consensus by the fuqaha’ on the mirath of the mafqud. If a mafqud is found dead, the mafqud status lapses and the normal mirath pattern takes its course. If he is still a mafqud, and feared dead, his heirs can succeed to the lowest share they are entitled to until the mafqud is declared dead by the qa’di or the mafqud returns to his domicile. If he is pronounced dead by the qa’di and an initial distribution was made to his heirs, they will receive the remainder due to each of them from the mafqud’s tarakah. This case is found when a man dies leaving an ibn mafqud (missing son) and bintān as only heirs. The bintān are given a half and one half is kept for the ibn al mafqud. If he returns, he gets his half and distribution is then complete. If he is pronounced dead by the qa’di, then his half goes to the bintān, each one receiving a half thereof and distribution is then complete.

In the case where the mafqud is to succeed to someone else’s tarakah and he had not yet been pronounced dead by the qa’di, then, if he (the mafqud) will influence the shares of the heirs by excluding them from the tarakah, then the tarakah is frozen and no one gets anything until the issue of the mafqud is finalised.

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1 Tashil al-Fara’id, p. 163.

2 Al-Wajiz fi al-Mirath, p. 68.
i.e. he either returns alive or he is pronounced dead by the qādī. This is to prevent harm and hardship to both parties when the mafqūd returns. An example hereof being an abb deceasing and leaving an ibn sulb mafqūd (missing own son) and an akh shaqīq as the only heirs. In this case, the ibn sulb mafqūd will exclude the akh shaqīq from the tarikah and thus it must be frozen until the position of the ibn sulb mafqūd is finalised.

In the case ware the mafqūd is an heir along with other heirs and his muwarrith deceases, then the shares of both cases must be worked out i.e. the case when the mafqūd will be alive and the case when he will be dead. The lowest share is then given. Should the mafqūd return alive, he gets his share and if he is pronounced dead by the qādī, the other heirs will receive redistribution so that their shares are in accordance with mirath laws. An example hereof is when a man deceases leaving abawan, his zawjah and an ibn mafqūd. If it is assumed he is alive, then the distribution will be one sixth for each parent, as the deceased left a descendant heir and one eighth for the surviving zawjah for the same reason. The rest is for the ibn mafqūd as he is the ʿāṣib. The shares being from 24 will be 4/24 for the abb which is 1/6, 4/24 for the umm which is 1/6 and 3/24 for the zawjah which is 1/8 and 13/24 for the ibn mafqūd. If it is assumed that the ibn mafqūd is dead, then the division will be from 12, the zawjah receiving 1/4 which is 3/12 and the umm 1/3 of the residue of the tarikah which is 1/3 of 9/12 which comes to 3/12 and the rest 6/12 goes as a final residue to the abb as
'āsib. Thus, in this problem, the ibn mafqūd must be taken as alive and the shares given and the heirs either wait for the ibn al-mafqūd to return or have the qaḍī declare him dead. In this case, redistribution is made to the heirs until their correct shares had been distributed in terms of mirath. The zaidiyyah and ja'fariyyah share these distribution patterns of ahl al-sunnah.¹

(14) Mirath al-'Asir (Succession Of The Prisoner):

The word 'asir is noun agent of the arabic 'asara, meaning, amongst other things,"to take prisoner or capture".² The 'asir is thus the prisoner. Such an 'asir can either be imprisoned in the Dar al-Islam or Dar al-Harb. In the case of him being imprisoned in the Dar al-Islām, and his whereabouts are known, he is taken as alive and his position, thus, is the same as someone who is not imprisoned. His tarikah can only devolve upon his heirs at his known death. If his whereabouts is unknown, but his imprisonment is in the Dar al-Islām, he is taken as a mafqūd and the laws of the mafqūd are applicable to him. If he is an 'asir in the Dar al-Harb and it is known that he is alive, (which is easily ascertainable nowadays), his position is the same as the living Muslim in the Dar al-Islām. This means he can be a muwarrith with his heirs succeeding to his tarikah on his death and he can be heir succeeding to his muwarrith's tarikah. The

¹ Al-Tarikat wa al-Wasaya, pp. 197 - 205.
² Al-Munjid, p. 10.
rule is, thus, that a Muslim is a Muslim irrespective of where he may find himself.

Only ibn Musaiyib opposes this rule, ruling that a Muslim 'asir of the Dār al-Ḥarb does not succeed as an heir to the tarikah of his muwarrith because he is like a captured slave in their hands. The other fuqaha' respond hereto stating that a free Muslim can never be a slave as nonmuslims cannot destroy the freedom of a free Muslim, even by slavery. The law of free persons, are, thus always applied to him. However, when a Muslim 'asir becomes murtadd in the Dār al-Ḥarb, he ceases to be an 'asir and the laws of riddah applies to him during his lifetime and at his death, if he dies as a murtadd (apostate).

(15) Mirath Walad al-Zina (Succession Of The Illegitimate Child:

The word zina is the noun from the arabic verb zana meaning fajara which means "to commit an unlawful sex act". Zina covers both fornication, which is an unlawful sex act by an unmarried person and adultery which is an unlawful sex act by a married person. Zina in married life may be followed by li’ān (mutual imprecation). Li’ān is the noun arrived from the arabic verb la’ana meaning "to curse".

Mutual denials take place between the zawjan in this matter and if no one admits to lying, permanent separation takes place between the two and the child is attributed to

1. Al-Tarikat wa al-Waṣayā, pp. 206 - 207.
the woman only. Li'ān also takes place when a zawj denies paternity to the child his zawjah is pregnant with. This child is also considered illegitimate.¹

A pregnancy without a valid shari'iah recognised nikāh is also ruled illegitimate. A zawjah can also claim that a child she carries is not her zawj’s, in which case the child will also be illegitimate. In ahl al-sunnah law, an illegitimate child is only illegitimate to his biological father and not to his natural mother, while in ja'farī law, such a child is illegitimate to both these persons. An illegitimate child, in sunnī law, irrespective of what kind of illegitimacy, succeeds to the tarikah of his umm as her motherhood to him is undisputed. He does not succeed to any of her relatives’ tarikah. Such a child succeeds only to the tarikat of his ikhwah and akhawāt with whom he shares his mother and then only by ṣafq as an ḍakli umm and never as an ḍāsib. The illegitimate son’s umm also succeeds by way of ṣafq only to his tarikah. No other pattern is permitted. There is, thus, no tawāruth between an illegitimate’s biological father and him as legitimacy is a necessary rule for ubūwwah. This is the ruling of the ḥanafis, ẓālikis and shafi‘is as well as the ẓāhirīyyah, whether it is an illegitimate child by fornication or zīnā or li’ān.¹

Hanbalis share the above ruling in one of their reported views from Aḥmad. If there are multiple births of an illegitimate pregnancy,

² Al-Tarīkaț wa al-Wasāya, pp. 233 – 234.
each of these children succeed to one another's tarikah by farq only and that as ikhwah li umm. They can never succeed as 'asabah to one another as they are not ikhwah ashiqqa' nor ikhwah li abb. There is no difference between the illegitimate child of zina and that of li'an. In the former cases, there is no nikāh while in the latter case of li'an, a valid nikāh existed in which the child or children were conceived. A later, alleged new illegal situation arose which affected the legitimacy of the unborn child. Thus, if the li'an is retracted, the child becomes legitimate with all the normal consequences that it entails. If the li'an is not retracted, then the laws of walad al-zina will apply.

Hanbalis have two rulings reported from Ahmad. One is reported by al-Athram which states that the umm of the child of li'an is his heir and 'asabah, meaning he can succeed to her tarikah by ta'sib. Thus, if a walad al-li'an dies, leaving his umm and a khāl (maternal uncle), the umm receives a third of the entire tarikah as the deceased left no descendant heir. She also receives the residue as an 'asibah to the deceased. This is reported to be the view of ibn 'Abbās, ibn 'Umar, al-Ḥasan, ibn Sīrīn, al-Sha'bi, al-Nakha'i, al-Thawrī and Ḥasan bin Saliḥ.

The second hanbali ruling reported from Ahmad is reported by Abū al-Harith which states that the umm walad al-li'an (mother of the child of mutual imprecation) is 'asabah and if not found, then her 'asabah become his 'asabah. This is also reported to be the view of 'Ali, ibn Mas'ūd, Makhūl and al-Sha'bi.
Thus, if a *walad al-li'ān* dies leaving only his *umm* and a *khāl*, the *umm* receives a third *fardan* as the deceased left no descendant heir and the remaining two thirds share goes to the *khāl* by *taṣīb*. The 'āšabah *al-umm* of the *umm* *walad al-li’ān* is 'āšabah in the absence of such a child’s legitimate father. The ḥanbali proof on al-Athram’s reported ruling is that the Prophet ruled in the case of ibn Zuraiq, that his mother is both father and mother in his *mirath*. This is due to her *nasab* to ibn Zuraiq. The proof of Abū al-Ḥārith’s reported ruling is the *ḥadīth* of the Prophet (ṣ.a.w) that the *āshāb al-furūd* be given their shares and the residue to the nearest ‘āšabah, which is the *khāl* in the example quoted by Abū al-Ḥārith.\(^1\)

In the case where there is a residue to the *tarikah* of a *walad al-li’ān*, such goes to the *bait al-māl* and this is the ruling of ibn ‘Abbas, ibn Musaiyib, ‘Urwah, ibn Yasār, ibn ‘Abd al-‘Azīz, al-Zuhrī, Malik, ahl al-Madinah and al-Shāfi‘i. Abu Ḥanīfah rule that the *dhawī al-arḥām* of the *walad al-li’ān* succeeds to the residue of his *tarikah* when there is a residue. This is due to his *umm*, in the absence of him having a descendant heir, being entitled to a third of his *tarikah* only. Al-Ḥasan bin Ṣāliḥ differ from all the above *fuqahā* and rule that the *walad al-zinā* has no 'āšabah and the residue of his *tarikah* goes to the all the Muslims. This is due to his *umm* having been unmarried at his conception.

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\(^1\) *Al-Tarikāt wa al-Wâṣaya*, pp. 234 - 235.

A child conceived illegitimately cannot be legitimised, even by marriage to the biological father. The rule is that that which is found illegitimately remain so permanently as the natural circumstances surrounding that cannot be altered. This is the ruling of the majority of the *fuqaha*'. A minority of the *fuqaha*’, namely al-Ḥasan and ibn Sirin rule that the *walad al-zina* is attributed to the fornicator or adulterer when the *ḥadd* (fixed criminal punishment)¹ had been meted out to the biological father of that child.

Ibrāhīm rules that if the fornicator received his prescribed punishment, or marries the woman he had illicit sexual relations with and impregnated, that that child will be attributed to him. Similar rulings are attributed to Ishaq, ‘Urwah and Sulaiman bin Yasar. Ibn ‘Asim narrated from Abu Ḥanifah that the latter said that if a man committed fornication or adultery with a woman and impregnated her and marries her while she is pregnant, then the child born from her, is his child.

The *fuqaha*’ have consensus that if a woman is married to a man and another man claims her child as his, the child is attributed to the *zawjān* as the Prophet (s.a.w) said "*al-walad li al-firash*" - children born from a *nikāh* is attributed to that *nikāh*. The dispute is only in the case where there is no existing *nikāh*.²

¹ 100 strokes and, by some *fuqaha*’, exile from the place of the crime for a lunar year for fornicators (unmarried adulterers) and death for the married adulterers.

Both the zaidīyyah and ja'fariyyah rule that a walad al-zinā, whether from fornication or adultery, does not succeed to his mother's nor biological father's tarikāt, nor do they succeed to his. The walad al-zinā's wife and children of their correct nikāh succeed normally to the tarikāt in their family circle. Another ruling of the ja'fariyyah is that the walad al-zinā is like the walad al-li'ān in which case, there is tawārīth between the mentioned child and his āmm. The ja'fariyyah rules retraction of li'ān by the former zawj of the āmm walad al-mulānā'ah as rendering the child a legitimate child with all that it entails, while the zaidīyyah rule that in the case of the walad al-li'ān, there is tawārīth between his āmm and her relatives.

Some ḥanbalīs have a very different ruling from most of the fuqahā' in the case of the walad al-zinā. They rule that if a man impregnated a woman and that man accepts that he is the father of that unborn child and that woman was unmarried at the time and not in any form of 'iddah, then that unborn child is taken as that man's child and take his nasab. However, if that same woman married another man, other than the known biological father of the child, that child is attributed to that couple due to children born in a marriage being attributed to that marriage.¹

¹ Al-Tarikat wa al-Wasaya, pp. 237 – 239.
Mirath Muqir Lahu Bi al-Nasab (Succession Of The Accepted Person In Lineage):

The muqir lahu bi al-nasab means "the one whose lineage is accepted by someone". Nasab can only be attributed by three ways, al-firash (a marriage situation), al-baiyinah (proof) and al-iqrar (acceptance of lineage). The other previously mentioned different patterns are minority exceptions. Acceptance of nasab are of two kinds:

Case 1:

This is called al-iqrar bi aṣl al-nasab or acceptance of nasab on yourself, which can be iqrar al-bunuwwah (claiming to be a son) or iqrar al-ubuwwah (claiming of lineage of fatherhood) and iqrar al-umumah (claiming lineage of motherhood). These kinds of iqrarat bi aṣl al-nasab (acceptances of lineage) are called iqrarat mubashirah (direct lineage claims) as no third party is involved. If all the required shurūt, set by the fuqaha', are met, then such a person is taken as being approved of i.e. either the position of ibn or abb or umm is approved. Mirath then takes place normally between them at death.

Case 2:

This deals with al-iqrar bi al-nasab 'ala ghair al-muqir or approval of lineage through other than the original descendant pattern, like a person claiming to be someone else's akh or jadd or 'amm. This kind of iqrar bi al-nasab is retractable. The law is, however, that people are held to their acceptances of given situations and such rights as emanating

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1 Al-Ahwal al-Shakhsiyyah, pp. 388, 393-394 & 402.
2 Ahkam al-Tarikat wa al-Mawārith, p. 75.
from that are executed. Thus, if the person accepting the *nasab* of another by his own *iqrār*, then the one *muqir lahu bi al-*nasab* (the one accepted as of the lineage), will succeed to the *tarikah* of the *muqir* (one who claimed the lineage). The reason being that there is no harm done to any party as the *muwarrith*, in this case, himself claimed the *nasab* of someone else and not *vice versa*. The difference shows in the example, when someone dies and leaves two sons and one of them accepts the *nasab* of another as their other brother.

Mālik, Abu Ḥanīfah and Aḥmad all rule that the third brother has a right over the brother who accepted his sonship to their father and thus share with that brother of him his share of the *tarikah*. The three *fuqahaʾ* differ on this share. Mālik and Aḥmad rule that he should give a third of his share to the third brother while Abu Ḥanīfah rule a half as he takes them as equal *ikhwah*. Al-Shāfiʿī rule that the matter be referred to the *qādī* for his decision on the *nasab* claim. If the matter is referred to the *muftī*, al-Shāfiʿī has two rulings attributed to him herein. One is that a ruling must be given by the *muftī* and the other ruling is that the third brother succeeds to his share of the *tarikah*. The same rule applies if a deceased leaves only an *ibn* as heir and he makes *iqrār al-*nasab* to someone else as his brother i.e the *tarikah* is shared equally according to all *fuqahaʾ* save al-Shāfiʿī who again have two rulings attributed to him; one of *mirath* and one of prohibition.

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of *mirath*. However, the *shafi'i*is, as a *madhhab*, rule that if someone is the only heir and makes iqrār al-nasab to someone else, such will be a valid approval and *mirath* is its logical conclusion.  

(17) *Mirath al-Khunthā* (Succession Of The Hermaphrodite):

A *khunthā*, literally means, in arabic, "a person who has both male and female parts." In *shari'ah* it is defined as "one who has sexual organs of both male and female or one who has no sexual organs at all". This category of heir has numerous rulings due to the limited knowledge of medicine in the time of the early *mujtahidun*.

Al-Sha'bi was asked about a person with no sexual organs but urinating from (near) the navel. He ruled the person a female. This is also the basic rule with a person possessing both male and female organs. Ibn Mundhir states that this is the *ijma* of the *fuqaha*. Ibn 'Abbās reported that the Prophet (s.a.w) ruled, in the case of a minor *khunthā*, that the share of that is determined from where urine passes from. Should a *khunthā* urinate from both sexual organs, and no record is found which preceded the other, the *fuqaha* differ. Abū Ḥanīfah gave no ruling (*tawāqqafa*), al-Shāfi'i did not give it any consideration while al-Awza'i, Abū Yūsuf,

Muḥammad al-Shaibānī and Aḥmad rule that the part passing most urine is taken as the sex of that person. When both organs pass the same amount of urine, Abū Yusuf and Muḥammad state that they do not know of this while the hanbalis state that this person is mushkīl (sexually doubtful). ¹

Division of a tarikah in which a khunthā features is in the following example. Someone deceases leaving amongst his heirs a minor khunthā. The majority of the fuqahā' rule that the tarikah must be frozen and all the heirs must wait until the khunthā becomes mukallaf. The dominant physical signs will determine the sex and thus, the share of this person.² If the heirs are in need of their shares, two assumptions must be made, firstly that the khunthā is a male and secondly a female and then give the lowest value to the heirs.³ They can receive the remainder due to them when the khunthā reached taklīf (age of pubescence). If the khunthā dies before reaching age of taklīf or the khunthā reaches taklīf, but is mushkīl, then such a person receive half the share of a male, which is less than that of a male and half of the share of a female, which, altogether is a position between the two sexes.⁴ This is the ruling of ibn ʿAbbās, al-Shaʿībī, al-Thawrī, ibn Abī Lailā, al-Luʿluʾī, ibn ʿAbbās, al-Shaʿībī, al-Thawrī, ibn Abī Lailā, al-Luʿluʾī.

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¹ this matter can nowadays be dealt with accurately and swiftly due to the advances in modern medicine.

   Aḥkām al-Tarikāt wa al-Mawārith, p. 226.

³ Aḥkām al-Tarikāt wa al-Mawārith, p. 226.

⁴ Al-Tahqīqat al-Mardiyyah, p. 211.
   Aḥkām al-Tarikāt wa al-Mawārith, p. 227.
Shuraik, Ḥasan bin Ṣāliḥ, ahl al-Madinah, ahl Makkah, Abū Yusuf, Naʾim bin Ḥammād and others. This rule is based on the uncertainty of the sex of the person concerned. Abū Ḥanīfah rule that a female's share is given to such a person, while Abū Thawr, al-Shafiʿī, Dawud and ibn Jarir rule that the residue be frozen until the sex becomes clear or the heirs agree to give this khunthā the share of a male or female. When a khunthā informs that an act normally occurring with a certain sex, like ihtilām (nocturna), this is taken and no evidence is called for. If anything occurs, which belie that, such as having ḥaīd, the situation is reversed i.e. the person is now ruled a female.

Mīrāth al-Ḥaml (Succession Procedure Of The Unborn Child):

According to the fuqaha', Shuraik, Abū Hanifah, Malik and al-Nakhaʿī, a share for four boys or four girls is to be reserved for the unborn, whichever is the bigger. The other heirs receive, then, the lowest share possible. Al-Shafiʿī states that there is no rule for this situation. At birth, the shares are normalised. Muḥammad al-Shaibānī of the Ḥanafīs and al-Laith rule that the share of three boys or girls have to be reserved from the tarikah, whichever is more. Another view of Muḥammad says a share of two boys and two girls as twin births are not rare and rules are for common occurrences. Al-Ḥaṣṣaf reported from Abū Yusuf, that only a single share of a male or female is reserved as single births are most common. The fuqaha' of

Samarkand ruled that if the *haml* (pregnancy) is advanced, the *tarikah* should be frozen till after the birth, but if not, the distribution pattern of *haml* is applied. Abū Yusuf ruled that the *qādi* must take *kafalāh* (security) from the heirs in case there is a multiple birth. Ahmad shares, in one of his rulings, the ruling of Abū Yusuf and the view of twin births of Muḥammad as far as distribution in this case is concerned. With pre-natal scanning nowadays, the above problems can be solved easily.

(19) **Mirath Of Those Whose Time of Death Is Unknown:**

When related people and heirs of one another die together or simultaneously like drowning together or being burnt in a dwelling, they do not succeed to one another’s *tarikah* as it is not known who died before whom. This is the agreed ruling of Abū Bakr, ’Umar and Zaid bin Thābit. Their *tarikāt* devolve upon their other surviving heirs. This was the ruling given to those murdered in Yamamah. It was also the ruling of 'Ali for those killed in the battles of *al-Jamal* and *Siffin*. This is also the ruling of ’Umar ibn ’Abd al-‘Azīz as well as that of the majority of the *fuqahā*.

Another ruling reported to be from 'Ali as well as the ruling of Ibn Mas‘ūd states that these deceased persons who died possibly

   *Al-Mabsūt*, Vol 30 p. 27.
simultaneously and are heirs of one another, do succeed to one another's tarikah. The reason being that the cause of mirath is known, namely, having been alive previously which was known.¹ The exclusion from mirath which is the time of death is doubtful and al-qā'idah al-fiṣḥiyyah states that "al-yaqīn la yazulu bi al-shaqq - confirmed matters are not rendered void by doubt". The opposers of ibn Mas'ūd's ruling state that the cause of mirath of each of these persons are doubtful, and since istihqaq al-mirath (meriting of succession) is based on cause and the cause in this case is doubtful, no mirath can take place.² (20) Al-Muṣa Lahu (A Legatee) In The Absence Of An Heir:

Al-muṣa lahū means "the legatee" i.e. someone receiving a legacy.³ If someone left a third of his tarikah to someone and the muṣī (legator) has no heir of any kind, then according to the hanafis and hanbalis, such a person succeeds to the entire tarikah of that muṣī and he precedes the baʿit al-māl. Their ruling is based on the rule that the muṣa lahū is to receive one third and the rest should go to the heirs. As there are no heirs, the muṣa lahū receives all the tarikah.⁴ Mālikis and shāfiʿis oppose this ruling that the muṣa lahū cannot succeed to the residue of the tarikah

¹ Al-Taqīqīat al-Mardiyyah, p. 238 - 240.
Al-Mabsūt, Vol 30 p. 28.
³ Al Qamus al ‘Asri, p. 799.
⁴ Al-Fiṣḥ al-Islāmi wa Adillatuhu, Vol 8 p. 286.
as there is no one who can authorise that and as it is the musi's wealth, only his heirs can authorise a wasiyyah for more than a third of the tarikah.¹

(21) Mirath Dhawi al-Arham (Succession Of The Uterine Relatives):

Arhām is the plural of rahim which literally, means, "the place where the foetus grows" and it also means qarābah (relatives), or its origin or causes.² In shari'ah, rahim is every relative of a person. In mirath, it is every Muslim relative of you who has no fard nasib (fixed share) granted him by Allah or whom the Prophet (s.a.w) granted a share or ijma' al-ummah granted it and such a person is not of the 'asabah who merit the residue of a tarikah. The dhawi al-arham are thus the uterine relatives of a person.³

There is a difference amongst the sahabah, their students, the tabi'un and the fuqaha', on the mirath of these persons. Those of the sahabah who allow the arham to succeed, are 'Alī, ibn Mas'ūd and ibn 'Abbās (which is his more known view), Mu'ād bin Jabl, Abu Darda' and Abu 'Ubaidah bin Jarrah. Of the tabi'un who approve of this type of mirath are Shuraiḥ, al-Hasan, ibn Sirīn, 'Aṭā'ā and Mujāhid and of the fuqaha' are the ḥanafis, ḥanbalis, the later mālikis and the later

shafi'is. Those who ruled that the arham do not succeed to a tarikah are, of the sahābah, Zaid bin Thabit, ibn 'Abbas (in his lesser known ruling) and of the tabi'īn, ibn Musaib, ibn Jubair and the early mālikī and early shafi'i fuqahā.¹

Those who support the mirath of the arham quote the Qur'an: "But kindred of blood have prior rights against each other in the Book of Allah..."² They also quote hadith herein. Ibn 'Umar narrated that the Prophet (s.a.w) said: 
"...and the maternal uncle is an heir to him who has no heir..." Similar texts are narrated by 'Abd al-Salām bin 'Atiq and al-Miqdād al-Kindī.³ Al-Tirmidhī also transmitted similar texts.⁴ Those who oppose mirāth al-arham quote from the Qur'an: ".and your Lord never forgets"⁵ stating that had the arham been heirs, Allāh would have mentioned them along with the other heirs. This group also quote hadith stating that the 'ammah and khalalah does not succeed to the tarikah of their arham. This text is weak and unacceptable as proof.⁶

Some mālikīs rule that the arham succeed to a tarikah of their arham when no ashab al-furūd or 'asbah of the muwarrith are found and the hakim is unjust. The later shafi'is

² Al-Qur'an, Chapter 8: 75.
⁵ Al-Qur'an, Chapter 19: 53.
⁶ Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 54.
ruled that the *arḥām* succeed to the *tarikah* of their *arḥām* if the *bait al-māl* is improperly administered (i.e. money in it is not used as prescribed in *shari‘ah*) and when there are no *aṣḥāb al-furūḍ* or *‘asabah* to the deceased. 1

Thus, if there is a residue to a *tarikah*, redistribution takes place to the *aṣḥāb al-furūḍ* until the *tarikah* is exhausted and the *arḥām* do not feature.

The *fuqaha* who allow *mirath* to the *arḥām* rule that if there is only one *raḥim* of a deceased, male or female, and no other *qarib* of any kind, then he or she succeed to the entire *tarikah*. When there are more than one of these *arḥām*, then the *fuqaha* differ on the distribution of the *tarikah* to them.

These *fuqaha* have three distinct systems herein, namely:

- madhhab *ahl al-qarabah* (principle of the nearest relative).
- madhhab *al-tanzil* (principle of descending relationship).

1) *Madhhab al-Qarabah* (System Of Relatives):

This group bases *mirath al-arḥām* (succession of uterine relatives) on *quwwah al-qarābah* (strength of relationship) in the same pattern as for the *‘asabah*. 2

They have four divisions which are:

- *furu‘ al-mayyit* (uterine descendants of the deceased) such as the *awlād al-bint* (children of the daughter), uterine descendants of his parents and uterine

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1 Nihāyah al-Muḥtaţ, Vol 6 pp. 11 - 12.
descendants of his grandparents. These heirs are the *awlād al-banāt* (children of the daughters) and *awlād bint al-ibn* (children of the daughter of the son), how lowsoever, *awlād al-akhawāt* (children of the sisters), whether male or female irrespective of their grade i.e. *awlād ashiqqāʾ* (the full category), *li ʾabb* (the consanguine category) or *li umm* (uterine category), how lowsoever and the relatives of the *ajḍād* (grandparents) and they are the *ajḍād raḥimiyūn* (uterine grandparents). Also the *ʾammāt* (paternal aunts), *akhwāl* (maternal uncles), *khalāt* (maternal aunts), the *ʾammāt waʾammāt al-umm* (paternal uncles and aunts of the mother) and their daughters, *banāt akhwāl* (daughters of the maternal uncles) and all those coming through these lines of uterine relationship. This pattern is that of the *ḥanafīs* and a narration claiming it is also ʿAlīmadʿs.2

There are two narrations from Abu Ḥanīfah through both Muhammad and Abu Yūsuf on the *tawrīḥ* of the aforementioned *arḥām*. In Muhammad’s narration the *ajḍād raḥimiyūn* how highsoever, come first, then the *awlād al-banāt* and those in their category followed by the *awlād al-akhawāt*, then the *banāt al-ikhwāh* (daughters of the

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brothers) irrespective of grade (i.e. full, consanguine or uterine), then all related to the deceased through his ajdād and these include his 'ammāt, 'āmām al-'umm and the awlād al-'āmām wa al-akhwāl wa al-khalat (daughters of the paternal aunts, maternal uncles and maternal aunts) irrespective of distance from the deceased. Abu Yusuf’s narration list them as in the 'asābah category, but the raḥim side, thus the awlād al-banāt and the awlād banāt al-ibn come first, followed by ajdād raḥimiyyun, followed by awlād al-akhwāt and banāt al-ikhwah irrespective of grade followed by the daughters of the ‘āmām, khal and khalat. Abu Yusuf and Muḥammad also let the awlād al-akhwāt and the banāt al-ikhwah and awlād al-ikhwah li umm precede the mother’s father.

(a) Pattern Of Tawrīth (Succession) Of These Persons:

The nearest exclude the furthest removed, thus, the awlād al-bint exclude the awlād banāt al-ibn. When their darajah al-qarabah (degree of relationship) is the same, then the children of an heir precede the awlād raḥim. Thus, the bint bint al-ibn (daughter of the daughter of the son) precedes the ibn bint al-bint (son of the daughter of the daughter) as the former’s jadd is an heir of the 'asabah category.

1 Al-Mabsūt, Vol 30 p. 3.
If the darajah al-qarabah is the same, and they are all males or all females, they share equally and if they are males and females, they share in the ratio two shares for the male and one for the female. There is no consideration for any category here according to Abū Yusuf and al-Ḥasan bin Ziyād but Muḥammad rule that origin is considered. This difference appears in the masʿalāh of division between a bint ibn al-bint and the ibn bint al-bint. According to Abū Yusuf and al-Ḥasan bin Ziyād, two thirds go to the ibn bint al-bint as he is a male and the bint ibn al-bint receives a third because she is a female. Muhammad insists that usūl (parentage) must be read in conjunction with the relationship and the shares are reversed. Thus the bint ibn al-bint will receive two thirds as that would be her father's share and the ibn bint al-bint a third as that would be his mother's share.¹

(b) Category Of The Ajdad Rahimiyyun (Uterine Grandparents):
The nearest precede irrespective if the person is from the father's or mother's side. Thus the abb al-umm (father of the mother) precedes the abb umm al-

umm (father of the mother of the mother). When the darajah al-qarābah is the same, then the one who relates (yudli) to the deceased precedes. Thus, the abb umm al-umm (father of the mother’s mother) precedes the abb abb al-umm (father of the mother’s father), as the former relates to the deceased i.e the jaddah sahihah who is the umm al-umm.

When there is similarity in qurb wa quwwah al-qarābah (nearness and strength of relationship) in that they relate to a sahib al-fard or a rahim then mirāth sharikah (shared succession) takes place. If they are either from the father’s side or the mother’s side, then they share in the ratio two to one in favour of males. If some are from the father’s side and some from the mother’s side, then two thirds go to the father’s side and the remaining third to the mother’s side. They take the shares of the origin which is of the father and mother which is two thirds and one third respectively as the deceased left no ashab al-furud and ‘asabah.¹

Awlad al-Ikhwah Wa al-Akhawat:
(Children Of The Brothers And Sisters):

These are the children of all the ikhwah and akhawat regardless of category and their children, how lowsoever. Their tawrith is the same that if only one is found of them, whether male or female he or she succeeds to the entire tarikah when there is no āshab al-furud or āsabah of the deceased. This raḥim also takes the residue when a zawj (spouse) is found with him or her. If more than one raḥim is found, the nearest in darajah of relationship precedes and if they are equal in darajah, then those related to the āsabah precede those who are related to the raḥim only. If they are all equal in darajah and qūwwah al-qarābah, like all being awlād al-āsabah (children of residuaries), or of āshāb al-furud or they are a mixture of the two mentioned kinds of heirs, then the one strongest in qarābah succeeds. This means that the awlād ashiqqa' (children of full brothers and sisters) precede the awlād ikhwah li abb (children of the consanguine brothers and sisters) and the latter precede that of the awlād ikhwah li umm (children of the uterine brothers and sisters).
If they are all of one of these categories, and equal in *darajah* and *quwwah al-qarabah* to the deceased, they all share equally if they are only of one sex or in the ratio double the share to a male than a female if they are a mixture of sexes. This is Abu Yusuf’s ruling.\(^1\)

(d) The 'Amām Al-Rahimiyun, (Uterine Paternal Uncles), 'Ammat, (Paternal Aunts), Akhwāl (Maternal Uncles) And Khālat (Maternal Aunts):

The 'āmām al-raḥimiyūn are the paternal uncles of the mother. If there is only one person of any of the mentioned categories present and the deceased left no *ašāb al-furūd* or *ašābah*, such a person succeeds to the entire *tarikah* whether the heir is a male or a female. This is irrespective whether it is an *akh shaqīq* or *ukht shaqīqah* or *li abb* (consanguine) or *li umm* (uterine).

If they are more than one, then the male line of the mother’s side precede if they are of the same kind, like *āshiqqa*’ (full brothers and sisters) etc and they take the entire *tarikah* and exclude all the others. If the *arrham* are all equal in *quwwah al-qarabah* to the deceased, like all being the 'āmām

\(^1\) *Al-Tarikat wa al-Wasaya*, p. 422.
al-\textit{umm} or all are \textit{akhwal} or \textit{khalat}, they all share the \textit{tarikah} together. If they are only males, or only females, they share equally and if a mixture of both sexes, they share in the ratio males double the share of females.

If the categories differ, like \textit{\textquoteleft\textquoteleft amam li umm, \textquoteleft\textquoteleft ammat li umm, akhw\textit{al}} and \textit{khalat}, then the \textit{tarikah} is distributed by giving two thirds to the mother's male line and one third to the her female line, the male receiving twice the share of the female.

Basically, the same rules apply to these \textit{arham}'s offspring. Thus, if a deceased left no \textit{ashab al-furud} nor \textit{\textquoteleft asabah} but only a \textit{bint kh\textit{al}ah} (female maternal cousin), a \textit{bint bint al-kh\textit{al}ah} (daughter of the daughter of the maternal aunt) and an \textit{ibn ibn al-kh\textit{al}ah} (son of the son of the maternal aunt), then the \textit{bint kh\textit{al}ah} takes the entire \textit{tarikah} because she is nearest in \textit{qar\textit{ab}ah} to the deceased.\footnote{\textit{Al-Mabs\textit{ut}}, Vol 30 p. 20.} If he leaves a \textit{bint \textquoteleft ammah} (female paternal cousin) from his mother's side and a \textit{bint bint al-kh\textit{al}ah} (daughter of the daughter of the maternal aunt), then the \textit{bint \textquoteleft ammah} succeeds to the entire \textit{tarikah} as she is nearer in \textit{darajah} to the
deceased. If these children are equal in qa‘abah and darajah, like a bint ‘ammah and bint khalah, then the former gets two thirds and the latter one third of the tarikah. The sides of relationship differs but no distinction is made between ‘asabah descendants and ghair ‘asabah descendants. This is Abū Yusuf’s ruling. The zāhir al-madhhab (apparent view) of the ḥanafis is that preference is given to the nearer side of relationship. As the children of the residuaries are nearer to the deceased, they must receive preference.

Muḥammad recognises the ‘usubah (residuary status) of the arḥām of the mother’s side. Thus, if only a bint khālah and an ibn khālah is found, the former receives a third and the latter two thirds of the tarikah as their ascendants are the same. If the succeeding arḥām are a bint khal and an ibn khalah, then, according to Abū Yusuf, the ibn khalah gets two thirds of the tarikah and the bint khal a third as the uterine heirs are a male and a female while in Muḥammad’s ruling is the opposite due to the different fathers of the succeeding heirs.

Summarising, thus, it can be said that when persons of this category relate to an ‘asib and they are in the same category or
qarabah and darajah of relationship, then the tarikah is for the one strongest in qarabah and darajah to the deceased. If there is more than one of these uterine heirs, and they are equal in qarabah and darajah of relationship to the deceased and they are males and females, then the male gets twice the share of the female. If they are from the side of the father like descendants of the 'amm or of the 'ammah and from the side of the mother like the khāl and khalah, then the paternal male side gets two thirds and the maternal side one third.

The remaining categories of arham are the 'amām abawai wa khu'ulatihima li umm (paternal uncles from the mother’s side of both her parents and the maternal uncles and aunts of the mother of both parents) and their children. This category succeeds as the first category of arham mentioned earlier i.e. the banāt bint al-mayyit (daughters of the daughter of the deceased). Then the grand and great grand paternal uncles and aunts of the mother’s side as well as the maternal uncles and maternal aunts of all categories and the 'amām umm al-umm (paternal uncles of the maternal grandmother) as well as the maternal side of the deceased father’s side i.e paternal grandmother’s side. They also succeed as the first category of the arham. They are followed by the children of these categories, how lowsoever. All the children mentioned in these immediate afore

1 Al-Tarikat wa al-Wasaya, pp. 424 - 427.
mentioned categories of arḥam succeed as the children of the brothers and sisters of the deceased.¹

In finally summing up the tawrīth of the arḥam by al-qarabah, when they are more than one, they resemble that of the ‘aṣabah. In the ‘aṣabah scale the bunūwwah comes first, followed by the ubūwwah, then the ikhwah and finally the ‘umūmah. The nearest in darajah al-qarabah (degree of relationship) precede when there is a difference in this quality without paying attention to relation to the deceased through an heir. This is called taqdim bi al-darajah (preference by virtue of degree of relationship). If they are all of the same qarābah levels, then those who relate to the deceased through an heir, either a šāḥib al-fard or of the ‘aṣabah take preference over the one only related through raḥim. If they are all equal in one of these qualities of relationship, and they are all equal in darajah al-qarabah to the deceased, then quwwah al-qarabah decides the issue. Thus the ashiqqā' (full category) comes first followed by the consanguine (li abb) and then the uterine (li umm) categories. If the sexes are mixed, then the rule of double share for males and single shares for females is applies.²

¹ Al-Tarikat wa al-Waṣāya, pp. 427 - 428.
2) **Madhhab Ahl al-Rahim** (**System Of Order Of Relationship**):

Those fuqaha' who subscribe to this system in **mirath al-arham** have no distinction between the different categories as to **qurb al-qarabah** or **darajah**. Thus, if a deceased leaves only a **bint al-bint** and a **bint al-ukht**, they share equally in the **tarikah**. The same applies when the deceased leaves an **ibn ukht** and a **bint ibn akh**. This is so as the cause of succession, here, is **rahim** and thus equality in shares is the rule.¹ Those who took this line are Hasan bin Maisir and Nuh bin Dharah. It is conspicuous that none of the famous **madhahib fiqhiyyah** took to this system.²

3) **Madhhab ahl Tanzil** (**System Of Heir Substitution**):

This system is based on the rule that the **rahim** who relates to the deceased through an heir takes such an heir's place in **mirath** when there are no heirs of the **ashab al-furud** or **'asabah**. Thus, the **walad al-banat**, **walad banat al-ibn** and the **walad al-akh wat** fall in the place of their mothers. On the other hand, the **banat al-ikhwah**, and the **banat al-'amam**, whether of the full or consanguine categories as well as the **banat banihim** (daughters of their sons), **awlad ikhwah li umm** and the **awlad al-'amam li umm**, are like their fathers.

Those fuqaha' who subscribe to this ruling

¹ **Al-Mawsu'ah al-Fiqhiyyah**, Vol 3 p. 62.
are 'Alqamah, al-Sha'bi, Masrūq, Na'im bin Hammād, Abū Na'im and Abū 'Ubaidah al-Qāsim bin al-Salām. This is also the view of the later malikis, ṣafī'is and a view of Ahmad.¹

Mas'ālatān (two problems) are excluded from this ruling by ṣafī'is and Ahmad and they are:

- they reduced the khal and khālah even of the father's side, to that of the mother's side according to the more accepted view. The same applies to the jaddah li umm (maternal grandmother) of the deceased.

- they did the same with the 'ammam li umm and the 'ammah placing them in the position of the abb. Their reason for accepting this system, is that they claim it is the madhhab al-ṣahabah.

Thus, when a deceased leaves a bint al-bint and a bint bint al-ibn (daughter of the daughter of the son), then, according to those subscribing to tanzil (substitution) in mirath al-arhām, the tarikah is for the two of them 3/4 for the bint al-bint and 1/4 for the bint bint al-ibn, by fard and radd (redistribution) of the residue. If there is only one rahim, he or she takes the entire tarikah, as is the case with madhhab al-qarābah (system of nearness of relationship). The madhhab al-tanzil - (system of substitution) differs from the latter system, in that they allowed

substitution of the arham in the place of the heir through which they relate to the deceased, whether this is by farid or ta'sib. Ahmad rules that the ansibah are equal for a male and a female if only one of them qualify as they are arham.1

Shafi'is (i.e. later shafi'is) apportion the share of the representative relative i.e. either sahib fard or asib to the rahim heir.2 This presupposes unequal shares.

(22) *Ja'fariyyah Exception In Tawrith Al-Arham* (Succession Of Uterine Relatives):

The ja'fariyyah is peculiar in one aspect of this kind of mirath ruling by consensus that the ibn akh shaqiq succeeds before the 'amm li abb. They base this on a saying claimed to be of 'Ali who in turn claims it to be from the Prophet (s.a.w). It is only in this case that this occurs. Thus, the ibn 'amm shaqiq does not precede the 'amm shaqiq nor the 'amm li umm. However, the bint 'amm shaqiq (daughter of the full paternal uncle) does not precede the 'amm li abb.3 This is probably due to their concept of 'Ali succeeding to the imamah (leadership) of the shi'ah grouping as he was a full cousin to the Prophet (s.a.w) and, thus, preceded 'Abbās, the Prophet's (s.a.w) consanguine uncle.

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1 Al-Mughni, Vol 6 pp. 231 - 232.
Al-Tahqiqat al-Mardiyyah, p. 268.


3 Al-Tarikat wa al-Wasaya, p. 430.
(23) *Al-Wasiyyah al-Wajibah (Compulsory Legacy):*

This is not actually found in any of the classical *fiqh* works, not even under the subject matter of *mirath*. As is known, one of the *shurut* of *mirath* is that the heir must be alive when his *muwarrith* dies. A problem arises when a child predeceases his parent or parents and leaves descendants behind, especially minor and needy descendants.

According to the majority of *fuqahā’*, the grandparent(s) of such surviving grandchildren may, at their discretion, leave them a *wasiyyah* of not more than one third of their individual estates as for them. This *wasiyyah* is optional. According to some *fuqahā’*, like Talha, al-Zubair, al-Zuhri, Tawus, Abu ‘Awānah, ibn Jarir, al-Shāfi‘i (in his old view) and the *zahirīyyah*, *wasiyyah* is necessary for family not succeeding to your *tarikah*. This they take from their interpretation of the *āyah al-wasiyyah* (verse of legacy) in the *Qur’ān*. It would thus not be a *bid‘ah* (innovation) if a *wasiyyah* was made obligatory on grandparents for their grandchildren whose parent (and who is their child) had predeceased them. Some Muslim

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4. *Akhām al-Tarikat wa al-Mawārithe*, p. 244.
countries had already introduced this into their family law codes as will be shown in chapter six of this thesis. A recommendation for wasiyyah wajibah will also be made in the mentioned chapter.

B) **Al-Hajb** (Exclusion Or Diminished Shares)

a) **Definition:**

_Hajb_, literally, means _man_ and _man_ means "prohibition or prevention" or it can mean _satr_ meaning "to cover". Thus, one speaks of _ḥijab_ (derivative of _ḥajb_) which means "a cover which prevents people from seeing something or someone". The gatekeeper is called _ḥājib_ (another derivative of _ḥajb_) as he prevents entry (to a place)."¹ In _shari'ah_, _al-ḥajb_ is defined as "prohibiting a specific person from a part or all of his share of a tarikah due to the presence of another person."²

There are two kinds of _al-ḥajb_, namely, _ḥajb al-nuqṣan_ (diminishing share system) and _ḥajb al-ḥirman_ (exclusion from the estate).

1) **Persons Meriting Hajb Al-Nuqṣan (Diminished Shares):**

They are five heirs, namely, the spouses as the zawj has his share reduced from a half to a quarter when his deceased zawjah leaves a descendant heir, male or female while the zawjah's share is diminished from a quarter to one eighth when her deceased zawj leaves a descendant heir, male or

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¹ Qamus al-Muhit, Vol 1 p. 54
Al-Munjid, p. 118.

² _Fiqh al-Mawarith_, Vol 2 p. 82.
_Al-Mawsū'ah al-Fiqhiyyah_, Vol 3 p. 46.
_Al-Tahqiqat al-Mardiyyah_, p. 122.
_Al-Tarikat wa al-Wasāyā_, p. 443.
female. The mother’s share is reduced from a third to a sixth when the deceased, who is the mother’s child, leaves a descendant heir, male or female, or two or more ikhwah or akhawat. The bint al-ibn, if found with the bint sulbiyyah of the deceased, is reduced from a half to a sixth which completes two thirds, which is the allotment for two or more banat. The ukht li abb is reduced from a half to a sixth by the ukht shaqiqa.

2) Persons Meriting Hajb Al-Hirman (Exclusion From The Estate):

Six heirs never ever suffer this ḥirman (exclusion) and they are; the zawjān (spouses), the ibn, the bint, the umm and the abb. They, thus, always succeed to a tarikah.

Those heirs who suffer ḥajb al-ḥirman from a tarikah may sometimes succeed or sometimes fall under the ḥirmān rule be they ḥab al-furud or ḍhabah. Those suffering ḥajb al-ḥirman are:

- the banu al-aṭyān or ikhwah ashiqqa’ and
- the akhawat shaqiqa’ who are excluded from the tarikah by the ibn or ibn al-ibn, how lowsoever of the deceased. These ikhwah ashiqqa’ and akhawat are

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1 Minhaj al-Muslim, pp. 476 - 477.
Al-Tarikāt wa al-Wasayā, p. 444.

2 Al-Ikhtiyār, Vol 5 p. 94.

3 Tashil al-Fara‘id, p. 81.
Al-Tarikāt wa al-Wasayā, p. 444.
also excluded by the jadd sahīḥ according to Abu Hanifah’s ruling while Abu Yusuf, Muḥammad and other fuqahā’ rule muqasamah (coinheritance) for them on condition that the jadd sahīḥ does not succeed to less than a third of the tarikah when there are no ashab al-furūd or a sixth when there are ashab al-furud.

- the banū ‘allat or ikhwah and akhawat li abb are also excluded by the ibn or ibn al-ibn, how lowsoever, of the deceased and by the banū ‘ayan of the deceased.

- the banū akhyāf or ikhwah and akhawat li umm are excluded by the child of the deceased, male or female and the child of the son of the deceased, whether male or female, how lowsoever. They are also excluded by the abb and the jadd sahīḥ of the deceased.

- the umm excludes the jaddat, whether abawiyat (from the father’s side) or ummiyat (from the mother’s side) of the deceased. The jaddat abawiyat (grandmothers from the father’s side) are excluded by the abb and by the jadd sahīḥ, save the umm al-abb (mother of the father), how highsoever because she is with the jadd sahīḥ as she is his zawjah and not of him. The near jaddat irrespective of whether they are abawiyat or umamiyyat exclude the further removed jaddat due to the qurb (nearness) rule in relationship.¹

¹ Al-Tahqiqat al-Marqiyah, pp. 125 - 126.
Al-Tarikat wa al-Wasa‘aya, p. 447.
b) **Al-Mahrūm min Al-Mirath (Person Prohibited From Succession):**

These are persons who cannot succeed to a tarikah of their Muslim muwarrith due to a permanent prohibition hereto, like kufr (disbelief).

The majority of the fuqaha’, including Abu Hanifah, Mālik, al-Shafī‘i and Ahmad, all rule that the kuffār (disbelievers) have no effect on al-hajb (exclusion or diminished share system) as they are considered ma’dum (non-existent). Ibn Mas’ud and Dawud al-Zahiri allow hajb al-nuqsān to the spouses and umm if found with a walad kāfir (non-muslim child) or more of the deceased as well as allowing the murderer to establish hajb al-nuqsān although he himself does not succeed to his muwarrith’s tarikah. Al-Hasan al-Basri, al-Hasan bin Ṣalih and al-Tabarī allow hajb al-nuqsān when the murderer would have been an heir, although he himself will not inherit anything. Thus, by the majority ruling of the fuqaha’, if a zawj deceases and leaves a zawjah Muslimah (Muslim wife), a walad kāfir and a Muslim akh shaqiq, the zawjah Muslimah receives a quarter of the tarikah as there are no children (the non-muslim child being taken as non-existent for diminished share purposes) and the rest goes to the akh shaqiq Muslim as the ‘asib, while in ibn Mas’ud’s view, the zawjah Muslimah is reduced to an eighth, due to the presence of the walad kāfir and the rest goes to the akh shaqiq Muslim as the nearest ‘asib.1

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1 Al-Tarikat wa al-Waṣāya, p. 446.
Hajb al-hirmān is avoided in the case of the banāt or ukhtān shaqiqatān or more found with bint al-ibn or more and ibn ibn al-ibn (son of the son of the son). In this case the bint al-ibn or more, are made 'asabah with the ibn ibn al-ibn sharing in the ratio double the share for a male than a female. This is done to let the bint al-ibn succeed to something as without this they will have nothing. They, thus, share in the remaining one third of the tarikah, the banat taking the other two thirds and this is shared equally between the latter. The rule of qurbah in relationship is disregarded in this case. The same will apply, if, instead of banāt and bint al-ibn and ibn ibn al-ibn, two or more akhawat shaqiqat are found and an ukht li abb or more with an akh li abb who can make them 'aṣabah with him sharing in the ratio double share to the akh li abb than to the ukht li abb.¹

The zaidīyyah and ja'farīyyah do not differ from ahl al-sunnah in the matter of al-hajb.² The basic rules of al-hajb, are, thus:

- that those who relate to the deceased by way of an heir of that deceased, is excluded ḥajb al-hirmān from the tarikah of that deceased because of bu'd al-qarābah (distance of relationship). The ibn, thus, excludes the ibn al-ibn. This rule is also applicable to all the 'aṣabah, the nearest excluding the furtherest removed from the deceased.

¹ Al-Tarikat wa al-Wasāya, p. 448.
² Al-Tahqiqāt al-Mardīyyah, p. 125.
the strongest in qarābāh excludes the weaker in qarābāh, like the akh shaqīq excluding the akh li abb completely, while the ukht shaqīqah and ukht li abb share, half for the former and a sixth for the latter, which completes two thirds for the akhawāt when there are no other heirs to prevent this.

C) Al-‘Awl (Share Devaluation):

a) Definition:

Al-‘Awl, literally, means, amongst other things, ziyyādah i.e. "increase".² In shari’ah, it means the increase in the share number of the ashāb al-furūḍ from the original mas’alāh and, consequently, a decrease in the value of the shares of the tarikah.³ An example of this is when a zawjah deceases, leaving her zawj and ukhtān shaqiqatān. The zawj is to receive a half as there is no descendant heir of the deceased and the ukhtān shaqiqatān two thirds, which is the share for two sisters and more. This exceeds the whole which should be out of six, but increased to seven. The equation is, thus:

zawj \( \frac{3}{6} \) + ukhtān shaqiqatān \( \frac{4}{6} \) = \( \frac{7}{6} \).

This calls for a re-evaluation of the share value to even out the equation.

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8. Al-Tarikāt wa al-Waṣāyā, p. 455.
b) Origin Of 'Al-`Awl:

There are different narrations as to how 'awl came about. It is stated that during the reign of the khalifah 'Umar ibn Khattab, the mas'alah of the zawj and ukhtan was brought to him. The equation, of course, did not balance. 'Abd ibn 'Abd al-Muttalib pointed out 'awl in the example of someone leaving six dirhams (silver coins) but owing one person three dirhams and the other four dirhams. The solution will be to divide the six dirhams into seven parts. 'Umar accepted and ruled by it. There was no objection to this until during the reign of 'Uthman, when ibn 'Abbas differed on the issue.¹

The majority of the sahabah, the tabi'un as well as the hanafis, malikis, shafi'is, hanbalis² and the zaidiyah all accept the principle of 'awl. A minority of the sahabah, like ibn 'Abbas, some of the tabi'un, like Muḥammad al-Hanafiyah, 'Alī bin Ḥasan and Zain al-'Abidin, the ja'fariyyah and the zahiriyah reject 'awl.³

c) Proofs Of The Opposers Of Al-`Awl (Devaluation in Shares):

Ibn 'Abbas states that there is no 'awl in any mas'alah but that those placed lower in the scale of heirs are excluded when the tarikah cannot accommodate their shares. In his opinion, thus, the ashāb al-furūd, whom

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¹ Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 47.
Allah had given fixed shares, precede and those who hover between fard and ta'sib had been kept last. These, according to ibn 'Abbas, are the banāt and akhawāt and they must therefore accept less than their allotted share in the case where the tarikah cannot meet all the shares. He further contends that the 'asabah take the residue of the tarikah. The akhawāt are more meriting for that residue as they actually share it and are, thus, more likely to accept a diminished share. He contends, further, that the tarikah is distributed in an order setting rights attached to it starting from the strongest to the weakest. Thus, tajhiz of the deceased comes first, followed by qadā al-duyun, tanfidh al-wasaya and lastly, distribution to the heirs of the deceased. Thus, in the distribution of the tarikah, the ashab al-furūḍ precede, the stronger preceding the weaker.¹

d) Proofs of the Supporters of 'Awl:

The majority of the fuqahā' prove their point by stating that there is no text in shari'ah stating that the stronger must precede the weaker heirs. In fact, there is no distinction made between heirs in shari'ah texts. They quote a hadith of the Prophet (s.a.w) which says "give the share of the heirs as is due to them"². Making a distinction between heirs is against this ruling of the Prophet (s.a.w). They also

contend that there was *ijma'* herein amongst the *sahābah* of the Prophet (s.a.w) during the reign of 'Umar ibn Khattāb and ibn 'Abbās only differed herein during the reign of ʿUthman. Finally, they state that *qiyas* necessitates that if the shares cannot be accommodated ordinarily, that the diminished value be applied evenly to all the heirs so that they all suffer the loss as in the case with a *tarikah mustaghraq bi al-duyun* (insolvent estate). In the latter case, the creditors must accept loss each according to his percentage due to him from that *tarikah*. The view of the majority is more fair and reasonable and in line with fairness.

e) **Problems In Which 'Al-Awl (Devaluation Of Shares) Arise):**

'Awl arises in *masāʾil* where the original share is out of six, or twelve or twenty four.

i. **'Awl (Devaluation) In Six As Original Share Allotment:**

This allotment can go to seven, eight, nine or ten.²

- **Six Rising to Seven:**

In this case, a deceased left a *zawj* and *ukhtān shaqiqatān*. The *zawj* is to receive a half and the *ukhtān shaqiqatān* two thirds as there is no *ibn* nor *bint* or *banāt*. The equation is, thus: \( \frac{3}{6} \cdot \frac{1}{2} + \frac{4}{6} \cdot \frac{2}{3} = \frac{7}{6} \). This does not balance. The shares are now made into seven, instead of six parts and are, thus,

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3/7 for the (zawj) and 4/7 for the
dektan and the equation balances: 3/7 + 4/7 = 7/7. The value of the shares
had diminished.

- **Six Rising to Eight:**

  This happens in the following
  example: A deceased leaves a zawj, 
dektan li abb, and an umm. The shares
  are; half for the zawj as there is no
descendant heir, two thirds for 
dektan li abb and the umm a sixth as
  the deceased left akhawat. The
equation is: 1/2 + 2/3 + 1/6 = 3/6 +
4/6 + 1/6 This totals to: 8/6, which
does not balance. The shares are made
from eight instead of six and we
have; 3/8 for the zawj, 4/8 for the
dektan li abb and 1/8 for the umm.
Thus, 3/8 + 4/8 + 1/8 = 8/8 which is
a balanced equation.

- **Six Rising to Nine:**

  This occurs when a deceased leaves a
zawj, dektan shaqiqatan and akhawan
li umm. The shares will be; 1/2 for
the zawj as the deceased left no
descendant heir, 2/3 for the dektan
shaqiqatan 1/3 for the akhawan li umm
as the deceased left no abb nor
descendant heir. The equation is,
thus 1/2 + 2/3 + 1/3 = 3/6 + 4/6 +
2/6 which totals: 9/6 which is an
unbalanced equation. The shares are
made from nine instead of six and we
have: 3/9 + 4/9 + 2/9 = 9/9 which is
a balanced equation.
Six Rising to Ten:
This is reflected in the case where the deceased leaves a zawj, ukht shaqiqah, ukht li abb and akhawan li umm and an umm. The zawj is to receive a half as there is no descendant heir, the ukht shaqiqah receives a half as there is no bint and the ukht li abb one sixth, completing two thirds allotted for ukhtan and more and one third for the akhawan li umm as the deceased left no abb nor a descendant heir and one sixth for the umm as the deceased left akhawat. The equation will thus be as follows:

\[
\frac{1}{2} + \frac{1}{2} + \frac{1}{6} + \frac{1}{3} + \frac{1}{6} = \frac{10}{6}
\]
which is an unbalanced equation. The shares are now made out of ten instead of six. The zawj receives \(\frac{3}{10}\), the ukht shaqiqah \(\frac{3}{10}\), the ukht li abb \(\frac{1}{10}\), the akhawan li umm \(\frac{2}{10}\) and the umm \(\frac{1}{10}\) which is:

\[
\frac{3}{10} + \frac{3}{10} + \frac{1}{10} + \frac{2}{10} + \frac{1}{10} = \frac{10}{10}
\]
which is a balanced equation.¹

²AwI (Devaluation) In Twelve As Original Allotment:
The original share allotment of twelve can rise to thirteen, fifteen or seventeen.

Twelve Rising to Thirteen:
In this example, the deceased leaves a zawjah, umm and an ukht li abb. The shares are; a quarter for the zawjah as there is no descendant heir of the

¹ Hawashi al-Shaikh, Vol 6 p. 431.
deceased, one third for the *umm* as the deceased left no descendant heir and only one *ukht* and a half for the *ukht li abb* as there is no one to exclude her. The shares will, thus, be:

$$\frac{1}{4} + \frac{1}{3} + \frac{1}{2} = \frac{3}{12} + \frac{4}{12} + \frac{6}{12}.$$  
This comes to \(13/12\) which is an unbalanced equation. The shares are made from thirteen instead of twelve, thus, the *zawjah* receives \(3/13\) instead of \(3/12\), the *umm* receives \(4/13\) instead of \(4/12\) and the *ukht li abb* receives \(6/13\) instead of \(6/12\). The equation will, thus, be as follows:

$$\frac{3}{13} + \frac{4}{13} + \frac{6}{13} = \frac{13}{13}$$  which is a balanced equation.

**Twelve Rising to Fifteen:**

This occurs in the case when a deceased leaves a *zawj*, *bintan sulbiyyatan*, an *umm* and an *abb*. The shares will be; a quarter to the *zawj* as the deceased left descendant heirs, two thirds for the *bintan sulbiyyatan*, a sixth for the *umm* and a sixth for the *abb*, in both their cases, due to the deceased leaving descendant heirs. The equation will, thus, be:

$$\frac{1}{4} + \frac{2}{3} + \frac{1}{6} + \frac{1}{6}$$  which is:

$$\frac{3}{12} + \frac{8}{12} + \frac{2}{12} + \frac{2}{12} = \frac{15}{12}$$  and is an unbalanced equation. The shares are now made out of fifteen instead of twelve. The *zawj* receiving \(3/15\) instead of \(3/12\), the *bintan sulbiyyatan* receiving \(8/15\) instead of
8/12, the *umm* 2/15 instead of 2/12 and the same for the *abb*. The balanced equation, will, thus, be as follows:

\[ \frac{3}{15} + \frac{8}{15} + \frac{2}{15} + \frac{2}{15} = \frac{15}{15} \]

which is a balanced equation.

**Twelve Rising to Seventeen:**

Twelve rises to seventeen in the situation where a deceased leaves a *zawjah, umm, ukhtan li abb* and *akhawan li umm*. The shares will be a quarter for the *zawjah* as there is no descendant heir, one sixth for the *umm* as the deceased left *ukhtan* which reduces the *umm* from a third to a sixth, two thirds for the *ukhtan li abb* as there is no one to exclude them and one third for the *akhawan li umm*. The equation of these shares are:

\[ \frac{1}{4} + \frac{1}{6} + \frac{2}{3} + \frac{1}{3} \]

which is actually \[ \frac{3}{12} + \frac{2}{12} + \frac{8}{12} + \frac{4}{12} = \frac{17}{12} \] which is an unbalanced equation. The shares are made from seventeen instead of twelve and thus, the *zawjah* receives \( \frac{3}{17} \) instead of \( \frac{3}{12} \), the *umm* \( \frac{2}{17} \) instead of \( \frac{2}{12} \), the *ukhtan li abb* \( \frac{8}{17} \) instead of \( \frac{8}{12} \) and the *akhawan li umm* \( \frac{4}{17} \) instead of \( \frac{4}{12} \). The equation, is, thus:

\[ \frac{3}{17} + \frac{2}{17} + \frac{8}{17} + \frac{4}{17} = \frac{17}{17} \]

which is a balanced equation.
iii 'Awl (Devaluation) In Twenty Four:
The original allotment of twenty four rises to twenty seven and there is only one example hereof:

This occurs when a deceased leaves a zawjah, bintan sulbiyyatan, an umm, and an abb. The shares will be; an eighth to the zawjah as the deceased left descendant heirs, two thirds for the bintan sulbiyyatan, one sixth for the umm as the deceased left descendant heirs, and a sixth for the abb for the same reason. The equation will thus, be:

\[ \frac{1}{8} + \frac{2}{3} + \frac{1}{6} + \frac{1}{6} \]

which is properly expressed as:

\[ \frac{3}{24} + \frac{16}{24} + \frac{4}{24} + \frac{4}{24} = \frac{27}{24} \]

which is an unbalanced equation. The shares are now made from twenty seven, instead of twenty four. The shares will thus be; 3/27 for the zawjah instead of 3/24, 16/27 for the bintan sulbiyyatan instead of 16/24, 4/27 for the umm instead of 4/24 and 4/27 for the abb instead of 4/24.

Thus, we have:

\[ \frac{3}{27} + \frac{16}{27} + \frac{4}{27} + \frac{4}{27} = \frac{27}{27} \]

which is a balanced equation.

These are the only cases in which 'awl occur.

It does not occur in masā'i1 (problems) of 2 (where a half is shared by each heir) as in the case of the deceased leaving a zawj and an akh shaqiq as the only heirs. The zawj receives a half farḍan as there is no descendant heir and the akh shaqiq receives the remaining half by ta'ṣib as the nearest 'asib to the deceased. Nor does it occur in 3 like a deceased leaving an umm
and an akh shaqiq. The umm receives a third as there is only one akh and the remaining two thirds go to the akh shaqiq by ta'sib as the nearest 'asib to the deceased.

There is no 'awl in 4 as with a deceased leaving only a zawj and an ibn, where the anšibah are a quarter for the zawj as the deceased left an ibn and the remaining three quarters going to the ibn as the nearest 'asib to the deceased. 'Awl never occurs when there are 'asabah and there is a residue such as when a deceased leaves a zawj, bint sulbiyyah and an akh shaqiq, where the zawj receives a quarter due to the presence of a bint, the latter a half, which is the share for a bint and the residue goes to the akh shaqiq of the deceased as the nearest 'asib.

There is, likewise, no 'awl in 8 as when a deceased leaves a zawjah and an ibn, the former receiving an eighth due to the presence of an ibn and the latter receiving the residue as the nearest 'asib to the deceased. Nor does it occur when a deceased leaves a zawjah, a bint sulbiyyah and an akh shaqiq, the shares being an eighth for the zawjah due to the presence of the bint, a half for the latter which is the allotment for a bint and the residue going to the akh shaqiq as the nearest 'asib to the deceased.¹

D) **Al-Radd — Redistribution:**

a) **Definition:**

Radd, literally, amongst other things, means *rafḍ* meaning "refusal" or *iʿādah* which means "to return to someone or something". In *shariʿah*, *radd* is defined as "the payment of the residue of a *tarikah* to the *aṣḥāb al-furūḍ* when there is one meriting the residue of that *tarikah*."

b) **Māshruʿiyyah (Validity) Of al-Radd (Redistribution):**

The *fuqahā* of the *saḥābah* as well as those of the *tabiʿun* differ on the validity, in *shariʿah*, of *radd*.

Zaid bin Thābit and ibn ʿAbbas of the *fuqahā* of the *saḥābah* rule that the residue of a *tarikah* is deposited in the *bait al-māl*. This is also the view of Malik, al-Awzaʿi, al-Shāfiʿi and ibn ʿAzm of the *zāhirīyyah*. The principle of both Malik and al-Shāfiʿi is that, if there is a residue after the *aṣḥāb al-furūḍ* had been given their respective shares, the residue is deposited in the *bait al-māl*. Shāfiʿis and Malikis, especially, consider the *bait al-māl* an ʿāṣib when there is no heir. This is the earlier *mālikī* rule even if the *bait al-māl* is *ghair* *muntazimizer*. It is also the earlier *shāfiʿi* ruling. The later *fuqahā* of both the *mālikis* and *shāfiʿis* ruled that *radd* must be resorted to when the authority is unjust in his administration of

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   *Al-Munjīd*, p. 254.
   *Al-Tarikāt wa al-Wāṣāyā*, p. 467.
the *bait al-māl*. The later *shafi’is*, specifically, do not allow *radd* for the spouses.¹

Those who oppose *radd* of the residue of a *tarikah* quote the following proofs:

- firstly, *Allah*, had prescribed the share of each heir of the *aṣḥāb al-furūḍ*. To allow *radd* will be to exceed the prescribed limits as set out in the *ayat al-mirāth* in the *Qur’ān* which reads "*but those who disobey Allah and His Messenger and transgress His limits will be admitted to a Fire to abide therein and they shall have a humiliating punishment*".² The opposers state that punishment is prescribed for transgression of the Law and as such *radd* must be *ḥaram*:

- the opposers further contend that the residue is for the *ʿasib* and if not found, then it must go to the *bait al-māl* as is the case with a Muslim deceasing and having no heir whatsoever. They further contend that the *aṣḥāb al-furūḍ* come first, followed by the *ʿasabah*. If none are found, then the *ʿarḥām* succeed according to the rules of such *mirāth*. If none are found, what is left of a *tarikah* goes to the *bait al-māl*.

Those who permit *radd* are *ʿUmar*, *ʿAlī*, *ʿUthman*, ibn *Masʿūd*, *Jābir*, ibn *Zaid*, al-*Ḥasan*, ibn *Sirīn*, *ʿAṭāʾa*, Mujāhid, all of the *fuqahāʾ* of the *ṣaḥābah* and *tabiʿīn*, as well as al-*Thawrī*, the *ḥanafīs* and the *ḥanbalīs*. These

¹ *Al-Tarākat* was *al-Waṣaya*, pp. 467 - 469.  
² *Al-Qur'ān*, Chapter 4: 14
fuqaha’ differ amongst themselves on how radd is to take place. Their rulings are:

- ’Ali allows radd to the ashāb al-furūḍ, each according to the value of his share. However, the spouses are excluded from radd according to ‘Ali.

- ‘Uthmān, Jabir and ibn Zaid allow radd to all the ashāb al-furūḍ including the spouses. Their reasoning is that the spouses must accept ‘awl, so they must merit radd for equality and justice sake.

- ibn Mas‘ūd allows radd for the ashāb al-furūḍ save the spouses, bint al-ibn when found with the bint sulbiyyah, the ukht shaqiqah, the awlad al-umm when found with their umm as well as the jaddah found with an heir who succeeds to a fixed share.

- ibn ‘Abbas allows radd save to the spouses and the jaddah, the latter due to her share being confirmed by sunnah and being for her tu‘mah (maintenance) due to the Prophet ruling feeding (at’imu) the grandmothers a sixth. No radd is due to her save when no other warith nasabi (heir of lineage relationship) is not found.

- the ḥanafis took the ruling of ‘Ali. They, further, allow radd to seven categories of heirs and these are; the bint sulbiyyah, the bint al-ibn, the umm, the jaddah, the ukht shaqiqah, the akh li umm and ukht li umm. Radd, according to them (ḥanafis) can

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1 Ahkām al-Tarikāt wa al-Mawārith, p. 172.
3 Al-Tarikāt wa al-Waṣāya, pp. 470 – 471.
be to a single heir, like the bint Sulbiyyah who can be the only heir of the deceased, taking a half of the tarikah farđan and the remaining half raddan. Another case is the umm being the only heir of the deceased. She receives a third of the tarikah farđan and the remaining two thirds raddan. Thus, at times, a female can receive the entire tarikah if she is a wārithah bi al-fard (heir with a fixed share). The later hanafi fuqaha' ruled radd valid for the spouses also due to the fasad in the administration of the bai't al-māl.

The hanbalis share the thrust of the hanafi arguments and rules, allowing radd to the ašhāb al-furūḍ save the spouses for they are not of the arḥām of the deceased i.e. blood relations. They claim radd is founded on Quranic law, which shows that kindred by blood must precede the bai't al-māl as the latter represents all the Muslims who are not related to the deceased. As radd is for the arḥām of the deceased, they must precede all others. The Prophet (s.a.w) included this in his ḥadīth which reads: "He whoso leaves a debt, I am responsible for (settling) it and he whoso leave wealth, it is for his heir." This text is 'amm (general) and as such includes all wealth.

1 Al-Qur'ān, Chapter 8: 75.
Nail al-Awṭār, Vol 6 p. 64.
the zaidiyyah and ja'fariyyah also allow radd to the ašḥab al-furūḍ, save the spouses and they both proffer the same arguments as ahl al-sunnah, including quoting the āyah of arḫām in the Qur'ān¹ as well as the ruling of 'Ali stating that he used to allow radd to all the heirs save the spouses.²

c) **Procedure Of Radd Distribution:**

There are categories in and divisions herein and they are as follows:

**Category 1:**

In this category one finds one category of heir, like bintān, or ukhtān who are in the same darajah with the deceased or jaddatān. When any one of these groups are found as the only heirs, only one division is made. The tarikah is halved and each heir receive a half.

**Category 2:**

There are three cases in this category and they are as follows:

**Case 1:**

In the case where the root of the mas'alah is 3, the tarikah is divided into three like when the farḍ are 1/3 and 1/6 as in the case when where the deceased leaves akhawan li umm, who merits 1/3 as they are more than one and an umm who merits 1/6 as the deceased left ikhwah. The tarikah is divided into three equal parts; two parts for the akhawan li umm and one part for the umm, fardan and raddan. The same will

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¹ Al-Qur'ān, Chapter 8: 75
² Al-Tarikat wa al-Waṣaya, pp. 476 – 478.
Case 2:
If the distributive process involves shares of 1/2 and 1/6 and radd has to occur, like in the case of a bint sulbiyyah and a bint al-ibn or a bint sulbiyyah and an umm, then the tarikah is divided into 4 equal parts. In the case of the heirs being the bint sulbiyyah and bint al-ibn, the bint sulbiyyah receives 3 parts and the bint al-ibn, one part. In the case where the heirs are the bint sulbiyyah and umm, the bint sulbiyyah receives 3 parts and the umm one part. The actual shares are from 6; 3/6 for the bint sulbiyyah, which is a half, and 1/6 for either the bint al-ibn or umm with the bint sulbiyyah. The shares are made from 4, with 3/4 for the bint sulbiyyah and 1/4 for the bint al-ibn or the umm.

Case 3:
If the heirs who will benefit from radd are those who will inherit 2/3 and 1/6, like bintan sulbiyyatan and the umm, then shares are from 6; 4/6 (which is 2/3) for the bintan sulbiyyatan and 1/6 for the umm. The shares are taken from 5 instead, and, thus, the bintan sulbiyyatan receive 4/5 and the umm 1/5, fardan and raddan. The same process is followed when the heirs meriting radd are a bint sulbiyyah, bint al-ibn and an umm as the shares will be in the same fraction system (i.e. the bint sulbiyyah - and the bint al-ibn sharing 2/3 in the ratio 2:1 and the umm having 1/6).1

1 Al-Tarikat wa al-Wasaya, pp. 473 - 474.
Category 3:
In this situation, there are heirs who merit *radd* and those who do not. In this case, those who merit *fard* but not *radd* are given their shares. The remainder is then subject to the *fard* and *radd* processes. An explanatory case hereof is when the deceased leaves a *zawj* and three *banat sulbiyyah*. The *zawj*'s share is deducted, which is 1/4 as the deceased left descendant heirs. The remaining 3/4 is for the three *banat sulbiyyah*, each receiving 1/4, *fardan* and *raddan*. In the case where the residue does not fit the number of heirs, like in the case where the deceased left a *zawj* and six *banat sulbiyyah*, the *zawj* merits a 1/4 as the deceased left descendant heirs, leaving a residue of 3/4, which does not agree with six. The *zawj* is not given his share, but the denominator of his share, which is 1/4, is multiplied by 2, giving 8. The *zawj* gets 2/8 hereof, which is 1/4 and the remaining 6/8 for the six *banat sulbiyyah*, each receiving 1/8. If the above cannot solve the division problem, *tashih* (rectification) of the equation is required, like when the deceased left a *zawj* and five *banat sulbiyyah*. The original root here is 12 as 1/4 and 2/3 features in the equation. The *zawj* receives 1/4 which leaves 3/4 for the five *banat sulbiyyah* which does not evenly divide by 5. One now takes the lower denominator, which is 4 (of the 1/4 of the *zawj*) and multiply this 4 by the number of persons meriting *radd*, which is 5. This comes to 20. From this, the *zawj* receives 5, which is 1/4 and the remaining
15/20 is for the five banāt sulbiyyah, each receiving 3/20.¹

E) *Al-Munasakhah* (Share Transfer):

a) Definition:

Munāsakhah is derived from the root word *nasakha* which, literally, means *izalah* which in turn means "removal". Tanāsakha also means *naqil* or *taḥwīl* which means "transfer".² Munāsakhah, in *sharī'ah*, means "the transfer of the shares of the heirs or all of them to those who succeed them in meriting *mirāth*".³

b) *Al-Munasakhah* (Share Transfer) In Practice:

The issue of munāsakhah has one of two cases. Either the first set of heirs are the same as the second set or they are different.

Case 1:

In the case where the heirs of the first set are the same as the second set of heirs, like in the case where a deceased leaves his *zawjah* and *awlad*, both *abna'* and *banāt*. If an *ibn* or *bint* dies before the division of the estate, then the *tarikah* devolves upon the *zawjah*, who receives an eighth as the deceased left descendant heirs and the residue is divided between the *abna'* and *banat* in the ratio 2:1 in the favour of the males. This is when the *ibn* or *bint* deceasing and having no heir to succeed him or her.

   *Al-Munjid*, p. 805.
   *Minhāj al-Muslim*, p. 490.
Case 2:
This is the case when the first set of heirs are different from the second set as in the case where the deceased leaves a zawjah and awlād ashiqqā’. Before the division of the estate, one of these awlād deceases. If that walad leaves no descendant heir, then Case 1, immediately above, is followed. If such a walad leaves heirs, who are not, in fact heirs of the first deceased, then the first division is made to the first heirs i.e. the zawjah and the awlād ashiqqā’. Thereafter the second division is made to the heirs of the second deceased. Thus, in the example quoted, the first division is made to the zawjah of the deceased who receives an eighth as the deceased left descendant heirs and the residue goes to the awlād ashiqqā’, each male receiving twice the share of a female. Thereafter the division is made to the heirs of the walad shaqiq who deceased prior to the first division of the first deceased. These cases of munāsakḥah are the same for all madhāhib fiqhīyyah al-sunnīyyah as well as the ja’fariyyah.

F) Al-Takharuj (Agreement Of Exit Of An Heir Or Heirs):
Takhāruj is the noun of takḥāraja which means "the ending of a company by some partners taking the house and some the land." The original root

1 Al-Mughni, Vol 6 pp. 197 - 198
Al-Tarikāt wa al-Waṣāyā, pp. 512 - 518.
Al-Mawsū’ah al-Fiqhīyyah, Vol 3 p. 73.

2 Qamus al-Muḥīṭ, Vol 1 p. 192.
Al-Munjīd, p. 172.
is kharaja which means "to exit". ¹ In shari'ah, takharuj means "the agreement of the heirs on the exit of some of them from the tarikah with a share other than their rightful share".² Ibn 'Abidin defines it as "the agreement of the heirs on the exit of some of them from the tarikah on condition that something is given to them from the tarikah, be it 'ain (asset) or dain (debtor's dues)."³

a) Mashru'iyah (Validity) Of Takharuj (Exit From An Estate):

The validity of takharuj is founded on the Qur'an and sunnah. Takharuj is a form of sulh (settlement) and sulh is valid in shari'ah. The Qur'an states: "...and settlement (sulh) is best ..."⁴ The zawjah of ibn 'Awf who suffered talaq al-far (divorce on deathbed of spouse), Tamâdîr bint al-Asbagh al-Kalbiyyah made sulh with the remaining three wives of ibn 'Awf and received 1/32 of his tarikah⁵ which amounted to 83 000 dinars. This shows the validity of sulh in mirath.⁶ Abu Hurairah narrated from the Prophet (s.a.w) that sulh between Muslims is valid as long as it does

³ Al-Tarikât wa al-Wasââyâ, p. 518.
⁴ Al-Qur'an, Chapter 4: 128.
⁵ the four wives shared equally in one eighth as ibn 'Awf must have had children.
⁶ Al-Tarikât wa al-Wasââyâ, p. 518.
not legalise ḥarām nor prohibit the ḥalāl. Takḥāruj falls under al-ʻuqūd al-muʻawadah (contracts of compensation) and as such is an agreement between two parties, in this case, the exiting heir and the remaining heirs on an agreed compensation. When properly and correctly contracted, the consequences of this 'aqd is that the heir exits from the tarikah by accepting the agreed compensation and the other heirs thus buys out the exiting heir’s share. The 'aqd al-takḥāruj (contract of settlement in succession) can be ruled void if any of the principles or shurūt has not been met or improper enactment took place or other issues affecting distribution comes to light, like a debt attached to the tarikah or another heir becomes apparent or there is a musālaḥahu.

b) Cases Of Takharuj:

There are three main cases in this matter and they are:

Case 1:

This is takharjur ṣarīth ila ṣarīth - exit agreement between two heirs. This is the case of takharjur between two heirs only in a given tarikah. Thus, when an heir reaches sulh with the other heir paying him, say, 5 thousand dollars to effect his exit from the tarikah, then the remaining heir succeeds to all the tarikah. He had, in effect, purchased the share of the other exiting heir.

1 Subul al-Salam, Vol 3 p. 59.

2 Al-Tarikat wa al-Wasaya, pp. 519 & 526.
Case 2:
Khurūj 'alā tašāluḥ 'alā al-'ain or exit on settlement of an asset. This is the most common form of takharūj. An heir makes ṣulḥ with the other heirs on exiting from the tarikah in return for something from the tarikah. An example being a deceased leaving a zawj and five abnā' and a tarikah of a small house, five cars and five plots of land, all equal in size. The zawj of the deceased makes ṣulḥ with the five abnā' that he takes the house and exits from the tarikah, to which the other heirs agree. The five abnā' now share equally in the five cars and five plots of land.

Case 3:
Khurūj bi tašāluḥ ma'ā ja'mī' al-warāthah (exit from the estate by settlement with all the heirs). This is the case when an heir agrees to exit from the tarikah on payment of a required sum of money which is paid from a source other than the tarikah itself. There are three situations in this matter. Either each heir contributed the same amount to the exiting heir or paid in accordance with the share value in the tarikah or some of the heirs paid more than the others to the exiting heir. In each of these cases, an example will explain the situation:

- in the case where a deceased leaves his zawjah, umm and an akh shaqīq and a tarikah of 36 plots of land, the zawjah is to receive 1/4 as there are no descendant heirs to the deceased, the umm 1/3 for the same reason and there being only one akh shaqīq to the
deceased so the residue goes to the *akh shaqiq* as the nearest *'asib*. The equation is from 12; 3/12 for the *zawjah*, 4/12 for the *umm* and the rest of 5/12 for the *akh shaqiq*. However, the *zawjah* makes *şulḥ* with the other two heirs to exit the *tarikah*, on payment of 900 dollars. Of this amount, the *umm* contributes 400 dollars and the *akh shaqiq* 500 dollars. The shares will be: 1/4 for the *zawjah* which is 3/12 X 36/1 which gives 9 plots. The *umm* get 1/3 which is 4/12 X 36/1 which gives 12 plots. The remainder of 5/12 is for the *akh shaqiq* which is 5/12 X 36/1 which gives 15 plots. The *zawjah* exited the *tarikah* by *takharuj*. Her share must now be divided between the two remaining heirs in the ratio 5:4 in favour of the *akh shaqiq* and the *umm* due to the paying out of the *zawjah*. The latter's share of 9 plots is divided to suit the ratio. The *akh shaqiq* receiving 5 plots and the *umm* 4 plots. The *umm* will, thus, have: 12 + 4 plots = 16 plots for the *umm* and the *akh shaqiq* 15 + 5 plots = 20 plots. The final calculation is, thus, 16 + 20 plots = 36 plots which is the full complement of the *tarikah*.

when both the *umm* and *akh shaqiq* paid equal amounts to the *zawjah* exiting from the *tarikah*, then the *zawjah's* share is equally divided between the two of them and thus we have;

*umm* 12 + 4,5 = 16,5 plots.
*akh shaqiq* 15 + 4,5 = 19,5 plots.
in the cases where the heirs pay different amounts to the exiting heir, each is to be compensated for the amount they contributed. In the example quoted where the deceased leaves a zawjah, ummings and an akh shaqiq and 36 plots of land, and the zawjah agreeing to exit on payment of 900 dollars, when the ummings gives 600 dollars and the akh shaqiq 300 dollars, the ratio is here 6:3 in favour of the ummings. The shares of land, for the heirs, are 9 plots for the zawjah, which is 1/4, 12 plots for the ummings which is 1/3 and the residue for the akh shaqiq as ‘asib which is 15 plots. The 9 plots of the zawjah is divided between the ummings and akh shaqiq in the ratio 6:3. Thus, the ummings will receive: 
12 + 6 = 18 plots, and the akh shaqiq receives 15 + 3 = 18 plots. This equals the complement in the tarikah.

In the cases mentioned, the laws of bai’ (sale) are applicable as the exiting heir is selling his or her share to the other heirs and the calculations are made in ratio form. Care must be taken where riba (usury/interest) takes place, like a deceased leaving only cash assets. In this case, takharuj in cash is forbidden as riba will occur. If there is cash and ‘ain (moveable or immovable assets), then takharuj can take place). The basic rule with riba is that when the items of exchange are the same, then equal amounts must be

1 Al-Tarikat wa al-Wasaya, pp. 523 - 525.
exchanged, like flour and flour or money and money, but when they differ, like money and flour, then exchange can take place in the manner the seller and buyer agree on. Principle law hereon is in the Qur'an, and detailed law in the sunnah, the latter narrated from the Prophet (s.a.w) by Abū Sa'īd al-Khudrī, 'Ubadah bin Ṣamīt and Abū Hurairah. Money, specifically, in shari'ah, is not a saleable commodity. It is an instrument of purchase only.

G) Masa'il Mulaqqabāt (Titled Problems):

Masa'il mulaqqabāt are those problems, in mirāth that derived a name from a specific happening surrounding it. The famous ones are the following:

a) Mas'alah Al-Sharikah (Problem Of Partnership):

This is also called al-ḥajariyyah or al-yamaniyyah or al-ḥimariyyah and had been dealt with previously under the mirath ikhwah li umm. This is a disputed mas'alah, in which both the ikhwah li umm and ikhwah ashiqqā feature. The ashiqqā being excluded from the tarikah of their umm, who is also the umm of their ikhwah li umm, by the ikhwah li umm and other heirs due to the ikhwah ashiqqā' being residuaries and there being no residue. Some fuqahā like 'Ali, Abu Musā and 'Ubai bin Ka'b all rule exclusion of the ashiqqā' while 'Uthman, Zaid bin Thabit, Shuraiḥ, al-Thawri, Malik and al-Shāfi'i ruling sharikah (sharing)

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1 Al-Qur'an, Chapter 2: 275 - 278.
Ibid, Chapter 3: 130.

of the ikhwah li umm and ikhwah ashiqa' in this case.¹

b) **Mas'alah Al-Gharimatain (Problem Of The Strange Position Of Parents):**

This is also called al-gharibatan (due to the strange position of the parents in succession) or al-gharawan (as the parents are like creditors in an estate here) or al-umaryatan (as 'Umar was the first to give this ruling in this problem). This mas'alah is founded in the case where a deceased leaves a zawj, an umm and an abb or the deceased leaves a zawjah, an umm and an abb. Most of the fuqaha', including Abū Ḥanīfah, Mālik, al-Shāfi'i and Ahmad rule, in both cases, that the umm receives 1/3 of the residue after the surviving spouse's share has been deducted. This applies to both the zawjān. The abb receives the final residue as the nearest 'āṣib to the deceased. The basic rule here is that every heir, male or female, who succeeds in shares of thirds (ath-lā-than), must take such, in the case of one of the surviving spouses being also an heir, from the residue after the zawj's share had been deducted. In the mas'alah under discussion, if this is not done, the abb will not get twice the share of the umm. Ibn 'Abbās opposes the above ruling, ruling that the umm receives 1/3 from the entire tarikah as the Qur'ān, gave her that share² and the Prophet's (s.a.w) ruling "give

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² *Al-Qur'ān*, Chapter 4: 11.
the heirs their due share..." He further contends that the abb, in this mas'alah, is an 'āṣib and as such must accept the residue after the asḥāb al-furūq had taken their respective shares. If the abb is not found and the jadd saḥīḥ takes his place, the same rule shall apply, according to ibn 'Abbas. His ruling is also one of the reported views of Abu Bakr Siddiq. Abu Yusuf gives the umm 1/3 of the residue when she is found with the jadd saḥīḥ in this mas'alah.2

c) Mas'alah al-Kharqa' (Problem Of The Breaching the Consensus:

This is so called due to 'Uthmān, breaching the ijma' on certain issues (kharq al-ijma'). It is also called 'Uthmaniyyah. This mas’alah centres around the case where a deceased leaves an umm, jadd saḥīḥ and an ukht. The saḥābah differed hereon. Abu Bakr ruled 1/3 for the umm and the entire residue to the jadd saḥīḥ as 'āṣib. Zaid ruled 1/3 for the umm and the residue to be shared by the jadd saḥīḥ and the ukht in the ratio of 2/3 of that residue for the jadd saḥīḥ and the remaining 1/3 of that residue for the ukht. 'Alī again ruled 1/3 for the umm, 1/2 for the ukht and the residue of which is 1/6 for the jadd. Ibn 'Abbās has two rulings attributed to him; one like the view of 'Alī just quoted and another one in which he gives the ukht half of the tarikah and the residue being shared equally between the jadd saḥīḥ and the umm. 'Uthmān

1 Mukhtasar Saḥīḥ Muslim, p. 262.
ruled 1/3 for the umm, and the residue shared equally between the jadd sahih and the ukht.

d) **Mas'alah al-Marwaniyyah (The Marwan Problem):**

This mas'alah gets its name from the khalifah Marwan bin al-Hakam, in whose reign it occurred. It is also called mas'alah al-ghara'a due to it being famous and well known amongst the people of his reign. It is presented in the case where a deceased leaves her 6 akhawat mutafarriqat (sisters of different parentage) and her zawj. The zawj receives 1/2 as the deceased left no descendant heirs. The ukhtan shaqiqatan receive 2/3, the ukhtan li umn receive 1/3 and the ukhtan li abb are excluded as the ukhtan shaqiqatan excluded them taking the maximum allowed for ukhtan and more. 'Awl occurs as the original root is 6, but increased to 9 i.e. 1/2 + 2/3 + 1/3 = 9/6. The shares are to be taken from 9 instead of 6 and are, thus, 3/9 (instead of 3/6) for the zawj, 4/9 (instead of 4/6) for the ukhtan shaqiqatan and 2/9 (instead of 2/6) for the ukhtan li umm. Thus, the final equation is: 3/9 + 4/9 + 2/9 = 9/9 which is a balanced equation.

e) **Mas'alah al-Hamziyyah (The Hamza Problem):**

This mas'alah gets its name from the person who asked the question, namely, Ḥamza al-Ziyāt. The saḥābah differed on it. The case presents itself when a deceased leaves 3 jaddat mutahaddiyat (grandmothers equal in lineage), 3 akhawat mutafarriqat (sisters of different

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4. Ibid, Chapter 4: 12.
parentage) and a jadd šahīh. It appears from
the calculation that the 3 akhawat are one
ukht shaqīqah and the other li abb. Ābu Bakr
and ibn 'Abbās ruled 1/6 for the jaddat
(grandmothers) shared equally amongst them and
the rest to the jadd šahīh as he is the
nearest 'aṣib excluding the akhawat
completely. He does the same as when an abb of
the deceased was found with the akhawat. The
mas'alah is from 6; 1/6 for the jaddat and 5/6
for the jadd šahīh. The calculation is
corrected by multiplying the number of jaddat
by the root, which is 6 and which gives 18.
The jaddat receive 3/18 i.e. 1/18 for each of
them and the jadd šahīh receives 15/18. Thus
3/18 + 15/18 = 18/18 which is a balanced
equation. 'Ali and ibn Mas'ūd rule that the
ukht shaqīqah receives 1/2 and the ukht li abb
1/6 completing 2/3 for two and more akhawat,
the jaddat share equally in 1/6 and the jadd
šahīh receives 1/6 also. Their equation is,
thus, as follows:

1/2 + 1/6 + 1/6 + 1/6 = 6/6. A shadh
(irregular) ruling is attributed to ibn 'Abbās
herein in that it is purported that he ruled
1/6 for the umm al-umm and the remaining 5/6
for the jadd šahīh as the 'aṣib. This
equation is simply:

1/6 + 5/6 = 6/6. Zaid bin Thabit, again, rule
1/6 for the jaddat shared equally between them
and the rest between the jadd šahīh, the ukht
shaqīqah and ukht li abb. Correction is
required in the equation which is out of 72,
but is simplified to 36. The jaddat receives
6/36 (which is one sixth), each, thus
receiving 2/36. The residue is divided into
nasiban (two equal shares) of 15 each. The
"jadd sahih" receive 15/36. The remaining 15/36 is divided between the "ukht shaqiqah" who will get 10/36 and the "ukht li abb" 5/36. The equation, is thus:

\[\frac{6}{36} + \frac{15}{36} + \frac{10}{36} + \frac{5}{36} = \frac{36}{36}.\]

f) **Mas'alah al-Dinarîyyah (Problem Of The Dinars):**

This is also called *mas'alah Dawudiyyah* (the Dawud problem) due to Dawud al-Tai'i asking about it. The case revolves around the case of the deceased leaving a *zawjah*, a *jaddah*, *bintân sulbiyyatân*, 12 *ashiqqa'*, and an *ukht shaqiqah*. The *tarikah* is 600 *dinars*. The *zawjah* receives 1/8 as the deceased left descendant heirs, which is 75 *dinars*. The *jaddah* receives 1/6 which comes to 100 *dinars*. The *bintân sulbiyyatan* receive 2/3 which comes to 400 *dinars*. A residue is found which is 25 *dinars*. The *ikhwah ashiqqâ'* and their only *ukht shaqiqah* share, by *ta'sib*, this residue: 2 *dinars* for each *akh shaqiq* and one *dinar* for the *ukht shaqiqah*. The final equation is, thus:

\[\frac{4}{24} + \frac{3}{24} + \frac{16}{24} + \frac{1}{24} = \frac{24}{24}\]

and the *dinars* are distributed as:

\[75 + 100 + 400 + 25 = 600\ *dinars*.\]

g) **Mas'alah al-Imtihan (The Testing Problem):**

In this case, the deceased leaves categories of heirs, each category being less than 10 and the equation does not balance save if it exceeds 30 000. The *mas'alah* is presented by the deceased leaving, 4 *zawjat* (wives), 5 *jaddat*, 7 *banât* and 9 *akhwât li abb*. The equation is from 24 and the division is 3/24 (which is 1/8 as the deceased left succeeding descendants) for the *zawjat*, 4/24 for the *jaddat*, (which is 1/6) 16/24 for the *banât* which is 2/3 and the residue is for the
akhawat li abb which comes to 1/24. Correction is required in the equation to get even figured shares for all the heirs individually. This is done by multiplying the number of heirs by each other, category by category. Multiplying the zawjat by the jaddat we have: 4 X 5 = 20. We now multiply 20 by the number of banat which is 20 X 7 = 140. Then 140 is multiplied by the number of akhawat li abb which comes to: 140 X 9 = 1260. This 1260 is now multiplied by the root 24, thus, 1260 X 24 = 30240. The complete final shares are, thus: 4 zawjat 3/24 X 30 240/1 = 3780. Each zawjah receives 3780/4 = 945 4/24 shared by 5 jaddat which is 4/24 X 30 240/1 = 5040. This is divided by 5 which equals 1008 for each jaddah.

16/24 for the 7 banat is 16/24 X 30 240/1 = 20 160 divided by 7 = 2880 for each bint.

1/24 for the 9 akhawat li abb is 1/24 X 30 240/1 = 1260 divided by 9 akhawat li abb which comes to 140 for each ukht li abb. The full final equation is, thus, as follows:

zawjat 4 X 945 = 3780
jaddat (grdms¹) 5 X 1008 = 5040
banat (daughs²) 7 X 2880 = 20160
akhawat(sists³) 9 X 140 = 1260

Total: 30 240, which balances.

¹ short for grandmothers.
² short for daughters.
³ short for sisters.
h) Mas'alah Al-Ma'muniyyah (The al-Ma'mun
Problem):

This mas'alah arose when al-Ma'mun wished
to appoint a qadi for the city of al-Basrah in
Iraq. Yahya bin Akthar was brought before him
whom al-Ma'mun considered too young so he
asked him the following mas'alah. Yahya
answered correctly. The mas'alah is presented
in the case of both parents and bintan
deceasing and leaving heirs behind and in
another situation where one of these parties
decease leaving behind heirs. Thus, in the
first case, when the deceased leave behind
bintan and both parents, 1/3 will go to each
bint and 1/6 to each parent. The equation is:
1/3 + 1/3 + 1/6 + 1/6 = 6/6 which balances.
This is the case when the deceased is a male.
In the case of one of the banat deceasing, the
heirs will be a jadd sahih, a jaddah sahihah
or umm al-abb (mother of the father) and an
ukht. According to Abu Bakr's ruling, the
jaddah get 1/6 and the remaining 5/6 goes to
the jadd and the ukht is excluded. With Zaid
bin Thabit, again, the jaddah receives 1/6 and
the rest is divided into three equal parts;
two parts for the jadd and one part for the
ukht. If the first deceased is a female, then
she left an ukht, jaddah sahihah and a jadd
fasid. In this case, the jaddah receives 1/6,
the ukht 1/2 and the rest is redistributed to
these two only as the jadd fasid is excluded
by ijma' as the aishab al-furud had exhausted
the tarikah. 1

1 Al-Mawsu'ah al-Fiqhiyyah, Vol 3 pp. 75 - 79.
Al-Ikhtiyar, Vol 5 pp. 128 - 130.
CHAPTER 4

AL-WAŠĀYĀ (LEGACIES)

1. Al-Wašāyā:

Al-Wašāyā (sing al-wasiyyah) also has to do with succession to property after death. The cardinal difference between it and al-mirath is that much more freedom of testation is allowed.

1.1 Definition:

Wasāyā or wasatu is the plural of wasiyyah which means "a testament or legacy". The root derivative is the verb 'awsa, meaning "to make someone responsible for the execution of a specific duty after your death". Awsa, thus, literally means "to impose upon someone or command with something." Wašiyyah is so called due to ittišaliha bi 'amr al-mayyit (due to it having relation with the instructions of the deceased). As for the meaning of wasiyyah in shari'ah, hanafis define it as "authorising (tamlik) possession of your wealth or possessions to someone else after your death by way of charity (tabarru')." There is a slight variation in this definition by hanafis. This definition includes 'uqūd (contracts), like bai' (sale), hibah (gift) and the like. Limitation to "after death" excludes everything save the wašiyyah itself, while "charity" (tabarru') excludes iqrār bi al-dain (acknowledgement of debt to a creditor). A wasiyyah can, thus, be 'ain (a physical asset) or manfa'ah (beneficial usage or usufruct).

1 Lisan al-'Arab, Vol 6 p. 4853.
Al-Munjid, p. 904.

2 Lisan al-'Arab, Vol 6 p. 4854.

3 Al-Tarikāt wa al-Wasāyā, p. 531.
Al-Ikhtiyār, Vol 5 p. 63.

is, actually, not necessary to mention "after death" as a wasiyyah is only enacted after death by shari'ah.

Malikis define wasiyyah as "a right (haqq) due from one-third of the possessions of the 'aqid al-wasiyyah or musī (legator) due at the death of the musī or it is a haqq due to someone by agency (niyabah) of the musī."

This definition includes the wasiyyah as well as al-'iṣā' (curatorship). Hanbalis² share this definition of the malikis, while shafi'is³ limit it to the wasiyyah only. The zahiriyah states wasiyyah to be fard (binding) on every Muslim leaving mal (wealth) behind.⁴

The ja'fariyyah share the maliki definition on wasiyyah, while the zaidiyah define it as "a special instruction ('ahd) chained down to take effect after death (of the legator) and which may be accompanied by tabarru'.

There is virtual ijma' on the scope of wasiyyah save that some fuqaha' have included al-'iṣā' in the definition.

1.2 Mashru'iyyah al-Wasiyyah (Validity Of Legacy):

The fuqaha' differ on the hukm of wasiyyah. The majority of the fuqaha'⁵ rule it to be sunnah while the zahiriyah rule it to be fard (compulsory)⁶. The mashru'iyyah of wasiyyah is proven from Qur'an, sunnah

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1. Al-Tarikāt wa al-Wasāyā, p. 533
and *ijma*'. ¹ The Qur'an states: "It is prescribed when death approaches any of you, if he leave any goods (wealth), that he make a bequest to parents and next of kin according to reasonable usage. This is due from the God-fearing."² Also in another *ayah* it is stated: "...after a legacy (so made) or debt (which has to be paid)."³ Initially, prior to the revelation of *āyāt al-mirāth*, *wasiyyah* was necessary for wives at death of the husband and entailed lodgings and maintenance for a year (ḥawl).⁴ In the sunnah, *wasiyyah* is mentioned in *ḥadith*, as narrated by ibn 'Umar that the Prophet (s.a.w) said: "It is the duty of every Muslim who has something to dispose of as *wasiyyah*, to have it written down as soon as possible."⁵ The text speaks of "*thalaṭha la yālin*", literally meaning "three nights" which is interpreted to mean "swiftness".⁶ *Ijmā'* of the Muslims is manifest as it was practised from the time of the *saḥabah* till today. The fuqaha' differ on the status of *wasiyyah*. Those who rule it *farḍ* (compulsory) are Talḥa, al-Zubair, al-Zuhri, Tawus, ibn Abi Awaфа, Talḥa bin Mutarrraf, Sulaiman Abū Majlas, Dāwūd al-Zāhiri, Abū 'Awānah, al-Asfarainī, ibn Jarīr, Ishaq and the

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³ Ibid, Chapter 4: 12.
⁴ Ibid, Chapter 2: 240.
⁵ *Mukhtasār Sahīḥ Muslim*, p. 259
   *Al-Muwatta’*, Vol 2 p. 228.
This is also al-Shafi'i's old view as reported by al-Baihaqi.

The difference of opinion of the fuqahā' centres around the standing of the āyah al-wasiyyah (verse of legacy) as to whether it is mansūkhah (abrogated) or not. Those of the fuqahā' who rule wasiyyah fard, state that the verse of legacy is 'āmm (general) in its meaning as conveyed by the wording of the text and has special application to parents who do not inherit (like nonmuslim parents) of a convert to Islam, for example, as well as relatives who do not succeed to the tarīkah of a deceased. Ibn 'Abbas, in one ruling attributed to him and Qatādah, rule that all those inheriting by way of āyāt al-mīrāth (verses of succession) are excluded from wasiyyah and all other persons have right to wasiyyah i.e. they may receive from it. This is ibn 'Abbas's and Qatādah's understanding from the hadīth narrated by Abū 'Usāmah that the Prophet (s.a.w) said: "Allāh had granted the right due to everyone so there is no wasiyyah for the warith (heir)." The above ruling is also the view of al-Shafi'i, most mālikis and a group of the ahl al-′ilm (scholars in shari'ah). Ibn Hazm of

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3 Al-Qur'an, Chapter 2: 180.
4 A similar difference is found in the verse of the wasiyyah for wives at the death of the husband (Al-Qur'an, Chapter 2: 240). The vast majority of the mufassirūn rule that it was abrogated by the āyāt al-mīrāth. (See Al Jāmi' li Ahkām al Qur'ān, Vol 3 p. 226).
5 Al-Qur'an, Chapter 4: 11 - 12 & 176.
the zahiriyyah goes so far as to rule that any Muslim deceasing and leaving wealth behind and not having made wasiyyah, a third of his tarikah must be taken for that purpose.\textsuperscript{1}

The majority of the fuqahā’ rule that the verse of legacy was abrogated fully by what ibn `Abbās narrated that, initially, all the wealth left by a deceased was for his child or children and the wasiyyah part for his parents. This was abrogated by what Allāh wished and He ruled that a male receives double the share of a female, to parents each a sixth, the wife a quarter or an eighth and the husband a half or a quarter.\textsuperscript{2} Those who rule the verse of legacy as being mansukhah (abrogated) are, ibn `Umar, Abu Musa, ibn Musaiyyib, al-Hasan, Mujāhid, `Ata’ā, ibn Sirīn, Qatādah al-Nakha’ī, Shurāhī, al-Dhahhāk, al-Zuhrī and others\textsuperscript{3}. The verses of succession\textsuperscript{4} supports this view.\textsuperscript{5} Further, those fuqahā’ who agree on the fardīyyah (compulsion) of wasiyyah differ on its scope and its application. Most say it is of general application while Tawūs, Qatādah, Jabir bin Zaid and others state that it is compulsory for those relatives who do not inherit from the tarikah while Abū Thawr states the wujūb is manifest in the verse of legacy and it had been explained in hadith to whom it is to be given, failing which this right is lost.\textsuperscript{6}

\textsuperscript{1} Al-Muhalla, Vol 9 p. 313.
\textsuperscript{2} Sahih al-Bukhārī, Vol 4 pp. 4 – 5.
\textsuperscript{3} Tafṣīr ibn Kathīr, Vol 1 p. 372.
\textsuperscript{4} Al-Qur’ān, Chapter 4: 11 – 12 & 176.
\textsuperscript{5} Tafṣīr ibn Kathīr, Vol 1 p. 372.
\textsuperscript{6} Nāil al-Awtar, Vol 6 p. 39.
1.3 Permissible Amount For Al-Wasiyyah:

There are several hadith texts on this matter. The hadith of ibn 'Umar\(^1\) quoted previously does not mention any amount. Ibn 'Abbās stated that "if only the people would reduce their wasiyyah from a third to a quarter, for the Prophet (s.a.w) said (in matter of wasiyyah): "...a third and a third is much".\(^2\) Sa'd ibn Abī Waqqās narrated that the Prophet (s.a.w) visited him during his serious illness and the former asked him (s.a.w) if he could dispose of all his wealth as wasiyyah. The Prophet (s.a.w) replied negatively. The Prophet (s.a.w) also refused a half as wasiyyah, but consented to a third, saying "a third and a third is much; it is better leaving your heirs rich then poor begging for their living".\(^3\) Abu Dardā' narrated that the Prophet (s.a.w) said: "Allāh granted you a third of your wealth at the time of your demise to increase your good deeds."\(^4\) The isnād (chain of reporters) is weak, but the rule of a third for wasiyyah is supported in other stronger, proven and authentic hadith texts. There is, thus, ijmā' that an unrestricted wasiyyah must not exceed a third and, thus, logically, the amount distributed to the heirs must not be less than two thirds of the tarikah.

The question arising now is, is it permissible to have a wasiyyah of more than one third of your tarikah. The hadīth texts quoted are clear that the muwarrith has a right of disposing of one third of his tarikah as a

\(^1\) Mukhtasar Sahīh Muslim, p. 259.


\(^4\) Nail al-Awṭār, Vol 6 p. 43.
wasiyyah and does not require the permission of anyone herein. The heirs, thus, have control over the remaining two thirds. Therefore, if a muwarrith makes wasiyyah of more than a third of his tarikah and his heirs consent to that wasiyyah being executed after the death of the muwarrith, it is so executed. If they refuse, the wasiyyah is reduced to a third of the entire tarikah. This is due to the possession rights in wasiyyah of the muwarrith and the rights of the heirs of the muwarrith to his tarikah. An heir, normally, does not receive wasiyyah from his muwarrith testator. If his muwarrith should grant a wasiyyah to an heir of his, then such a wasiyyah is only executed when all the remaining heirs consent thereto. In 'Abbas and others narrated that the Prophet (s.a.w) said: "a legacy is not permitted for an heir save when the (other) heirs consented thereto."

Some of the ḥanbali fuqaha', the shafi'is, al-Muzani and the zahirīyyah oppose this due to the hadīth text. The reason why the other heirs have to consent is that their right is attached to that wasiyyah for their share of the tarikah will be reduced by that as well as to prevent hatred, enmity and strife between the heirs. The Prophet also prohibited a Muslim parent from unequal gift distribution to his children during his lifetime. 'A'ishah narrated that the Prophet (s.a.w) said: "Be

Al-Tarikāt wa al-Wasāyyā, p. 551.
Al-Muhallā, Vol 9 p. 316.
fair and just to your children in the giving of gifts."

1.4 *Arkān al-Wasīyyah (Principles Of Legacy):*

The fuqahā’ differ on what constitute the arkan (principles) of wasīyyah. Some, like Abū Ḥanīfah, Abū Yūsuf and Muḥammad al-Shaibānī of the ḥanafīs rule that only *ijāb* (proposal) and *qabūl* (acceptance) of wasīyyah form a single *rukn* (principle) of the *ʔaqd al-wasīyyah* (contract of legacy). The *muṣī* must enact wasīyyah legally and the *muṣā lahu* (legatee) must accept it. *Qabd* (taking possession) is not a requirement with wasīyyah as is the rule with *hibah* (gift).² Zufar of the ḥanafīs opposes this ruling only *ijāb* (proposal) from the *muṣī* as the required principle. His proof is that no *qabūl* is required from the heirs in succession to the tarikah of their *muwarrith* at the death of the latter, but is automatically ceded to the heirs. The same is applicable to the *muṣī* in the case of wasīyyah.³ Abū Ḥanīfah and fellow fuqahā’ prove their argument by referring to the āyah in the Qurʾān "...and that man can have nothing but what he strives for..."⁴ If the *muṣā lahu* is possessed automatically of wasīyyah, at the death of the *muṣī*, then he had made no effort for attaining the wasīyyah, this effort being his *qabūl*. This automatic possession of the *muṣā lahu* is in conflict with the āyah quoted. They further contend that by not ruling *qabūl* of wasīyyah as a principle, one may harm the *muṣā lahu* for the wasīyyah may cause his death or some other

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4 Al-Qurʾān, Chapter 53: 39.
disadvantage, like waṣiyyah of some blind and crippled servants. To obligate acceptance of waṣiyyah, could, in certain cases, thus, be harmful to the muṣā lahu and, thus, he must be given the chance of accepting or refusing the waṣiyyah.¹

Other fuqaha’ like mālikis, shafi’is and others rule the arkan (principles) of waṣiyyah to be the mūsī, muṣā lahu, muṣā bihi (the actual legacy) and the sighah (formula for enacting the contract of legacy).² These principles have shurūt pertaining to them.

a) Shurūt Arkan al-Wasiyyah (Conditions Pertaining To The Principles Of Legacy):

Ḥanafis rule that it is conditional that the qabul of waṣiyyah must complement and agree its ijab. If not, that principle is incomplete and thus no ‘aqd al-waṣiyyah is found.³ Qabul must take place after the death of the mūsī as waṣiyyah is tamlik (transferred ownership) at death. Qabul of waṣiyyah during the lifetime of the mūsī is thus invalid.⁴

b) Shurūt al-Musi (Conditions Pertaining To The Legator):

The mūsī must fulfil the following shurūt before his waṣiyyah can be valid. These shurūt are as follows:

- he must be of ahl al-tamlik i.e someone who can possess someone else of his possessions. This requires him to be ‘aqil and mukallaf. The

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   Minhāj al-Tullāb, p. 73.
   Al-Iqna‘, Vol 2 p. 57.
   Al-Tarikat wa al-Waṣāya, pp. 542 – 543.
wasiyyah, thus, of a majnūn or a maʿtu’ is invalid. Wasiyyah of a saghir, even a murāhiq (adolescent) if not mukallaf yet, is also invalid, even if his wali consents thereto. The only exception is his instruction for his dafn (burial) on condition that he is a sabi mumaiyiz. This is ḥanafī doctrine. All the other fuqahā’ require 'aql as a condition for the musī. Mālikis rule validity of the wasiyyah of a sabi mumaiyiz, but they differ as to purpose herein. Some mālikis ruling invalidity when such a saghir makes wasiyyah for the sultan, but valid if it is for qurbah (religious beneficence), while others do not lay down this condition.1

Shafi’īs rule the wasiyyah of a sabi as invalid as they rule bulugh and 'aql as necessary requirements for the musī. The ḥanbalis require the musī to be 'aql, thus, the wasiyyah of the majnūn mutbiq (permanently insane) is invalid. As for those who oscillate between being insane and sanity, their wasiyyah is valid in times of them being 'aqlī. The wasiyyah of the inebriated is invalid. As for the weak minded (daʿif al-'aql), but who is rashid, his wasiyyah as well as his isa’ (appointment of curator for his minor children) is valid. Tamyiz is required, but not bulugh and therefore the wasiyyah of a sabi mumaiyiz is valid.2

The musī must also not be insolvent as debts are settled before the execution of a wasiyyah.3 Islam is not a condition, according to the

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Al-Tarikât wa al-Wasa‘yā, p. 545.
hanafis, thus, the wasiyyah of a nonmuslim to a Muslim and vice versa is valid.\(^1\) They quote the Quranic ayah (verse) "Allah forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them..."\(^2\)

c) Shurut al-Musa Lahû (Conditions Of The Legatee):

The mūsā lahû must fulfill the following conditions:

- he must be found at the time the wasiyyah is made by the mūsī. Wasiyyah is tamlīk (transfer of ownership) and if the mūsā lahû is ma'dūm (non existent) at the time of the enactment of wasiyyah, tamlīk had been effected to a non existent instance which is void in shari'ah. This point gives rise to wasiyyah for a hamīl (unborn child). There is a basic rule that the wasiyyah to a unborn child is valid. There is no known difference herein amongst the fuqaha' and its the ruling of, amongst others, al-Thawrī, al-Shafī'i, Isḥāq, Abū Thawr and ahl al-ra'i.\(^3\) Hanafis rule that if a wasiyyah is made for an unborn child and such a child is born within six months of the enactment of the wasiyyah, then such a child succeeds to that wasiyyah as he was found when it was enacted. If that child is born before that period, the wasiyyah is void as he was not found at the enactment of the wasiyyah.\(^4\) Shafī'i's share

\(^1\) Al-Hidayah, Vol 4 p. 233.

\(^2\) Al-Qur'an, Chapter 60: 8.

\(^3\) Al-Mughni, Vol 6 p. 56.

this view\(^1\) as well as hanbalis.\(^2\)

Malikis rule that the unborn child succeeds to wasiyyah when born alive according to their definition of a live birth or even if the foetus was not found at the time of the enactment of wasiyyah. Thus, if someone says; "if a foetus is found of so and so, such a wasiyyah will be for that child", such a wasiyyah is valid and executed when found and the issue born alive, irrespective of duration between enactment of wasiyyah and birth of that child, succeeds to the wasiyyah.\(^3\) Most of these rulings are based on the issue of when is an unborn child found in the mother's womb. Due to the difficulty of ascertaining this accurately at the time of these rulings, these different rulings were founded. Nowadays, pregnancy can be confirmed very early, which makes the issue of wasiyyah al-haml (legacy of the unborn) much easier.

- the musā lahu must be known even if by description only, like the fuqara' (poor) or masakin (needy). Malik and al-Shafi'i concur hereon, basically\(^4\), but al-Shafi'i rule that if the musā lahu is a person he must be distinctly known. Thus, a wasiyyah for Zaid is invalid.\(^5\)
- the musā lahu must not be the murderer of his musi. If he is, the wasiyyah is cancelled. This is so irrespective if it is al-qatl al-'amd or al-qatl al-khata'a. However, if the heirs of the

\(^1\) Minhaj al-Tullab, p. 73.


\(^3\) Al-Tarikat wa al-Waṣaya, p. 558.

\(^4\) Fiqh 'ala al-Madhahib al-Arba'ah, Vol 3 pp. 319, 322 & 324.

slain muwarith approves the wasiyyah to the murderer of their muwarith, it is executed if it was al-qat1 al-khata’a and not if it is al-qat1 al-‘amd even if the heirs approve the wasiyyah. This is all ḥanafi doctrine. Mālikis rule that if someone strikes someone a blow from which he later dies and after that blow and before his death, he grants a wasiyyah to the perpetrator of the crime, then such a wasiyyah is valid on condition that the mūṣi knows that person struck him. If, however, he made a wasiyyah to someone and thereafter that mūsā lahū strikes him a blow from which he dies, then that wasiyyah is cancelled, whether the victim knows the perpetrator of the crime or not. Ḥanbalis exclude the murderer of the mūṣi from the wasiyyah whether it is al-qat1 al-‘amd or al-qat1 al-khata’a, whether the act was committed before or after wasiyyah was enacted for the mūsā lahū.

there is a difference amongst the fuqahā’ about wasayā when the mūsā lahū deceases before the mūṣi. Most fuqahā’, amongst them ‘Alī, al-Zuhrī, Ḥammād bin Sulaimān, Rābi‘ah, Mālik, al-Shāfi‘ī and others rule that the wasiyyah goes to the walad mūsā lahū (child of the legatee), while ‘Ātā’a rules it to go to the heir of the mūsā lahū as this heir stands in the place of the mūsā lahū. This is subject to the mūṣi knowing about the demise of the mūsā lahū and nothing happened which altered the wasiyyah.

a wasiyyah for a deceased person is void. This is the ruling of Abu Hanifah al-Shāfi‘ī, and the hanbalis. Mālik rule validity hereof and the wasiyyah goes to his heirs. Malik argues that wasiyyah is for the benefit of the mūsā lahū and

this is procured here and this resembles the same situation as when the ṣūṣā lahu was alive.¹

Qabūl al-wasiyyah (acceptance of a legacy) by the ṣūṣā lahu, if he is a person, is required after the death of the ṣūṣī. If it is an instance, only death of the ṣūṣī is required.² If the ṣūṣā lahu rejects the wasiyyah, it is abrogated and cancelled. This is so if done after the demise of the ṣūṣī. If done before the demise of the ṣūṣī, the wasiyyah stays intact as qabūl must be after the demise of the ṣūṣī. Wasiyyah is also cancelled when the ṣūṣā lahu rejects it after the demise of his ṣūṣī but before he (the ṣūṣā lahu) accepts it. When a wasiyyah is cancelled, it reverts to the tarikah of the ṣūṣī and forms part of it for distribution to his heirs.³ If the ṣūṣā lahu deceases after his ṣūṣī and before he (the ṣūṣā lahu) had accepted the wasiyyah, then the heir of the ṣūṣā lahu takes his place.⁴ Hanbalis differ on this question; a group of them ruling that the warith ṣūṣā lahu (heir of the legatee) can accept or reject the wasiyyah as he stands in the place of the ṣūṣā lahu who is his muwarrith. This group ruled as such due to a reported ḥadith of the prophet (s.a.w) which says "he whoso leaves a ḥaqq (right) (such) goes to his heirs". The other group of hanbalis, amongst them ibn Ḥammād rule the wasiyyah as cancelled as qabūl by the ṣūṣā lahu is required and he is maʿđum.⁵

1 Al-Mughni, Vol 6 p. 21.
d) *Shurut al-Musa Bihi* (Conditions Of The Actual Legacy):

The *musa bihi* is the actual *waṣīyyah* which has to be transferred from the ownership of the *musī* to that of the *musā lahu*. The following rules are applicable here:

- **Ḥanafis** rule that the *musa bihi* must be found at the time of enactment of the *waṣīyyah* when the latter is *muʿāiyān* (specified) or *shaʿīʿan* (mixed with other possessions of his). If not so found, the *inʿiqaḍ al-waṣīyyah* (enactment of legacy) is void. However, when not specified, like leaving someone a third of his possessions, but at the time of the *waṣīyyah* the *musī* has nothing, but later on profits from a venture, such a *waṣīyyah* is valid by Ḥanafi ruling. Al-Ṣafīʿī does not require the presence of the *musa bihi* at the time of *inʿiqaḍ al-waṣīyyah*. **Hanbalis** share this Ṣafīʿī view. They also rule that it is not required that the *musa bihi* be such as to be delivered to the *musī lahū*, like birds in the sky or animals in the wild.

- **Ṣafīʿīs** and **Ḥanbalis** allow the *waṣīyyah* of a non-*tāhir* (impure) nature provided it is used for the purposes prescribed, like *waṣīyyah* of *zait mutanajjis* (polluted oil) which may be used for anything save for the *masjid* (mosque).

- Some fuqaha' like Ḥanafis, Ṣafīʿīs and Ḥanbalis allow the *waṣīyyah* of *manfaʿah* (usufruct) of an

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asset for any period specified to a musā Iahu.1 Ibn Abi Laila, ibn Shubramah and the zāhirīyyah oppose this.1

e) Shurūt Sighah al-Wasiyyah (Conditions Of The Formula For Legacy):

Malikis require that the wording be such that enactment of wasīyyah is understood by it. This applies to the verbal wasīyyah. The same applies to the written wasīyyah as well as for the one enacted by an akhras (dumb person), the latter's sign which must be clearly understood to mean the enactment of a wasīyyah. Shāfi‘īs share, basically, these rules as well as hanbalis. Hanafis rule that the ījāb and qabul must fulfil the requirements of enactment of wasīyyah.2

f) Hukm al-Wasiyyah (Ruling On Legacy):

A wasīyyah may sometimes be wājib (necessary), mandūb (preferred) and at times muḥarramah (forbidden). Waṣīyyah wajibah (necessary legacy) is for instances in which the rights and possessions of others, like items for safekeeping belonging to someone else, or debts that must be settled, features. Waṣīyyah mustahabbah (preferred legacy) is for settling the rights of Allah like outstanding zakah and fidyat al-siyām (penalty incurred during fasting Ramadan) while waṣīyyah muḥarramah (prohibited legacy) is exhortation or instructing in sinful ways or acts. Waṣīyyah mubahah (permissible legacy) is that of the rich for their rich relatives and kin. This is all ḥanafi doctrine. There are

1 Al-Muqni‘, p. 174.
   Al-Ikhtiyār, Vol 5 p. 70.
   Kifāyah al-Akhyār, Vol 2 p. 32.
   Al-Majmu‘, Vol 15 p. 403.


other rules applicable to other forms of wasāyā which have a religious nature. These will be dealt with later on. Shafi’īs agree with the ḥanafī definitions of wasiyyah wajibah and wasiyyah muharramah. They also have wasiyyah makruhah (detestable legacy) which is a wasiyyah of more than a third, while they define wasiyyah mustahabbah (preferred legacy) as the wasiyyah for your relatives who are not heirs of you or for the poor. Wasiyyah mubahah is that which is for the rich. Malikis have the same kind of wasāyā save that they give other names to it. Ḥanbalis have four kinds of wasāyā. Wasiyyah wajibah is like that for other fuqahā’ save that they include the rights of Allah under this heading, like outstanding zakah and performance of outstanding hajj. Wasiyyah mustahabbah is that for your poor relatives who are not heirs of you on condition that the müsi left much behind according to the understanding of his place of residence and that it does not exceed a fifth of the tarikah so that the heirs are not disadvantaged. Wasiyyah makruhah for them is the wasiyyah of a müsi who is not well off and causes problems for his needy heir by this wasiyyah. Wasiyyah muharramah is that which is more than a third. They, thus, prohibit anyone who has heirs, from doing this. This is actually of the wasāyā makruhah. Besides these categories, other wasāyā are wasāyā mubahah.

g) **Instances Of Wasaya (Legacies):**

**Case 1 - Performance Of Haji (Major Pilgrimage):**

There is a general consensus by the fuqahā’ that every avenue which is good and beneficial to the Muslims and is not prohibited in shari‘ah, is a valid avenue for wasiyyah.¹ The fuqahā’ have views and rulings on these instances. One being the validity or otherwise of wasiyyah for the performance of hajj and recitations of Qur‘an after your death. Hanafis rule that it is mustahab to have the hajj made for him who did not do so during his lifetime. Some hanafis rule it to be wajib. This is conditional that there is enough money for the deputy to perform that hajj for that deceased. Malikis rule that it is necessary to execute the wasiyyah for performance of hajj when the muṣī so instructed.² The cost for this is taken from a third of the tarikah (estate). If the muṣī did not instruct herein, it is not performed as hajj is also a bodily act and as such does not accept deputising. However, the wasiyyah herein must be executed.³

Both shafi’is and hanbalis rule validity of such a wasiyyah⁴. This is also the view of ibn ‘Abbas, Zaid bin Thabit and Abu Hurairah. Shafi’is and those agreeing with them, rule that this is taken from his entire tarikah. These rulings are based on the hadith narrated by ibn ‘Abbas and transmitted by al-Bukhārī which states that a woman of the tribe of Jahm told the Prophet (s.a.w) that her mother vowed to perform hajj but died before she could perform it. She asked the prophet (s.a.w) if she could

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¹ *Al-Majmu‘*, Vol 15 p. 403.
perform it in her stead to which he (s.a.w) replied: "If your mother had a debt, would you have settled it? Settle the debts of Allah because He merits it more that you should settle His debt (you owe Him)."¹ Due to Quranic law² there is ijma' by the fuqaha' that hajj is compulsory on all those Muslims who are sane and pubescent and have the means to perform it, to do so once in their lifetime.³

Case 2 - Recitation From Qur'an:

Hanafis rule that a wasiyyah for recitations of Qur'an for the deceased whether at his home or graveside, is void and must not be executed. A hanafi view is that the payment may be taken as sadaqah and not a fee for recitations.⁴ They also rule butlān (non validity) for wasiyyah for building or decorating graves save when it is necessary, like preventing wild animals from digging out a corpse or from the smell to pour forth from the grave. The latter rule is based on the ijma' of the fuqaha'. Shafi'is and hanbalis allow the execution of wasiyyah for recitations of Qur'an for a person after his death. Malikis and hanbalis allow the wasiyyah for a masjid although the latter is not normally a recipient of wasiyyah. It is allowed due to being birr.⁵ There is ijma' that a wasiyyah instructing in the performance of salah or siyām and the like missed, to be performed by someone on behalf of the deceased legator is void as these are duties of body and person only and no deputising is allowed for it during your lifetime nor after your

¹ Fiqh al-Sunnah, Vol 1 p. 636.
² Al-Qur'an, Chapter 3: 97.
death. Any sinful act in a wasiyyah is not executed either by ijmā' of the fuqahā'.

**Case 3 - Non Specificatory Wasiyya (Legacies):**

This has mostly to do with inaccurate speech or wording for wasiyya. Being of the birr and beneficial to the musā lahum as well as the müsi, the fuqahā' allowed some leeway in this matter. Thus, the wasiyyah for neighbours and relatives are valid, but the fuqahā' differ on its scope then. Abu Hanīfah rule that the wasiyyah for neighbours is for all those whose houses which are inseparably attached (mutalaziqun) to the müsi's house, irrespective who they are while Abu Yusuf and Muhammad al-Shaibānī rule it for all those who are in one area defined as people who use one masjid of one congregation and of one din.

These fuqahā' also differ on the wasiyyah for relatives. Abu Hanifah ruling it for the nearest arham maḥārim (blood relatives of the prohibited category in marriage) or their descendants on condition they are two or more and subject to the musā lahu not being excluded from legacy in the same way as in mirath as well as not being an heir of the müsi. Thus, the parents and child of the müsi are excluded, but not the ibn al-ibn if found with the ibn, for example. Abu Yusuf and Muḥammad go against all this and rule it to be for all the relatives, near or far removed from the müsi, whether it be one or more persons or whether they are Muslims or not.1 Malikis rule that wasiyyah for neighbours are for all those "living around" the house of the müsi while wasiyyah for relatives are for all those relatives who are not heirs of the müsi. There are lots of details in this matter which is actually

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derived from 'urf and as such may not be relevant to a specific region or place under the laws of 'urf.

Wasiyyah for neighbours, according to al-Shafi'i, is for 40 houses on each side of the musi's house, which comes to 160 households. Hanbalis share this view but add that the share for each household must be divided equally between all members of that household while wasiyyah for relatives are for the nearest only. Shafi'is, further, rule that wasiyyah for relatives are for all the relatives in equal shares while wasiyyah for the poor is for three and more persons as three is the least for jama'ah (a congregation) in shari'ah. Similarly, wasiyyah for the 'ulama' is for all save if a category is specified, like the mufassirün, in which case, it will be only for them.1

h) Tazahum al-Wasaya (Several Legacies From The Legator):

A musi may leave more than one wasiyyah. In this case, there are three possibilities:
- either all the wasaya are for people,
- or all are for settlements of the huquq Allah owed by the musi, or
- they are a mixture of the two mentioned kinds.

Case 1 - Wasaya (Legacies) For People Only:

In this case, the wasaya are, each, not more than a third or more than that. In the case where the wasaya, each of them, are less than a third, like 1/3, 1/4 and 1/6, then all are executed if the heirs of the musi approves. These wasaya will be 4/12 (which is 1/3), 3/12 (which is 1/4) and 2/12 (which is 1/6), all adding up to 9/12 or 3/4 of the tarikah of the musi, leaving 1/4 for the heirs as tarikah. If the heirs refuse to execute

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the mentioned wasaya over 1/3 of the tarikah, then the wasaya is to be taken from only 1/3, each musâ lahmu taking what is his share proportionally to their share. This 1/3 for wasâyâ is thus divided into 12 equal parts and the musâ lahmu meriting 1/3 get 4 parts (4/12), the one meriting 1/4 gets 3 parts (3/12) and one meriting 1/6 gets 2 parts (2/12).¹

In the case where the musî made more than one wasiyyah and it is more than 1/3, like a wasiyyah of 1/2 for one and 1/3 for another, if the heirs of the musî accept this, the wasâyâ are executed which means 3/6 and 2/6 goes for wasâyâ and 1/6 remains for the heirs to be distributed as required in mirath. If the heirs refuse, the wasâyâ are reduced to 1/3 of the tarikah. There is a difference between the fuqahâ’ as to the distribution of this 1/3 between Abu Hañifah and the other fuqahâ’. The former rule that each musâ lahuma (two legatees) share equally in that 1/3 i.e. 1/6 each. Abu Yusuf, Muñammad al-Shaibânî, mâlikis, shâfi’îs and hanbalis rule that the musî’s wishes must be obeyed and thus the 1/3 is divided into 5 parts; 3 parts for the musa lahmu who is to have received 1/2 (which is 3/5) and two parts for the one who was to receive 1/3 (which is 2/5). The zâhiriyyah rule that one starts with the one first mentioned by the musî and execute his wasiyyah from that. If that exhausts the 1/3 of wasâyâ the other wasâyâ are automatically cancelled. The zaidiyyah agree with the majority view in this mas’alâh as expressed by Abu Yusuf and others.²

¹ Al-Tarikât wa al-Wasâyâ, pp. 585 - 586.
Case 2 - Wasāyā li Allāh - Legacies Of The Right Of God:

This has to do with the commanded acts of worship which the musī defaulted during his lifetime. These missed acts cannot be substituted by anyone or anything, including wasāyā. Acts which can be performed on your behalf, like payment of outstanding zakāh and ḥajj has to be executed, according to most of the fuqahā', while acts like salāh and siyām Ramadān (fasting of Ramadān) cannot be repaid. Wasīyyah given in these cases, is a sadaqah for enhancing the standing of the person in virtue as against the sin of default in these duties. There is no such thing as purchasing exemption for missed salāh and siyām Ramadān through wasīyyah. If a musī makes wasīyyah for a category of acts and they are all of the same kind, like only farḍ or only sunnah (optional) acts, and these can be executed from 1/3 of the tarikah, then these are executed. If the shares of the wasāyā differ, like a musī decreeing 1/3 for ḥajj, 1/4 for unpaid zakāh and 1/4 for kaffārah, and the heirs refuse to give more than 1/3 for wasāyā, then all these acts share in that 1/3 proportionally. The actual shares of the wasāyā are; 4/12 for ḥajj, 3/12 each for zakāh and kaffārah. This make it 10 parts (adding the nominators). The 1/3 is divided into 10 equal parts; 4 for ḥajj, 3 for zakāh and 3 for kaffārah.

If the musī decreed 1/3 for his ḥajj, zakāh and kaffārah and it is too little to cover all these acts, then the fuqahā' differ, quite widely, in the settling of this issue. Their rulings range from settling what can be settled and cancelling those which cannot be settled to a
complicated system of precedence of forms of 'ibadat which are found in fiqh works.¹

Case 3 - Wasāyā li Huqūq Allāh (Legacies For Rights/Duties Owed To God) And Wasāyā li al-İbad (Legacies For Persons):

When a müsi leaves wasāyā for settling the huqūq Allāh and wasāyā for people, but did not specify any share of his tarikah for it, 1/3 is given to cover them. Thus, is he leaves unspecified wasāyā for ḥajj, zakāh, kaffārah and for a person, then the 1/3 is equally divided between these four. Since all three huqūq Allāh are of a compulsory nature, each receives an equal share for execution. If the huqūq Allāh differ in degree, like some being farḍ and some sunnah, like wasāyā for ḥajj, zakāh and ṣadaqah and for a person, then 1/4 of the 1/3 of the tarikah goes for the person and the 3/4 thereof is made into one and the huqūq Allāh executed starting from the most major of these huqūq. This is done till all the huqūq Allāh had been met or until the proceeds are exhausted and the remaining wasāyā are cancelled due to insufficient means for its execution.²

i) Ruju' 'An al-Wasiyyah - Retraction Of A Legacy:

There is broad ijma' that the müsi can withdraw any wasiyyah of his at any time before his death. This is the ruling of 'Umar, 'Atā’ā, Jābir bin Zaid, al-Zuhri, Qatādah, Mālik, al-Shafī'i, Aḥmad, Ishaq and Abū Thawr. Al-Sha'bi, Ibn Sirin, Ibn Shubramah and al-Nakha'i also agree save that they rule the wasiyyah 'itaq (legacy of freeing a slave) as irretractable. Ruju' is effected by speech or an act

¹ Al-Tariqat wa al-Wasāyā, pp. 587 - 588.
indicating rujū', like giving away something or selling land you had made wasiyyah of.¹

j) *Al-Wisayah (Appointment Of A Wasi – Curator):*

The word *wisayah* is another plural of *wasiyyah* meaning, in this case, appointment of a *wasi*. Thus, we speak of *awsā ila fulan* meaning "making him your *wasi* over your possessions and minor children after your death."² A person can appoint someone to administer his possessions after his death and be guardian of his minor children. This person is called, in *shari'ah*, a *wasi*. This kind of *wasi* is called *al-wasi al-mukhtar* (appointed curator). This *wasi* is appointed by the *wali* and its acceptance is necessary, during the lifetime of the *wali* or after his death, unlike *wasiyyah* which can only be accepted after the death of the *musi*. It is likewise imperative that the *wali* be informed of the refusal or retraction of acceptance of *wasi* during his lifetime. Rejection of *wisayah* after the death of the *wali* may be reversed, before the *qādi* confirms the retraction. *Qabul* of a *wasi* or *wisayah* is by speech or an act, such as carrying out the duties of a *wasi*.³

i) *Shurut al-Wasi* (Conditions Of The Curator):

- All the *fuqahā’* agree that the *wasi* must be *‘aqil*, *mukallaf* and *rāshid*. The *wasi* must also be a Muslim if the minor children are Muslims. All *fuqahā’* also agree that the *wasi* must be *amin* (trustworthy) and *‘adil* (righteous). Some *fuqahā’* rule *‘adl ẓahiran* (apparent righteousness) as being sufficient, while others, like *shafī‘is* require both *‘adl

¹ *Al-Tarikat wa al-Wasāya*, pp. 590 - 591.
² *Al Munjid*, p. 904.
³ *Al-Tarikat wa al-Wasāya*, pp. 90 - 92.
zāhiran and ʿadl bātinan (righteousness in private life). The shahadah of righteous Muslims being taken to establish this quality. There is a difference amongst the fuqahaʾ as to whether qudrah (physical strength) to see to the duties of the wasī is required, some requiring it while others, like the ہانبالی، not requiring it, the latter ruling that a stronger person can be appointed to assist the weak wasī. An ʿama (blind person) and an akhras (dumb person) can be a wasī on condition that the latter’s sign is understood. Dhukurah (masculinity) is not a requirement for some, like the ہانبالی، who allow a woman to be a wasī.

Some fuqahaʾ like the ہانافی، rule that if a wasī cannot attend to his duties properly in certain matters in the way he did previously, the qādi appoints an assistant to assist him therein and does not relieve his position. If he still cannot see properly to his duties as wasī, the qādi replaces him with another wasī. If the wasī had the required qualities for a wasī and later exhibits a quality or qualities in conflict herewith, he is relieved of his duties as wasī. An example being a Muslim curator apostatising from ہسل or is guilty of theft. Al-Shāfiʿi especially rules that the wasī must not be an enemy of the those under his care in curatorship.

It is the general rule that if two or more curators are appointed by the walī, then each can act independently from one another save if the instructions are such that prohibit such independent actions. Some fuqahaʾ, however, allow one of the curators to act individually in certain matters, like collecting the
possessions of the wali, burial of him, the
return of items of safekeeping to its rightful
owners and the sale of perishable items.\(^1\) Abu
Yusuf rules that authority of \(\text{waṣīyah}\) is
established in each of the multiple curators
and each can, thus, act on his own.\(^2\)

- if a wasi appoints, before his death, another
person to continue with the curatorship, it
will be correct according to some fuqaha',
like hanafis. If the wasi did not do so, the
qādi appoints a new wasi.\(^3\)

(ii) 'Ajr al-Wasi (Payment Of The Curator):

The fuqaha' differ on payment for the wasi.
Some rule that if he is poor, he is entitled
to payment and if he is rich, no payment is
due to him. Others rule that irrespective of
the financial position or standing of a wasi
he is due for payment while others rule that
no payment is due to any wasi, rich or poor.\(^4\)
This ruling is based on the fuqaha's
interpretation of the Quranic āyah on this
matter. The āyah reads: 
"...But consume it not
wastefully, nor in haste against their growing
up. If the guardian is well-off let him claim
moderate remuneration and if he is poor let
him have for himself what is just and
reasonable."

\(^2\) Aḥkām al-Awlad, pp. 93 - 94.
\(^3\) Fiqh 'ala Madhahib al Arba'ah, Vol 3 p. 351.
\(^4\) Aḥkām al-Awlad, p. 96.
\(^5\) Al-Qur'ān, Chapter 4: 6.
CHAPTER 5

AL-WAQF (ENDOWMENT)

1 Al-Waqf (Endowment):

Waqf (pl. awqaf - endowments) are of the oldest Muslim institutions which has survived till this day and are being created continuously. It is one of the institutions that preceded the modern ministry of social welfare. In Muslim countries today, waqf alleviates considerably the work and responsibilities of the social programme of government. In South Africa, especially in the former Natal and Transvaal, numerous awqaf instances have been created by Muslim philanthropists which contribute considerably to Muslim welfare, education as well as aiding nonmuslims.

1.1 Definition:

Literally, waqf means "opposite of sitting". Waqf al-'ard means habs al-'ard i.e "freezing it".1 "Freezing" here refers to its ownership. In the shari'ah waqf is "the freezing (taḥbis) of an asset and retention of ownership of it by the owner or transfer of the ownership to Alḥāh and the benefits or proceeds from that asset being given away as charity."2 This definition covers the various definitions of the fuqaha'. A waqf is never sold (yuhāb), nor given in gift (yuhab) nor inherited (yurath).3 Waqf is sometimes called ḥabs by some fuqaha', like the zahiriyah.4

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1 Lisan al-'Arab, Vol 6 p. 4898.
2 Subul al-Salām, Vol 3 p. 87.
3 Al-Muhalla, Vol 9 p. 175.
1.2 *Mashru’iyyah al-Waqq* (Validity of Endowment):

The validity of *waqf* is established in the Qur’ān and sunnah as well as the practice of the saḥābah. As for the Qur’ān, the fuqahā’ quote: "...Do what is good to your closest friends..."\(^1\) and "Oh you who believe! Bow down, prostrate yourself and adore your Lord, and do good that you may prosper."\(^2\) Various ḥadīth texts have been reported dealing with *waqf*. Abu Hurairah narrated that the Prophet (s.a.w) said: "When a person dies, all his deeds cease, save three things; sadaqat al-jariyah (continuous charity), knowledge he left behind from which people benefit and a pious child who prays for him."\(^3\) The fuqahā’ interpret sadaqat al-jariyah to mean *waqf* for it is enacted for perpetuity. The practice of *waqf* comes from two main acts of two senior saḥābah, namely 'Umar and 'Uthman. As for 'Umar, what he asked the Prophet (s.a.w) what to do with the land he acquired in Khaibar to which the Prophet (s.a.w) replied "freeze the asset and distribute its produce as charity on condition that such is not sold, nor given in gift nor inherited." 'Umar gave such charity to the poor, kin, visitors and travellers.\(^4\) There is no harm in the *mutawalli*\(^5\) eating of it in moderation or feeding a

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2. Ibid, Chapter 22: 77.
5. the term *mutawalli* is usually translated as "trustee". However, in *waqf* matters, "trustee" is inappropriate as a trustee under Trust laws can own the trust property. A *mutawalli* of a *waqf* can never own a *waqf*. He is actually a manager of the *waqf*. Thus, *mutawalli* in this chapter will be translated as "manager".
friend therewith on condition that it is not done for profit, according to some fuqahā'. Ibn 'Umar continued his father's waqf.¹ This proves that waqf is for perpetuity. 'Uthman bought the well of Rumah, the only well with sweet water in al-Madīnah, and made it waqf for the Muslims with him using it also.² Other instances of waqf by the senior sahābah have been reported. Abu Bakr gave his house as waqf to his son. 'Āli gave his lands in Yanbu as waqf, while Zubair gave his houses in Makkah and Mīṣr (Egypt) to his son. Other sahābah did likewise.³ Waqf is a very old Islamic institution and some of it had survived for more than a millennium.⁴ Many awqāf institutions are found throughout the Islamic world and in minority Muslim situations, like in South Africa. Waqf, as an institution, is thus not only a religio-historical phenomenon.

In its operation, it is interesting to note that awqāf, throughout the ages, had provided different essential services such as health, education and municipal services for which the governing authority did not pay a cent. This aided government in reducing, massively, public expenditure and reducing public lending.⁵ From this, in practice, waqf prevented

¹ Nail al-Awtār, Vol 6 p. 25.

Nail al-Awtār, Vol 6 p. 25

³ Al-Mughni, Vol 5 p. 599.
Nail al-Awtār, Vol 6 p. 7


⁵ Al-Shajarah, p. 64.
complete centralisation of services and thus acts as a brake on an authority which has ulterior aims in providing necessary services to the citizens.

1.3 Ahkām 'Ammah li al-Waqf (General Laws of Endowment):

waqf is enacted immediately it is uttered or delivered to the beneficiary thereof. It is, then, forbidden to sell it, give it in gift or inherit it, and according to many fuqahā' the ownership of the asset is ceded to Allāh. This is the ruling of al-Shāfi‘i and the hanafis. Malik and Ahmad, in one of his rulings, rule that ownership is not lost. According to Abu Hanifah, ownership of waqf property is only lost when the qādi so rules it as waqf. Abu Yusuf rule that ownership ends immediately waqf is enacted while Muḥammad rule that it only lapses when the mutawalli of the waqf had been appointed and it then cedes to the ownership of Allāh. Abū Yusuf shared Abū Hanifah's ruling initially, but changed it when he heard, in Baghdad, the hadith of the waqf of 'Umar and said: "If my colleague (ṣāhibi) heard this, he would have changed his ruling". Abū Hanifah's ruling is, thus, not ḥanafi law.

the fuqahā' differ as to whether qabūl is necessary from the mawqūf 'alaihi (beneficiary of an endowment). Some fuqahā', like some ḥanbalis, rule that if the beneficiary is the poor, acceptance is not required, but when it is a specific person, it is required. This is also the view of al-Khattāb of

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1 Kitāb al-Mabsūt, Vol 12, p. 31. Minhāj al Muslim, p. 434.
2 Al-Mughni, Vol 5 p. 600.
4 he is referring here to his mentor, Imam Abū Hanifah.
5 Al-Ikhtiyar, Vol 3 p. 41.
the hanbalis. Another senior hanbali, al-Qadi, rule no such requirement is necessary.\(^1\) Shafi'is share the view of al-Khaṭṭāb.\(^2\)

- waqf is enacted by speech which indicates waqf, whether such speech is clear or metaphorical or an act indicating waqf like one building a masjid and allowing the Muslims to offer salah therein, or making land of yours a maqbarah (graveyard) and allowing people to be buried therein. There is some difference amongst hanafis on some of the rules in this case.\(^3\)

- it is forbidden for the waqif (one creating an endowment) of receiving anything from the waqf he created, save if this shart is set. This is the ruling of ibn Abī Lailā, ibn Shubramah, Abū Yusuf, Zubair and ibn Shuraiḥ and the hanbalis. Malik, al-Shafi'i and Muhammad al-Shaibani rule this shart as invalid and the waqf as such as invalid. Ibn Abī Lailā and others prove their argument on grounds of the hadith of 'Umar on his waqf where it is stated that the wali of the waqf and his friend may eat of the produce of the lands. A similar argument is taken from the waqf of 'Uthman making the well of Rumah waqf for the Muslims, but he himself using the well also. Should the waqif make a shart that his family may also partake of the benefits of the waqf it will be valid according to ibn Abī Lailā and others. It is reported that 'Umar made waqf for his daughter Hafṣah and thereafter for her family.\(^4\)

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However, a *shart* for selling the *waqf* later on is invalid and no *waqf* comes into operation.¹

- the fuqahā' differ on a *waqf* made for yourself and later for the poor. Some, like al-Shāfi‘ī and the hanbalis rule this kind of *waqf* as invalid as it contradicts a principle of *waqf*. Others, like ibn Shubramah, Abū Yūsuf, ibn Shuraih and ibn Abī Lailā rule it as valid.

- *waqf* for your children necessitate that they all share equally in the *waqf*, save if there is a provision to the contrary. This is so because *waqf* is in the meaning of ṣadaqah and *hibah* and in such cases one is not allowed to discriminate between your children.² This is due to the *ḥadīth* narrated by Nu‘man bin Bashīr on his father giving ṣadaqah to him alone and the Prophet (s.a.w) ordering him not to do so saying: "Fear Allah and be just in matters of your children" (i.e. give equal shares in charity).³

- *waqf* for a group and their subsequent descendants continue as long as such are alive. When no one of them is found, the *waqf* goes to the poor. In the case of *waqf* created by you for your family and relatives, such is due to them as long as they live. If they become extinct, it also goes to the poor as *waqf* is for perpetuity and for charitable causes.⁴ *Waqf* is of the birr and the poor are the most meriting of such acts.

- *waqf* made in *maraḍ al-mawt* by the *waqif*, is taken from a third of his tarīkah. Anything more, requires

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³ *Mukhtāṣar Sāhīh Muslim*, p. 261.
the consent of the heirs of that person as their right, i.e their inheritance share is now involved.¹
- setting a *shart* for the commencement of a *waqf* is valid according to some *fuqaha*², like al-Kharqi, as reported by Abu al-Khaṭṭāb, while al-Qādi of the Ḥanbalis rule it as invalid.²
- when a *waqf* is destroyed or derelicts to destruction, it may be sold on condition that the proceeds are used to purchase a new *waqf* for those meriting *waqf*, like a house, which is a *waqf* derelicting as to become unhabitable or which was destroyed by fire, for instance. The same applies to beasts of burden³ which were made *waqf*. *Hanbalis* especially subscribe to this, basing such ruling on one of the principles of *waqf* being that it is not sold, nor given in gift nor inherited but is for perpetuity.⁴
- *waqf* of plants which yield food or fruit, when such reach the *nisāb* (weight necessitating *zakāh*), then *zakāh* is levied on such produce. This is the rule of Malik and al-Shafi‘i. Šawās and Makhūl rule no *zakāh* due on such produce as the person or persons benefitting from the *waqf* is/are not owners of the *waqf* land. Ḥanbalis agree with the ruling of Malik and al-Shafi‘i.⁵
- that from which one cannot benefit from save by its use and using it in such a way as to decrease or exhaust the asset, is invalid as a *waqf*. Examples hereof are gold, silver, eatables, fluids for drink as well as money. This is the general ruling of the

³ this can apply to vehicles made *waqf* nowadays.
fuqahā' save what is reported from Malik and al-Awza'i that waqf of food is valid. By gold and silver is meant money coins of gold and silver and not jewellery, the latter of which is valid as waqf.¹ Some fuqahā' have different rulings on these issues. There is difference between the fuqahā' on the waqf of movables. Ḥanafis have consensus on movables of an immovable waqf instance, like farm implements on a farm which is waqf. They differ when the moveable alone is the actual waqf. If there is usage (ta'amul) of this, it is sanctioned by 'urf² and if not, then not. If it is something that is needed by the people (ma yahtaju ilaḥi al-nās), then it is also permissible, subject to it not being forbidden in shari'ah. Abū Yusuf does not sanction the waqf of masāhif (Qur'an copies), dana'ir and darāhīm³ (old Arabian gold and silver coins) while Muhammad allows it, as, when people have a certain usage⁴, qiyās is not employed for arriving at a ruling. Muhammad actually sanctions waqf of movables on grounds of istiḥsān.⁵ The waqf of money, generally, is valid in ḥanafi, mālikī, and shāfi'i rulings and invalid in ḥanbalī ruling.⁶

¹ Al-Mughnī, Vol 5 p. 640.
⁴ Al-Hidayah, Vol 3 p. 16.
⁵ Al-Ikhtiyār, Vol 3 pp. 42 – 43.
⁷ Al Hidayah, Vol 3 p. 16.
⁸ Buhuth wa Fatawa, Vol 2 p. 711.
waqf. The ḥanbali, al-Athram, reports that Ahmad allowed waqf of houses and lands which are the things the ṣahābah gave in waqf. Abū Yusuf does not allow waqf of animals or armour. Mālik has two reported rulings attributed to him on waqf of armour. Hanbalis allow the waqf of armour due to ḥadīth on Khalid making his armour waqf. ¹

1.4 Waqf Fi Al-Ma’siyah (Endowment On Sinful Instances):

Waqf is only allowed for acts of birr (virtuous deeds) and for known persons to benefit from, such as your descendants or your kin, the poor or instances meriting waqf like masājid (mosques), dūr aitām (houses for orphans) and the like. Unlawful waqf is void apart from being sinful, like waqf for places of worship other than Islam or places of sin and iniquity, like gambling houses, liquor outlets and the like.

The basic rule is that every act which is sinful and prohibited in shari‘ah is prohibited to be made waqf of. Waqf is also not allowed for the ĥaml nor for the deceased due to waqf being tamlik (conferring ownership of benefit) and these two categories are ma’dūm (non-existent). The same rule applies to the murtadd from Islam as he is considered ma’dūm as long as he remains a murtadd.

Hanbalis allow waqf for ahl al-dhimmah (nonmuslims living under Muslim rule). This ruling is based on the waqf of Safiyyah bint Ḥai, a converted Jewess and wife of the Prophet (s.a.w), who made waqf for her brother, a Jew. ² Waqf is actually valid on all instances benefitting Muslims such a places of learning, resting houses for travellers, instances feeding the indigent

² Al-Mughni, Vol 5 p. 642.
⁴ Ibid, Vol 5 p. 646.
and needy, places of residence for the destitute and needy who cannot purchase a house or cannot afford to rent one and the like.

Most awqaf are for the foundlings, orphans, pensioners and retired persons, the weak and infirm, the blind and the like where they may live, receive food and drink, clothing, education and treatment. There is even a wider practical meaning to this form of waqf where those young men who cannot afford the ṣadāq are helped so that they may marry and uphold the high moral values and standing of the Islamic Faith.¹

The general rule is, thus, that if the welfare of the Muslims is assured and the waqf is not invalid in terms of sharī'ah, it will be valid, is encouraged and exhorted to.

1.5 Matters Pertaining To The Administration Of A Waqf:

When a waqf had been correctly enacted, it has to be administered. There are rights and duties relating to both the waqif and the nāzir or mutawallī of a waqf. The term mutawallī will be used here to mean manager of a waqf.

a) Rights Of The Waqif:

- he can make himself a beneficiary of his waqf for his lifetime.² He can appoint someone as mutawallī of the waqf and can do so by any means sanctioned in sharī'ah, like, for example, by appointment or instruction or the like. There is 'ijmā on the means he may employ in creating a waqf.³

- the šart a waqf lays down is observed save if it is against sharī'ah or is sinful. This is a

¹ Al-Mujtama' al-Mutakafîl fi al-Islām, pp. 233 - 234.
² Al-Mabsut, Vol 12 p. 41.
This ruling is based on the hadith transmitted by Ahmad which says: "that which the Muslims see as good is good in the sight of Allah - (ma ra'ahu al-muslimuna hasanan fahuwa 'inda Allah hasan)". It is a qā'idah fiqhiyyah that the shart a wāqif sets is like the text of the Shari' as far as necessity of execution thereof is concerned. A valid shart is when the wāqif prohibits the mutawalli of appointing a wasi for the waqf on the mutawalli's death. There are exceptions in Ḥanafī law in matter of shurūṭ the wāqif lays down. If the wāqif stipulates that the qādi cannot remove the mutawalli the qādi can remove him if he is untrustworthy, for example. If the wāqif made a shart in limiting the renting period of the waqf and there is benefit for the poor in extending it, the qādi can extend it if the mutawalli asks for it. If the wāqif sets a remuneration for the mutawalli the qādi can increase it if the former is righteous and trustworthy.

Hanafīs rule that if the wāqif did not appoint a mutawalli for his waqf, he himself is then the mutawalli. The wāqif can also appoint a mutawalli for his waqf and it may be of the beneficiaries of his waqf. Family of the wāqif,

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who qualify, must be appointed mutawalli when the waqif did not appoint one and a non family member should only be appointed when family members do not qualify to be the mutawalli.\(^1\) Shafi'is and hanbalis differ hereon ruling that if the waqif did not appoint a mutawalli, the qadi appoints one. If the waqf is for persons, a suitable person is appointed and if it is an instance, then qadi is the mutawalli.\(^2\)

- the waqif cannot remove his appointed mutawalli once he delivered the waqf to him as the waqf will then return to the owner according to Muhammad of the Hanafis.\(^3\) Abu Yusuf allows the waqif to remove the mutawalli as he is his wakil (agent) and the muwakkil (principal) can remove his wakil.\(^4\) This is as long as the qadi did not rule the waqf as lazim (binding). However, if the waqif made a shart that he can dismiss the mutawalli, he can do so even after having delivered the waqf to the mutawalli. If he makes a shart prohibiting the hakim or qadi from removing his appointed mutawalli, the latter can disregard it if the mutawalli is untrustworthy.\(^5\)

- if the waqif prohibits the mutawalli to appoint a wasi for his waqf, it will be valid. This is hanafi law.\(^6\)

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hanbalis rule that a waqif cannot create a waqf for himself as ownership of the asset has to cease before a waqf comes into operation.¹

b) **Shurut (Conditions) For A Mutawalli (Manager):**

- the majority of the fuqaha' rule 'adalah zahirah as a requirement for the mutawalli. By this is meant that the mutawalli must carry out the compulsory religious duties as well as refraining from vice and sin. Hanbalis do not require 'adalah for the mutawalli.

- he must be mukallaf and 'aqil as well as physically healthy to carry out his duties as mutawalli. Dhukūrah is not a requirement as 'Umar appointed his daughter Hafsah wasiyyah (manager) over his waqf.

- he must be a Muslim if the beneficiary is a Muslim or if the instance is an Islamic instance like a masjid, for example.² This is due to the position of mutawalli being a form of wilāyah and Allāh has precluded the nonmuslims from having a say over the affairs of Muslims.³ If the waqf is for the disbelievers, a nonmuslim can be the mutawalli of such a waqf. This is specifically hanbali law. Hanafis do not require Islam as a shart for the mutawalli.⁴

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³ *Al-Qur'ān*, Chapter 4: 141.

Duties And Rights Of The Mutawalli
(Manager) Of A Waqf:
- he must protect and look after the waqf and collect the income or benefits accruing to the waqf and distribute it to the beneficiaries.
- he must exert sincere effort in the growth of the waqf income if it is of an accruing nature or repairing any immovable waqf property.
- if there are restrictions on his duties according to the waqif's instructions, he is to observe such restrictions.
- if he hires out the waqf property, then he can hire out the buildings for one year only and land for three years. This applies when there is no need to extend the period of hire. He must hire out at a price normally charged for such buildings (ajr mithl). If he hires any waqf property under the normal price, the lessee has to make up the difference.
The above are all hanafi rules.
- Malikis rule that the mutawalli can hire out agricultural waqf lands for one or two years for ordinary people and four years for the poor and the 'ulama'.
- that he cannot distribute benefits to the beneficiaries until the period of accrual of benefits had lapsed. This applies even when the income was paid in advance.

in the case of the beneficiaries being poor or 'ulama, the mutawalli uses his judgement in distribution to them.

- the mutawalli can change of the fixtures of the waqf property and transfer it to another waqf property of the same waqif if so required.

- he can receive something from the waqf for remuneration for his services and duties by order of the qadi if the waqif granted him nothing. Hanbalis rule the same save that they do not state that the qadi has to consent hereto but state that the mutawalli may use of the waqf bi al-matruf (in moderation). They also place liability on the mutawalli if the hires our the waqf property for less than ajr mithl.

b(ii) Dismissal Of The Mutawalli:

The mutawalli can be removed from his position under the following circumstances:

- the waqif dismisses the mutawalli if he appointed him and if the qadi appointed the mutawalli, then the waqif cannot remove him. Some hanafis differ hereon as indicated earlier in this chapter. Shafi'is rule that if the waqif dismisses the mutawalli, the former appoints a new one.

- the qadi removes the mutawalli if he is ghair ma'mun (untrustworthy) whether the waqif or the qadi appointed the mutawalli. The latter is also dismissed if he becomes incapable of carrying out

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his duties or becomes a fasiq. This applies even if the waqif made a shart that his appointed mutawalli cannot be removed by the ḥakim or qādi. Malik rules that if the mutawalli is dismissed by the qādi, the latter appoints a new one. If a qādi dismisses a mutawalli, a second qādi cannot reinstate him. Some fuqaha', like shafi'is, for example, allow the mutawalli to dismiss himself. Ḥanbalis allow the waqif, the ḥakim or even the beneficiaries, if they are specified persons, like Zaid and 'Umar, for example, to dismiss the mutawalli. The latter can dismiss himself also. If he does so, it must be done in front of the qādi. He cannot be considered dismissed until the qādi had been informed hereof. Malikis and shafi'is rule that if a mutawalli dismisses himself, he can appoint someone else in his place.

the mutawalli is also dismissed if he leaves off his duties.¹

CHAPTER 6

ADMINISTRATION AND IMPLEMENTATION OF ISLAMIC LAWS OF SUCCESSION, ADOPTION, GUARDIANSHIP AND ENDOWMENT IN SOUTH AFRICA.

It can be justifiably said that South Africa had to enter a fundamentally new era in all spheres after the unbanning of the African National Congress (ANC) and other political organisations in February 1990 and the later setting free of Nelson Mandela and other fellow political prisoners. The events which had to follow were unstoppable. The negotiation process, starting with the agreement on the Groote Schuur Minute\(^1\) on 4 May 1990 in Cape Town\(^2\), through to the Pretoria Minute\(^3\) of 6 August 1990\(^4\), the National Peace Accord\(^5\) of 14 September 1991\(^6\), the Declaration of

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1. This Minute deals with the issues of political offences, immunity from prosecution for political offences including temporary immunity, channels of communication between the then government and ANC \textit{et al.}


3. These Minutes deal with political offences, release of political prisoners, indemnity matters, repealing of legislation relating to the Security Act having relevance to the talks.


5. This Accord established a Peace Committee and deals with the required conduct of all parties and security matters etc.

Intent of the Convention for a Democratic South Africa (Codesa I) of 20 December 1991, then the Record of Understanding of 26 September 1992 between Messrs De Klerk and Mandela and later the Resolution on the Need for the Resumption / Commencement of Multi Party Negotiations of 5 - 6 March 1993, and, finally the enactment of the Transitional Executive Council Act, which, regulating the transitional process, was to facilitate and promote, in conjunction with all legislative and executive structures at all levels of government in South Africa, the preparation for a transition to a democratic order in South Africa. This culminated in the Codesa talks at Kempton Park delivering the interim constitution, the latter of which

In this declaration all parties committed themselves to bringing about real democratic reform in "an undivided South Africa with one nation sharing a common citizenship, patriotism, and loyalty, pursuing amidst our diversity, freedom, equality and security for all irrespective of race, colour, sex, or creed; a country free from apartheid or any other form of discrimination or domination..."


The Resolution was aimed at resolving misunderstandings as well as recognising the need for a democratic Constituent Assembly / Constitution making body.

Selected Documents & Commentaries on negotiations & Constitutional Development in the RSA, pp. 104 - 105.

In terms of this Resolution parties had to commit themselves to drafting and adopting the new South African Constitution.


subsequently engendered the working draft of the new constitution. This latter draft gave rise, eventually, to the controversial version of the first non-racial democratic constitution of South Africa, firstly by the constitutional committee of the Constitutional Assembly in Cape Town and thereafter by both Houses of Parliament sitting as the Constitutional Assembly of parliament in Cape Town which brought the irrevocable reality of a pluralistic heterogenous South African society to reality. This was effected by parliamentary Bill No: B34A-96 of 8 May 1996. The drama of the Constitutional Court, which in terms of the interim South African constitution, had to certify the new constitution as fulfilling the constitutional requirements set forth in the said interim constitution, sending back the constitution for amendments to the Constitutional Assembly as it did not fulfill certain required constitutional requirements was breathtaking compared with the former final political decision making process as the final arbitrator of any law. In this melee and excitement, the position of South African Muslims and their legitimate struggle over three centuries for the legal recognition of their Muslim way of life had largely been dimmed and apparently relegated to travel on the oxwagon of political bureaucracy to await its turn on the agenda of importance.

This chapter will deal with the issues of wilayah (guardianship), al-tabanna (adoption), al-mirath (succession), al-wasayya (legacies) and al-wisayah (curatorship) and waqif (religious endowment) as it affects Muslims in South Africa and what should be done to justly, fairly, equitably, honestly and

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3 Constitutional Assembly: Statement of P A Lilienfeld, Secretary of the Constitutional Assembly, 29 October 1996.

sincerely remove the discrimination, hardship and imbalance in
the addressing of Muslim anxieties and grievances in their lives.
Prior to this, it is deemed expedient to sketch, first, a very
brief scenario of the history of South African law followed by a
critical review of the new South African constitutional order and
other orders relevant to this thesis.

1. Brief Sketch the of History of South African Law:

Roman Dutch law, which is actually the uncodified law of
Holland at the Cape's secession in 1806¹, is South Africa's
common law² having been brought here by Jan Van Riebeeck when
a colony was established at Kaap De Goede Hoop (The Cape of
Good Hope)³ and which eventually reached the other South
African areas during British rule⁴. Roman Dutch law is made
up of Roman and Dutch law with infused French and Spanish
ideas. English law is also part of its present day
ingredients⁵. When the British took over the Cape from the
Dutch, they retained Roman Dutch law as the common law⁶, but
government, administration and judicial instances were changed
to suit British practices. There was a substantial
introduction of English civil and criminal procedure as well
as English mercantile and company law and the English Law of

¹ Africa South of the Sahara, England, New Zealand &
Japan, Europa Publications Ltd, 1997, Staples Printers,
26th ed., p. 914.

² Walker E A (ge. editor): The Cambridge History of the
British Empire, Cambridge, University Press, 1963, 2nd
Africa South of the Sahara, p. 914.

³ Hahlo H R & Kahn E: The South African Legal System and
Its Background, Cape Town, Juta & Co. Ltd., 2nd ed.,
1973, p. 571.

The Cambridge History of the British Empire, Vol 8,
Chapter 31, p. 858.

⁵ The South African Legal System, p. 584.

Evidence being adopted. Criminal procedure followed the same pattern. Significant changes were effected by the Charters of Justice such as the Raad van Justitie being replaced by the Cape Supreme Court, landrosten and heemraden were replaced by resident magistrates while a Master of the Supreme Court took over the functions of the Weeskamer and Desolate Boedelkamer. A Registrar of Deeds was created in 1828 and municipal self-government which functioned on modern lines, was introduced in 1836. By influence and other factors, English rules and concepts were superimposed upon the laws of Grotius and Voet, which anglicised Roman Dutch Law. This was British practice in countries conquered by her and them having to face competition from English law and institutions.

South African courts mainly rely on the elucidation of Roman Dutch law by institutional writers. These collections of law opinions have little for us use as the views of writers of Holland have preference. The prevailing judicial opinion is that the courts must apply Justinian's law as interpreted by 18th century Dutch lawyers and not modern Romanist expounding of classical Roman law. Roman Dutch law is an important part of South African law nowadays but had been refashioned in many spheres, on English lines, by legislation and other

5. Ordinance 9 of 1936.
instruments, such as constitutional, administrative, mercantile law and other forms of law. 1

The South African Constitution Processes And Its Effects On Shari'ah And Muslims:

Discrimination against persons other than Europeans, is as old as South Africa itself. When Britain took over the Cape, the restrictive Hottentot laws of 1809 - 1819 were repealed allowing Hottentots, Bushmen and free Coloureds to be granted full civil rights as well as right to buy and own land 2 in the same way as Europeans. The Slavery Abolition Act was passed by the British in 1833. 3 Muslims were initially prohibited from publicly practising their religion and to convert people to Islam by Placaat 1642. 4 The spirit of this religious discrimination is still present in South Africa in certain spheres of life - both private and public till this day, as well as in religious circles even across ethnic lines.

As is known, South Africa consisted of various States prior to Union. The Cape of Good Hope and Natal were under British rule while both the Oranjefrijsaat (Orange Free State) and Transvaal were Boer republics ruled by Afrikaners. Laws of the Cape were usually applicable to Natal after the latter's annexation. Thus, by proclamation, Sir George Napier, governor at the Cape of Good Hope declared: "...there shall not be, in the eye of the law, any distinction and disqualification, whether founded on mere distinction of colour, origins, language or creed..." 5 Sharply contrasting to this were the constitutional laws of both the Oranjefrijsaat (Orange Free State) and Transvaal. The Transvaal Republic prohibited and

1 The South African Legal System, p. 585.

2 Ordinance 50 of 1828 (Cape).

3 The South African Legal System, p. 577.

4 Mosques of Bo-Kaap, Foreword p. xv.

5 Ordinances and Proclamations Relating to the Cape Colony and Natal: 1836 - 1847, published by Saul Solomon & Co., Cape Town, 1848. Proclamation dated 12/05/1843, Clause 6(1).
denied "Coolies\(^1\), Arabs, Malays and Mohamedan subjects of the Turkish Dominion" both burgher rechte (citizenship) and ownership of property, according to Law 3 of 1885 signed by president Paul Kruger on 10/06/1885.\(^2\) Laws requiring separate registration for Indians doing business was passed by the Transvaal Volksraad\(^3\) (parliament) as well as laws prohibiting Indians from being on the streets after 9 pm.\(^4\) Many of these persons were Muslims.

The Oranjefrijstaat (Orange Free State) did no better. Only White persons could be citizens, the birth of White children, legitimate or illegitimate was to be registered\(^5\). No mention is made of other communities' children. No Arab, Chinese, Indian\(^6\), or "other Asiatic Coloured" was allowed to reside in the Oranjevrijstaat (Orange Free state) or stay longer than two months without the prior permission of the State President\(^7\) and no Coloured could own property for trading or farming purposes, direct or indirect.\(^8\) Land and property could only be legally owned by persons of colour who had one European parent and one coloured parent and who were legally married in terms of law.\(^9\) In these circumstances, there was no place in law for either Muslims or shari'ah.

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1. a derogatory name for Indians, whether Muslim or Hindu.


3. Ibid, p. 342. Transvaal Volksraad Resolution of 16/05/1890 passed an amendment to Law 3 of 1885.


5. Wetboek Van Den Oranjevrijstaat, Bloemfontein, Stoomdrukkerij van de Oranjevrijstaatse Nieuwsblad Maatschappij, 1892, Chapter 1 (a - d) and Chapter 32 (1).

6. the text uses the word coolie.

7. Wetboek Van Den Oranjefrijstaat, Chapter 33 (1).

8. Ibid, Chapter 33 (7).

9. Wetboek Van Den Oranjefrijstaat, Chapter 34 (1).
The attaining of Union in South Africa in 1910 did not see a departure from the former Boer Republics' fascist attitude. Thus, to qualify for being a member of the House of Assembly and the Senate of the Union Parliament, one had to be, "a British subject of European descent"\(^1\). A proviso for the retention of coloured voters on the voters' role was granted and required a two thirds majority of both Houses of Parliament sitting together to remove them.\(^2\) Muslims thus suffered firm discrimination in the two Boer republics as well as Union. The Afrikaner political vision as well as staunch Calvinist religious fervour strongly influenced subsequent governments and policies, eventually giving rise to the colossus of apartheid (ethnic and racial discrimination) in a form hitherto unknown in South Africa. This indecent abberation in governance, especially white privilege and eventually, greed, had to give rise to the collapse of privileged White minority government and its following.

In the Union of South Africa, shari‘ah had no official recognition or place either. This gave rise to serious problems for Muslims in all spheres of their lives and especially, their family laws.

Later the "Tricameral" constitution\(^3\) was to concretise parliament into three ethnically based chambers, namely, the House of Assembly for Whites, the House of Representatives for Coloureds and the House of Delegates for Indians\(^4\) with "own" and "general" affairs being the foundation of law and administration. Still, even in this pattern, there was no place for shari‘ah, not even Muslim family law. Its preamble, surprisingly, in part, reads "...To uphold Christian values

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\(^1\) Statutes of the Union of South Africa 1910 - 1911, Government printer, Pretoria, 1911 - South Africa Act of 1909, Clauses 26(d) and 44(c).

\(^2\) Ibid, Clause 35(1).

\(^3\) Republic of South Africa Constitution Act, Act 110, 1983.

\(^4\) Ibid, Part 6, Article 37 (1).
and civilised norms, with recognition and protection of freedom of faith and worship..." In essence, South Africa's political and related problems centres on justice and rights from the earliest of times.

3. The South African Constitutional Position In The Nineties:

While the previous white minority administration was guilty of denying rights and practising injustices, the new government claims to be the champion of justice and rights of people.

South Africa is a plural society with a kaleidoscope of cultures, religions, languages, customs and traditions resembling its physical geography. If religion, culture and language, constitute the most important components of human beings and their lives, then practical recognition of these factors must be accorded and upheld. Fairness, justice, equity and sincerity demands that.

As is known, South Africa's first participatory constitution was produced at the Codesa constitutional talks in Kempton Park, outside Johannesburg, in what is now called Gauteng province. These talks were participatory in that parties and interest groups considered the most important were represented, although not all delegates were elected representatives of their people or respective constituencies. In this sense, these talks were not truly democratic.

Furthermore, this interim constitution was not formally presented to the nation for its consent and approval. Instead, the outgoing white dominated parliament had to pass that constitution and its outgoing president, F W De Klerk signed it into law on 25 January 1994. This constitution was to be operable as from 27 April 1994, save for some clauses which became operable on 28 January 1994 and others on 9 March

1 *Preamble, South Africa Constitution Act, Act 110, 1983.*

1994, and was to be functional until 1996 when the Constitutional Assembly had to enact the final new constitution.

3.1 **Analysis of the Interim Constitution of South Africa with Regards to Muslims and Muslim Life:**

In a public address to residents of the Bo-Kaap on 19 March 1991, the South African president, Dr Mandela, and leader of the ANC, the dominant political party in the country, said, as reported by *Muslim Views,*:

"We (ANC) regards it highly insensible and arrogant that the culture of other groups can be disregarded. The ANC had pledged itself to recognising Muslim Personal Law." He did not expound on the relationship between religion and State and the place of religion in the new in South Africa and how Muslim Personal Law will be recognised. Muslim euphoria of the recognition of their personal law virtually obliterated the requirement of properly qualified Muslims necessary for that statement to have proper Islamic application in a *shari'ah* context.

The interim constitution makes South Africa a "sovereign and democratic constitutional state...in which there is equality between men and women and people of all races..." Since South Africa is a constitutional state the interim constitution declares: "This constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary application in this constitution, be of no

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2 Ibid, Act No 200 of 1993, clause 73.
3 *Muslim Views, Cape Town, March 1991, Vol 5 No. 2 p. 3.*
4 *Act No 200 of 1993.*
5 *Preamble to Act 200 of 1993.*
force and effect to the extent of the inconsistency. The constitution shall bind the legislative, executive and judicial organs of state at all levels of government."\(^1\) The working draft of the new South African constitution\(^2\) does not significantly alter these clauses.

These clauses must be borne in mind when reading the chapter on Fundamental Rights\(^3\) in the interim constitution. The BOR binds all legislative and executive organs of state at all levels of government as well as "...all law in force and all administrative decisions taken and acts performed..."\(^4\) and entitles aggrieved persons to seek judicial relief if their right had been infringed.\(^5\) Of great importance to Muslims is clause 14 of the interim constitution which reads: "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion,...\(^6\) This is unchanged in the working draft of the new constitution\(^7\). The interim constitution also states that "Nothing in this chapter shall preclude legislation recognising a system of personal and family law adhered to by persons professing a particular religion; and the validity of marriages concluded under a system of

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3. Hereinafter called the Bill of Rights or BOR in short.
5. Ibid, Chapter 3 clauses 7(4).
6. Ibid, Chapter 3, clause 14(1).
religious law subject to specified procedures."¹ This clause had been fundamentally changed in that it includes "other recognised traditions" as valid personal law systems as well as restricting all religious and customary personal law systems to be "consistent with the Bill of Rights".² While there was never a doubt that the interim constitution applied vertically between State and citizen, it was not clear whether it would apply horizontally between individuals as well. However, the working draft of the new constitution recommended imposing secular western liberal law on all regardless.

Another issue in the constitution which may give rise to problems for Muslims is the clause on language and culture. In the interim constitution it reads: "Every person shall have the right to use the language and to participate in the cultural life of his and her choice."³

In the working draft of the new constitution it reads: "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the rights of anyone else."⁴ Another possible problem area for Muslims, pending interpretation of the clause, is the equality clause in the interim constitution which reads: "Every person shall have the right to equality before the law and to equal protection of the law. No persons shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following

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² Working Draft of the New Constitution, Chapter 2, clause 3.
³ Act 200 of 1993, Chapter 3, clause 31.
⁴ Working Draft of the New Constitution, chapter 2, clause 30.
grounds in particular; race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.\textsuperscript{1} The working draft of the new constitution did not radically depart from this position, but added another clause reading: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."\textsuperscript{2}

Customary international law forms part of the law of South Africa save if it inconsistent with the constitution or an Act of parliament.\textsuperscript{3} The same provision exists in the interim constitution.\textsuperscript{4} This form of law refers to the unwritten law which is universally recognised despite the fact that it is not specifically legislated into law. There must be widespread acceptance of such a law before it is given recognition; an example being the UN Charter. Customary international law, however, does not include domestic customary law.

We thus again have possible forms of discrimination against Muslims in their lives. The former discriminating Boer republics did not consult Muslims in their law processes and legislated against them on ethnic lines. The same situation, in principle, if not in practice, may exists with the present constitutional process. The error lies in the fact that no wide, open, full and transparent consultations with Muslims was held at the Codesa constitutional talks, which, in practice, seriously disadvantages Muslims and perpetuates certain

\textsuperscript{1} Constitution of the Republic of South Africa Act, Act 200 of 1993, Chapter 3, clause 8(1)(2).
\textsuperscript{2} Working Draft of the New Constitution, Chapter 2, clause 8 (1)(3)(4).
\textsuperscript{3} Ibid, Chapter 15, clause 202.
angles of Muslim problems — problems they have been experiencing for over 300 years. In my view, the first interim (Codesa) constitutional process, which was of great magnitude and importance, was too speedily conducted.

3.1.1 Analysis Of The Final Constitution Of South Africa With Regards To Muslims:

No modern constitutional process is easy and the South African one is no exception. The Constitutional Assembly’s Constitutional Committee, under Mr Cyril Ramaphosa, at a meeting in Cape Town, adopted the new constitution on 8 May 1996 by majority vote. The full Constitutional Assembly, comprising both Houses of Parliament sitting in one session\(^1\), passed the new constitution on 8 May 1996 as Bill B34A-96 by a huge majority\(^2\) and it was forwarded to the Constitutional Court for certification in terms of the requirements of the interim constitution\(^3\).

The Constitutional Court, after hearing evidence and due study and consideration, on 6 September 1996\(^4\), delivered judgment and sent the constitution back to the Constitutional Assembly for amendments as the said constitution did not fully comply with the constitutional principles\(^5\) set out in the interim constitution. The required amendments (only

\(^1\) Constitution of the Republic of South Africa Act, Act 200 of 1993, Chapter 5, clause 68(1).


\(^3\) Constitution of the Republic of South Africa Act, Act 200 of 1993, Chapter 5, Clause 71(2).


eight)\(^1\) are not serious flaws which will upset the constitutional process\(^2\). The core constitution was not rejected - not even self determination and traditional councils clauses. The Constitutional Court called the efforts for writing a new constitution "a monumental achievement."\(^3\) The Constitutional Assembly passed the required amendments\(^4\) on 11 October 1996.\(^5\) On the Constitutional Court certifying it, president Mandela will sign it into law.\(^6\) He had done subsequently done that.\(^7\)

The Preamble to the new constitution mentions that "We, the people of South Africa....believe that South Africa belongs to all who live in it, united in our diversity."\(^8\) This should be the limiting

\(^1\) Constitution Talk, p. 3.

\(^2\) These issues are Collective Bargaining, Immunisation of the Labour Relations and the Truth Reconciliation Acts, the Public Service Commission, the Public Prosecutor and Auditor General, Amending the Constitution, Provincial Powers, Local government and certain provision of a State of Emergency.


\(^4\) Constitution of the Republic of South Africa Third Amendment Bill, Bill B34B-96.


interpretation of the catchy phrase on the cover of the draft Bill "One law for one nation." National diversity appears to be accommodated in a certain manner in the constitution, like recognition of indigenous law, its application and administration, participation in a cultural life of one's choice, the new clause not found in the previous versions of post apartheid constitutions allowing cultural, religious and linguistic communities, "with members of their community to enjoy their culture, practise their religion and use their language and form, join and maintain cultural, religious and linguistic associations and other organs of civil society..." as well as recognition of other than civil marriages and systems of family and personal law other than the common and civil South African law.

These are all subject to such being consistent with the BOR.

The Limitation of Rights clause in the new constitution makes interesting reading allowing limitation of the rights in the BOR by a law of general application on condition that such is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and, less restrictive

1 Constitution of the Republic of South Africa, May 1996, Chapter 12, Articles 211 & 212.
2 Ibid, Chapter 2, Article 30.
3 Ibid, Chapter 2, Article 31 (1)(a)(b).
4 Ibid, Chapter 2, Article 15 (3) (a)(i)(ii), (b).
means to achieve the purpose."¹ Except for the immediate afore mentioned rule, and any other provision, no law may limit any entrenched right in the BOR².

Apart from the BOR having a central influence in the new constitution and its application, the constitutional principles³, embodied in the interim constitution regulated the constitution writing process and as such, the later functioning and interpretation of the new constitution. South Africa is also constitutionally bound by international agreements which the Republic acceded to before the new constitution came into operation⁴. This is important for Muslim Family Law application here.

Finally, the new constitution "does not preclude the recognition of the notion of the right to self determination of any community sharing a common cultural and language heritage, within the territorial entity of the Republic or in any other way, determined by national legislation".⁵ This could possibly be a useful clause for accommodating diverse community matters.

² Ibid, Chapter 2, Article 36 (2).
³ Constitution of the Republic of South Africa Act, Act 200 of 1993, Schedule 4, Articles I - XXXIV.
⁵ Ibid, Chapter 14, Article 235.
4 Religious / Cultural Rights In The Constitutions Of Selected Countries:

4.1 Accommodation of Religious and / or Cultural Rights in Constitutions of NonMuslim Countries:

Since we are dealing with Islamic Law, which is a religious based law, it is deemed valuable to see how the concept of religion and culture feature the constitutions of countries where Muslims form a minority.

In Europe, Belgium allows freedom of public worship and manifestation of personal views.\(^1\) No specific mention of religion is found. Byelorus\(^2\) allows freedom of religion and its practice while Germany considers freedom of faith, conscience and religion as inviolate\(^3\) but denies any favour or disadvantage to any religion.\(^4\) Greece allows freedom of religious worship and conscience but prohibits proselytism.\(^5\)

In Asia, Japan allows freedom of religion but denies it any privilege. No recognition of any personal religious law is allowed.\(^6\) India prohibits discrimination, including religious discrimination.\(^7\) There are no special rules for personal social religious laws.

In Africa, Botswana protects freedom of conscience which includes religion as well as its practice and

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4. Ibid, Chapter 1, Article 4(1).
observance, individually or in community with others.\(^1\) Ghana prohibits discrimination which includes religious discrimination.\(^2\) However, there is an exclusion clause which reads: "Nothing in this Article (i.e. art. 17) shall prevent parliament from enacting laws that are reasonably necessary to provide for matters relating to adoption, marriage, divorce, burial, devolution of property at death or other matters of personal law", as well as "for making different provisions for different communities having regard to their special circumstances..."\(^3\) The constitution of Sierra Leone\(^4\) and Zambia\(^5\), in relation to religious freedom and practice, resembles that of Botswana. The Zambian constitution has an apparent exclusion clause which rules that any law inconsistent with the non discriminatory clause in the constitution, shall not be a contravention of Article 19 when "it is shown that the law in question makes provision which is reasonably required...for the purpose of rights and freedoms of other persons, including the right to observe and practice religion without the unsolicited intervention of members of any other religion..." if it is shown not to be reasonably justifiable in a democratic society.\(^6\) Zimbabwe rules as valid law that which "protects the rights and freedoms of other persons, including the right to observe and practice any religion or belief..."\(^7\)

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3. Ibid, Chapter 5, Article 17 (4)(b)(d).
The Singaporean constitution is unique in Asia and the world in its provisions for rights of minorities. While that constitution outlaws discrimination and grants freedom to all, it does not prohibit or invalidate a provision for regulating personal law or any provision or practice restricting office or employment to a specific religious group in running their affairs. The constitution goes much further by creating a 20 member Council of Minority Rights. The particular functions of the Council is to draw attention to any Bill or any subsidiary legislation which is, in the opinion of the Council, a differentiating measure. A mechanism of procedures, including the right to refer Bills back to the Speaker for amendments is constitutionally guaranteed. Any Bill affecting a minority community must bear the certificate of the Council President before assent is granted to a Bill. By any standards of democracy, this is certainly one of the most profound in protecting, in a practical sense, minority rights, especially minority family laws and thus minority fears and anxieties and thus easing and relaxing inter-community relations and cooperation which are so important in plural societies.

Surprisingly, even Israel recognises a religious marriage and divorce of the parties' choice as well as consequences of such a marriage and subsequent divorce of a specific religion. In addition, religious courts exist for specific religious communities such a rabbinical courts for Jews, Muslim religious courts for

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2 Ibid, Article 69.
3 Ibid, Part 7, Articles 77 & 78.
4 Constitution of Israel, 1958 - 1988, Section on Human Rights, Article 22 (d).
4.2 Religion And Cultural Freedom In The Constitutions Of Muslim Countries:

Constitutional provisions for freedom of religion and culture differs from country to country - from short expressions to some form of detail. Brunei Darrusalam declares Islam its religion, but allows freedom of religion to other groups. Tunisia also declares Islam its religion but grants equality before the law for all. Morocco has the same provision as Tunisia but also guarantees freedom of worship for all. Indonesia uniquely declares that "The State shall be based on belief in one Supreme God" and grants freedom for all "to profess and exercise their religion". Egypt's State religion is Islam and Islamic jurisprudence its principal source of legislation but grants freedom of belief and freedom of practice of religious rites. Jordan declares Islam as its State religion, grants freedom to all forms of worship and prohibits discrimination, including on religious grounds. Malaysia rules equality before the law for all, despite


2 Constitution of Brunei Darrusalam, 1984, Part 2, Article 3(1).

3 Constitution of Tunisia, 1959, Chapter 1, Articles 1 & 6.

4 Constitution of Morocco, 1992, Title 1, Articles 5 & 6.

5 Constitution of Indonesia, 1959, Chapter 11, Article 29 (1)(2).


7 Ibid, Part 3, Article 46.

8 Constitution of Jordan, 1984, Chapter 1, Article 2 & Chapter 2 Article 6(i) and 14.
Islam being its State religion. In addition, it allows provisions for regulating personal law.¹ Sudan declares *shari'ah* as its main source of legislation but rules that personal matters of nonmuslims are governed by their own personal law. Freedom of religion to all is granted and discrimination of various forms prohibited.² Pakistan allows freedom to profess, practice and propagate religion, rules Islam as system of life for Muslims with the State safeguarding legitimate rights and interests of minorities, including their due representation in the federal and provincial services.³

Iran declares Islam as its official religion and *ja'fari* (shi'ah) school of law as its eternally immutable source of law⁴. *Sunni* schools have the right to decide religious matters in terms of their own jurisprudence. Personal status (marriage, divorce, inheritance and will) and related matters of litigation in courts of law are allowed and where a specific school of jurisprudence is prevalent, it will have to be followed by local councils without infringing on the rights of followers of other schools of jurisprudence.⁵ Zoroastrians, Jews and Christians are recognised religious minorities within limits of law and have freedom to perform religious rites and ceremonies and

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1. *Constitution of Malaysia, 1963*, Part 1, Article 5(a) and Article 8(1)(2).
4. This makes Iran a sectarian State in law in stark contrast with some other muslim countries where Islam is the State religion and Islamic jurisprudence its source of law, which, in practice, includes, at times, recourse to some aspects of *ja'fari* (shi'ah) jurisprudence.
act according to their canon in matters of personal affairs and religious education. They have no hope of gaining a seat in parliament due to their small numbers, hence the constitutional guarantee for representation so that their affairs can be brought to parliament's attention directly.

It will be noted that at least some Muslim countries have gone far in recognising the canons of personal law of nonmuslims virtually without limitation of any kind, something which nonmuslim countries, democratic and otherwise, save Singapore and a few other States, did not reciprocate to this day. The Western World had not reciprocated properly either, to this day. Some Muslim countries legally recognise nonmuslim personal law such as Jordan where ecclesiastical courts exists for Christians, even for different sects who use canon law in their judicial processes. Syria has a similar arrangement as Jordan, while Somalia has district courts dealing with civil and customary matters, the latter pertaining to nonmuslim customary law. Nigeria has a similar position.

In Kenya, where traditional African religion prevails and where Muslims constitute 16.6% of the population, kadi courts exists which deal with questions of Islamic law, while in Sierra Leone where Muslims constitute

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2 Ibid, Article 64.
3 they are for Eastern Orthodox, Greek Melekite and Roman Catholics Christians.
4 The Middle East & North Africa, pp. 625 - 626.
5 Ibid, p. 904.
6 Africa South of the Sahara, p. 882.
7 Ibid, p. 753.
30% of the population, local courts have jurisdiction over native and customary law which fall outside the jurisdiction of other courts.¹ Mauritius does not accommodate differing family law systems.²

The main Islamic constitutional rule on which the freedom of nonmuslim religions' canon law is to apply to them and not Muslim law is the Quranic verse: "Let there be no compulsion in religion; the Truth stands out clear from Error."³ Islam forbids forced conversions as it is against human nature. Conversion is by free conviction.⁴ "Compulsion in religion" here, includes compulsion of nonmuslims in following shari'ah based family law for it is forbidden to force people into Islam.⁵

5 Roman Law Relating to the Law of Persons:

Since South Africa has Roman Dutch law as its common law, it is deemed relevant to deal with aspects of that law which has a bearing on this thesis, albeit, as briefly, as possible.

5.1 The Roman Family:

This was the most important unit of the Roman law of Persons and was merely a collective under the authority of a man, the paterfamilias (family head). Every male, whether pubescent or not, was his own potestas and had power or was in power. Potestas means "authority or

¹ Africa South of the Sahara, p. 860.
³ Al-Qur'än, Chapter 2: 256.
Women had no standing in this regard. While marriage and blood ties is central to modern family life, a Roman marriage had little relevance to family for its essential value lay in the fact that it gave the husband or his *paterfamilias potestas* over any issue. No distinction was made between natural and adopted children; thus, if a father emancipated his natural son, he became a stranger to that family while the adoptee remained a family member. This proves that *potestas* and not procreation was the basis of the Roman family.

Family relationship was traced through the male line and there was no relationship with the mother's family save if she was married in manu. The civil law relationship was *agnatio* (agnate based) existing between those born under the *potestas* of a family head or who would have been under the *potestas* of a single male ancestor in the male line. On the death of the *paterfamilias*, his subordinates were subjected to the *potestas* of the newly emancipated persons of the family of that *paterfamilias*. In early Roman law, the family head's power was absolute and virtually unregulated. He could, for instance, with a family council, condemn to death and execute sons or daughters and descendants as well as sell his children. He could decide on their legitimacy, marry them off or forbade their marriage as well as regulate their divorce, give them away in adoption or emancipate them at will. This despotic system later changed and the child's consent was required. The family head's power in proprietary capacity of his family members developed later. Augustus and Constantine I brought substantial changes in this field. The latter, especially, ruled that the mother's inheritance to her beneficiary child shall be such a child's *dominium* (possession), although still

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forming part of the pater’s (family head) estate. He was not allowed to alienate or appropriate the capital of such a possession, but he could use the returns from it. The beneficiary child succeeded to this property at the family head’s death.¹

5.2 Legitimacy Of Children:

Children born from a valid and lawful marriage came under the potestas of the father if the parents had connubium (capacity to contract a valid marriage). If the marriage was unlawful at law, like between a civis (free person) and a foreigner, the child related by blood to both parents but took the mother’s status and was denied any agnatic link or relationship with his father. This kind of marriage was thus valid but not recognised in Roman law.² Legitimation (i.e. acquisition of family control over children born out of wedlock) was unknown in classical times. This developed in the later Christian empire and presupposes a system of concubinage. Men were allowed both a wife and concubine or concubines. Children born from concubinage were illegitimate at law but were not despised nor did they have intestate succession rights to the estate of their natural father. However, the latter could give them gifts or provide them with a legacy in his Will and he could appoint a guardian for such children which the magistrate had to confirm.³ Illegitimate children belonged to the mother.⁴

⁴ Textbook of Roman Law, p 419.
⁵ Ibid, p. 433.
⁶ Institutes of Roman Law, p. 451.
Constantine legitimated these children, but not subsequent issues of concubinage. Justinian carried the matter further but did not allow legitimation of children of adulterous unions. Natural fathers of illegitimate children could petition the emperor for legitimation or their natural father could make them heirs in his Will by rescript of legitimation of children by concubinage. The legitimation of children from concubinage was also politically encouraged through inducement of serving as decurio (municipal councillor), a dying profession, or by marrying your daughter to a decurio (municipal councillor).¹

5.3 Adoption:

Two adoption systems existed in Roman society. One was the androgatio which marked the extinction of one family in order to perpetuate another² and continue observing its sacra (house gods worship). Androgatio was actually a precursor of testation which allowed for the artificial creation of an heir by the paterfamilias during his lifetime. A pontifical assembly, the comitia curiata, under the Pontifex Maximus, together with the androgator (one making the androgatio) and the androgatus (one entering androgatio) had to agree to the androgatio. Women had no part in this ceremony and was, initially, excluded from androgatio, but Antonius Pius opened their way by allowing androgatio by rescript. The androgatus and all his family came under the control of his new paterfamilias³.

Adoption came later. The Roman adoption process entailed the transfer of a person from an alien family from one potestas to another. This process had to be

¹ Textbook of Roman Law, pp. 434 - 435.
² Historical Introduction to the Private Law of Rome, p. 30.
confirmed by the magistrate and recorded in the court's archives as well as requiring the emperor's permission. Initially, women could not adopt, but Diocletian changed that "so as to be a solace for them in their bereavement." Justinian retained this. Adoption only affected the adoptee. If the adoptee had children, such will remained under the potestas of their pater. In Roman law, the adoptee had no claim on his former pater nor succession right to his estate save as a cognate where the praetorian succession scheme was applied. Justinian altered the consequences of adoption. Classical law consequences only applied where the adopter was a natural ascendant like a maternal grandfather. In all other cases, the adoptee retained succession rights to his former family and did not pass into the potestas of his adopter even if he acquired intestacy succession rights to his adopter. In the case of a woman adopting a child, the consequences thereof was to create mutual intestate succession rights between the adoptive mother and adopted child and his descendants.

5.4 Tutelage (Tutela) And Curatorship (Cura):

Tutelage and curatorship were, initially, for the protection of the guardian rather than for the protection of those who were under tutelage or curatorship. Tutelage is the assistance a tutor gives to a non pubescent minor and women in transactions which these persons conducted themselves while in curatorship, the curator substituted for the insane and

1. *Institutes of Roman Law*, p. 481.
3. *Institutes of Roman Law*, p. 482.
prodigal (spendthrift). Tutelage for males ended at puberty for they could beget children then, while women remained permanently under it due to only bearing children. Tutelage of non pubescent children came either under testamentary tutelage (tutela testamentaria) i.e by Will, or legal tutelage (tutela legitima). When there was no appointment for a tutor by testament, the latter, if he is the one who succeeds to the estate of the non pubescent person, became his tutor. If emancipation was performed by a collaborator of the pater, he became the tutor fiduciarius in fiduciary tutelage. Roman women, due to not having power of testation, was under a form of perpetual tutelage (tutelea perpetua milierum), and as a consequence did not have power of testation. Hadrian changed this. A number of births liberated them from this tutelage. Curatorship of the insane went to the nearest agnate and in his absence, one was appointed. A disqualification system operated for both tutors and curators.1

5.5 Roman Succession Law:

Roman succession law, unlike modern succession law, had more to do with appointing a successor than transferring or disposing of property at death. The Roman praetor interfered with succession and modified it considerably in both testate and intestate forms and did so especially with agnatic privileges. Living succession was already found in androga where the androgatus and his family passed into the potestas of the androgator, the latter who acquired the former’s assets and became liable for his delicts.3 An heir succeeded to the

1 Textbook of Roman Law, p. 453.  
Institutes of Roman Law, p. 489.

2 Textbook of Roman Law, pp. 454 - 467.

3 Ibid, p. 479.
estate completely i.e. proprietary rights as well as liabilities of the deceased.¹

Roman law required, in testate succession, that heirs be named in a Will and succession had to be complete. The Will system evolved over a long period of time from the requirement of an ecclesiastic session for succession pronouncements to a document witnessed by the testator and seven witnesses through to a holograph Will without witnesses. A soldier’s Will existed which had exceptions from other Wills.² Certain persons were entitled to make a Will but others, like those born deaf or blind were denied testation rights. Women could not make a Will, initially, until Hadrian came to their aid.

Conditions to being a testator included, amongst others, a fitness to be an heir or becoming a beneficiary or to be appointed a tutor. Women could not be an heir under the Lex Voconia to an estate worth 100 000 sesterces nor receive legacies exceeding that of the heirs. Justinian allowed natural children and their mother to succeed to no more than 1/12 of the inheritance of their natural father, but if the deceased left no legitimate children, they could succeed to everything.³ The Lex Julia de Muritandis Ordinibus of 17 BC and the Lex Papia Pappaea of 9 AD, aimed at cajoling and bullying people into marriage and procreation to offset the falling birth rate of the upper classes. Unmarried and childless couples suffered succession deprivation of varying degrees and such forfeited shares went to heirs with children.⁴

A Roman Will had to name heirs at the beginning, initially, but this was relaxed later on. Impossible,

¹ Institutes of Roman Law, p. 504.
² Textbook of Roman Law, 485 – 486.
³ Ibid, p. 488.
illegal and immoral provisions in a Will were struck out. A testator could institute as many heirs as he wished and vary their shares. If no specification of shares were made, equal shares were allotted. Wills were rendered void if they failed to observe required rules. Special arrangements of substitution were allowed for non pubescent minors who became heirs but died as minor pubescents and thus had no power of testation. Ascendants could petition the emperor naming substitutes for insane descendants. Justinian removed this requirement.

Testation was free so disinherison was legal although morally and socially unfair and improper. Disinherison had to be clear. A somewhat elaborate system operated in degrees of relationship and their shares. A testator could even disinherit his family validly, save for minor modifications hereto. During Justinian's time the view that a family had a lawful right to succession of a deceased's estate developed. He also laid down the shares the heirs had to receive. Heirs were of three classes, namely, freed slaves who became automatic heirs and could not refuse the inheritance, necessary heirs such as sons, daughters and grandchildren or remote ascendants who, also, could not refuse the inheritance while extraneous heirs could accept or refuse it.

As far as intestate succession was concerned, Romans viewed this with horror due to the importance of an heir in continuing the worship of the sacra. The Twelve

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1 Textbook of Roman Law, pp. 490 - 491.
3 Historical Introduction to the Private Law of Rome, p. 46.
4 Textbook of Roman Law, pp. 492 - 495.
5 Ibid, pp. 496 - 498.
Tables of Law gave the order of intestate succession as *sui heredes* i.e. sons, daughters, grandchildren and wives *in manu*, followed by the *proximus agnatus* (near agnate) and then gentiles i.e. those with a common *nomen* with the deceased. In later Roman republican days, the praetor established a new succession order, granting *bonorum possessio* (possession of inheritance) in an order of his own, which differed from civil law and in which he preferred blood relations to civil relations. The praetorian order of succession in possession of inheritance was; the immediate family such as sons and the like with diminished distribution of those further removed like grandsons of the deceased, then the nearest agnate, then the nearest cognate, then the surviving spouse if the deceased’s marriage ended by the death. Ascendants and descendants had a year to claim possession and all others 100 working days.

The *senatus consulta* ameliorated the position of mother and child of which Roman civil law said nothing. It gave children, legitimate or not, first claim to succeed their mother. Justinian brought in a new system completely breaking the agnatic principles and removing discrimination between the sexes. This system, through canon law, found its way to modern systems of legislation. He placed descendants first, how lowsoever, the nearest excluding the furthest removed, then ascendants on the same principle, but if both paternal and maternal lines existed, each took half of the estate. If none of these are found, the treasury took it as *bona vacantia*, subject to third party claims. Succession of freedmen was easier as they could only have issue as relatives. Free men were those born free (*ingenui*) and those made free (*libertini* or *liberti*).
Free born citizens were Latins, either original or colonary and foreigners\(^1\). Junian Latins had no succession right as they reverted to slavery at death and their patron succeeded to all his property. A later ruling changed this somewhat. The property of the *dediticii* was for his patron as they had no testation powers. There were, thus, succession rights to persons born free or made free, in Roman law.\(^2\)

In matter of legacies, Roman practice is expressed that "a legacy is a particular disposition in a Will — or in a codicil confirmed by a Will — whereby the testator made a devise, whether corporeal or incorporeal, or money to the designated beneficiary at the expense of the heir or heirs or a specified heir among them."\(^3\) Four kinds of legacies existed in developed law, which, in essence, were the ceding of a thing to a legatee. These had to be written in Latin until 439 AD. Legacies had various forms, various laws and applicable rules and some having been changed by certain rulers. A bequest was upheld even if it had impossible, immoral or illegal conditions in them, these conditions simply being ruled as invalid.

In the Republican era, legacy size was reduced to curtail freedom of devise of ancient times. This was to ensure that the heir had some material advantage of the estate he succeeded to. This was a gradual evolvement and, generally, with the *Lex Falcidia* of 40 BC which ruled that a maximum of three quarters of the nett value of the estate could go to legacies, thus the heir had to receive at least a quarter of the state.\(^4\) Inoperative legacies were those of which the legatee predeceased the

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legator and ademption. If a legacy was conditional and the prescribed condition did not occur or materialise yet, the legatee could require the heir to give security that he would honour the legacy if and when the condition occurred or arrived.¹

5.6 **Fideicommissa (Trusts):**

To evade the Roman law restrictions on heir institution and legacies, Romans resorted to the process of trusts, by way of imposition or by codicil, like, for example instructing one’s brother to transfer what he had received under a Will, to an ultimate beneficiary. It was used to give women more than what they were allowed under the *Lex Voconia*, like in the case of daughters who were quite disadvantaged in succession to their father’s estate. Married daughters, for instance, could not succeed to their father’s estate as they ceased, on marriage, to be a member of his family. Unmarried daughters inherited in name only as their guardian had effective control of their inheritance.²

A trust, as a legal institution, is actually a "Roman juristic innovation on imperial instigation". In early Roman days, consuls (executive magistrates) administered trusts and later the special trust magistrates, the praetor fideicommissarius, performed this function. A trust could comprise an entire estate or part of it and was subject to an heir accepting the inheritance. This gave rise to heirs being reluctant to accept inheritance which caused trusts to fail. Romans could settle their property in perpetuity as the modern day trust institution does.³

¹ Textbook of Roman Law, pp. 506 - 507 & 509.
² Historical Introduction to the Private Law of Rome, p. 44.
³ Textbook of Roman Law, pp. 511 - 514.
5.7 Codicils:

This forms part of modern day Wills. However, in classical Roman law, it existed independently, though originally dependent on a Will. Confirmed codicils dealt with anything which could be effected in the Will, such as the creation of legacies. When legacies and trusts assimilated under Justinian law, little practical difference existed between a Will and a codicil, save that only a valid Will could institute an heir.¹

6 Aspects Of Indigenous Law Having Bearing On This Thesis:

Before dealing with South African law in such issues as this thesis deals with, it is necessary to deal briefly with some aspects of the African customary law, also known as indigenous law, operating in South Africa as there is confusion as to its relation with Islamic law and practice. The term indigenous law will be used instead of African customary law.

6.1 Property And Persons in Indigenous Law:

Indigenous law is tribally based and follows, at times, a complex system of personal laws. Tribes comprise families, each family comprising a family head, his wife or wives and children. In indigenous law, only family heads are emancipated persons.² At the death of the family head, the eldest son of each house becomes the family head of that house. There is an uninterrupted and unchanged pattern of rights and liabilities passing from father to son.³ There are usually two kinds of property owned by a family head, namely, the general estate also called family property⁴ and house property.

According to indigenous law, generally, all property

¹ Textbook of Roman Law, pp. 514 - 515.
³ Ibid, p. 70.
⁴ this is property not allotted to any house nor automatically accruing to it.
which a family head or which any of the unemancipated members of his house acquired is his and is administered by the family head and no one else has a right to own anything. The family head acquires property by various means such as by his own labour, that which his wife or wives and unemancipated members of his family acquires, fines for personal law issues, like damages from the adulterer for adultery with his wife, produce of his lands and inheritance. The family head is responsible for contracts, as in any normal procedure of law, but an unemancipated family member may enter a contract benefitting him as that would go to the family head. Incurring a debt by such a person is not clearly provided for in indigenous law. The family head or his heir must maintain the entire family.

6.2 Indigenous Succession:

Indigenous succession is based on familial status and tribal law and relates to indigenous marriages. It is, thus, necessary to understand the family pattern in these forms of unions. All indigenous tribes, of which there are four main ones, namely, the Nguni (to which both the Xhosa and Zulu tribes belong), the Sotho-Tswana or Tswana of which the North Sotho or Bapedi and the Southern Sotho or Basuto are branches, the Tsonga, Tonga, Tsonga-Shangaan or Shangaan and the Vhanenda, Bavenada or simply Venda with three main branches. Unlimited polygamy is allowed by all tribes subject to paying lobola (bride price) and "having a physical need" for more than one wife. Wives and their offspring are graded in a system; either the simple or the complex system of polygamy.

1 Customary law, p. 72.
2 Ibid, pp. 72, 81 & 126.
3 Ibid, pp. xxxv - xxxvi.
In the simple polygamy system, one great or main wife is found, who is the first woman the family head married and all other wives are subordinate to her, each of these other wives is, in turn, subordinate to the one married previous to her. In this system, ownership of property is in the hand of the family head, and at his death, in the hand of the heir who is the eldest son of the great wife. The other wives and their sons have no right in the estate, but have right of maintenance and the lobola of their first wives. Wives, here are regarded as assets coming under the guardianship of the heir. This system is practised by the Tsonga who were not influenced by Zulu law.

In the complex polygamy system, Cape Nguni have two main wives, sometimes three and the others are subordinate wives. Each family wife creates a house and all wives and houses are under the guardianship and control of the family head. The first house is the great house and highest in rank. The second wife is the right hand wife and her house is distinct from the great house. The third wife is the qadi (support) wife and is subordinate to the great house while the fourth wife is the qadi (support) to the right hand house and subordinate to it and so the upturn continues in this order for other wives. There are various variations in this complex polygamous system amongst the various tribal branches which increases the complexity of the system. When a family head has no heir, due to his great wife, for example, dying without leaving a male child or his wife is barren or he divorced her and she has no male child from him, he may marry a seed raiser whose task it is to produce children and especially a male heir to succeed the family head. This seed raiser does not form another house but continues the great wife's

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1 Customary Law, p. 126.
2 Ibid, pp. 126 - 127.
house, while in Thembu law, she actually becomes the great wife.\footnote{Customary Law, p. 279.}

Generally, a male belongs to the family of his mother at the time of his birth while a family relates to a group of families who are traced through a male line. Every male member may potentially succeed the family head and through him to any other family head in the group. A family head’s descendants precede his ascendants and collaterals. A woman does not inherit under any circumstances as an heir. The family home consisting of many houses has as many inheritances, but only one heir succeeds to the inheritance of a house and no one shares in this right. Indigenous succession law is based on perpetuating the family head’s name as well as a form of communalism of collective right and responsibility within the family and family grouping.\footnote{Ibid, p. 273.}

There are different systems of succession in indigenous succession. When a family head deceases and he had only one wife and his children were legitimate, the eldest son will succeed as only heir; if the latter predeceased the family head, the second eldest son succeeds. This pattern continuous until this male line is exhausted. If a son, who predeceased the family head, had a son, then he succeeds. When no descendant is found, the family head’s father succeeds and if the latter predeceased the family head, the latter’s eldest brother or one of his descendants succeeds in the same manner as with descendant sons. If not found, then the next eldest brother of the family head and if this male line is exhausted, the family head’s grandfather succeeds. If not found, then the most senior paternal uncle succeeds and if not found, then his senior descendant following the pattern as for sons. If none are found, then the great grandfather of the family head
succeeds, followed by his sons and their descendants in the mentioned pattern of descendants. When there are no male relatives who can succeed, the paramount chief of the family head’s tribe succeeds in his capacity as guardian of female wards of the deceased family head. However, in KwaZulu-Natal, the paramount chief does not succeed in this case, but the inheritance devolves upon the family head’s heirs as in intestate division according to civil law consequences of a civil law marriage.

In the Sotho and Pedi tribes, the widow, in a one wife marriage, or the great widow in a polygamous marriage, succeeds to the position as family head until a male issue can be raised to succeed.¹

In the case of a polygamous union, the succession is either simple or complex. In simple polygamous succession, like that of the Tsonga where no Zulu influence is found, the eldest son of the first wife succeeds the family head and in his absence or disqualification, the eldest of his descendants. If no male descendants are found with the first wife, then the sons of the family head by the second wife. If she has no sons, then the successive wives’ male children and descendants are taken into consideration in the order of their marriage to the family head.²

In a complex polygamous system, like with the Cape Nguni tribes, the family head’s property is distributed amongst the houses of his wives. Each such house has its own estate and only the eldest son thereof succeeds, whether he is minor or major. If only two houses are found, the great and right hand houses, and no heir in one of them, the eldest son succeeds to both. In the case of qadi (supporting) houses, the son of one section of the qadi house system is preferred over that of the

¹ Customary Law, pp. 274 - 275.
other. A complex system of succession is involved here.

In *Pondo* law, if no sons are found in the two main houses (great and right hand houses), the highest ranking son of the *qadi* (supporting house) is the heir of the main house of his section. Zulu succession resembles, more or less, that of the Cape *Nguni* tribes.¹

7 The Current South African Family & Succession Laws & Matters Relating Thereto:

This thesis deals, primarily, with succession (*mirath*) and its immediate related subject matter, such as legacies (*wasaya*) and endowment (*waqf*) and also with guardianship, custody and custodial care, status and adoption. These matters will now be dealt with as in South African law and practice.

7.1 Guardianship:

There are similarities as well as differences, sometimes cardinal, between *shari'ah* and South African law in this matter. Guardianship is defined as "the control over and administration of the estate of a minor (his money, property, investments) and assistance in the performance of juristic acts (for example, the conclusion of contracts)."² A minor, irrespective of sex, is someone who is, as far as age is concerned, under 21 years of age.³

a) Prenatal Guardianship:

South African law protects and takes notice of the interest of a foetus⁴, such as postponing the

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¹ Customary Law, pp. 275 - 276.
³ Age of Majority Act, Act 57 of 1972, Section 1.
death sentence on a pregnant woman\(^1\) and the court issuing an order for custody of an unborn child in divorce proceedings after its birth.\(^2\) However, it appears that a foetus is not taken as a being in law and has, thus, no rights as a being especially now with the enactment of a new abortion Act\(^3\), save if it is injured, for example, during his mother's pregnancy with him. A claim for damages can be instituted after his birth.\(^4\) This principle was confirmed in a court case\(^5\) although the plaintiff lost her case on grounds of not proving beyond reasonable doubt that the actual accident caused the foetus' defect.

**b) Postnatal Guardianship & Curatorship Of Minors:**

In South African law, each of the parents married legally to one another, has guardianship rights over their minor children.\(^6\) In fact, each parent can exercise this guardianship independently and without the consent of the other parent.\(^7\) Both parents' consent is required for certain matters, such as marriage of the minor, adoption of the child or his removal from the Republic, his application or a passport and the alienation or encumbrance of his immovable property or right thereto.\(^8\)

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7. Ibid, Section 2.
c) **Majority (Taklif):**

A minor attains majority on reaching the age of 21 years. A minor of 18 years can be emancipated by applying therefor to a South African court and complying with the necessary documentation and procedures required under the Act. If so granted, he attains majority. A minor can be tacitly emancipated in terms of tacit emancipation which is a controversial form of emancipation in modern law. Some maintain that tacit emancipation "liberates the minor from parental power for all intents and purposes," while others maintain that it is only "an enlargement of the minor's capacity to act without parental consent." An *infans* (someone aged below 7 years) has no power to conclude any contract even with parental assistance, while persons aged 7 to 20 have limited contractual power save when such will improve their state like receiving while the other contracting party gives. They must, however, be assisted by their guardians herein.

The prodigal (*safīh*) is restricted in his capacity to act in managing his own affairs when he is incapable of it and squanders his assets. He or someone else can apply to the court for the appointment of a curator to manage his affairs. This system existed in both Roman and Roman-Dutch law and

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1 *Age of Majority Act, Act 57 or 1972, Section 1.*
2 *Age of Majority Act, Act 57 of 1972, Section 2.*
3 Ibid, Section 7.
7 Ibid, p. 80.
is also South African law. The insane person's acts are invalid as he has no capacity to act. The court appoints a curator to act for them and look after their assets.

d) Custody Of Minors:

Parents are eligible for the custody of their children save if they are unfit for it. Custody is that part of parental power which deals with the child's personal life. In marriage, custody is shared by both parents unless they are not proper parents and no one of them can prevent the other from custody of the children. If a marriage subsists, but parents live apart, the court will give a decision which parent will get custody of the children and herein the court will be guided by the interest of the children. When one parent dies, the surviving parent has then sole custody and guardianship of the children. After divorce, the court must make a ruling as to what parent gets custody, but both parents have a right to the physical presence and company of their children.

The mother of an illegitimate child had exclusive custody over her extra-marital child. In a court case the Witwatersrand division of the Supreme Court, held that the natural father of an illegitimate child has an inherent right of reasonable access to the child while the Transvaal Division held that such a father must approach the court for such access. This is set to change dramatically as a Bill has been introduced in parliament where the natural father of children born out of wedlock may be granted access rights, custody or guardianship of his illegitimate child on application to the court subject to certain considerations.

Joint custody may be awarded, although this is rare, as happened in the Kastarn case where the parents agreed, in their divorce action, to exercise joint custody over their children. A similar ruling was given in another case. In another case, joint custody was refused.

e) The Court As Upper Guardian:

The High Court is upper guardian of all minor children which, in practice, means that its powers

Children's Status Act, Act 82 of 1987, Section 3.
Van Erk vs Holmer 1992 (2) SA 636 (W).
now the High Court.
Introduction to Family Law, p. 187.
Natural Fathers of Children Born Out of Wedlock Bill, 1997, Section 2(1).
Kastarn vs Kastarn 1985 (3) SA 325 (C).
Venton vs Venton 1993 (1) SA 763 (D).
Schlebusch vs Schlebusch 1988 (4) SA 548 (EC)
previously Supreme Court.
overrides the authority of both parents and guardians. The court may thus interfere with parental authority in the child's interest. Both common and statutory law grant these powers to the court. At common law the court interferes with the guardianship of a child, when the child's life, health, morals or property is endangered by the conduct of the child's parents. Court intervention in the interest of minor children in divorce cases is also founded on common law. The court's statutory powers have been conferred by Acts of Parliament. The Child Care Act makes provision for the welfare and protection of children. A magistrate's court sits as a children's court. Children in need of care and those without parents or guardians are provided for as far as their safety is concerned. Children in the care of unsuitable parents or guardians may be placed in foster care or sent to a children's home or school of industries.

The High court can consent to the marriage of a minor if his parents or guardian or commissioner of child welfare refuse consent without adequate reason or act contrary to the interest of the child in this matter. Guardianship, custody and access to children of divorced parents can be entertained by the court in the best interest of such children, while a minor's property is protected in that

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3 Ibid, Chapter 2, Clause 5.
5 Ibid, Chapter 3, Clause 15(b)(c)(d).
7 *Matrimonial Affairs Act*, Act 37 of 1953, Section 5(1).
parents or guardians cannot alienate immovable property of minors without the court's consent when its value exceeds R10 000.00.¹

f) Other Forms Of Guardianship:

Other forms of guardianship exist in South African law such as testamentary guardians who are appointed by a guardian in his testament and who can commence his duties after appointment by the Master of the High Court. A sole guardian nominates a guardian exclusively to control the minor child's estate.² An assumed guardian is nominated by a testamentary guardian to act with him or in his place. There are specific regulations herein regulated by an Act.³ A putative guardian is a person who acts erroneously as guardian under the mistaken assumption that he has that right. The court can ratify the conduct of such a guardian if it is in the interest of the child.⁴

7.2 Adoption In South African Law:

Adoption was valid in Roman law⁵, and was widely practised⁶, though Roman-Dutch law did not recognise it, it existed in Friesland⁷. Adoption was legalised in South Africa in 1923 by an Act⁸. This was followed by

¹ The Administration of Estates Act, Act 66 of 1965, Section 80.
² Introduction to Family Law, p. 196.
³ Administration of Estates Act, Act 66 of 1965, Section 72(2).
⁴ Introduction to Family Law, p. 197.
⁵ Textbook of Roman Law, p. 437.
⁸ Children's Act, Act 25 of 1923.
the Children's Act of 1937\textsuperscript{1}, which was followed by the Children's Act of 1960\textsuperscript{2} and finally the Child Care Act.\textsuperscript{3} A magistrate's court, sitting as a children's court deals with adoptions in the area of its jurisdiction.\textsuperscript{4} Private adoptions are invalid in law as confirmed in a court case\textsuperscript{5} where biological parents gave their child to a married couple but never completed adoption papers. The child was returned to his biological mother as there was "no threat to his life, health or morals" with her "..nor would the court deprive a parent of the custody of his child."\textsuperscript{6}

South African law has procedures which has to be followed for adoption to be valid which are set out in the Child Care Act.\textsuperscript{7} Of these are the ability of the adoptive parent(s) to be of good repute, fit and proper to be entrusted with the custody of a child and have adequate means to maintain and educate the child and see to his interest and welfare\textsuperscript{8}. There were stringent age restrictions between adoptive parent and adopted child in the Children's Act\textsuperscript{9} but these are not found in the present Child Care Act.\textsuperscript{10} Consent is necessary for a

\begin{enumerate}
\item \textit{Children's Act, Act 31 of 1937.}
\item \textit{Children's Act, Act 33 of 1960.}
\item \textit{Child Care Act, Act 74 of 1983.}
\item Ibid, Chapter 2, Section 5.
\item \textit{Van der Westhuizen vs Van Wyk & Mother 1952 (2) SA 119 (GW).}
\item Ibid.
\item Section 18.
\item \textit{Child Care Act, Section 18(a)(b).}
\item \textit{Children's Act, Act 33, Section 2(a)(b)(c)(d) & 3(a)(b)(c).}
\item \textit{Act 74 of 1983.}
\end{enumerate}
valid adoption and both parents must consent or the mother of the illegitimate child must consent.¹

Married persons adopt jointly, while a divorce or divorcee, widowed or unmarried person adopts singly.² This had now been amended³ to allow a natural parent to adopt his illegitimate child. A child of 10 years or older must also consent to his adoption.⁴

There must be regard for the child's religion and cultural background in adoption.⁵ This is called "matching". The law states that "regard" be had in this case and not that the court must be "satisfied" in this matter. The High Court did not uphold the background rule. In fact, it had, at times, overruled the commissioner of child welfare in a court case⁶ where a Jewish couple was granted adoption of an Afrikaans speaking child who was also a member of the Dutch Reformed Church. Matching of religion and culture diminishes with the advance of age of the prospective adoptee.⁷

a) Legal Effect Of Adoption:

An adoption order confers the surname of the adoptive parent on the adoptive child and he becomes the legitimate child of the adoptive parents⁸ as well as terminates all rights and legal responsibilities existing between the adopted child

¹ Child Care Act, Section 18(d).
² Ibid, Section 17(a)
³ Child Care Amendment Act, Act 86 of 1991.
⁴ Child Care Act, Section 18(e).
⁵ Ibid, Section 40.
⁸ Child Care Act, Section 2(2)(3).
and his natural parents and their relatives. An adoption order does not legalise marriage or sexual intimacy which would otherwise be unlawful, nor does it prohibit a marriage or sexual intimacy which would otherwise be permitted. However, the adopted child cannot marry his adoptive parent nor can there be sexual relations between them as that would tantamount to incest.\(^1\) There is, thus, no prohibition of marriage between the adopted child and a natural child of the adoptive parent nor between other adopted children of an adoptive parents, provided there is no barrier to marriage such as prohibited degrees in marriage. This again highlights the artificial nature of adoptions. It is interesting to note that prior to 1960, there was no prohibition of marriage between the adopted child and his adoptive parent on condition that the child was not less than 21 years of age.\(^2\) This is another example of the artificiality of adoptions.

It is an offence to give or receive any consideration for adoption save with the Minister's consent.\(^3\) An adopted child may be adopted by another adopter parent. If so, all previous legal consequences of his previous adoption are cancelled save property acquired by virtue of his previous adoption.\(^4\) The artificiality of adoption is again manifest herein also.

\(^1\) Child Care Act, Section 20(4).


\(^3\) Child Care Act, Section 24(1).

\(^4\) Ibid, Section 23(1).
7.3. **SUCCESSION:**

This differs fundamentally and cardinally with *mirath*.

In common law, making a Will requires the attaining of puberty which is 14 years for males and 12 years for females.\(^1\) Statutory laws in the pre-Union colonies and territory of South West Africa changed this and the English form of a Will was introduced.\(^2\) Natal colony explicitly departed from common law requiring a testator to be 21 years or older or be emancipated from parental power and having legal capability of making a Will.\(^3\) These laws had been changed statutorily by an Act\(^4\) which created uniformity. The administration and execution of Wills thus had two phases, one dating before 1st January 1954\(^5\) and those after that date.

a) **General Rules Of A Will:**

A "Will" is defined as "a unilateral, voluntary expression of the wishes of the testator in legally prescribing ways which determine what must happen to his property after his death."\(^6\) In English law, a Will is defined as "...the declaration in a prescribed form of the intention of the person

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3. Law 2 of 1868 of Natal Colony, Section 6.
5. date of the *Wills Act*, Act 70 of 1953.
making it with regard to matters which he wishes to take effect upon or after his death."¹

A Will must be in writing, signed or marked by the testator² and signed by witnesses³. When a testator uses a mark, a magistrate, commissioner of oaths or justice of the peace must certify that he/she is satisfied with the testator's identity and that the Will is his Will.⁴ If there is more than one page, each page must be signed by the testator and witnesses.⁵ These rules are obvious for the avoiding of fraud in Wills.

In order to make a valid Will, a testator must be 16 years of age and mentally capable to make a Will. The witnesses, must be 14 years of age or older.⁶ Minors under 16 years in statutory law (and those under 14 years, at common law) have no capacity to make a Will and their Wills are invalid at law.⁷ Later Roman law as well as Roman-Dutch law validated a prodigal's Will if prodigality did not show in the Will. There appears to be acceptance hereof in South African law as in Ex Parte F 1914 WLD 27 at 30.

² testator will, hereinafter, also include the testatrix, unless otherwise indicated.
⁴ Wills Act, Act 70 of 1953, Section 2(i)(ii)(iii)(v).
⁵ Law of Succession Amendment Act, Act 43 of 1992, Section 2(b)(ii).
       *The South African Law of Succession*, p. 47.
⁶ Wills Act, Act 70 of 1953, Section 1.
Persons born as deafmutes had no capacity to make a Will in Roman law nor does Roman-Dutch law view this positively and South African courts have not dealt with this. Corbett et al is of the opinion that the real test in these persons' cases will be if they had the required capacity to execute a Will.

Sound mental capacity is a requirement for the execution of a valid Will. These were all applicable before 1st January 1954. Wills executed after this date, are dealt with in terms of the Wills Act. This Act apparently does not preclude a prodigal of being incapable of executing a valid Will by reason of interdict alone whether prodigality is observed or not from his Will due to prodigality not being a mental incapacity. If there is no mental deficiency in a deafmute, he is likewise not precluded from making a valid Will.

Joint Wills are valid in South African law, whether the persons are married in or out of community of property or even if they are not married at all.

b) Administrative Requirements Of A Will:

These have no corresponding statutory rules in *shari‘ah*.

Opening of Wills in front of witnesses featured in both Roman and Roman-Dutch law. In South African law both production and registration of a Will is governed by statute. A Will, prior to death is either kept by the testator or entrusted to another

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The Act requires that a deceased's Will be delivered to the Master when the testator dies. This includes a revoked Will. The original minute of a notarial Will must also be delivered to the Master by the notary in whose presence it was passed and he must file a certified copy of such a notarial Will in his protocol and endorse such a copy to the effect that the original had been delivered to the Master. This account is for the estate in question. Defaulting herein is an offence in law punishable by a fine of R100.00 or imprisonment not exceeding 6 months or both.

The Master is under obligation to register Wills delivered to him in a register of estates. He must also register a certified copy of an original foreign Will if such was certified by a competent authority. When an original will is lost, application must be made to the Court in declaring the copy to be the Will of the deceased. In normal practice an outright order is usually not immediately granted but a rule nisi calling on those

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3. meaning here, and hereinafter, the Master of the High Court (previously Supreme Court).
8. Ibid, Section 102(h).
10. Ibid, Section 8(3).
having an interest in the matter to show cause why
the order should not be granted is issued. It may
grant an order if circumstances so warrant.

Registration of a Will is not recognition
thereof. Any aggrieved party can apply to the court
to set aside a Will registered with the Master.¹
The Master himself, with valid reason(s), may refuse
to accept a Will, even if he registered it and
refuse to grant letters of executorship.² It is the
duty of the surviving spouse or nearest relative of
the deceased or associate of the deceased residing
in the latter’s district, to supply an inventory of
deceased’s estate to the Master.³ An interim curator
can be appointed by the Master to take custody of
the deceased estate until letters of executorship
have been granted, signed and sealed or someone had
been instructed to liquidate and distribute the
estate.⁴ The Master must grant letters of
executorship to an executor mentioned in a Will when
there are no legal objections to his executorship.⁵

c) Revocation Of Wills:

Since freedom of testation applies in South
Africa, it is logical that the revocation of Wills
will also be valid. A testator can revoke a Will at
any time before his death, but an agreement by him
to revoke his Will is invalid. By making another
Will, he revokes the previous Will. He also revokes
his Will by making a codicil to that effect or
destroying the Will in question. A testator’s

¹ The Law of Succession in South Africa, pp. 104 - 105.
² Administration of Estates Act, Act 66 of 1965, Section
  8(4).
³ Ibid, Section 9(1).
⁴ Ibid, Section 12(1).
⁵ Ibid, Section 14(a)(b).
marriage does not revoke his Will nor is a mutual Will revoked by remarriage of the surviving spouse.\(^1\)

d) Contents Of Wills:

South African law applies the principle of freedom of testation which is wider than in any other western system of law. A high regard is placed on the testator's wishes in disposing of his assets provided it is lawful. Immoral, vague, impracticable or impossible provisions are not executed nor provisions prohibited by law\(^3\). Thus, The Immovable Property Act\(^3\) empowers the court to alter or amend immovable property restrictions imposed by a testator in his Will\(^4\), likewise is the subdivision of agricultural land also limited by provisions of an Act\(^5\).

The court can also, on application of a trustee or other suitable person, authorise the amending of a trust deed.\(^6\)

A surviving spouse may claim maintenance from the deceased estate of the deceased spouse until his/her death or remarriage, if unable to provide for him/herself.\(^7\) This claim must be reasonable and rules had been laid down for determining this.\(^8\) The maintenance of minor children as well as costs of

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\(^1\) The South African Law of Succession, pp. 58 & 62.


\(^3\) Act 94 of 1965.

\(^4\) Law of Succession, pp. 2 – 3.

\(^5\) Agricultural Land Act, Act 70 of 1970.

\(^6\) Trust Property Control Act, Act 57 of 1988, Sections (13) & (14).

\(^7\) Maintenance of Surviving Spouse Act, Act 27 of 1990, Section 2.

\(^8\) Ibid, Section 3.
their education are claimed from their parent's estate, but is subordinate to creditor claims but precede claims of legatees and heirs. Apart from this, the testator can appoint any heirs and name any legatees and any form of benefit. There can, thus, be only one heir.

The minor children must be provided for from their mother's estate when the surviving father cannot provide sufficiently for them. Provisions of an ante nuptial contract on the devolution of property at death of one of the spouses are valid and can only be revoked by a mutual Will.

The South African succession system is the English executorship system brought in by a Cape Ordinance which supplanted the Roman universal succession system.

As far as conditions in a Will is concerned, bequests may be conditional or unconditional or resolutive, which cancels the bequest if a certain act is done. If the condition is impossible, the heir succeeds unconditionally. A condition may be mixed when an heir can only fulfil it partially, or casual of it is beyond his power to fulfil or potestative if he can fulfil it. Illegal conditions or those against public policy are void and the beneficiary succeeds to his benefit if the Will makes sense without the void conditions. Illegal

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3 The South African Law of Succession, p. 65.
5 Cape Ordinance No. 104 of 1883.
6 The Law of Succession in South Africa, p. 5.
conditions are those that destroy an existing marriage or forbidding the beneficiary to marry, but partial restraint is valid such as prohibiting the beneficiary from marrying someone of a particular religion, race or nationality.\(^1\) Excluding court jurisdiction is against public policy and is void.\(^2\)

A testator may make either a suspensive or resolutive \textit{dies}.\(^3\) In a suspensive \textit{dies} a time limit is set before succession to benefit is allowed while a resolutive \textit{dies} ensures that a right given will disappear.\(^4\) Another valid testamentary imposition is a \textit{modus} which is an obligation imposed on the beneficiary without making his rights conditional, like the testator ruling "my property P is left to Q subject to him building school S". A condition postpones but does not oblige while a \textit{modus} obliges but does not postpone. Benefit subjected to a \textit{modus} vests immediately in the beneficiary subject to complying with what the \textit{modus} instructs in.\(^5\)

e) \textbf{Vesting:}

When a beneficiary’s right to an inheritance or bequest becomes unconditionally fixed and established, such a beneficiary is vested with the specific benefit.\(^6\) There is a difference between vesting of an interest in a deceased estate and the accrual of the right to enjoy or exercise that interest. In intestate succession, vesting takes

\(^{1}\) This may be void now in terms of the new South African constitution’s Bill of Rights, Chapter 2, Section 9(2)(4), Section 10, Section 15(1) & Section 18.

\(^{2}\) Law of Succession, pp. 91 - 93.

\(^{3}\) a \textit{dies} is a time factor imposed by the testator before a beneficiary succeeds to his benefit.

\(^{4}\) Law of Succession, pp. 93 - 94.

\(^{5}\) The Law of Succession in South Africa, pp. 130 - 131.

\(^{6}\) The South African Law of Succession, p. 77.
place immediately at death of the deceased but in testamentary succession, the testator's intention, as in his Will, determines that. This is usually at death of the testator or when he stipulates it in his Will. Where an interest is vested in a beneficiary but its enjoyment postponed and the beneficiary dies before he can enjoy the benefit, it passes to his heirs. Vesting plays an important role where there is excess income from property in cases where beneficiaries receive an annuity (usually from trusts). When an inheritance or bequest had been made conditional, the right of the beneficiary therein will be vested, usually, when the condition had been met.¹

f) Collation:

This applies to both testate and intestate succession. Collation is the required duty of heirs of an estate of an ascendant, whether testate or intestate, to declare what they owe his estate or what they received from him in advances or gifts during the latter's lifetime.² Such an heir is only obliged to do so when no indication to the contrary is found. This process is required for calculating the shares of the heirs. Only descendants collate and only when they would have succeeded to the deceased's estate *ab intestato* (by way of intestacy) if there had been no Will of their testator. Thus, if a testator wills his estate to his grandchildren and his son is still alive at his death, the grandchildren do no collate as they would not be the grandfather's heirs *ab intestato*.³ Descendants who have to collate themselves are entitled to


² The South African Law of Succession, p. 17.

collation. Grandchildren must collate to their brothers and sisters, uncles and aunts.

There is no collation due to ascendants nor strangers nor descendants who do not succeed to a deceased's estate \textit{ab intestato}, nor do legatees or creditors. There is no agreement as to whether the deceased's surviving spouse can claim collation. Benefits that must be collated are an advance by the testator for his heir as part of his inheritance, property, money, or an advance made to him for aiding him in his profession or business or as a marriage settlement or such gifts which are substantial when compared with the donor's financial position and which, if left out of the deceased estate, will result in an unfair and diminished share value to the heirs. No collation is due for gifts of a simple and unconditional nature, nor for maintenance and education nor donations for recognition or in recompense of services or benefits.\footnote{1}

The following issues may be validly reflected in Wills and since of these have relevance to Muslim Wills, they are discussed hereunder.

\textbf{g) Substitution In Wills:}

Substitution is resorted to to prevent failure of a bequest such as a beneficiary replacing one that deceases. In this case, if the first is found, the second one falls away.\footnote{2}

Substitution are of two kinds, namely, direct substitution which occurs when the appointed beneficiary takes the benefit to the exclusion of the substitute, and fideicommissary substitution when "an instituted heir has to allow benefit to pass to a subsequent beneficiary after a lapse of

\footnote{1} \textit{The Law of Succession in South Africa}, pp. 20 - 23.

\footnote{2} \textit{The South African Law of Succession}, pp. 78, 79.
time or the death of the heir." Direct substitution provides for alternative succession, in this case the first heir, the *institutus*, succeeds followed by the substitute or *substitutus*. There may be one *institutus* and many *institutii* or vice versa. There can also be direct substitution by law. The General Law Amendment Act provides implied substitution in certain cases. A testator's grandchildren will succeed to the benefit of the testator's predeceased son, if the testator's Will does not prohibit that.

The South African Law Commission (SALC) had recommended that section 24 of the General Law Amendment Act be amended and its provision be extended to cover all descendants of the testator and that "lawful descendants" in the mentioned section be amended to read "descendants" and that children born after the testator's death (who are not his children) shall not be included in sharing any benefit save if the testator so expressed such in his Will.

h) Fideicommissary Substitution:

A *fideicommissum* is a legal institution which is established by the *fideicommittens* and transfers property to a particular beneficiary, the *fiducianus* on condition that if a certain condition had been fulfilled, the further beneficiary, the *fideicommissarius* or fideicommissary, receives the

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2. *Act 32 of 1952*.
property. The substitution in this case is thus that it is successive and cumulative. The difference between a fideicommissary and direct substitution is that in the latter provision is made for alternative beneficiaries while in fideicommissary substitution, the beneficiaries benefit successively.

For a fideicommissum to be valid, certain necessary requirements have to be met and these are that the testator clearly intends to create a fideicommissum, that there is effective ceding of benefit in favour of the fideicommissary when he fulfils the requirement(s) of the fideicommissary condition, that the testator clearly indicate the fideicommissary assets, which may be any kind of assets (but is usually land) and that the fideicommissary be valid. For it to be valid it must not be vague, nor prohibit the fideicommissary from coming into operation, nor must it be illegal or contrary to public morals. It is, however, valid to make a fideicommission conditional on the death, marriage or remarriage of a fiduciary.

1) Operation Of A Fideicommissum:

It can be explicitly created, like in a Will, for example. In this case, it is usually stated that "I leave my land L to C and on his death to D, who is C's son." It can be tacitly created (the fideicommissum tacitum), like in the example, "I leave my land L to Y and if Y dies, childless, then Z will take the land." Thus, if Y dies childless, Z succeeds to the land, but not if Y dies before the testator and leaves children. The fideicommissum, in this case, goes to Y's children according to the latest Appeal Court ruling. A fideicommissum may, through the

1 The South African Law of Succession, p. 86.
2 Law of Succession, pp. 101 - 103.
instrument of a Will, prohibit alienation or limit its duration.¹

2) Legal Position Of The Fiduciary :

There must be proper and adequate identification of the fiduciary before the fideicommissum can be valid.²

When the fideicommissary assets are transferred to him, the fiduciary is vested with the right therein and becomes the owner thereof on being delivered to him, in the case of movables, or on registration, in the case of immoveables. However, his proprietary rights are limited and he can, generally, not alienate the property but enjoy its fruits subject to not changing the essential state and qualities of the property as it must be in that state when transferred to the fideicommissary. The fiduciary can be compensated for improvements made to the fideicommissary assets, but not for luxury or even ordinary improvements and the scope of his claim is limited to the improvement in the fideicommissary assets and expenses incurred by him. Whichever is smaller, is paid to him, usually into his estate as benefit of fideicommissary assets is usually for life.³

The fiduciary is required to provide an inventory of the fideicommissary assets and furnish security thereof unless the testator gave contrary instruction. The fideicommissary assets must be retained in its original state when delivered to the fiduciary. On fulfilment of the

¹ Law of Succession, pp. 104 - 105.
² The South African Law of Succession, p. 91.
³ Law of Succession, pp. 107 - 108.
The South African Law of Succession, p. 100.
fideicommissary condition, the assets are transferred to the fideicommissary.

There is a ranging disagreement on the legal position of the fideicommissary before the fulfilling of the fideicommissary condition. Some maintain that it is only a hope or expectation (and this is the traditional view) to those who confer a real right to him in the fideicommissary. 1

3) Alienation Of Fideicommissary Assets:

The fiduciary can only alienate the fideicommissary assets when the testator had so explicitly stated that in his Will. If not, only the court can alienate it but can only act in terms of the common law or legislation. In terms of common law, if all the fideicommissaries agree and they are majors, the court can order alienation.

The court can also act in alienating fideicommissary assets on behalf of unborn fideicommissaries, conceived or not yet conceived, but cannot remove the fideicommission. 2 The court can also consent to an exchange of fideicommissary assets or the sale thereof and substitute assets bought with the returns and it will do so if it is in the interest of the fideicommissaries. Alienation will be resorted to by the court in fideicommissary assets when there is dire need for it like paying the testator's debts, making provision for legacies made, to discharge statutory required obligations such as taxes, for maintenance of the testator's children as well as

1 Law of Succession, pp. 110 - 111.
covering for recurring expenses for the maintenance and protection of the fideicommissary assets.\textsuperscript{1}

4) **Termination Of A Fideicommision:**

A *fideicommissum* ends when the fideicommissary condition had been met and there is no fideicommissary substitute or when the *fideicommissum* duration, as mentioned in the Will, ended. It will also end as a result of the application of Act 94 of 1964\textsuperscript{2}, or when the fideicommissary assets are destroyed due to no fault of the fiduciary as well as being ended by interested parties who are majors or the testator’s nomination of a fiduciary to fideicommissary fails or when the fideicommissary condition is invalid.\textsuperscript{3}

If a *fideicommissum* is multiplex, the testator must indicate for how many generations it will continue. If he does not, the court will limit it to 4 generations according to common law.\textsuperscript{4}

i) **Usufruct:**

This is a legal institution which can be granted *inter vivos* (during your lifetime) or *mortis causa* (in a valid Will).\textsuperscript{5} This personal servitude can be granted in a Will and can be created by movable, immovable or incorporeal things, but not consumables. The usufructuary has limited real right to use another's property and take and enjoy the fruits thereof after which, it returns to the real

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\textsuperscript{1} Law of Succession, pp. 108 - 109.

\textsuperscript{2} Immovable Property Act (Removal or Modification or Restrictions).

\textsuperscript{3} Law of Succession, p. 115.

\textsuperscript{4} The South African Law of Succession, p. 113.

\textsuperscript{5} The South African Law of Succession, p. 98.

\textsuperscript{5} Law of Succession, p. 115.
owner. The difference between a usufruct and a fideicommisssum has been set by the court case of Estate Watkins-Pitchford v CIR 1955 2 SA 437 (A) 447 which states that the "fiduciary has a vested right in the corpus of the fideicommissary property and may, on failure of the fideicommissaries, acquire full dominium in respect of the property which he holds as a fiduciary interest while in a usufructing interest, the usufructuary has no vested interest in the corpus of the property.... and can never acquire the full dominium of that property."

A testator may also grant other limited benefits to a beneficiary like usus (right of use) or habitatio (right of living in a property) with certain limitations. Joint usufruct is valid and the usufruct property is divided between them to the extent of their life interest except when it is forbidden to do so by the Will in question.

j) The Trust:

This exists in the context of the law of testate succession. A beneficiary benefits from this legal institution, but a trustee is vested with ownership and or control of the trust assets. A trust can also be created for impersonal purposes like a charitable trust. An Act regulates the law of trusts. This Act defines a "trust" as "the arrangements through which the ownership in property of one person is, by virtue of a trust instrument, made over or bequeathed to:

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(a) another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument or,

(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument for the achievement of the object stated in the trust instrument,

but does not include the case where the property of another is to be administered by any person's executor, tutor or curator in terms of the provisions of the Administration of Estates Act, Act 66 of 1965".¹ In "a" of the above definition, the trustee becomes the owner of the trust assets which is to benefit the trust beneficiary or other trust objective. Here the trustee is not the owner in his own right, but in the interest of the trust beneficiary.² But in "b" of the Act's³ definition, the trust beneficiary actually owns the trust assets and the trustee only undertakes control and administration of such assets.⁴

¹ Trust Property Control Act, Act 57 of 1988, Section 1(a)(b).
² Law of Succession, p. 119.
⁴ Law of Succession, p. 120.
1) **Requirements For A Valid Trust:**

A testamentary trust created by a Will must comply with certain required formalities. These are the clear intention by the testator to create a trust, indicating the beneficiary, the trust assets and what the trust objectives are, the latter of which must be lawful. These objectives apply to charitable trusts.

Trust assets can be moveable, immovable or incorporeal things. Trust objectives having consideration for religion, nationality and population group have been regarded as lawful by the courts.

2) **The Legal Position Of The Trustee In Law:**

A trustee appointed after commencement of the Act either by nomination in a trust instrument, by court order or by appointment by the Master can only act as a trustee when the Master had authorised him herein. The trustee must furnish an address for service of notices as well as furnishing any change of address. He is required to lodge the original or certified copy of the trust deed with the Master and pay the prescribed fee. He must do the same when the trust document is varied.

A trustee must account to the Master satisfactorily in the administration and disposal of assets and answer any queries about the administration and records of the trust honestly.

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1. *Law of Succession*, pp. 120 - 121.
3. Ibid, Section 6.
4. Ibid, Section 5.
5. Ibid, Section 4.
and truthfully. An auditor of the trust must report any material irregularity to the trustee and if such is not rectified one month after being reported, the investigating officer must report such in writing to the Master. Further requirements are that the documents of proof of the operation of the trust must be kept by the trustee, that he provide security save if he is exempted from it by the trust document, the Master or a court order. The Master has wide discretionary powers in this matter save in the case of a court order.

A trustee is further required to execute his duties with care, diligence and skill and is not absolved by a trust instrument provision herein. Monies received by a trustee in that capacity must be banked in a banking institution or building society, while he may receive remuneration specified in the trust document or reasonable remuneration if such had not been specified. A dispute as to what is reasonable herein, will be decided by the Master.

As far as the tenure of the trustee as such is concerned, he can be directed to comply with the request to perform his duty as required under the trust deed or by law. He can be removed from office by a court order at any time on application from the Master or any person having interest in the trust assets if the court feels

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1 Trust Property Control Act, Act 57 of 1988, Section 16.
2 Ibid, Section 15.
3 Ibid, Section 15 & 17.
4 Ibid, Sections 6 (2) & 6(3).
5 Ibid, Sections 9(1), 9(2) & 10.
6 Ibid, Section 22.
this is in the interest of the trust beneficiaries and the trust. He can be similarly removed from office if he is convicted in the Republic or elsewhere of an offence of which dishonesty is an element or for any offence for which he was sentenced without the option of a fine, fails to give security or additional security to the Master within 2 months of being requested to do so by the Master and the latter granted no extension herein.

Also, when the trustee's estate is sequestrated or placed under judicial management or he is declared mentally ill or incapable of managing his own affairs or he is detained in terms of the Mental Health Act or declared a patient in such an institution or as a President's patient or he fails to perform his duties so required under the Act, satisfactorily. A trustee can, further, resign his position in written notice to the Master and the Master can appoint a trustee if such is required (such as the post being vacant or cannot be filled) but he must consult interested parties herein as he deems necessary. He may also appoint a co-trustee, if he deems it fit.

3) The Legal Position Of The Trust Beneficiary:

He has a right to receive income or capital from the trust as prescribed. If the trustee mismanages or fails to comply with the trust directives, the trust beneficiary can obtain a prohibitionary interdict against the trustee who wish to alienate trust assets in an unauthorised

1 Trust Property Control Act, act 57 of 1988, Section 20(1).
3 Ibid, Section 7(1)(2).
manner or if the trustee fails to carry out his duties in payment to the beneficiary or transfer of capital or income to such a trust beneficiary. In the latter case the trust beneficiary can sue the trustee. Similarly, the trust beneficiary can sue for damages consequential to the trustee's deliberate or negligent maladministration of the trust, non compliance with trust provisions or misapplication of trust assets.

If the trust beneficiary is aggrieved by the authorization, appointment or removal of a trustee, by the Master, or any decision made by the latter in terms of the Act, he can seek relief through the court.

4) Insolvency Of The Trustee:

A trust beneficiary may be harmed if the trustee is declared insolvent in the case where the trustee is the owner of the trust assets. It is accepted that immovable trust property registered in the name of the insolvent trustee shall not fall into the insolvent estate of such a trustee. The trust beneficiary enjoys complete protection from the insolvency of the insolvent trustee.

5) The Charitable Trust:

This is created for social benefit and not only for religious orientated benefit. Thus, trusts providing bursaries, maintaining old age homes or provide for the needs of the destitute

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1 Trust Property Control Act, Act 57 of 1988, Section 19.
2 Law of Succession, p. 128.
3 Trust Property Control Act, Act 57 of 1988, Section 23.
4 Law of Succession, p. 129.
5 Trust Property Control Act, Act 57 of 1988, Section 12.
and under privileged are all charitable trusts. Courts are more accommodating and lenient to these forms of trusts.¹

6) Changing And Termination Of A Trust:

Courts have wider powers to alter trust provisions. The Act² allows the court to alter trust instrument provisions, which, in the opinion of the court, the founder of the trust "did not contemplate or foresee and which will hamper the achievement of the objects of the trust's founder or prejudices the interest of beneficiaries or is in conflict with public interest". An application is to be lodged herefor by the trustee or any person having sufficient interest in the trust property. This altering of trust provisions includes substituting trust property for other property or an order terminating the trust.³

A trust is terminated when its objectives had been accomplished, or trust assets are destroyed, or the trust fails, or the trustee and trust beneficiary agree to end the trust or when an income beneficiary renounces his rights and there is no other intention mentioned in the trust document.⁴

k) The Foundation:

This may be created during your lifetime or in one's Will. A foundation is a juristic person without members and has legal capacity bearing rights and duties. It resembles a charitable trust in that it is usually created for an impersonal

¹ Law of Succession, p. 130.
³ Ibid, Section 13.
⁴ Law of Succession, p. 132.
objective. The specific beneficiaries have no membership of the foundation nor do the representatives, controller, administrator or manager of it have any claim to its assets. A foundation is established by legislation such as the Land Bank founded in terms of an Act¹ etc., or it may be set up by private persons such as the Urban Foundation and Rural Foundation were established.

The Foundation's charter must be in writing but no government permission or registration is required. The nature of a foundation is disputed amongst the authorities, some claiming it to be the transfer of ownership from the founder to a charitable institution while others maintain that it is founded on an ambivalent act.

A foundation is terminated, amongst other reasons, upon its liquidation due to insolvency or when the purpose of its founding had been met or such becomes impossible to meet.²

1) Systems Of Succession In South Africa:

There are only two systems of succession, namely, testate and intestate succession.

1) Testate Succession:

Testate succession is by a valid and accepted Will, while intestate succession is without it.³ Both these forms of succession in South African law clash fundamentally with mirath (Islamic succession law). In essence, testate succession allows for freedom of testation subject to certain statutory requirements as mentioned previously. This entire system is cardinally and fundamentally opposed to mirath as compared with the chapter on mirath in this thesis.

¹ Act 18 of 1912. (Later replaced by Act 13 of 1944).
2) **Intestate Succession:**

A person dies intestate when he leaves no Will or left a Will, but it is invalid or he left a revoked Will or he failed to dispose of his entire estate in his Will or his beneficiary predeceased him or there is a residue to the estate.¹

South African law intervened in intestate succession to define prescribed conditions, rules and shares for heirs. This form of succession is governed by an Act². The basic provisions of this Act are:

- if a deceased leaves a spouse, but not a descendant, the surviving spouse succeeds to the entire intestate estate.³
- if the deceased leaves a descendant and not a spouse, then the surviving descendant succeeds to the entire intestate estate.⁴

Collaterals (i.e. those relatives who are not descendant or ascendants of the deceased) do not feature in intestate succession in the above two cases.

- if the deceased is survived by both a spouse and a descendant(s), the spouse inherits a child’s share of the intestate estate or such an amount as the Minister of Justice determines from time to time by way of an official notice in the Government Gazette. The South African Law Commission recommended the

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³ Ibid, Section 1(a).
⁴ Ibid, Section 1(b).
latter procedure. These two amounts are compared and the surviving spouse gets whatever is the greater. The present amount is R125 000.00 as stated in Government Gazette No. 11188 of 18 March 1988. The equation is worked out by dividing the monetary value of the deceased intestate estate by the number of *stirpes* (children) of the deceased plus one. Whatever remains of residue are for the descendant(s).

- if the deceased is survived by both his parents and no spouse or descendant, then each surviving parent receives half of the entire deceased intestate estate.

- if the deceased is survived by one parent only, such a parent receives half of the entire deceased intestate estate and the other half goes to the descendant(s) of the deceased parent. If no descendants of such a deceased parent survived him, the surviving parent succeeds to the entire intestate estate.

- if the deceased is survived by descendants of both predeceased parents only (and thus no spouse or parents or descendants of his own), then the deceased estate is halved; one half goes to the descendants of the deceased's

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2. *Intestate Succession Act, Act 81 of 1987*, Section 1(c)(i).


4. *Intestate Succession Act, Act 81 of 1987*, Section 1 (c)(ii).

5. Ibid, Section 1 (d)(i).

6. Ibid, Section 1 (d)(ii).
predeceased mother and the other half to the
deceased’s predeceased father’s descendants. The full descendants (full blood collaterals) will inherit from both parents’ descendants’ share and thus get a double share while those relating to one parent only receive only one share.\(^1\) If the deceased is survived by descendants of a predeceased parent only, then the mentioned descendants only will succeed to the deceased intestate estate.\(^2\)

if the deceased is survived by blood relations in the third degree or further and leaves no spouse, nor descendants, nor parents, nor descendants of parents, then these blood relations succeed to the entire deceased intestate estate in equal shares. They must be nearest to the deceased in degree of relationship.\(^3\)

The degree of relationship for the direct line is determined by the number of generations between the ancestor and the deceased or descendants. However, in the collateral line, the degree of relationship is the number of generations between the deceased, the blood relatives and the common ancestor and this includes the generations between the mentioned common ancestor and the deceased.\(^4\)

at common law, an illegitimate child could be intestate heir to his mother and his maternal blood relations and vice versa, but not his

\(^1\) Intestate Succession Act, Act 81 of 1987, Section 1 (e)(i)(aa)(bb)(cc).

\(^2\) Ibid, Section (e)(ii).

\(^3\) Ibid, Section 1 (f).

\(^4\) Law of Succession, p. 18.
The South African Law of Succession, p. 31.
biological father nor the latter's blood relations. The Intestate Succession Act (1987), has changed that and illegitimacy has no effect on the capacity of blood relations to inherit under intestacy from another blood relation.

- an adopted child can be an intestate heir of his adoptive parents and their blood relations and vice versa, but not to his natural parents nor the later's blood relations and vice versa. Certain sections of the Child Care Act (Act 74 of 1983) have "related" the adopted child to other persons and have "derelated" him to others. This arrangement is confirmed by the Intestate Succession Act.

3) Other Matters Pertaining To Intestacy:

- when no intestate heirs are found, the deceased intestate estate forfeits to the State as bona vacantia. The law requires the executor of an estate to forward to the Master, two months after an estate becomes distributable, all monies unable to be distributed for any reason for depositing in the Guardians' Fund. Monies deposited in the

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4 Child Care Act, Act 74 of 1983, Sections 17(c) & 20(1)(2).
5 Intestate Succession Act, Act 81 of 1987, Section 1 (4)(e)(i)(ii).
6 Administration of Estates Act, Act 66 of 1965, Section 35 (13).
Guardians' Fund and unclaimed for 30 years, forfeit to the State.¹

an heir to a testate deceased estate can renounce his right to succession or he may be disqualified from succeeding to his benefit in which case the deceased is taken as deceasing intestate.² A disqualified heir, for example, is one who murdered the deceased.³

8. The Position Of Muslim Family Law In Some Muslim Countries:

Generally al-ahwāl al-shakhysiyah (Muslim Personal Law) in Muslim countries includes family law and countries may use any one of these two terms for this. The law of persons is the foundation of Muslim society and is family based. This family law is a "collection of natural and family values which distinguishes a being from another and to which legislation gives social consequences for (effective) personal life", or it is the law "that has to do with personal matters of members of a family in issues such as marriage, divorce, custodial care (hadānat), maintenance (nafaqah), linage (nasab), death and succession (mirāth)".⁴ These two definitions form the foundation on which Muslim countries' family laws are based. Most, if not the overwhelming majority of Muslim countries, practice al-ahwāl al-shakhysiyah as in shari'ah. Those who excepted certain shari'ah provisions herein, did so on their own and did not obtain the required Islamic juristic sanction (fatwā) for it. It will be a serious mistake and miscalculation to assume that these deviations are "modern" Muslim directions in law seeking accommodation with "a new world order". There is also a mistaken tendency amongst

² Intestate Succession Act, Act 81 of 1987, Section 1 (7).
⁴ Majallah al-Hiwar, Beirut: 1987, Vol 2 No 8, Article: Family Law in Law as one of the Factors of Change in Egypt by A Y Wahdān, p. 54.
certain people to equate switching Islamic juristic rulings or opinions of *al-madhāhib al-fiqhiyyah* (juridical schools) as "modernising" *shari'ah*. This is also incorrect as *al-madhāhib al-fiqhiyyah* are all founded on the same fundamental and primary sources of *shari'ah*, differing only in *masā'il ijtiḥadiyyah* (issues based on juristic inference). The law content of some Muslim countries in subject matter relevant to this thesis, is now presented.

8.1 *Al-Wilayah*:

Moroccan personal law deals with *al-wilayah* (guardianship) and *al-niyābat al-shar‘iyyah* (legal deputation). Guardianship is vested either in the *wali* (guardian) or *waṣī* (tutor) declaring that he is, according to *shari'ah*, the father of a *saghir* (minor) or the *qādi* (Muslim judge). The father is declared to have legal control over the person of the minor and his possessions and is bound by his duty until the *saghir* (minor) reaches *ahliyyah* (legal capacity). The father can appoint a *waṣī* for his minor child or unborn child and can withdraw this appointment, but if he deceases without appointing a *waṣī*, the *qādi* appoints a *muqaddam* (curator).\(^1\)

Kuwaiti law grants the father *wilayah*, followed by his father and then the *'asabah* (residuary agnates) as in *mirاث*. When more than one of the latter, of equal standing, are found, the court appoints a suitable sound person from them and if not found, the court can appoint any suitable sound (*ṣāliḥ*) person for this position.\(^2\)

The *wali* must be *āmin* (trustworthy) in relation to the person of the minor and have the physical ability to be a guardian as well as being of the same religion as the minor. Failure to comply herewith causes *wilayah* to

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lapse for that wali. When no one merits wilayah, then, in this case, when no appointment had been made for a wasi by the wali of the saghir, the court will place the latter with a trustworthy person or a welfare institution. The same 'asabah as in mirath, has the wilayat al-tazwiji (guardianship of marriage), but, in the case of a bikr (never married woman), both she and her guardian must consent to the marriage, while a thaiyib (previously married woman) or a woman 25 years and more marries on her own, but in both cases their wali manages or conducts (bashara) the actual 'aqd al-nikah on their behalf (and presumably on their instructions). When there is no wali, the qa'di assumes this position.

The never married woman between puberty and 25 years petitions the court when her wali refuses consent and the court has discretion in granting her application.

Jordanian family law obligates the qa'di to marry off a woman whose wali refuses consent for marriage. No condition is set by this law. Iraqi law prescribes 18 years as minimum for marriage for both males and females and allows 15 year olds to petition the qa'di for marriage. If the wali unfairly withholds consent, the qa'di consents to the marriage. Malaysian family law, like Kuwaiti law, insists on the agreement of both the marrying woman and her wali. Singapore has the same

1 Qanun al-Ahwai al-Shakhshiiyyah, Kuwait, Book 3, Chapter 7, Sections 211 - 212.
2 Qanun al-Ahwai al-Shakhshiiyyah, Kuwait, Book 1, Sections 29 - 30.
3 Ibid, Section 31.
4 Jordanian Family Law, Law 61 of 1976, Clause 6(b).
5 Qanun al-Ahwai al-Shakhshiiyyah, Iraq, Law 188 or 1959, Chapter 3, Sections 7 - 8.
principle as Jordanian law, save that the aggrieved woman petitions the Appeal Board for permission for a Muslim marriage and the Board will instruct the qadi to marry off the woman.\footnote{Muslim Marriage and Divorce Rules, Singapore, 1968, Clause 9.} Indonesian law requires both marrying parties to consent to the marriage\footnote{Indonesian Marriage Law, Law 1 of 1974, Book 1, Chapter IV, Part 2, Article 16.} as well as according the wali of the woman, deputising rights as in shari'ah.\footnote{Ibid, Part 3, Articles 19 - 23.}

8.2 **Al-Hadānat:**

Hadānat is defined by certain Muslim law codes as "the protection of a child from that which may harm him in a manner (humanly) possible and seeing to his upbringing and training as well as his interest," while Tunisian law defines it as "protecting the minor in providing him safe residence and seeing to his upbringing".\footnote{Mudawwanah al-Ahwal al-Shakhsiyyah, Morocco, Book 3, Chapter 3, Section 97. Majallah al-Ahwal al-Shakhsiyyah, Tunisia, 1988, Chapter 5, Section 54.}

Moroccan law rules custodial care and custody as a duty to both parents during the subsistence of the marriage.\footnote{Mudawwanah al-Ahwal al-Shakhsiyyah, Morocco, Book 3, Chapter 3, Section 99(1).} Tunisian law makes it a right (ḥaqq) to both parents during the subsistence of their marriage.\footnote{Majallah al-Ahwal al-Shakhsiyyah, Tunisia, Chapter 5, Section 57.} Singaporean law is not explicit on the issue, save that in a divorce case the court can "make such orders as it thinks fit with respects to the custody, maintenance and education of the minor children of the (divorcing)
parties..."¹, while Iraqi law is unique in that custodial care and custody, including education of the minor in that stage, is the right of the mother, save if such will harm the minor.²

Egyptian law grants the right to custody and custodial care of minors to, predominantly, the female line of the minor's mother. This last for males until they reach 10 years and females until age 12 with the qadi being granted discretion to prolong these periods for males until age 15 and females until they marry.³ This clause was retained in the amended law.⁴ Kuwaiti law also give custody and custodial care right to females of the mother's side, starting with the latter and allowing males to remain with her until puberty and females until they marry and set up house with their spouse.⁵ Moroccan law concurs with this Kuwaiti law ruling.⁶ Indonesian law apparently merged minority (sughr) and rushd (full emancipation) and ruled 21 years age of maturity.⁷ It departed significantly from expressed shari'ah herein.

¹ Administration of Muslim Law Act, Singapore, 1985, Chapter 3, Clause 52(3)(c).
² Qanun al-Ahwal al-Shakhsiyyah, Iraq, 1959, Chapter 6, Section 2, Clause 57(1).
³ Egyptian Law 25 of 1925 Relating to Some Matters of Personal Status, Section 7(1).
⁴ Egyptian Law 100 of 1985, Section 20.
⁵ Qanun al-Ahwal al-Shakhsiyyah, Kuwait, 1984, Chapter 5, Section 194.
⁶ Mudawwanah al-Ahwal al-Shakhsiyyah, Chapter 3, Section 102.
⁷ Indonesian Marriage Law, Chapter XIV, Article 98 (1).
a) **Persons Meriting Hadanat:**

Kuwaiti law rule these persons\(^1\) to be the minor's mother followed by her mother, how highsoever, then the maternal aunt\(^2\), then the mother's maternal aunt\(^1\), then the mother's paternal aunt, then the paternal grandmother, then the father, then the sister, then the paternal aunt, then the father's paternal aunt, then the father's maternal aunt, then the daughter of the son, then the daughter of the sister taken in the order of first the full (\(\text{ashiqqa'}\)), followed by the uterine (\(\text{li umm}\)) and then consanguine (\(\text{li abb}\)). If none are found, then the appointed tutor, then the brother, then the paternal grandfather, then the uterine grandfather, then the son of the brother, then the paternal uncle, then his son, in the latter case following the rule of first the full followed by the uterine and then the consanguine. It is conditional that the custodian be mahram (one you may never marry) to the minor.\(^4\) When there is equality between persons meriting hadanat, the qādī selects the best one of them.\(^5\)

Egyptian law mentions these persons as being the mother, followed by the mother's mother how highsoever, followed by the paternal grandmother, these persons who follow are taken in the mentioned relationship to the minor in question.\(^1\)

First the khalah shaqiqah (full maternal aunt), followed by the khalah li umm (uterine maternal aunt) and then the khalah li abb (consanguine maternal aunt). This is the standard pattern when categories of relatives are in line for rights.\(^2\)

The same rule as for the maternal aunts.\(^3\)

A cousin to a minor can thus have custody only of a minor of his own sex as cousins can marry in shari'ah.\(^4\)

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\(^1\) Qanun al-\(\text{Ahwāl al-Shakhṣiyah}\), Kuwait, Law 51 of 1984, Book 3, Chapter 5, Sections 189 (a)(b)(c) & 190 (b).
then the full sisters (shaqiqat) followed by the uterine sisters (akhawat li umm), then the consanguine sisters (akhawat li abb). These are followed by the daughter of the full sister (bint ukht al-shaqiqah) followed by the daughter of the uterine sister (bint ukht li umm). Then the maternal aunts (first the full, then uterine then consanguine), then the daughter of the consanguine sister (bint ukht li abb), then the daughter of the brother, first of the full brother (bint akh shaqiq), then the uterine (bint akh li umm), then the consanguine (bint akh li abb), then the paternal aunts first the full ('ammah shaqiqah), followed by the consanguine ('ammah li abb). Hereafter the mother’s maternal aunts, first the full maternal aunt (khālah al-umm al-shaqiqah), then the mother’s uterine maternal aunt (khālah al-umm li umm), then the mother’s consanguine maternal aunt (khālah al-umm li abb). Then the father’s maternal aunts in the same pattern as the mother’s maternal aunts mentioned afore, then the mother’s paternal aunts in the same pattern, then the father’s paternal aunts in the same pattern.

If none of these are found or are found but fail to qualify for hadānāt, or the period of hadānāt had ended, then such is transferred to the males in the agnate line of succession in mirath with the paternal grandfather (abb al-abb) preceding the brothers (ikhwah). If none of these persons are found then custody goes to the non agnate category of male relatives (dhukūr rahimiyūn) starting with the maternal grandfather, then the uterine brother, then his son, then the mother’s paternal uncle (‘amm li umm) followed by the maternal uncles (akhwāl), starting from the full (khāl shaqiq), then the
uterine (*khāl li umm*) and then the consanguine (*khāl li abb*).¹

The two differing systems (Kuwaiti and Egyptian) is due to different *al-madhāhib al-fiqhīyyah* they used in their laws. The South Yemeni² law allowed the mother custody of her minor male child till age 10 and female child till 15 years.³ Malaysian law also grants custody to minor children to their mother or her substitute allowing males to be with her till 7 and females till 9 but grant the *shari‘ah* court discretion to extend these periods on application by the custodian (mother or substitute). The maximum age for males, then, will be 9 and for females 11 after which custody goes to the father. However, a discerning child (*sābi mumaiyīz*), whether male or female, can choose with which parent to reside unless the court decides otherwise.⁴ Indonesian law rules that a normal child of 12 years and over is *mumaiyīz* and may decide with which parent he wishes to reside (if parents are divorced, of course).⁵

b) Conditions Pertaining To The *Hadinat Or Hadin* (Custodial Parent Or Substitute):

According to Tunisian law, the *ḥādin* and *ḥādinat* must be trustworthy, physically capable to the task of rearing a minor, healthy and to be *mahram* (not

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¹ *Egyptian Law 100 of 1985*, Section 20.
² Yemen is now a united country.
⁵ *Indonesian Marriage Law*, Chapter XIV, Article 105 (a)(b).
within marriageable range) to the child. Kuwaiti law require them to be *baligh* (pubescent), *'aqil* (sane), *amin* (trustworthy), *qadir* (capable of the task of custody and rearing), of sound physical health and of sound morals. Kuwaiti law, further rules that the *ḥādinat* married to a non *mahram* male, loses *ḥadānat* and that the *ḥadin* must be *mahram* to the *mahdūnah* (female minor under custodial care). Access for the non custodian parent or his substitute is guaranteed. Morocco also allows this save that it prescribes weekly visitations, while Tunisian law allows the father to discipline his minor or send him to a place of learning. However, the minor stays with his mother, if not having completed his custody years with her.

c) **Attaining Majority In Managing One's Property:**

Majority in *shari‘ah* entails two stages, namely, majority for marriage which is puberty (*bulugh*) and majority for taking possessions of your property and dealing therewith (*rushd*). The latter issue is important for this thesis as issues of *mirath* will be affected by it. Some Muslim countries’ laws ruled the attaining of *rushd* as 21 years such as Morocco.

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1 *Majallah al-Ahwāl al-Shakhṣīyyah*, Tunisia, Chapter 5, Section 58.

2 *Qanun Aḥwāl al-Shakhṣīyyah*, Kuwait, Chapter 5, Section 190 (1) & 191 (a)(b).

3 *Egyptian Law 100 of 1985*, Section 20. *Qanun al-Aḥwāl al-Shakhṣīyyah*, Kuwait, Chapter 5, Section 196 (1).

4 *Mudawwanah al-Ahwāl al-Shakhṣīyyah*, Morocco, Chapter 3, Section 111.

5 *Majallah al-Ahwāl al-Shakhṣīyyah*, Tunisia, Chapter 5, Section 60.
and Indonesia\(^1\) and Tunisia 20 years\(^2\). Those Muslim countries which do not mention an age will usually depend on the madhhab’s prevalent in that country\(^3\) or if so ruled, left to the discretion of the qadi to rule hereon.

8.3 Al-Tabanna:

There is no recognition for adoption in shari'ah as shown in chapter 2 of this thesis. This is the position in all Muslim countries save two, namely, Somalia\(^4\) and Tunisia\(^5\) who have both departed from shari'ah rulings herein. There rulings are thus secular based and not shari'ah based. Surprisingly, Tunisian law allows for the fostering of minors\(^6\), which agrees with shari'ah.

Somali adoption law is a virtual photocopy of western secular adoption law, creating artificial parentage and making it "natural parentage" with all that goes with that as well as creating filial relationships between the adoptee and adoptive parents and equal rights between and adoptee and the natural children of the adoptive parents.\(^7\)

Tunisian law is another photocopy of western secular adoption law in that it has the same formalities,

\(^1\) *Mudawwana al-Ahwal al-Shakhsiyyah*, Morocco, Book 4, Chapter 1, Section 137.

\(^2\) *Indonesian Marriage Law*, Chapter XIV, Article 98 (1).

\(^3\) *Majalla al-Ahwal al-Shakhsiyyah*, Tunisia, Book 10, Chapter 1, Section 153.


\(^5\) *Law 27 of 1958 - Guardianship & Adoption*, Tunisia, Section 8 - 16.

\(^6\) *Law 27 of 1958, Guardianship & Adoption*, Sections 3 - 7.

\(^7\) *Law 23 of 1975*, Somalia, Sections 110 & 114.
imposed rights, obligations and duties which flow from adoption in a western secular law sense such as application to a court, changing of surname of adoptee to that of adoptive parents, but retaining the marriage prohibitions of blood relations etc.¹

Reasons for these two States' drastic departure from shari'ah requirements in this issue, are that Somalia, after the socialist revolution, of 1969, the ruling party in Somalia, leaned towards communism and adopted a policy of restricting the sphere of religion and religious laws. It was under ideological communist influence of the communist world that the new Somali government started a massive law reform process. The 1975 Family law which was enacted in terms of the First and Second Charters of Justice was required "in order to create a healthy society." Somali adoptions are restricted to cases where the parents are unknown.²

Tunisian adoption laws are found due to the fact that while its constitution³ regards Islam as the State religion, it does not declare that shari'ah is a binding source of law.⁴ However, shari'ah was reintroduced in Somalia in September 1993⁵ so a general overhaul of the legal system can be expected.

8.4 Al-Mirath:

Tunisian law did not depart from the basic principles of shari'ah in mirath and the shares of males and females had been retained.⁶ Other Muslim countries

¹ Law 27 of 1958, Tunisia, Sections 8 - 17.
² Pearl D: A Textbook on Muslim Law, London, published by Croom Helm, 1979, p. 82.
³ Tunisian Constitution, 1959, Chapter 1, Article 1 & 6.
⁵ Africa South of the Sahara, p. 882.
⁶ Majallah al-Aḥwāl al-Shakhṣiyyah, Tunisia, 1988, Chapter 7, Part 2, Sections 89 - 90.
follow the same line, like, for example, Egypt\(^1\), Iraq\(^2\), Morocco\(^3\) and Kuwait\(^4\). Indonesia retained all \textit{mirath} laws, save that in the case of a child deceasing without leaving descendants, both father and mother received one third of his estate. This is against Quranic law as well as a contradiction as all other \textit{shari'ah} decreed shares had been retained.\(^5\)

In Libya females' share in inheritance, according to \textit{shari'ah}, is especially guaranteed\(^6\), while the Decree of 8 \textit{Ramadān} 1391 AH / 28 October 1971 ruled that all legislation had to conform to basic principles of Islamic Law.\(^7\) Pakistani law obligates \textit{shari'ah} to be used in matters of succession\(^8\), but retained sectarian interpretation of the Qur'an and sunnah.\(^9\) The Muslim minority of Singapore is obliged by law to execute their Wills according to succession law as in \textit{shari'ah}.\(^10\)

Muslim countries have maintained the \textit{shari'ah} prescribed shares. Thus, where males are obligated in \textit{shari'ah} to maintain females, the male share is double

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1. Law 77 of Egypt of 1943.
2. \textit{Qanun al-Ahwal al-Shakhsiyyah}, Law 188 of 1959, Iraq, Chapter 9, Section 89.
4. \textit{Qanun al-Ahwal al-Shakhshiyyah}, Kuwait, 1984, Part 3, Section 2, Chapter 1, Article 296.
the share of a female, but where it is not so, as in the case of uterine succession\(^1\) such as uterine brothers and sisters of a deceased, the shares are equal. Where there are males and females of the same strength (\textit{quwwah al-qarabah}) and degree of relationship (\textit{darajah al-qarabah}) such as the '\textit{asabah} category, the sharing is again a share for a male and a half share for a female for the maintenance of females applies again in their case.\(^2\)

a) Basic Principles Of Eligibility To Succeed To A Muwarrith's Estate:

Muslim countries have upheld \textit{shari'ah} laws in this regard. Thus, succession between a Muslim and nonmuslim and vice versa is prohibited but succession between nonmuslims is allowed, difference of domicile does not prevent succession between Muslims nor does it prevent succession between nonmuslims.\(^3\)

\(^1\) This refers to the uterine brothers and sisters of a deceased who are listed in the Qur'an as heirs with a fixed share. These must not be confused with the other uterine relatives who, in certain sectarian rulings, succeed when there are no heirs with a fixed share or agnate residuaries of the deceased.

\(^2\) \textit{Qanun al-Ahwal al-Shakhshiyyah}, Kuwait, Part 3, Chapter 2, Book 1, Sections 296 - 310.

\(^3\) \textit{Qanun al-Ahwal al-Shakhshiyyah}, Kuwait, 1984, Part 3, Book 1, Section 293.
\textit{Qanun al-Mirath}, Law 77 of 1943, Egypt, Chapter 1, Sections 5 - 6.
\textit{Mudawwanah al-Ahwal al-Shakhshiyyah}, Morocco, Book 6, Chapter 1, Sections 228 - 229.
b) Causes Of Mirath:

These have been retained as in shari'ah, namely that zawjiyyah (marriage), qarabah (filial relationship) and 'usubah (residual status) are causes for mirath. The laws of Egypt, Kuwait, Iraq, Morocco and Indonesia, amongst others, express this.

c) The Order Of Distribution Of A Tarikah:

The order is given as in shari'ah, starting with tajhiz (burial expenses), followed by settling of debts, then wasaya (legacies) of the mayyit (deceased) and finally distribution to those persons so meriting it in shari'ah.

Since mirath is so wide and peculiar, especially to some specific and interesting problems that may arise, as pointed out in the chapter 3 on the subject matter, it is interesting to see how some Muslim countries reacted to fiqh in this matter.

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1 Qanun al-Mirath, Law 77 of 1943, Egypt, Chapter 2, Section 7.
2 Qanun al-Ahwal al-Shakhsiyyah, Kuwait, Part 3, Book 2, Section 295.
3 Qanun al-Ahwal al-Shakhsiyyah, 1959, Iraq, Chapter 9, Section 88 (1).
4 Mudawwanah al-Ahwal al-Shakhsiyyah, Morocco, Book 6, Chapter 1, Section 225.
5 Indonesian Inheritance Law, Chapter II, Article 174 (1) (a)(b).
6 Qanun al-Ahwal al-Shakhsiyyah, Iraq, 1959, Chapter 7, Section 87 (1 - 4).
Qanun al-Mirath, Law 77 of 1943, Egypt, Chapter 1, Section 3 (1 - 3).
Mudawwanah al-Ahwal al-Shakhsiyyah, Morocco, Book 6, Section 218 (1 - 5).
Majallah al-Ahwal al-Shakhsiyyah, Tunisia, Book 9, Chapter 1, Section 87 (1 - 5).
Qanun al-Ahwal al-Shakhsiyyah, Kuwait, Part 3, Section 291 (1 - 5).
d) \textit{Al-`Awl}:

As pointed out in the chapter of \textit{mirath}, that it sometimes happens that the shares exceed a whole such as there being 6 heirs for 7 shares as in the case of a deceased leaving a \textit{zawj} and \textit{shaqiqat\text{"}an} (two full sisters) as the only heirs. The shares are 1/2 for the \textit{zawj} and 2/3 for the two sisters (all by Quranic text), which comes to 7/6. The \textit{sah\text{"}abah} differed on this, some accepting it while other rejected it. The shares are now made out of 7 parts instead of 6 in order to balance the equation, resulting in a diminished share for all heirs.

Several Muslim countries such as Tunisia\textsuperscript{1}, Egypt\textsuperscript{2}, Kuwait\textsuperscript{3} and Indonesia\textsuperscript{4}, accept the application of this principle.

e) \textit{Al-Radd}:

The \textit{fuqaha} also differed on this issue. In this issue, there is a residue of the \textit{tarikah} after distribution to the heirs. There is a difference as to who is entitled to this residue. Tunisian law rules the division of the residue to the \textit{ashab al-furud} (heirs with fixed shares) according to their share value when there are no \textit{`asabah} to take the residue.\textsuperscript{5} Egyptian law is the same as Tunisian law save that if there are no \textit{`asabah}, or \textit{a\text{"}shab al-furud}, the residue goes to one of the uterine

\begin{itemize}
\item \textit{Majallah al-`A\text{"}hwal al-Shakh\text{"}siyyah}, Tunisia, Book 9, Chapter 4, Section 112.
\item \textit{Qanun al-Mirath}, Egypt, 1943, Section 15.
\item \textit{Qanun al-`A\text{"}hwal al-Shakh\text{"}siyyah}, Kuwait, 1984, Chapter 2, Section 303.
\item Indonesian Inheritance Law, Chapter 4, Article 192.
\item \textit{Majallah al-`A\text{"}hwal al-Shakh\text{"}siyyah}, Tunisia, Book 9, Chapter 6, Section 143.
\end{itemize}
relatives (dhawi al-arham) and if not found then it goes to the zawjan (spouses).

Moroccan law implies that the residue, if any, of a given tarikah goes to the State as the personal law code rules that anything not mentioned in the law is dealt with according to the practice of maliki fiqh. Iraqi law does not mention al-radd, but in its "general laws" in its personal law code stipulates that if no text is found on a given situation, the most suitable shari'ah ruling suitable to the text of the said code should be used. Tunisian law rules that redistribution to the daughter or daughters of the deceased must take place when there is a residue to the tarikah of their muwarrith even if there are 'asabah present.

f) Al-Hajb:

Some Muslim Personal Law codes of some Muslim countries have kept the fiqh laws in this matter such as hajb al-hirman (exclusion) and hajb al-nuqsan (diminished shares). Egyptian and Kuwaiti law specifically rule that the mahrum min al-mirath (person prohibited from succeeding to his testator's

1 Qanun al-Mirath, 1943, Egypt, Chapter 4, Section 30.
2 Mudawwanah al-Ahwal al-Shakhshiyyah, Morocco, Book 6, Chapter 10, Section 297.
3 Qanun al-Ahwal al-Shakhshiyyah, Iraq, 1959, Article 2.
4 Majallah al-Ahwal al-Shakhshiyyah, Tunisia, Chapter 6, Section 143.
5 Qanun al-Mirath, Law 77 of 1943, Egypt, Chapter 3, Sections 25 - 29.
Mudawwanah al-Ahwal al-Shakhshiyyah, Morocco, Book 6, Chapter 5, Sections 253 - 256.
estate\(^1\) does not diminish the shares of the other heirs of that specific muwarrith.\(^2\)

g) Special Masā’il Mirāth (Problems of Islamic Succession Law):

As is known by now, the fuqahā’ differed in their ijtihād (juristic inferences) on certain problematic divisions in mirāth. Certain Muslim personal law codes have mentioned these and the solutions to be applied. Tunisian law mentions three cases only\(^3\), while Moroccan law has vast detail on these cases (9 in all).\(^4\)

h) Mirāth Of The Dhawī al-Arham (Uterine Relatives):

This is a disputed issue in mirāth, with some fuqahā’ permitting it while others rule that the tarikah, in the absence of asḥāb al-furūd and or the ‘asabah, goes to the bait al-māl (public treasury). Those that permit the succession of the dhawī al-arham differ amongst themselves as to how this is done. There is no Quranic text on this distribution system nor clear authentic hadith either. The differences between the fuqahā’ in the distribution pattern here is thus based on ijtihād (juristic inference).

Muslim countries’ laws differ in this issue.

due to committing a prohibited act such as murdering his muwarrīth.

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\(^1\) Qanūn al-Mirath, Law 77 of 1943, Egypt, Chapter 3, Section 24.
\(^2\) Qanūn al-Ahwāl al-Shakhṣiyyah, Law 51 of 1984, Kuwait, Book 3, Section 312.
\(^3\) Majallah al-Ahwāl al-Shakhṣiyyah, Tunisia, Chapter 7, Sections 144 – 146.
\(^4\) Mudawwanah al-Ahwāl al-Shakhṣiyyah, Morocco, Book 6, Chapter 7, Sections 257 – 265.
Tunisian law$^1$ and Moroccan law$^2$ do not mention anything in their succession law under the sections dealing with heirs anything on succession of *dhawi al-arḥam*. Since Morocco and Tunisia are both *mālikī* in *madhhab*, it is understandable as *mālikī* law rule that the *bait al-mal* succeeds as heir when there are no heirs to a Muslim. Moroccan law recognises only three kinds of heirs, namely, *aṣḥāb al-furūd*, *aṣābah* and those who are both *aṣḥāb al-furūd* and *aṣābah* and succeeding as such.$^3$

Those that do accept and mention this form of succession, deal with it quite extensively. Egyptian succession law, for example, mentions these heirs to be, the first category who are the children of the daughter how lowsoever, the children of the daughter of the son how lowsoever, the second category being the untrue grandparents how highsoever, the third category being the sons of the uterine brothers and sisters how lowsoever, the children of the daughters (first the full, then consanguine and then the uterine), daughters of the brothers (the full followed by the consanguine and then the uterine) and their children, how lowsoever and the daughters of the sons of the brothers (the full, followed by the consanguine and then the uterine). The fourth category is an involved category consisting of six categories such as the paternal aunts, paternal uncles of the mother’s side, the maternal uncles and aunts and children of these categories.$^4$

Iraqi law mentioned the *dhawi al-ārḥām* as of the heirs\(^1\) while Kuwaiti law categorises these relatives in the same manner as Egyptian law.\(^2\) In the manner of succession, Egyptian law gives precedence to a child descendant from a *sahib al-fard* (heir with a fixed share) or an ascendant related to the deceased as in the case of uterine grandparents. The *darajah* (degree) of relationship decides who precede in succession of all categories. If they are all equal in relationship to the deceased, they all share in the *tariqah*. In the case of descendants, the nearest to the deceased in relationship (*qarabah*) precede, with the full relatives first succeeding and in their absence the consanguine and in their absence the uterine. In the case of the uterine level uncles (both paternal and maternal), the strongest in relationship (*aqrab qarābatan*) to the deceased precede with the full coming first and if not found, the consanguine, and if not found, the uterine. If both sides of parenthood of the uterine category are involved, two thirds go the side related to the father and one third to the side of the mother.\(^3\)

Kuwaiti law is virtually the same as Egyptian law in this matter.\(^4\) Egyptian law rules equal shares for the heirs in the grade *dhawi al-ārḥām*\(^5\) while Kuwaiti law rule as for *'asabah* which is two shares for a

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1. *Qanun al-Āhwāl al-Shahāṣiyah*, Iraq, 1959, Chapter 9, Section 89 (3).
2. *Qanun al-Āhwāl al-Shahāṣiyah*, Kuwait, 1984, Book 5, Chapter 1, Section 320.
5. *Qanun al-Mirath*, Law 77 of 1943, Egypt, Chapter 5, Section 38.
male and one share for a female.\textsuperscript{1} Iraqi law does not mention any laws pertaining to the succession of the \textit{dhawi al-arhām} save mentioning them as heirs. It thus follows that this matter is dealt with in terms of \textit{shari'ah}.\textsuperscript{2} Indonesian law implies that the old \textit{shafi'i} law applies in that, if no heirs are found or they are unknown, the \textit{tarikah} goes to the \textit{bait al-mal} by order of the Islamic court.\textsuperscript{3} \textit{Dhawi al-arhām} are not mentioned as heirs in the law.\textsuperscript{4} Indonesia follows the \textit{shafi'i} madhab in \textit{fiqh}.\textsuperscript{5}

8.5 **Laws Relating To Al-Wasāyā:**

These laws have maintained \textit{shari'ah} standards in general. The definition of \textit{wasāyā} is standard.\textsuperscript{6} There is a general requirement that the \textit{musi} be \textit{ahlan li al-tabarr'u} (i.e. legally entitled in \textit{shari'ah} to make a \textit{wasiyyah}).\textsuperscript{7} Moroccan law requires only \textit{tamyiz}

\begin{itemize}
\item \textit{Qanūn al-Ahwāl al-Shakhṣīyyah}, Kuwait, 1984, Book 5, Chapter 2, Section 327.
\item \textit{Qanūn al-Ahwāl al-Shakhṣīyyah}, Iraq, 1959, Chapter 9, Section 90.
\item \textit{Indonesian Inheritance Law}, Chapter 3, Article 191.
\item Ibid, Chapter 2, Article 174.
\item \textit{Majallah al-Ahwāl al-Shakhṣīyyah}, Tunisia, Book 11, Chapter 1, Section 171.
\item \textit{Qanun al-Ahwal al-Shakhsiyah}, Iraq, 1959, Chapter 8, Part 1, Section 64.
\item \textit{Qanun al-Ahwal al-Shakhsiyah}, Kuwait, 1984, Part 2, Chapter 1, 213.
\item \textit{Qanoun al-Wasiyyah, Law 71 of 1946, Egypt}, Chapter 1, Section 1.
\item \textit{Mudawwanah al-Ahwāl al-Shakhsiyah}, Morocco, Book 5, Chapter 2, Section 177.
\item \textit{Qanūn al-Wasiyyah, Law 71 of 1946, Egypt}, Chapter 1, Section 5.
\item \textit{Qanūn al-Ahwāl al-Shakhsiyah}, Iraq, Chapter 8, Section 65 (2).
\item \textit{Qanūn al-Ahwāl al-Shakhsiyah}, Kuwait, Part 2, Chapter 1, Section 217.
\end{itemize}
(discerning age) for validity of enacting wasiyyah and rule validity of wasiyyah of persons in and out of sanity in times of their sanity. The musālahu need not be found at the time of enacting wasiyyah. If, however, it is defined, it must be found and known.

Wasiyya lillāh (legacies for God’s sake) or wasiyya 'amal al-khair (charities), are valid even without specification in which case it is given to charity. Futuristic charities not founded at time of the musī’s death are valid and enacted when the requirement is met. If not found, the wasiyyah is for a charity near to it in kind and purpose.

Wasiyya between Muslims and nonmuslims, even those of different States, are valid as long as it is no forbidden in shari‘ah. Wasiyyah to an heir of a musī is invalid in Moroccan law, save if the other heirs consent but a wasiyyah to a non heir of a musī of 1/3 or less of his estate is executed without recourse to his heirs. Tunisian law concurs. Egyptian

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1 Mudawwanah al-Ahwāl al-Shakhsiyyah, Morocco, Book 5, Chapter 1, Section 175.
2 Qanun Ahwāl al-Shakhsiyyah, Kuwait, Part 2, Chapter 1, Section 218 (1)(2).
3 Mudawwanah al-Ahwāl al-Shakhsiyyah, Morocco, Book 5, Chapter 6, Section 207.
4 Qanūn al-Ahwāl al-Shakhsiyyah, Kuwait, Part 2, Sections 219 – 220.
5 Qanūn al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 6 (1)(2) & 7.
6 Qanūn al-Ahwāl al-Shakhsiyyah, Kuwait, Part 2, Section 221.
7 Qanūn al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 9.
8 Qanūn al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 6 (1)(2) & 7.
9 Tunisian law concurs. Egyptian

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law allows wasiyyah to an heir of the musi even without their consent if it is 1/3 or less of the estate, but requires it if it is more than 1/3 of the estate.\footnote{Qanun al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 37.}

Wasiyyah in excess of 1/3 of an estate requires the consent of the heirs in some law codes.\footnote{Majallah al-Ahwal al-Shakhshiyyah, Tunisia, Chapter 2, Section 179.}

Wasiyyah of a murtadd is executed on condition that he reverts to Islam before his death.\footnote{Qanun al-Ahwal al-Shakhsiyyah, Iraq, Chapter 8, Section 70.}

Wasiyyah al-'ain (a physical asset) and manfa'ah (usufructuary benefit) are valid.\footnote{Qanun al-Ahwal al-Shakhsiyyah, Kuwait, Part 2, Chapter 1, Section 217 (3).}

a) Acceptance Of Wasiyyah:

A muṣā lahu may accept or reject a wasiyyah or part of it after the death of the musi provided he has ahliyyah.\footnote{Mudawwanah al-Ahwal al-Shakhshiyyah, Morocco, Book 5, Chapter 4, Section 190.}

This acceptance may be direct (ṣaraḥatan), or by an act (dalalatan). Those without ahliyyah, like a foetus, for example, has his wali acting for him and if the muṣā lahu is an instance, like an organisation, a representative of it does

\begin{footnotes}
\item[1] Qanun al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 37.
\item[2] Majallah al-Ahwal al-Shakhshiyyah, Tunisia, Chapter 2, Section 179.
\item[3] Qanun al-Ahwal al-Shakhshiyyah, Iraq, Chapter 8, Section 70.
\item[4] Qanun al-Ahwal al-Shakhshiyyah, Kuwait, Part 2, Chapter 1, Section 217 (3).
\item[5] Mudawwanah al-Ahwal al-Shakhshiyyah, Morocco, Book 5, Chapter 4, Section 190.
\item[6] Majallah al-Ahwal al-Shakhshiyyah, Tunisia, Book 11, Chapter 4, Section 189.
\item[7] Qanun al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 3, Section 50.
\item[8] Qanun al-Ahwal al-Shakhshiyyah, Kuwait, Part 2, Chapter 1, Section 223.
\item[10] Qanun al-Ahwal al-Shakhshiyyah, Kuwait, Part 2, Chapter 3, Section 234 (1)(2).
\item[12] Majallah al-Ahwal al-Shakhshiyyah, Tunisia, Book 11, Chapter 6, Sections 193 & 195.
\end{footnotes}
If the musā lahu dies before the musī, his heirs succeeds to the right of rejection or acceptance of the wasiyyah, while some Muslim countries rule that if the musā lahu predecease the musī, the wasiyyah lapses. A wasiyyah is cancelled when it is destroyed before the musā lahu can accept it or when the latter kills his musī al-qatl al-‘amd or when the musī retracts it by speech or act.

Egyptian law rules cancellation of wasiyyah when the musī becomes insane and dies in that state. A cancelled wasiyyah is returned to the estate of the musī subject to there not being other wasāy which could not be accommodated due to there being too many for the 1/3 allowed for wasāy. If there are other wasāy, in this case, it must be executed then.

1 Qanun al-Aḥwal al-Shakhsiyyah, Kuwait, Part 2, Chapter 3, Section 230.
2 Qanun al-Aḥwal al-Shakhsiyyah, Kuwait, Part 2, Chapter 3, Section 231.
3 Mudawwanah al-Aḥwal al-Shakhsiyyah, Morocco, Book 5, Chapter 6, Section 211.
4 Majallah al-Aḥwal al-Shakhsiyyah, Tunisia, Book 11, Chapter 7, Section 197.
Mudawwanah al-Aḥwal al-Shakhsiyyah, Morocco, Book 5, Chapter 6, Section 211.
Qanun al-Aḥwal al-Shakhsiyyah, Kuwait, Part 2, Chapter 2, Sections 227 - 228.
5 Qanun al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 14.
6 Ibid, Chapter 1, Section 34.
b) *Wasīyyah For A Ḥaml (Unborn Child):*

This is valid in *shari'ah*. Muslim countries' law allows this. Kuwaiti and Egyptian law give some detail herein such as limiting the time span of making of *wasīyyah* for an acknowledged (muqarr) ḥaml to 365 days from date of *wasīyyah* and live birth of the child. If the *mūṣī* does not acknowledge the presence of a ḥaml (lam yuqir bi wujudīhi) and a live child is born 270 days or less after making the *wasīyyah* for him then the *wasīyyah* is valid. This is conditional that the pregnant woman is not a widow in 'iddah al-wafāṭ (period of waiting due to death of her spouse) or in 'iddah talaq ba'inah (period of waiting due to irrevocable divorce). If she is, and a live child is born 365 days or less after the *mūṣī* making a *wasīyyah* for that ḥaml, such a *wasīyyah* will be correct.

If the woman is his widow or zawjah mutallaqaḥ (divorced wife), the *wasīyyah* for such a child is valid if he is born within 365 days or less of date of death of the *mūṣī* or ending of his marriage to the woman concerned. These countries have stuck to old *fiqh* rulings of the *fuqaha'*, and did not take the present day medical knowledge of pregnancy and related matters into consideration.

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1 Qanun al-‘Āhwāl al-Shakhsīyyah, Iraq, Chapter 8, Section 67 (1).
Mudawwanah al-‘Āhwāl al-Shakhsīyyah, Morocco, Book 5, Chapter 2, Section 177.
Qanun al-‘Āhwāl al-Shakhsīyyah, Kuwait, Part 2, Section 245.
Majallah al-‘Āhwāl al-Shakhsīyyah, Tunisia, Book 11, Chapter 3, Section 184.

2 probably due to there being either no confirmation of the pregnancy or no visible sign or other sign of it.

3 Qanun al-Waṣīyyah, Law 71 of 1946, Egypt, Chapter 1, Sections 35 - 36.
Qanūn al-‘Āhwāl al-Shakhsīyyah, Kuwait, Part 2, Sections 244 - 245.
Should, in this case, multiple births occur, all share equally in the *wasiyyah*, save if the *muss* gave contrary instructions. If twins are born, one dead and one alive, the live one succeeds to the entire *wasiyyah*, but if both are born alive and one dies afterwards, his share goes to his heirs.¹

### Wasiyyah Wajibah (Necessary Legacy):

This is a *wasiyyah* which some Muslim countries obligated on the grandparents in the case of one of their children predeceasing them and leaving children behind. In terms of the practical effect of this law, the deceased child is taken as "present" for inheritance purposes and his heirs receive his share provided it is not more than 1/3 of the entire estate. This share is distributed as a *wasiyyah* to these children.²

Tunisian and Egyptian law also allow this but disallows it if the heirs, in this case, are also the heirs of the grandparents or if the latter had already made a *wasiyyah* for them or he or she gave them something during their lifetime which is equal or more than the required *wasiyyah wajibah*. If the latter was less, the remainder must be given as *wasiyyah wajibah*.³ Tunisian law limits this process to the first level of grandchildren only, males and females and the distribution is made as for inheritance, namely, males twice the share of

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1. *Qanun al-Ahwal al-Shakhsiyyah*, Kuwait, Part 2, Section 246.

2. *Qanun al-Ahwal al-Shakhsiyyah*, Iraq, Chapter 8, Part 1, Section 74.


*Qanun al-Wasiyyah, Law 71 of 1946*, Egypt, Chapter 6, Section 76.
females. Egyptian law agrees with this pattern of distribution but extends the heirs to be the children of the daughters and children of the sons how lowsoever with the laws of *al-hajb* applying.

The *wasiyyah wajibah* must be executed before the other legacies, the latter of which are called *waṣāya ikhtiyāriyyah* (optional legacies). The *wasiyyah wajibah* must be taken from the 1/3 allowed for *waṣāya*.

d) **Tazahum al Wasaya (Exhausting Amount Allocated For Legacies):**

This means that there are too many *waṣāya* and 1/3 of the estate is not enough for the execution of all of it. If such *waṣāya* are for *qurubāt* (religious purposes), they are executed in the order of *fard* (compulsory), *wajib* (necessary) and *sunnah* (optional) purposes. When there are too many *waṣāya* for the allotted 1/3 of the estate and the heirs refuse to allow more than 1/3 for *waṣāya* and the allotted 1/3 is still too little to accommodate all the *waṣāya*, then each *mūsā lahu* gets a proportional share proportional to the *wasiyyah* allotted to it.

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2. *Qanun al-Wasiyyah*, Law 71 of 1946, Egypt, Chapter 6, Section 76.
3. Ibid, Chapter 6, Section 78.
4. *Qanun al-Ahwal al-Shakhsiyyah*, Kuwait, Part 2, Chapter 6, Section 286 (b).
5. *Qanun al-Wasiyyah*, Law 71 of 1946, Egypt, Chapter 6, Section 81.
Recommendations For The Application Of Al-Wilayah, Al-Tabanna, Al-Mirath, Al-Wasaya And Al-Waqf:

It is evident from the foregoing deliberations that shari'ah and liberal secular law are incompatible and irreconcilable. Incorporation or assimilation of shari'ah into secular law must give rise to abrogation of very basic and fundamental principles and laws in shari'ah which will amount to discrimination on religious grounds and will, thus, be in conflict with the South African constitution.1 The Republic is bound by international agreements which, amongst other issues, recognises freedom of religion and its practice.2 There is a need for founding a suitable system which can accommodate the sensitivities and peculiarities of Muslim family law.

It is recommended that:

- firstly, a Permanent Muslim Board of Muslim Personal Law be established which will deal with all matters relating to the Muslim family and personal law such as marriage and related and consequential matters, lineage, divorce in all its forms, succession, legacies, endowments etc. The South African constitution does not preclude this as it can function as an autonomous body under the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.3

- secondly a Muslim Family Court or Shari'ah Court be founded which will deal judicially with all matters of a Muslim family or personal law nature which is not repugnant to law.4 The said court must have both its normal as well as review division. Both these recommendations are reasonable and practicable for the following reasons:

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1 South African Constitution Act, Act 108 of 1996, Chapter 2, Section 15 (1) & Section 31 (1)(a).
2 Ibid, Chapter 14 (5).
3 South African Constitution Act, Act 108 of 1996, Chapter 9, Section 185 (a)(c).
4 Ibid, Chapter 8 Section 166 (e).
firstly, the apartheid era completely ignored Muslim family and personal law. It will be another form of discrimination when the new South Africa prescribes and imposes its own concept of what other systems and religions aught to be, how they should act and how they implement their family laws. The present constitution prohibits discrimination.\(^1\) A proper concept in shari'ah will show that what is perceived to be discrimination is not really discrimination and that proper shari'ah practice does not conflict with the mentioned section of the South African constitution. At the very most, "fair discrimination" may exist and will not be prohibited in the South African constitution.\(^2\) The constitutional right exists for religious communities to organise their affairs, in terms of their religious requirements, in community with members of their faith, culture and practice of religion is explicitly mentioned.\(^3\)

Indigenous law and traditional leaders are given constitutional recognition in clear terms in the constitution\(^4\) and the right to self-determination of a community sharing common cultural and language heritage in a territory in South Africa is not prohibited in the constitution or "in any other way determined by national legislation".\(^5\) The latter allowance was given to Afrikaners, specifically, but in all fairness and justice, has to apply to other communities too. Self-determination in lifestyle and the manner of its application is central to any community and must be taken as a constitutional right.

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1. *South African Constitution Act, Act 108 of 1996, Chapter 2, Section 9 (3).*
2. Ibid, Chapter 2, Section 9 (5).
4. Ibid, Chapter 12, Section 21 (1)(2)(3).
5. Ibid, Chapter 14, Section 235.
South Africa is also bound by international conventions and instruments it signed. Various United Nations (UN) Resolutions on various aspects of human life are applicable here and amongst these are the following:

- "Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."  2

Another UN Resolution states in one of its Articles that:
"The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society...." 3

This ruling must include the families of all social, cultural, and religious groupings.

In one of its Declarations, the UN states that: "No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or belief." 4 Furthermore it states that "Discrimination between human beings on grounds of religion or belief constitutes an affront to

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2. The United Nations: *Universal Declaration of Human Rights*, New York, Article 18. [This Declaration was enacted by the General Assembly of the UN on 10/12/1948 per Resolution 217 (A)(III)].


human dignity and a disavowal of the principles of the Charter of the United Nations..."\(^1\)

Another Article gives the right to parents or legal guardians for the organisation of family life, stating:

"The parents...or the legal guardians of the child have the right to organise the life within the family in accordance with their respective religion or belief, bearing in mind the moral education in which they believe the child should be brought up."\(^2\)

It is thus clear that the non recognition of the Islamic Personal Law code in South Africa, and elsewhere, is contrary to international Covenants and Resolutions.

secondly, \textit{shari'ah} is different from secular law in origin, philosophy, fundamentals, and practice as this thesis had clearly shown. \textit{Shari'ah} must, thus, be accommodated in a way which will not be repugnant to it nor cause it to pass permanently from Muslim hands. A National Commission of Inquiry (COI) into MPL was constituted in Cape Town in June 1995 by the Islamic Unity Convention (IUC) and has as its two main binding conditions of operation that MPL must function in such a manner as not to be repugnant to \textit{shari'ah} and that Muslims have effective control over the writing up, implementation, application and administration of MPL and \_its apparatus.\(^3\) This is in conformity with \textit{shari'ah}.

Two senior \textit{fuqaha'} of \textit{al-Ahkam al-Sul\'taniyyah} (Islamic constitutional law), al-Mawardi and al-Farra' gave ruling on persons who are fit to deal in \textit{shari'ah}.

\(^1\) \textit{Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion and Belief}, Article 3.

\(^2\) Ibid, Article 5.

and issue judicial decisions herein. The necessary requirements according to al-Mawardi are: to be a Muslim, having *ahliyyah* (legal standing in *shari'ah*), to be male, having a sound and thorough knowledge of *shari'ah* and being endowed with virtuous and noble conduct. He quotes from the Qur'an: "...And Allah did not grant to the unbelievers any way over the Muslims."\(^1\) Abu Hanifah only allowed the nonmuslim judge to rule on nonmuslim people's affairs according to their Faith and customs and not over Muslims.\(^2\)

The late Grand Shaikh of the celebrated al-Azhar University in Cairo in his *fatwa* (legal dispensation) ruled:

"...Thus is it forbidden for Muslims to submit to the judicial authority of a nonmuslim judge, save under *darurah*\(^3\) (absolute necessity). It is necessary for a Muslim minority (community), in this case, to rid themselves of such a situation through independence (from such judicial power), migration or the qualified 'ulama' of the Muslims in which the disputing parties (litigants) have trust, judge Muslim matters, especially in *halal* (the permissible) and *haram* (the forbidden) of which the Muslim Personal Law of *nikah* (marriage), *talaq* (divorce), *nasab* (lineage) and *mirath* (succession) form a part. This will be best for the Muslims in the affairs of a worldly and religious nature than to submit to a nonmuslim judicial authority (in matters pertaining to *shari'ah*).\(^4\)

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3. *darurah*, here, implies an authority which puts death or seriously harms persons who oppose its rulings or a policy of physical oppression.

This position is supported by the fact that the Prophet (s.a.w) never ever appointed a nonmuslim judge to judge Muslims law matters of Muslims. This is so because there is no wilāyah (authority) of nonmuslims over Muslims in matter of the latter's law practices. The Qur'ān confirms this: "The believers, men and women are awliyā (guardians / protectors) or one another; they enjoin what is just and forbid what is evil."\(^1\) The converse is also true where unbelievers are guardians to one another.\(^2\)

It had previously been pointed out that Muslim countries recognise, legally, nonmuslim personal law and have created special courts for this.

In addition, some nonmuslim countries in Africa and Asia had done the converse by legally establishing shari‘ah courts for Muslims. There is, thus, a precedent set herein.

10 Basic Structure Of Muslim Personal And Family Law In South Africa:

Having set out the basic requirements, the actual recommendations for enactment and application follows: A Muslim Personal Law code should cover all aspects of MPL and Muslim family law for marriage and related laws, divorce in all its forms, custody of minors, guardianship, curatorship, succession and legacies and endowment. Only the basic law should be codified and the numerous other sections should be left to the qada‘ (Muslim judiciary) to develop a system fit for the community and befitting the cases coming before it.

Since this thesis deals only with al-wilāyah, al-tabannā, al-mirāth, al-waṣaya and al-waqf, only recommendations for these will be dealt with here. Before proceeding proper with the recommendations, the following pertinent points should be made and these are:

\(^1\) Al-Qur‘ān, Chapter 9: 71.

\(^2\) Ibid, Chapter 8: 73.
the major part of this thesis, namely, *al-mirath*, cannot be accommodated at all in South African law as it is completely and fundamentally opposed to it. In shari'ah, as is clear from this thesis, there is no such thing as testate and intestate succession, nor freedom of testation either. Once a Muslim deceases, whether there is a Will or not, the estate devolves upon the heirs in such shares as prescribed in shari'ah after the pre-distribution formalities had been attended to. There are also no administrative rules and restrictions herein as there are in secular law, such as signature rules, for example. The issue of *waṣāya* has some leeway as the testator has substantial freedom herein save if it is more than 1/3 of the estate, in which case the heirs will have to consent.

As or *al-tabanna*, it has no place in shari'ah nor the overwhelming majority of Muslim countries, save Tunisia and Somalia, both of which breached shari'ah law and the present practice of Muslim countries. *Kafalah* (fostering) and care for the *lajīt* (foundling) are substitutes for *al-tabanna* and both have the same lofty moral aims and practice of caring, providing shelter, education and upbringing of parentless minors who will fall by the wayside and so become a social nuisance if not a danger.

In matters of *wilāyah*, shari'ah has allocated roles for parents to which they are best suited and so serves the interest of the children, their growth, upbringing and care.

Two types of *wilāyah* are found, namely, that over minors and that over property. The first type is subdivided into two; that over person called *wilāyat 'ala al-nafs* and that over marriage called *wilāyat al-tazwij* and the *fuqaha* differ about the latter.

\[1\] in this case we are dealing with the minimum of two thirds of one's estate which a Muslim testator should leave for his/her heirs without the latter opposing the division of shares and legacies.
The ḥanafīs, disallow *wilāyat al-tazwij* on any sane and *mukallaf* woman, but ruling it for all other minors. The majority of the *fuqaha* agree with the last part, but differ with ḥanafīs in the *wilāyat al-tazwij* (guardianship in marriage). There is virtual consensus on the issue of *rushd* but difference on age when this takes place.

10.1 Basic Recommendations For *Wilāyah* (Guardianship):

*Wilāyat al-hadānāt* is the responsibility of both parents during the subsistence of a Muslim marriage. However, the nafaqah of the *zawjah* and of all the children are the sole responsibility of the *zawj*, whether he is part of the *wilāyat al-hadānāt* process or not. Actual *wilāyat 'ala al-nafs* is the responsibility of the father subject to him doing so according to *shari'ah* in that the best interest of the child is served. If not, the qādī intervenes and applies *shari'ah* in the interest of the child. In the absence of the father, the next 'asib succeeds. If the father died and appointed a ṭāhi, such will succeed prior to anyone else. If no one had been appointed and no wāli is found of those meriting it in *shari'ah*, the qādī appoints a suitable and trustworthy Muslim person for this duty. All *awliya* (guardians) or *awsiya* (curators) must act in the interest of the minor child and the qādī has the right to intervene if the person, health, safety, life or moral life of the child is threatened on application from any source. The wāli must be suitable for his position as required in *shari'ah*. This applies to the ṭāhi also.

Emancipation from *wilāyat 'ala al-nafs* ends at *taklif*, with sanity, for males. If such a youth is self sufficient, the father's nafaqah duty lapses also. However, such a youth cannot control his property until he is *rashid*. The age of *nikah* shall not be less than 18 years save with permission from the qādī. The age of *rushd* shall be 18 years for both males and females, but the qādī must have discretion herein, but he should not allow anyone who has not obtained *rushd* to dispose of his assets. Females are emancipated from *wilāyat 'ala al-nafs* on marriage. This
means that her father’s responsibility to care, maintain and protect her person ends then.

Wilayat al-tazwij over the never married daughter or ward, shall be one of agency in practice. Such females choose their future husbands and set the terms of their 'aqd al-nikah and their wali acts for them in contracting with their future husbands. Both the woman and her wali must sign the 'aqd al-nikah. Widows and divorcees choose their own husbands and contract their own ankihah (marriages), save that it is better that their wali (guardian) acts for them on their instructions.

As for wilayat al-ḥadānath after the ending of marriage by divorce or by death, the custody of all minors, males under the age of 10 and females until they marry, shall be the right of the minor’s mother. If she does not qualify for ḥadānath, her mother will succeed to this right. Failing her, then the father’s mother, then the shaqīqāt followed by the akhawat li umm, then the akhawat li abb. These are followed by the bint ukht al-shaqīqah followed by the bint ukht li umm. Then the maternal aunts (first the full, then uterine then consanguine), then the daughter of the bint ukht li abb, then the daughter of the brother, first of the full brother (bint akh shaqiq), then the uterine (bint akh li umm), then the consanguine (bint akh li abb), then the paternal aunts first the full ('ammah shaqiqah), followed by the consanguine ('ammah li abb). Hereafter the mother’s maternal aunts, first the full maternal aunt (khalah al-umm al-shaqiqah), then the mother’s uterine maternal aunt (khalah al-umm li umm), then the mothers consanguine maternal aunt (khalah al-umm li abb). Then the father’s maternal aunts in the same pattern as the mother’s maternal aunts mentioned afore, then the mother’s paternal aunts in the same pattern, then the father’s paternal aunts in the same pattern.

If none of these are found or are found but fail to qualify for ḥadānath, or the period of ḥadānath had ended, then such is transferred to the males in the agnate line of
succession in *mirath* with the paternal grandfather (*abb al-abb*) preceding the brothers. If none of these persons are found, then custody goes to the non agnate category of male relatives (*dhukur rahimiyun*) starting with the maternal grandfather, then the uterine brother, then his son, then the mother's paternal uncle ('*amm li umm*) followed by the *akhwal* (maternal uncles), starting from the full (*khāl shaqiq*), then the uterine (*khāl li umm*) and then the consanguine (*khāl li abb*). If none of these are found, then the *qādi* shall place such a minor with any suitable Muslim person who shall be a *wasi*.

These are the patterns the *fuqaha'* have set and many of these are based on *ijtihad* and based on the rule of "the nearest relatives are closer to the minor and his genuine interest". The family had changed considerably these days and preoccupation with necessary duties is time consuming. Many young people have to work nowadays out of necessity. Besides this, Muslims in nonmuslim countries usually marry comparatively late and as such many of the older generation meriting *hadānat* will fail to satisfy its requirements. In the light hereof, the *qādi* should be allowed to exercise his discretion and in the process see that the interest of the child is paramount. The latter rule is a *shari'ah* rule and *hadānat* as such is based on it.

Qualifications for *hadānat* (custodial care) shall be:
- to be a practising Muslim.
- to be of sound and moral conduct.
- to be physically able to take on the duties and responsibilities of *hadānat*.
- to be *mahram* (permanently prohibited in marriage) to the minor.
- to have *ahliyyah* (i.e. to be sane and pubescent).
- that the minor be safe in the care and custody of the custodian.
- that the custodian mother be unmarried or married to a man who is a *mahram* (permanently prohibited in marriage) to the minor daughter in her care. If this
condition is not met and the interest of the minor is served by being with the mother, the qadi shall allow her to have custody of her minor child.

- that the custodian parent does not live with anyone, even a relative of the minor, who upsets or angers the minor.

- that the custodian parent must not be a murtadd or murtaddah (an apostate).

10.2 Regulations And Conditions For Al-Kafalah And For The Laqit:

- The kafil (foster parent) must have the same religion as the foster child and be of sound and good moral conduct as well as have the nature to care for children. Failure to comply herewith at any time causes forfeiture of kafalah.

- to maintain, care and educate the child and be his custodian save that if the makful (fostered child) or laqit (foundling) has been emancipated, the foster parent cannot claim for services rendered. If such a child has his own possessions and/or property, such is used for his maintenance and upbringing and if not, the foster parent is responsible for this.

- the foster child's surname and names, if known, must not be changed at any time. The child should be informed at taklīf of his natural parents, if known. If at any time, the natural parents wish to have their child back, the foster parent, nor any other instance may hinder them therein provided they are capable to care for the child. If such a wish is expressed by the foster child, the child will not be hindered by any person or instance, official or otherwise from attaining such a wish.

- any interested party may petition the qadi if there is a breach in the care and upbringing of the foster child or foundling.
10.3 Regulations For Legitimacy And Al-Iqrar Bi Al-Nasab
(Acknowledgment Of Lineage) of Muslim Children:

- any child not born from any person shall not be a child of that person and all such laws of shari’ah consequential hereto shall apply.

- any child born out of a valid and correct nikah in shari’ah of husband and wife shall be legitimate and anyone born outside of a properly contracted and valid nikah shall be illegitimate and there shall be no legitimisation process.

- a child conceived, after the marriage of a Muslim couple and while still being married, and such a child is conceived extra-vitro (outside the womb due to some necessary physical form of manipulation) and then implanted in his own mother’s womb, shall be a legitimate child to that specific Muslim married couple.

- surrogacy is forbidden and gives rise to illegitimate status as far as the biological father is concerned.

- any child conceived with the sperm of a man and the eggcell of a woman other than his wife by shari’ah shall be illegitimate to that man and shall belong to woman whose eggcell was used.

- any woman who provenly carries the child of another Muslim woman through surrogacy, shall not be the mother of that child, but the mother whose eggcell was used shall be the mother of that child and such a child shall be illegitimate to his biological father.

- any woman who has herself impregnated with the sperm of a man through any means, other than the sperm of her husband by shari’ah, shall be the mother of that child and such a child shall be illegitimate to the biological father of that child. This is a forbidden process in shari’ah as it has circumstances and
consequences of *zina* (illicit sexual actions) inherent in it.

The above rulings are such as the basic law in *shari'ah* is that a valid and correctly contracted *nikaḥ* gives rise to lawful and valid sexual relations and, thus, legitimate offspring are those who relate to parents and where the mutual responsibilities and obligations as well as rights and privileges are automatically found and enforced.

- any child, known to be without *nasab* and is claimed by a man to be his child and there is no reason why this cannot be so in *shari'ah*, such a child will be attributed to such a person and will be his child with all such rights as there are for a child in *shari'ah*. Children from incestuous or adulterous unions, the latter of which is a sexual relationship between a married man and a woman, married or unmarried, cannot be acknowledged by their biological father.

- any child born from a correct and proper *nikaḥ* or of a widow born after the death of her spouse or of a divorcee born after any kind of divorce within a period accepted by *shari'ah*, or of a *nikaḥ fasid* (voidable marriage) shall be attributed to the father of such a child but children from a *nikaḥ batil* (void marriage), whether such a marriage was known to be so by the parties or not at the time of the *nikaḥ*, shall be illegitimate to their biological father.

10.4 **Regulations For Al-Mirath:**

The basic recommendation in relation to *mirath* is that every person married according to *shari'ah* shall have his estate, upon his death, devolve upon his heirs and in such shares as expressed and determined in *shari'ah*, whether he has left a written Will behind or not. This is due to *mirath* being a natural consequence of *nikaḥ*. Such shall also be the case when that Will
conflicts with shari'ah requirements. Mirath is thus part of the unwritten ante-nuptial contract of a nikah.

Mirath functions in accordance with shari'ah. Consequently, all relevant circumstances as are required to be in operation in terms of shari'ah, must be in operation otherwise a clear injustice will prevail. The following must, thus, be found before mirath operates:

- the laws of nafaqah as in shari'ah must be enforced.

All females receive nafaqah. Nafaqah means, nourishment, clothing, lodgings, medical care and education and the like. There is no exemption from this for Muslim males. The wali of the woman or his substitute in shari'ah, in his absence, is responsible for this. If he is incapable, then the qadi obligates this on such male relatives of the woman, starting with those males who receive wilayah of such a woman and who will succeed to her estate as an 'asib. Nafaqah is determined by kifayah (sufficiency) and according to usage.

- all women receive nafaqah even if they are self-sufficient. This includes the religious tax imposed in Islam, but excludes zakah, sadaqah and kaffarat (religious penances) which shari'ah requires from the perpetrator of a religious wrong.

- all women should not work to provide for a home and its requirements. Should they do so, all income shall be theirs only. If they so choose, and help in purchasing any fixed asset(s), they own such a share therein equal to their contribution at market value. If the asset is something decreasing in value, such as furniture etc., the actual contribution at date of purchase shall be taken as a debt. Riba (usury or interest) shall not be due on such amounts. Any amount she contributes to a household, is a debt on the male head of that household. All these contributions mentioned above, fall under duyun (debts) of the deceased and is due to such a woman,
over and above what is due to her in inheritance from him, if the condition of mirath is found in her in relation to her spouse.

- all women, on marrying, per terms of shari'ah, must be paid a sadāq.\(^1\) This is, amongst others, due to her becoming a zawjah and in most cases an umm which restricts her capacity to be fruitfully and profitably employed. The sadāq offsets this. This necessitates that the sadāq be of value, if not of substantial value, relatively speaking, in relation to the economic standing of the couple. The Qur'an alludes to sadāq of substantial value.\(^2\) It is recommended that the sadāq be at least 10% of two years' gross earnings in the case of employees while in the case of self-employed men, the sadāq be 10% of the turnover of a single year, provided a reasonable profit had been made by the business concerned, and on condition it is not less than a sadāq a woman of her standing will receive. This sadāq is hers only and she sets the terms of payment or delivery of it. If it is paid off, she can demand security for the outstanding amount.

- any woman can carry on her own business concern without the consent of her husband on condition that it is lawful in shari'ah. The same applies to the husband, of course. Income from a concern run by the woman will be her's only.

- all property and possessions a woman possesses at her nikāh to a Muslim man, are and remain hers and hers only. She is free to do therewith what she feels to do without her husband’s consent subject to it being permissible in shari'ah.

- on divorce, she receives such a settlement as set out in her 'aqd al-nikāh and will then, not succeed

\(^1\) Al-Qur'an, Chapter 4: 4.

\(^2\) Ibid, Chapter 4: 20.
to her spouse's estate by way of inheritance, save if such is allowed in *shari'ah* (such as her being divorced *talaq raj'i* - revocable divorce - by her husband and he dies while she is still in *'iddah al-talaq* - period of waiting of divorce) or the like.

- there are some *fuqaha* who rule that *nikah* gives rise to wifehood and motherhood and as such, housework is not part of the *'aqd al-nikah*. Should such a provision be made in such a marriage contract, and domestic assistance was not provided by the husband as agreed upon, a claim, as a debt against the estate of her husband, is valid for such a widow.

- women contributing to the purchase of the fixed family property or other fixed property of their father, shall have such contributions calculated at market value at death of their father and such will be due to them at his death over and above what they inherit from their father's estate.

From this scenario, it is obvious that Muslim women are not disadvantaged in *mirath* if the system is made to function properly. The following system in *mirath* should be enacted in South Africa:

- all the shares allotted to heirs must be executed as in *shari'ah*. This is confirmed in the *shari'ah* texts as well as laws of personal codes in Muslim countries as shown in this thesis.

- an heir must take his share allotted by *shari'ah*, and after having being possessed of it, may do with it what he so wish, including ceding it to another heir or have some or all of the heirs share in it according to his directives.

- the shares of female heirs shall be their sole and full property and shall never form any part of any form of community of property between her and her spouse nor shall he have any form of control or say
over such property save with her explicit written consent.

- unmarried male children who lived with their father or mother in the family home which was bought by the house bond system and who contributed to paying off the bond shall have such contributions calculated as percentage of investment in the property and such shall be taken at market value at the death of the owner of the property and shall be considered a debt of the estate to such a child or children and this will be over and above other debts the estate may owe him or them and over and above what he is to inherit from the estate as his or their share according to mirath. This is so as a business transaction of a form of partnership is found in the above case.

In addition, the following special provisions must be provided for:

- al-wasiyyah al-wajibah shall be obligatory on every estate. If it had not been provided for by the muwarrith, it shall be taken from the estate. This wasiyyah shall equal the amount the predeceased parent or children should have received from the tarikah of their parents, but shall not exceed 1/3 of the entire estate. It will be divided between the children of the predeceased parent in the ratio of two shares for a male and one for a female child. This will not apply when the testator grandparent made wasiyyah for the mentioned grandchildren which equals or exceeds the amount required for al-wasiyyah al-wajibah or provenly gave that to them during his lifetime or made a proven settlement with them which equals or exceeds their required al-wasiyyah al-wajibah.

- if the estate cannot accommodate the shares from one whole, then the shares are reduced proportionately and not one of the ashab al-furud will be excluded
from the estate. For example, in the case where the deceased leaves a *zawj* and *ukhtān shaqīqatān* as the only heirs, the shares will be 3/6 and 4/6 respectively, which comes to 7/6. The shares must be taken from 7 instead of 6 and thus will be 3/7 for the *zawj* and 4/7 for the *ukhtān shaqīqatān*.

- where there is a residue of the estate and one of the *azwāj* (spouses) are of the heirs, they shall also be included in the process of *radd* (redistribution) as they have to accept diminished shares in the case of 'awl.

- where there is a residue of a *tarikah* and there are only minor or unmarried daughters to the deceased, such daughters shall receive the residue, in equal shares, after the *ašḥāb al-furūḍ* had received their shares. This is in terms of *ja'fari* jurisprudence.¹ Few *sunni* Muslim countries apply this law such as Tunisia² and Iraq³, the latter of which makes no qualification of the degree of daughters. In South Africa, this application will offset the hardship that will be encountered when the *ašabah* insist on their cash share and a family home has to be sold leaving women destitute as far as lodgings is concerned. There is also a propensity of some *ašabah* not to care and look after these females as is required in *shari'ah*. This rule must only apply to the *banāt sulbiyyah* of the deceased.

- when a husband deceases and leaves only one house and his sons are in such a condition as not to be able to house their surviving mother, living in the father's house, in such a manner as *shari'ah*

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¹ *Al-Tarikat wa al-Wasāya*, p. 477.

² *Majallah al-Ahwal al-Shakhšiyyah*, Tunisia, Chapter 6, Section 143.

³ *Qanun al-Ahwal al-Shakhšiyyah*, Iraq, Chapter 9, Section 91 (2).
prescribe, such a house shall not be sold, but the heirs shall all be made joint owners thereof and the said mother shall have right of *habitatio* and usufruct of the property until she remarry or dies. If she remarry, she must vacate the house as her new husband must provide for her and the heirs may then sell the property and take their shares, should they so wish. Should the *wali* of the mother or her son(s) be liable for her *nafaqah* too, the amount due for lodgings shall fall away in this case under discussion.

- anyone who has no heirs, as in *shari'ah*, shall have his estate distributed as a *wa'liyyah*. If he left written instructions herein, it shall be executed subject to it being in conformity with *shari'ah*. If not, such *wa'liyya* which are repugnant to *shari'ah* shall not be distributed to the instances mentioned in the written *wa'liyyah*. If no written *wa'liyyah* exists, the estate shall be given to such Muslim charitable instances as the *qadi* deems fit. Alternatively, a special fund is to be established under the Muslim or *Shari'ah* Court to receive such estates and use it for such Muslim persons as are in need such as destitute widows, divorcees and minor children.

These recommendations have bases in *shari'ah* and law practised in Muslim countries and suit problems encountered by South African Muslims in respect of *mirath*.

- if a Muslim deceased does not have any *așhab al-furûd* or *așabah*, but he has relatives of the *dhawi al-arham* category, they shall succeed to the estate, the nearest in degree succeeding, followed by the nearest in familial relationship (*qarabah*). If they are all equal herein, they will all be heirs. The shares, in this case, shall be equal for males and females as the relationship of these heirs and their
testator is not within the degree of wilāyah and ‘usūbah (agnate status). These kinds of heirs also have no claim of maintenance from the testator due to the absence of wilāyah and ‘usūbah status and relationship between them and the deceased. The fuqaha have varying methods in dealing with this distribution pattern, most preferring the mirath system of the ‘aṣabah (residuaries, i.e. males twice the share of females).

Mirāth al-arḥām is a disputed issue in fiqh, with some fuqaha allowing it and others not. The Qurān is not clear on the issue nor is the sunnah emphatically clear on it either. Some Muslim countries, like Egypt and Kuwait allow mirath al-arḥām according to the mirath pattern.

The categories in this kind of distribution will be, firstly, the children of the daughters of the deceased how lowsoever, the children of the daughters of the son of the deceased, how lowsoever. Secondly the uterine grandfather, how highsoever and the grandmother who is not a sahiḥah al-fard (heir with a fixed share). The third group are the sons of the uterine brothers and sisters of the deceased, how lowsoever, the daughters of the full brothers of the deceased, the daughters of the consanguine brothers of the deceased and their children, how lowsoever, then the daughters of the sons of the mentioned full and consanguine brothers, how lowsoever. The fourth group are the mother’s paternal uncles, the paternal aunts, the maternal uncles and maternal aunts, first the full and then the consanguine, followed by their children, how lowsoever. The daughters of the paternal uncles of

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1 Qanūn al-Mirath, Law 77 of 1943, Egypt, Chapter 5, Section 38.
Qanūn al-Aḥwal al-Shakhsiyyah, Kuwait, Part 3, Book 5, Section 326.
the deceased, first the full followed by the consanguine and their sons, how lowsoever. There are other degrees of this fourth category, but it will be a rare occurrence to find them in a South African context due to the overwhelming majority of Muslims marrying late compared with most Muslim countries. Should that occur, the qādi must refer to shari‘ah herein.

- the mafqud’s share of his testator’s estate shall be kept for him until his death is proven by his body being found or the qādi ruled him dead. If he appears alive, before the ruling of the qādi he is entitled to his share. If he appears after the judgment of the qādi on his death, he gets what remains in the hands of the heirs who took his share due to presumption of death ruling of the qādi. Nothing more is exacted from the said heirs.

- a person born with both systems of sexual organs and whose sex cannot be clearly discerned and no surgical method had been used to make one sex dominant, shall receive the share of a female. In the case of persons who had a sex change, the rules of mirāth will be applied in terms of the sex they were born with.

10.5 Recommendations For Wasaya:

A sane Muslim, man or woman has been allowed the right to dispose of a maximum of 1/3 of his or her estate for wasaya which will accrue to him or her as good deeds. The following should be enacted for wasaya:

- wasiyyah can be a physical asset (like a car or wardrobe) or money or a valuable or manfa‘ah (something of a usufruct nature) like use of a property for a fixed period or indefinitely. This is subject to the wasiyyah not being repugnant to shari‘ah.

- one third (1/3) of the estate is allowed for a wasiyyah or wasaya without the heirs’ consent.
Anything in excess thereof must have their consent. If some of the heirs are *mukallaf* (pubescent) and others not, the former must consent. If only some of the heirs consent to the increase in *wasiyyah* of more than a third for one of them, the calculated percentage constituting the consenting heirs' agreed amount, will be added to that specific *wasiyyah* for that heir. The *wali* of the minors consent on their behalf and this consent is subject to the *qadi*’s approval.

- A *wasiyyah* must be in writing, duly dated and signed and the place of signature recorded. The signature must be at the bottom of the page, if the document has only one page, or at the end of the document if it has more than one page. The other requirements may be anywhere in the document. No verbal *wasaya* will be valid.

- A *wasiyyah* from a Muslim *muši* to a non-Muslim *muša lahu* and vice versa shall be valid provided it is not repugnant nor prohibited in *shari‘ah*.

- A *wasiyyah* for a foster child or children or foundling(s) who lived or lives with the *muši* shall be valid provided it is not more than 1/3 of the estate.

- A *wasiyyah* is a voluntary act, save *al-* *wasiyyah* *al-wajibah*, and can be withdrawn or amended in any way, by the *muši* during his lifetime.

- A *wasiyyah* for an unborn child so specified shall be valid and if such a child is born alive, the child succeeds to the *wasiyyah*. If more than one is born, they share it equally irrespective of sex, save if the *muši* gave instructions to the contrary. If there is a multiple birth and one or more die soon after birth, the surviving one or surviving ones succeed to the entire *wasiyyah*. *Wasiyyah* to an unspecified unborn child (like someone leaving a legacy for the first born of his second youngest daughter) shall be
valid and executed when the child is born alive. In all these cases, if the child is not born alive, the wasiyyah reverts to the estate of the musi. If there are other wasaya which could not be executed due there great number, then they are executed in the order the musi put them in his document of wasiyyah. If he only made a wasiyyah to the unborn and the child is miscarried or stillborn, the wasiyyah reverts to the musi’s estate for distribution to the heirs according to their shares in the estate.

- A wasiyyah for a charitable instance not repugnant to shari‘ah shall be valid and a representative shall receive it on behalf of the instance.

a) Requirements For The Musi:
- The musi, if he is a Muslim, must be one who is ahlan li al-tabarru’ (has shari‘ah sanctioned legal capacity to be of those who can execute a charitable act).
- Anyone who is 18 years of age, save the insane or mentally deficient, can be a musi. A safih can be a musi subject to the qadi sanctioning it and the latter must rely on shari‘ah for his ruling. However, when a safih made a wasiyyah before al-hajr (being placed under curatorship), such is executed when the time of its execution comes.
- The wasiyyah of a murtadd (fem. murtaddah) is executed when he returns to the fold of Islam, otherwise, it will be void.

b) Regulations And Conditions For The Musa Lahu:
- Anyone or instance who can be possessed of property will be fit to be a musa lahu. If the musa lahu is a minor, his wali or wasi accepts the wasiyyah on his behalf. If there is no wali or wasi to the minor then, and it is imperative or in the interest of the minor that the wasiyyah be possessed by the musa lahu, then his mother or any of her male relatives may do so on his
behalf. On the appointment of a wasi, the latter will take charge in terms of and subject to the requirements of shari'ah.

- the physical presence of the musa lahu is not required at the time of death of the musi save if this requirement had been laid down by the musi himself.

- if the musa lahu dies before the musi, the wasiyyah is cancelled, save if the musi instructed that the heir or heirs of the musa lahu is to succeed.

- if the musa lahu dies after the musi had died, but before he could take possession of the wasiyyah, the heir(s) of the musa lahu succeed/s to this right.

- if the musa lahu, loses ahliyyah (legal standing, like, for example, becoming insane) after a musi allotted him a wasiyyah, and remains so, then his wali or wasi accepts the wasiyyah on his behalf, but if they wish to reject it or part of it, the permission of the qadi must be obtained and the latter shall be guided by the interest of the musa lahu.

c) Regulations And Conditions For The Musa Bihi (Actual Legacy):

- the wasiyyah must be such that it can be possessed.

- the wasiyyah itself must not be haram in shari'ah even if it is not haram for the musa lahu. An example being a Muslim leaving wasiyyah of wine for a nonmuslim.

- the wasiyyah can be 'ain (a physical asset) or manfa'ah (usufruct) or that which is in its meaning, like right of habitatio, for example, and this can be for any limited period or permanently i.e duration of life.
waṣīyyah lillah (legacy for the sake of God) is valid and will be distributed to poor Muslims and or to Muslim institutions of a charitable nature. The qādī shall decide on this and its scope.

a waṣīyyah for any acceptable charitable cause will be valid on condition that it is not forbidden or repugnant to shari'ah and its maqasid (aims and objectives).

a waṣīyyah is cancelled if the muṣī withdraws it, either in writing or by an act which clearly points to withdrawal or which is reasonably construed as such. It also lapses when the waṣīyyah is destroyed.

a waṣīyyah need not be found at the time of its enactment, but should be found after the death of the muṣī.

al-waṣīyyah al-muḥarramah (forbidden legacy) is automatically invalid and cancelled. Such will also be the case of an impossible waṣīyyah, like "leaving all the money in the world to X."

any waṣīyyah which cannot be executed reverts to the estate of the muṣī. If other waṣāyā could not be executed due to there being too many for the allotted amount for waṣāyā, then these legacies shall be executed. The order as it stands in the waṣīyyah document shall be followed, provided there is no shari'ah objection hereto. If there is a remainder of any waṣīyyah, such reverts to the estate of the muṣī and is distributed to his heirs according to their shares save if the muṣī gave instructions to the contrary and such are not forbidden or repugnant in terms of shari'ah.

waṣīyyah for duties owed to the Shari' (Supreme Legislator i.e God), such as zakāh arrears or outstanding ḥāji shall be executed first, before any other waṣīyyah is executed, even before al-
wasīyyah al-wajibah to grandchildren, where this is required.

10.6 Recommendations For Creating Awqaf:

Waqf (pl. awqāf) is an institution the shari'ah allowed to encourage virtuous deeds of a social and social communal nature as a physical and practical expression of the inner conceptions of the brotherhood of Islam. In this sphere it had preceded all socialist systems by centuries and fostered social obligations and responsibilities on the basis of inner convictions, and not the power or coercion of the legislature or military as has happened in so many social experiments the world over. Of the basic maqāsid of the shari'ah is tārghib li al-birr (exhortation and encouragement to good deeds) and tārhib li al-wā'id (inculcation of fear of retribution for wrong doing). Waqf is usually created through a wasiyyah document. It may also be created during your lifetime and enacted during your lifetime. Due to its aims, shari'ah allowed more leeway in the creation of waqf than for other forms of contracts.

The following recommendations should be carefully considered:

- waqf must be created by a written document in which the waqif (one making the endowment) clearly and unambiguously creates the waqf and indicates for which purpose and for what duration this is for. If this is not clear, the qādī will rule in this matter and must be guided by shari'ah. He should allow leeway usually allowed for this kind of charitable act as the waqif desired therewith jazā' al-ākhirah (reward in the Hereafter).

- waqf can be created for any charitable issue which is valid and acceptable in shari'ah. Anything haram in shari'ah or repugnant to it, will render the waqf void.
a waqf made for building a mosque or for the purchase of ground for building a mosque is valid and must be executed. This kind of waqf is permanent and cannot be revoked and the property, be it ground or building or both, cedes to the ownership of Allah permanently with the laws of awqaf al-masjid applicable to it. The waqif cannot retract this kind of waqf when made.

The same rules shall apply to a waqif making waqf of ground for Muslim public burial or institutions of public Islamic learning or public homes for orphans or widows or the destitute or the like. Islamic learning, here, refers to shari'ah learning. These waqaf may only be ruled by shari'ah injunctions. Thus, any clauses in the waqf document in conflict with shari'ah, in these cases, will be invalid.

When there is a conflict amongst the fuqaha' on any issue, the majority decision must prevail provided it is not repugnant in shari'ah. The waqif may appoint himself or of his Muslim family or relatives as mutawallis (managers) of this kind of waqf and such appointments may be hereditary, subject to the mutawallis executing their tasks and duties and seeing to their responsibilities in a manner acceptable to shari'ah. The conduct of the mutawalli must be in conformity with shari'ah and if not, he cannot be a mutawalli. The waqif, cannot, in the case of the building or contributing to the building of a mosque, make of his own family members or relatives the Imam (prayer leader) of that mosque, save if they qualify to be so, in terms of shari'ah and no one better is to be found. No heredity appointments of 'a'immah (prayer leaders) by the said waqif will be permissible whether from his family or relatives or from
outside their ranks if such appointments conflict with *shari'ah*.

- any other form of *waqf* will be valid and shall last for such duration as the *waqif* specifies.
- the beneficiary of the *waqf* can be a person or an institution. If the person has no *ahliyyah*, like being a minor or insane, for example, his *wali* or *wasi* acts for him. In the case of an instance, the representative thereof acts for it herein.
- a *waqf* can be made for your dependants such as your wife, children, grandchildren and other relatives as well as for non related persons.
- a *waqif* must create the *waqf* during his lifetime and cede whatever he gives in *waqf* to whoever is the beneficiary. Any *waqf* made during the lifetime of the *waqif* and not ceded properly during his lifetime or is ceded only at death will take the laws of *wasiyyah* as applicable to it.
- a *waqf* created without a time limit being specified will be construed to being permanent.
- a *waqf* created *lillah* (for the sake of God) without further specification, shall be for Islamic charitable purposes and the *qadi* shall rule herein.
- a *waqf* for *manfa'ah* allows usage of the asset only on terms specified by the *waqif*. If it is a physical endowment, like a property, the beneficiary is responsible for its upkeep save if the *waqif* ruled otherwise. If the beneficiary wilfully, or through neglect causes the property to be destroyed or to become dilapidated, he shall make good at his own expense.
- a *waqf* made by the *waqif* for his children and their offspring without any restriction or definitive definition, will perpetuate until no
more such persons are found. Thereafter it shall be for the benefit of the Muslim poor and needy.

- if a waqif did not leave administrative specifications and rules for his waqf or left insufficient administrative rules or specifications, or made invalid specifications and rules, the qādi shall make such rulings as will be fitting under the circumstances for the waqf and such must be in conformity with sharī‘ah and the perceived aims and objectives of the waqif.

- no charitable issue shall be created by a Muslim save through such a process as is valid in sharī‘ah.
CONCLUSION

This thesis deals primarily with al-mirath and al-waṣāya as well as with al-wilāyah which is linked to al-mirath and al-waqf which is linked to al-waṣāya.

What must be understood is that al-mirath is a result of nikāḥ and is, in actual fact, an unwritten condition of the 'aqd al-nikāḥ in shari'ah. Any condition excluding al-mirath as a consequence to the nikāḥ will be invalid as it conflicts with the muqaddayat 'aqd al-nikāḥ (requirements of the marriage contract). Thus, reading or understanding al-mirath on its own as a separate and independent subject matter in shari'ah, as some scholars have done, is completely erroneous.

From this thesis, it is clear that shari'ah is incompatible with secular law and as such with South African law. Both the religious and administrative forms of law are inextricably intertwined and linked to belief. This makes the assimilation or incorporation of Muslim Personal Law into South African law impossible. The fact that shari'ah is incompatible with secular law and as such with South African law is a reality which must be accepted by government and its institutions as well as South Africans in general. Incorporation or assimilation of shari'ah into South African law will destroy it; there is no way the two can be merged into one and still retain their respective identities and effects.

As shown earlier in this thesis, Muslims are under religious obligation to conduct their affairs according to shari'ah. This duty is linked to their belief system as the sources of shari'ah clearly indicate. The Qur'an states: "Obey Allah and obey the Messenger (Muhammad) and those (Muslims) charged with authority among you..." As shown earlier in this thesis, Muslims are under religious obligation to conduct their affairs according to shari'ah. This duty is linked to their belief system as the sources of shari'ah clearly indicate. The Qur'an states: "Obey Allah and obey the Messenger (Muhammad) and those (Muslims) charged with authority among you..." This fundamental principle is one of the constitutional laws of Islam and is clear in the scope and application of the command. This is amplified further by: "Oh

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1 Al-Qur'an, Chapter 4: 59.
you who believe! believe in Allah and His Messenger...⁴ Muslims are further commanded to heed the Prophet: "Oh you who believe! Respond to Allah and His Messenger when He calls to that what will give you life..."² The Qur'ān describes Muslims in their beliefs and obedience, in the following words: "The answer of the believers, when summoned to Allah and His Messenger, in order that he may judge between them is no other than 'we hear and we obey'."³ Muslims are warned not to follow ways other than that of Allah and His Messenger: "Allah is the protecting friend of those who believe. He brings them out of the darkness into the light, but those who disbelieve, their friends are the false deities and false leaders; they bring them out from light to darkness. Those are the companions of the Fire and they will abide therein."⁴ Allah Himself declares those who do not follow what He revealed as unbelievers, sinners and rebels.⁵ The command of the Prophet, emphasising the above is clear from his saying: "By Him in whose Hand my life is! No one of you will be a believer until I am dearer to him than his child or his parents and all mankind."⁶ There is thus no way a Muslim can follow a system other than one Allah ordained. Those who do so have broken the shari‘ah law.

Matters dealt with in this thesis all form part of shari‘ah and as such fall under the requirements set out above. Muslim Personal Law has been practised by Muslim nations throughout the ages right up to this present time. Special personal and family law codes in Muslim countries exist as elucidated in this thesis. Muslim Personal Law is thus not a historical event fit for

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¹ Al-Qur‘ān, Chapter 4: 136.
² Ibid, Chapter 8: 24.
³ Ibid, Chapter 24: 51.
⁴ Ibid, Chapter 2: 257.
⁵ Ibid, Chapter 5: 44, 45 & 47.
⁶ Mukhtasār Sahih Muslim, p. 14.
    Minhāj al-Muslim, p. 38.
academic study or the library archives only but a living issue practised twenty fours a day all over the world.

South Africa now has a new constitution. As with any secular constitution, it is not the end of constitutional mechanics, but it will have to be amended and streamlined as time goes on. One of the first issues to be addressed is to bring it in line with satisfying Muslim aspirations, unambiguously, in their personal law matters. Some potential ambiguity remains in the constitution with regards to the free and unfettered practise of shari'ah based Muslim Personal Law. Muslim Personal Law practise must thus be excluded from at least certain provisions of the BOR\(^1\), to remove this potential ambiguity\(^2\). Reference had been made earlier of political promises to recognise Muslim Personal Law issues. The Muslim public had understood this to mean the Muslim Personal Law as they understand it. The above mentioned section of the constitution and those related to it goes against this promise and would suggest that Muslims had been misled as to what was really meant by that promise.

The entire Muslim Personal Law code must be so recognised as to have an integral whole comprising all the divisions of the code, all inter-related and linked to one another, with an apparatus that guarantees the free and unfettered operation thereof, as well as allowing Muslims effective control of the Muslim Personal Law process as far as its substance, implementation, application and administration is concerned. For this, as previously stated, a Permanent Muslim Personal Law Board as well as a Shari'ah Court or Muslim Family Court must be established. This is the only practical way conflict of the two systems of law can be avoided and a peaceful, just, fair and practical solution for this conflict found and to correct, effectively, the wrongs, injustices and discrimination of the

\(^1\) Bill of Rights of the South African Constitution, Act 108 of 1996.

\(^2\) Section 3 of Chapter 2 of Act 108 of 1996, especially, must be rewritten to give effect to this. Section 3 (b), especially, must exclude muslims from its provision. Other provisions in the constitution which relate hereto must also be suitably amended.
past 300 years, effect national reconciliation and avoid endless, expensive, bitter and emotional litigations which may give rise to inter-communal conflict, the results of which will negate all the efforts being made for one nation with many cultures coexisting in peace and mutual tolerance.

The State and other parties should also not interpret Muslims' sensitivities to Muslim Personal Law as fundamentalism or separatism. If fundamentalism means living the life of a Muslim as required by beliefs and its practices, which, in actual fact, Islam had been for fourteen centuries, then the Muslim world as a whole had been and still is fundamentalist for all those centuries up to now. If the argument of separatism is used, one must be very careful not to label anything that does not conform to local and present day patterns of political thinking and models as relics from the past *apartheid* era. This may give rise to another form of *apartheid* by the process of imposition regardless of others. That will not be freedom of choice.

It is generally accepted that religion, culture and language constitute the most important elements of being human. This in itself necessitates a differentiation between communities and nations; this had been, still is and will continue to be so as long as there is human life on planet earth. The *Qur'an* bears testimony to this undisputed truth and fact when it says: "Oh mankind! We have created you from a single (pair) of a male and a female and made you into nations and tribes that you may know each other (not that you despise one another)..."¹

Situations exist in different parts of the world where constitutional and legal exceptions are made to accommodate divergent cultural and religious lifestyles. Such accommodation, is, thus, not innovative.

If freedom of religion and its practise, guaranteed by International Conventions, is to be a practical reality in South Africa, then imposed prescription, constitutional or otherwise, to any religious grouping, amongst others, must be avoided.

There exists, amongst certain people, the perception that like other religious and cultural or customary laws, shari'ah laws are discriminatory laws. This is erroneous as proven in this thesis. Shari'ah cannot be compared to indigenous law as far as males and females are concerned. The position of females in Islam is virtually opposite to that of women in indigenous societies and groupings. Muslim men have not and never had the authority indigenous males have in family life and control over their womenfolk, their persons and property nor do Muslim parents have such control over the person and property of their children as some indigenous systems grant.

Another issue is the call by some scholars and academics that shari'ah must be "changed" or "adapted" to suit "modern life", meaning modern western secular liberal life. They disregard the meaning, aims and objectives of shari'ah as well as the purpose of wahy throughout the ages.

Some people confuse community cultural and customary practices with shari'ah, while others confuse a particular madhhab with shari'ah. These are usually persons who did not study the shari'ah from its original sources in its full form, including sectarian interpretations.

One cannot be a Muslim unless you accept that Allah is infallible and that His Messenger Muhammad (s.a.w) is infallible in matters of shari'ah. The confession of the shahadah\footnote{1} is very clear herein. What stands in the Qur'an of law remains so permanently from the death of the Prophet (s.a.w). The Qur'an declares: "This day have I perfected your religion for you, completed My favour upon you and have chosen for you Islam as your religion."\footnote{2} During the era of prophethood, some abrogations of verses took place in which Allah Himself changed the laws. The Qur'an is clear about this process: "None of Our revelations do we abrogate or cause to be forgotten, save We substitute

\footnote{1}{A Muslim must believe in Allah and thus all that stands in the Qur'an and which His Messenger brought in the authentic ahadith and must do so unconditionally before he can be a Muslim.}

\footnote{2}{Al-Qur'an, Chapter 5: 3.}
something better or similar (to it)." This is a reference to what is called *tadarruj fi al-tashrī'*, (gradualism in revelation in matters of law practices, specifically), to accommodate the learning process of people. Since it is a cardinal rule in Islam that prophethood ceased at the death of the Prophet (s.a.w), it is logical that the *Qur'ān*, as it stood at his death, is the record of the last revelation and must so remain till the last Hour. No change can be effected by it, for the author thereof is none other than *Allāh* Himself. No Muslim can deny this and still be a Muslim.

If shortcomings had existed in the unofficial application of Muslim Personal Law in South Africa over the years, this must be attributed to the State which did not want to recognise the system and so deny administrative enforceability to it. To complain now that that system is unsuitable is to proportion blame to the wrong source and that will be very unfair and highly improper.

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APPENDICES

APPENDIX 1

This appendix sets out the recommended system that should be followed in implementation of Muslim Personal Law (which includes family law) in South Africa.

APPENDIX 2

Deals with the application of al-mirath (succession), al-wasaya (legacies) and al-waqf (Islamic endowment).

APPENDIX 3

This is an explanatory appendix dealing with madhahib (juridical sects) of the sunni school.
APPENDIX 1

Reference had been made in chapter 6 of this thesis in the establishing of a Permanent Muslim Personal Law Board and a Muslim or Shari'ah Court.

In this appendix recommendations for its founding and functioning are made. Reference had been made that it would be imperative that certain amendments to the South African constitution be made to ensure that MPL can effectively be implemented and applied. The following recommendations are made subject to the constitution being amended to accommodate what is being recommended:

1 Permanent Muslim Personal Law Board:

The Permanent Muslim Personal Law Board, hereinafter referred to as the "Board", shall:

1.1 consist of suitable Muslims as far as its decision making and implementation processes are concerned. This is to safeguard Muslim control of the system and its application. This is in accordance with shari'ah that the affairs of Muslims in their law matters are not subject to control of nonmuslims.

1.2 The Board should consist of a suitable number of persons, say five, who should be qualified in shari'ah. The required qualification must be the first university qualification and must have been done in the Arabic medium at a Muslim Arabic medium university at university college level. This is necessary as the mentioned members will have to be competent to refer to original shari'ah sources as well as being able to interpret and understand the sources. Postgraduate tertiary qualifications must be in the field of shari'ah as such to come into consideration for appointments to the Board. There may not be problems in this matter as the Human Sciences Research Council (HSRC) in Pretoria

1 Al-Qur'an, Chapter 9: 71
has an equivalence system for foreign degrees. A sixth person, preferably a Muslim lawyer with knowledge and experience in Muslim Family Law, will be the secretary of the Board. He shall be a non-voting and purely administrative member of the Board.

1.3 the most senior person in qualifications and experience in the field of shari'ah should head the Board.

1.4 the Board must have a Code of Conduct for members which must agree with shari'ah requirements.

1.5 the Board must have the complete power to formulate and pass all necessary and suitable laws and regulations to implement MPL and must apply it on a non-sectarian basis, but in such a manner as not to compromise shari'ah in this matter. This calls for a unique legislative process which the present constitution does not sanction clearly and unambiguously. It is recommended that a system be so worked out that the Board, after passing a given Bill, forwards it to a specific Minister of the National parliament who lays it before the President for signature. Since Muslims must have effective control of the MPL system, it is useless to send such Bills back and forth to the National Parliament and continuously engage in litigations with judicial instances herein. Mention had been made in chapter 6 of this thesis of Muslim countries giving complete freedom and legal recognition to non-muslim minorities in matters of their family and religious laws. Mention had also been made of the novel Singapore model in practically accommodating Muslim sensitivities in this regard. It is very strongly recommended that that model be seriously considered for implementation in South Africa.

1.6 the Board must have national powers in its operation and application of its decisions. Regional offices of the Board may exist as extension of its administration only.

1.7 the Board shall appoint, on proven merit, qualifications and in accordance with acceptable conditions and
regulations, Muslim persons who will act as qudat (Muslim judges) of the Shari'ah Courts. It shall also appoint the Chief Qādī. Qudat must be appointed on a permanent basis and their independence in their judicial functions must be guaranteed in law. Their dismissal shall be based only on:

1.7.1 apostatising from Islam.
1.7.2 committing a proven offence, considered as such in shari'ah.
1.7.3 proven mental or physical incapability to execute the required duties satisfactorily.

1.8 the Board shall, in conjunction with and practical participation of Muslim shari'ah experts, including qudat of the Court, draft a code of MPL in basic form. Matters of detail and discretion in sectarian issues, should be left to the Court for its decision.

2 Establishing of a Shari'ah Court:

As shown in this thesis, shari'ah is incompatible with the South African legal system. This means that the present court structure cannot be used for MPL application. It has also been recommended that the Board establish Shari'ah Courts (hereafter called the "Court") throughout the country to apply MPL.

The following shall apply:

2.1 the Chief Qādī shall head the Court structure and administer it and will be assisted by a deputy Qādī.

2.2 all Qudat must be Muslims and duly, properly and suitably qualified for their positions.

2.3 the Court shall hear, adjudicate, deliver judgment, including imposing sentences as well as attend, as required in shari'ah, to all matters it is empowered to attend to and in a way so prescribed.

2.4 the Chief Qādī shall appoint a suitable Muslim to the position of Chief Mutawalli of a Bait al-Mal (Muslim treasury) who shall administer the mentioned treasury. The Bait al-Mal shall receive all unclaimed or invalid Muslim deceased estates as well as various donations,
including zakāh, made to it by Muslims as well as fines paid by offenders. The Chief Mutawallī shall, under regulations set out by the Court, use funds in the Bait al-Mal for destitute Muslim widows, divorcees, orphans, minor children or such other Muslim persons or instances as the Court may direct.
APPENDIX 2

Most of this thesis had been devoted to mirath. It is one of the most complex subject matters in fiqh. To help understand the subject matter better, some examples will be presented here:

- **EXAMPLE 1:**
  A never married Muslim man dies leaving only his father and mother as heirs. The mother receives 1/3 of entire estate and the father the rest. The same happens when a never married Muslim lady dies.¹

- **EXAMPLE 2:**
  A Muslim widow dies leaving both her parents and a son. The surviving parents each receive 1/6 as there is a descendant child² and the son as 'ašib the residue which is 5/6.³ The same division, as in this example, occurs when a widower dies.

- **EXAMPLE 3:**
  A Muslim divorcee dies leaving both her parents and a minor daughter as heirs. Each parent receives 1/6⁴ and the daughter 1/2⁵ leaving 1/3 as residue which goes to the father by ta'sib (residual status) by the majority ruling. Some countries, like Tunisia and Iraq, will award the 1/3 residue to the daughter also being a 1/2 fardan (fixed share) and 1/3 raddan (by residue ruling).

- **EXAMPLE 4:**
  A Muslim man (or woman) dies leaving only his (her) mother and 3 brothers and 2 sisters. The mother receives 1/6⁶ and the rest goes to the brothers and sisters, on condition that they are of the same degree (i.e either full or consanguine) the

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¹ *Al-Qur'an*, Chapter 4: 11.
² Ibid.
³ Ibid.
⁴ Ibid.
⁵ Ibid.
⁶ Ibid.
brothers receiving twice the share of the sisters\(^1\), as the \textit{nafaqah} (maintenance) of the mother and sisters is \textit{farḍ} on the brothers. A sister or a brother does not reduce the mother's share from 1/3 to 1/6. Two of them (any mixture) does that by the vast majority ruling of the \textit{fuqaha'}. Ibn 'Abbas and ibn Hazm rule three and more of them (any mixture) reduces the mother from 1/3 to 1/6.\(^2\)

\textbf{EXAMPLE 5:}

A Muslim woman (or man) dies leaving her (his) mother and a \textit{shaqiq} (full brother) as only heirs. The mother get 1/3 and the rest goes the brother. A mother get 1/6 when there are two or more brothers and or sisters (of any grade i.e full or consanguine or uterine) as the Qur'an speaks of \textit{ikhwah} in this case\(^3\) and two and more are \textit{ikhwah} in arabic.

\textbf{EXAMPLE 6:}

A Muslim man dies leaving his Muslim wife and both his parents as the only heirs. The wife gets 1/4 (as there are no children) and the mother 1/3 of the remainder which is 3/4, she, thus, receiving 1/4 and the remaining 1/2 goes to the father of the deceased. In the reverse case, when the wife deceases, leaving her husband and both her parents, the surviving husband receives 1/2 (as there are no children), the remaining 1/2 is divided into 3 equal parts; one for the mother and 2 for the father. This is the ruling of the vast majority of the \textit{fuqaha'}\(^4\) as the father will receive twice the share of the mother, as is the common case in the \textit{mirath} pattern, the father being taxed with \textit{nafaqah} of dependants including the mother. Ibn 'Abbās and ibn Hazm\(^5\) rule that she

\(^1\) \textit{Al-Qur'an}, Chapter 4: 176.

\(^2\) \textit{Al-Tarikat wa al-Wasaya}, pp. 293 & 295.

\(^3\) \textit{Al-Qur'an}, Chapter 4: 11.

\(^4\) taken from the ruling of the caliph 'Umar ibn Khaṭṭāb in these two cases, thus these two problems are called the 'Umratain.

\(^5\) \textit{Al-Tarikat wa al-Wasaya}, p. 297.
receives, in both cases, 1/3 of the entire estate as the Qur'an did not speak of 1/3 of the remainder for her.

EXAMPLE 7:
A Muslim widow dies leaving a son and a consanguine brother. Her husband predeceased her. The son succeeds to the entire estate as nearest 'āšib and excludes the further removed 'āšib. In the same example, if the widow left a daughter, she will receive 1/2 and the other 1/2 will go to her consanguine brother as 'āšib according to the majority's ruling. According to Irāqi and Tunisian law, she would succeed to the entire estate.

EXAMPLE 8:
A Muslim father leaves three sons and one daughter as heirs. The mīrath is by ta'sīb as there are no aṣḥāb al-furūd (heirs with a fixed share). The estate is divided into 7 equal parts; two parts for each son and one part for the daughter, the sons having to provide nafaqah for their sister.

EXAMPLE 9:
A Muslim mother leaves a daughter, a daughter of her predeceased son and her paternal uncle. The daughter receives 1/2 and the daughter of her predeceased son 1/6 which completes 2/3 for two daughters, leaving 1/3 residue which, by the majority ruling, goes to the paternal uncle as 'āšib. In the Irāqi and Tunisian law, it will go to the daughter only.

EXAMPLE 10:
A Muslim deceased leaves his mother, his maternal grandmother (his mother's mother), two daughters, one full sister, one consanguine sister and a waṣīyyah of 1/6 for charity. The 1/6 for charity is first deducted leaving 5/6, of which 1/6 is for the mother as the deceased left daughters and 4/6 (2/3) for the two daughters. The estate is exhausted and there is nothing for the sisters (who are, anyway, excluded by the daughters as 2/3 allotted for females had been exhausted). The mother excludes her own mother by the rule, the nearest

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1 Al-Qur'an, Chapter 4: 11.
2 Ibid.
exclude the furthest removed, if they link up to the deceased in the blood line. She also excludes the father's mother, if found with her.

- **EXAMPLE 11:**

A deceased leaves a full sister, two consanguine sisters and two uterine brothers as heirs. The full sister, in the absence of the daughter, takes her share which is 1/2, the two consanguine sisters share equally in 1/6 completing 2/3 for females and uterine brothers share equally in 1/3\(^1\) as the deceased left no parents no furū' (descendants). If, in the same example, two full sisters are heirs and the other heirs being the same, the two full sisters share equally in 2/3 and the uterine brothers share equally in 1/3 and the consanguine sisters are excluded.

- **EXAMPLE 12:**

A Muslim deceased leaves two daughters of her predeceased son, a son of their grandson (ibn ibn al-ibn), a uterine brother and a uterine sister, a paternal aunt, a full maternal uncle and a paternal cousin. The two granddaughters receive 2/3 in the absence of two daughters and the son of the grandson (ibn ibn al-ibn) gets the residue of 1/3 as the 'āṣib. The uterine brother and sister is excluded by them. They also exclude all the others as the latter are all dhawī al-arḥām (uterine relatives), save the paternal cousin who is also an 'asib. However, bunūwwah (sonship) comes before 'ummūmah (paternal uncle's line) and thus the paternal cousin is excluded.

- **EXAMPLE 13:**

A Muslim deceased leaves his paternal grandfather, four full brothers and two full sisters as the only heirs. In this case the grandfather should receive 1/3 or take muqāsamah with the others heirs in this case whichever is better for him. If there are two or more brothers or sisters, muqāsamah is bad for the grandfather. In this case he gets 1/3 of the estate and the 2/3 are divided between the brothers and sisters in the ratio 2 shares for a brother and one for a sister.

\(^1\) *Al-Qur'an*, Chapter 4: 12.
EXAMPLE 14:
A Muslim deceased leaves her mother, husband, paternal grandfather and one full brother. The mother receives 1/3 as only one brother is found and no children, the husband receives 1/2 as there are no children which equals 5/6, leaving only 1/6 which goes to the paternal grandfather and he cannot get less than 1/6 under any circumstances. The full brother is excluded from the estate. The rule here is that when the paternal grandfather is found with ashāb al-furūd (heirs with a fixed share) and brothers and or sisters of the deceased, he must get 1/6, at least, even if that means excluding the brothers and or sisters.

EXAMPLE 15:
A Muslim deceased leaves a paternal grandfather, a full brother and a consanguine brother as only heirs. As only brothers are found, the paternal grandfather is taken as one of them for distribution purposes and thus, all will have 1/3. Here the full brother takes over the share of the consanguine brother according to the al-ḥajb (exclusion) rule and prevents the paternal grandfather from taking a bigger share. This is called the masʿalah muʿadah.

EXAMPLE 16:
A very peculiar situation is found in the masʿalah al-akdariyyah where the deceased leaves a husband, her mother, and a full sister or a consanguine sister and paternal grandfather. The shares are 1/2 for the husband as there are no children, 1/3 for the mother for the same reason, 1/2 for the full sister or consanguine sister as there is no daughter of the deceased and 1/6 for the grandfather. The problem is from 9 instead of 6. Thus they will be, as in the order above, 3/9 (husband), 2/9 (mother), 3/9 (sister) 1/9 (grandfather). The grandfather's share is now combined with the sister's share of 3/9 and divided 2:1 in favour of the grandfather. To have it properly worked out, the shares are taken from 27. The husband receives 9, the mother 6, the sister 9 and the

1 Mudawwanah al-Ahwal al-Shakhṣiyyah, Book 6, Chapter 7, Section 257.
grandfather 3. The grandfather's share is added to the sister's which gives 4/9 and taken from 27 is 12 which is divided by 2:1 in favour of the grandfather. The grandfather, thus, receives 8 and the sister 4. If should have been a simple case of 'awl (increase in share number). There is no father in this distribution, thus his father, the grandfather features. The sister is his daughter and he (grandfather) is responsible for her nafaqah, hence the ratio 2:1 in favour of the grandfather.

EXAMPLE 17:
A Muslim deceased leaves her husband, her mother, her full brother and full sister and uterine brothers and sisters of her mother. The husband receives 1/2 as there are no children, the mother receives 1/6 as there are brothers and sisters to the deceased. The uterine brothers and sister share in 1/3 as they are more than one. This exhausts the estate and the ashiqa (full brother and sister) being 'asabah are excluded as there is no residue. The majority of the fuqaha allow the joining up of the sets of brothers and sisters and let them share equally (both brothers and sisters) in the 1/3 allowed for the uterine brothers and sisters as they are all from one mother. They, thus, inherit from a uterine position.

EXAMPLE 18:
A Muslim deceased dies leaving a mother, a consanguine brother and paternal grandfather. The shares are 1/3 for the mother as there is only one brother and the grandfather does not reduce her share and the rest is equally divided between the grandfather and consanguine brother (each taking 1/3) as the former is taken as a brother when there are only brothers in the given situation. Their succession here is by ta'sib.

EXAMPLE 19:
A Muslim deceased leaves two sons, three full brothers, one full sister, two consanguine brothers and one consanguine sister and a son of his predeceased son. Two sons succeed to the entire estate in equal shares and exclude all the others and they are nearest to the mayyat and bunuwwah (sonship) preceding all other residual relationships.
EXAMPLE 20:
A Muslim deceased, who converted to Islam, leaves his entire estate to his nonmuslim parents and nonmuslim brother. This is not executed and the qādi will rule it invalid. At most, he can award 1/3 as a ʻwaṣīyyah to the three to be shared equally between them or in any ratio of his choice. The rest is to be for the benefit of the Muslims.

EXAMPLE 21:
A Muslim deceased, who converted to Islam, leaves all her estate to charities. She has Muslim relatives eligible for succession in terms of shari‘ah. The heirs receive what is due to them and the rest is for the charities proportional to their allotted share. One cannot dispose by way of ʻwaṣīyyah of all your possessions when you have legitimate and lawful heirs in terms of shari‘ah.

EXAMPLE 22:
A Muslim deceased leaves his estate to his heirs in shari‘ah, save one who is engaged in unlawful and sinful actions in terms of shari‘ah, such as consuming liquor, associating with women of ill-repute etc. All the heirs must succeed to their rightful shares. The other heirs may petition the qādi in the share of the sinful heir requesting that his share be frozen for his heirs to succeed to at his death. The qādi should rule in favour of the heirs’ applicants as not doing so will cause the sinful heir to continue, if not in worse form, with his wrongful lifestyle and may further harm his dependants. This ruling will be for sadd al-dhara‘i (blocking the avenues of sin).

EXAMPLE 23:
A murtadd (or murtaddah), dies in riddah (apostasy) and leaves Muslim heirs who qualify to succeed under normal shari‘ah required circumstances. No one succeeds to his estate as there is no succession between Muslims and nonmuslims.
EXAMPLE 24:
A murtadd or murtaddah reverts to Islam before his or her death and leaves an estate and Muslim heirs who would normally succeed to his estate. They succeed as the succession will be between Muslims.

EXAMPLE 25:
A Muslim heir kills his muwarrith. There are only two other Muslim heirs, a wife and a son to the deceased. Only the latter two succeed; the wife receiving 1/8 as there is a child and the son receives the rest by ta’sib. The murderer heir is excluded by shari’ah ruling.

EXAMPLE 26:
A Muslim deceased leaves Muslim heirs and a wasiyyah for his nonmuslim relative. The latter murders him. The wasiyyah lapses and reverts to the estate for distribution to the heirs as no provision had been made for other wasiyya.

EXAMPLE 27:
A Muslim creates a waqf during his lifetime for his minor children but does not depossess himself from the ownership of the waqf property nor allow them benefit from it and declares in his Will that the waqf is to continue indefinitely for the mentioned persons after his death. He has other lawful heirs in shari’ah. The waqf can only be founded as a wasiyyah and as such must not exceed 1/3 of the estate and must be consented to by other heirs as it is a wasiyyah for heirs of the deceased.

EXAMPLE 28:
A Muslim creates a waqf during his lifetime for homeless people and for this purpose buys a property and creates a proper waqf in perpetuity. At his death, one of the heirs sets a claim against the estate for the waqf to be part of the estate for distribution to the heirs. The claim is refused as the waqf had been properly instituted and is for perpetuity.

EXAMPLE 29:
A Muslim purchases ground and builds thereon a mosque for which he pays fully in his lifetime, but had everything registered in his name as owner. At his death, the heirs wish
to claim the mosque as part of the estate. The estate is
dispossessed of the mosque and its ground as well as
everything which the deceased might have given to it for its
use. This is so due to the fact that as soon as one builds a
mosque, it becomes to a permanent waqf, cedes to the ownership
of Allah permanently and is for the use of the Muslims as a
mosque in terms of shari'ah. The qadi must oversee the
appointment of a mutawalli for the mosque. The same rule will
apply if ground is bought for burial and public burials are
allowed in it without any objection of any kind from the owner
of the ground.
AL-MADHĀHHIB AL-FIQHIYYAH (ISLAMIC JURISPRUDENCE SCHOOLS)

Mention had been made several times, in this thesis, of the above term and its derivative. It is considered necessary to explain in more detail what *al-madhahib al-fiqhiyyah* are all about.

1 Major Islamic Movements In Islam:

Three major religious movements had arisen in Islam since its inception. These are the *Sunni*, *Shi'ah* and *Khariji* movements the latter of which is non-existent now. *Sunnis* form the overwhelming majority of Muslims in the world and is a system both of theology and *fiqh* while *Shi'as* form a small minority and is also both a theological as well as *fiqh* system.

1.1 The Sunni System:

As we are dealing with *fiqh* systems, we shall exclude the theological part of the *sunnī* school. A striking peculiarity of the *sunnī* *fiqh* is the large number of *mujtahidun* it produced, some with excellent *madhahib* while the work of many never reached us due to many of them not having their works recorded. However, some of their rulings are with us in the surviving works of the major *sunnī* *fuqaha*.

The major *sunnī* *fiqh* *madhahib* are:

1.1.1 The Ḥanafī *madhhab* founded by Nu'mān bin Thabit, commonly known as Abū Ḥanīfah who was born in 80 AH in al-Kufah in southern Iraq.

1.1.2 The Malīkī *madhhab* founded by Malik bin Anas who was born in Madinah in present day Saudi Arabia in the year 93 AH.

1 there are many sects amongst the *shi'ah*. Some, like the ghulāt (extremists who breached fundamental Islamic theological rules), are not Muslims while there are some *shi'ah* sects which are acceptable to *ahl al-sunnah*. 
1.1.3 the *shafi'i* madhhab founded by Muhammad Idris al-Shafi'i who was born in Ghazzah in Palestine in 150 AH.

1.1.4 the *hanbali* madhhab founded by Ahmad ibn Hanbal who was born in Baghdad, Iraq, in 164 AH.

1.1.5 the *zahirī* madhhab founded by Dawud al-Zahirī, who was, initially, a *shafi'i* follower. This madhhab is not well known amongst ordinary people. The most famous faqih of this madhhab is ibn Hazm who left a voluminous work called *Al-Muhalla* which contains the rulings of the *zahirī* madhhab. *Zahirī* rulings are quoted in most sunni fiqh works as well as fatāwā (dispensations) of muftūn (pl of mufti - Islamic law dispensation specialist).

a) The *Hanafi* Madhhab:

This madhhab’s founder, Abu Ḥanīfah, studied under famous teachers, amongst them being Ḥammād ibn Sulaimān, who in turn studied under the famous *ṣahābi*, ibn Mas‘ūd. Abu Ḥanīfa’s fiqh is based on *ijtihād* in all problems he found no *shari'ah* text, whether *Qur’ān* or *sunnah* or *ijmā’ al-ṣahābah*. His system is founded on certain *usūl* (principles) which he himself stated:

"I take from the *Qur’ān* if I found the ruling in it and if not, then I take from the *sunnah* of the Messenger of Allah. If I do not find anything there, then look at the fatāwā of the *ṣahābah* which I feel to take. When a matter comes to Ibrāhīm al-Nakha‘ī and al-Ḥasan, (of the *tabi‘un*), then I use *ijtihād* as they used it."

His *usūl*, comprises:

The *Qur’ān*, ḥadīth/sunnah, *ijmā’ al-ṣahābah*, fatāwā al-ṣahābah (dispensations of the legist companions of the Prophet), *al-qiyaṣ, al-istiḥsān*

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1 Ta’rikh al-Tashri‘ al-Islami, p. 170.
and \textit{al-‘urf}. His two most famous students, Abu Yusuf and Muḥammad al-Shaibānī recorded his works for posterity. Another two famous students and \textit{fuqaha}' of the \textit{hanafis} are Zufār bin Hudhail and al-Ḥasan bin Ziyād. Hanafis are found mostly in Asia and the Middle East.\footnote{Abu Zahrah M: \textit{Ta‘rikh al-Madhahib al-Islamiyyah Fi Ta‘rikh al-Madhahib al-Fiqhiyyah}, Cairo, Dār al-Fikr al-‘Arabi, undated, p. 162.}

b) \textbf{The \textit{Maliki} Madhhab:}

The \textit{maliki} madhhab derives its name from its founder Malik bin Anas, a Medinite. Of his famous teachers were ibn Hurmuz, Rabi‘ah al-Ra‘i and Ja‘far al-Ṣadiq.\footnote{\textit{Ta‘rikh al-Tashri‘ al-Islami}, p. 175.} Malik was both a \textit{faqih} and a \textit{muhaddith} (authority in \textit{ḥadīth}) and it is, thus, not surprising that his madhhab is \textit{riwayah} (text) based. His outstanding contribution to \textit{fiqh} is his legacy of \textit{fiqh al-Madinah}, derived from \textit{Qur‘an} and \textit{sunnah}. His monumental work \textit{al-Muwatta} is still with us and is extensively used by Muslims the world over. The \textit{usul} of his madhhab are, as explained by the \textit{maliki} jurist al-Qarrahī are:


\textit{Malikis} are found mostly in Egypt, Sudan, the Arabian Peninsula and North Africa.\footnote{\textit{Ta‘rikh al-Madhahib al-Islamiyyah}, pp. 223 - 224.}
c) **The Shafi’i Madhhab:**

Muhammad Idris al-Shafi’i, founder of this madhhab was a Qurashite and memorised the Qur’an at seven and the Muwatta’ of Imam Malik by fifteen. His teachers were Muslim bin Khalid al-Zunjî who was the mufti of Makkah, Sufyan al-‘Uyinah and later Muhammad al-Shaibanî, the famous hanafi faqih, from who he studied hanafi fiqh in depth. His madhhab has the distinguishing feature that it has two divisions, one called the "old" and the other "new" madhhab. The old one being his rulings in Baghdad and the new one being his rulings in Egypt. These are based on different ‘araf (customs) of Baghdad and Egypt. He has two famous compilations, namely, Kitab al-Umm and al-Risalah, the latter which deals with jurisprudence principles. The shafi’i madhhab is midway between hanafi and maliki fiqh.

His usul is:

The Qur’an, followed by the hadith or sunnah, even the aḥad category which are authentic. Hereafter follows the ijma’, the fatawa al-khulafa’ al-rashidin (dispensations of Abu Bakr, ’Umar, ’Uthman and ’Ali) and their rulings takes precedence over al-qiyas, which is the last format of proof. Amongst his famous students rank, Ahmad ibn Hanbal, al-Tabari, al-Muzani, Dawud and who later became Dawud al-Zahiri. Shafi’is are found mostly in Yemen, Egypt, Iraq, Syria, Pakistan, Indonesia, Malaysia, Philippines, East and South Africa.

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d) The Hanbali Madhhhab:

Its founder is Ahmad ibn Hanbal. He was a student of al-Shafi'î, but developed his own form of *ijtihad* later on. Of his famous students are al-Athram, ibn Hajjaj and al-Marûzi. The Hanbali madhhab is distinguished in its strong *shari'ah* text based system. Hanbalis aligned themselves as fully as possible to the Prophetic system. Their *usûl* are:

The Qur'ân followed by the *hadîth* and *sunnah*, even the weak, but *sahîh* (authentic) categories of *hadîth* and not the rejected texts. Hereafter follows the *fatâwa al-sahâbah* and Ahmad would take the one nearest to the Qur'ân and *sunnah*. Then comes *marasil al-hadîth* (a category of *hadîth* that is technically weak, but not rejected) and then the *al-qiyyâs* patterns. According to al-Tusi, the Hanbalis also accept *al-istihsân*, while, ibn Qudamah, the famous hanbali faqih, states that both *al-istişlah* and *al-istişhab* are also part of their *usûl*. Sadd al-dhara'i is also an accepted hanbali *usûl* principle.

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1 Ta'rikh al-Tashri' al-Islami, p. 190.
2 Madkhal li Dirâsah al-Shari'ah al-Islamiyyah, pp. 171 - 172.
3 Masadir al-Tashri' al-Islami, pp. 70, 89 & 152.
4 Ta'rikh al-Madhahib al-Islamiyyah, p. 335.
GLOSSARY

ARABIC WORDS

Abb (pl. Aba)
Abb al-abb
Abb al-umm
Abna sulb
Adah (pl. Adat)
'Adil

'Adl batinan

'Adl zahiran
Adwar fiqiyyah

Ahad
Ahd al-nubuwwah
Ahd ma ba' da al-nubuwwah
Aḥkām (sing ḥukm)
Ahl al-dhimmah

Ahl al-hadith

Ahl al-ra'i

Ahl al-Kitab
Ahliyyah

Al-āḥwal al-shakhṣiyyah
Ajir khass
Ajir washtarak
Ajnabi (pl. Ajanib)
Akhras shaqiq (pl. ikhwah ashiqqā')
Akhras
'Alim ('ulama')
Allah

father.
father's father.
mother's father.
own children/sons.
tradition/custom.
righteous in conduct/
just/fair/equitable.
righteous conduct in
private life.
apparent justice.
stages of development
of fiqh.
single.
prophetic era.
post Prophetic era.
laws/injunctions.
nonmuslims living under
Muslim rule.
followers of hadith
school of thought.
followers of juristic
opinions/ruleds.
people of the Book.
legal status and
standing.
personal law.
permanent employee.
casual employee.
non-related/foreign.
full brother.
a dumb person.
scholar.
God Almighty.
Amanah
Amin
'Amm (pl 'Amam)
'Amm li abb
'Amm li umm
'Amm shaqiq
'Ammah (pl 'Amam)
'Ammat abi al-saghir
Anbiya (read as ambiya)
Ansari (pl ansar)

Aqarra
'Aqd (pl 'Uqud)
'Aqd al-bai'
'Aqd al-hibah
'Aqidah
'Aqil
'Aqilah
'Aql
Arham (sing rahim)
Arham maharim

'Asabah
Asbab makhsusah
Asbab al-nuzul
'Ashib (fem 'ashibah)
Asl al-mayyit

'Awl
Awqaf al-masjid
Ayah (pl ayat)
'Ayan al-tarikah

Ayat kulliyah
Ayat Madaniyyah

trust.
trustworthy person.
paternal uncle.
consanguine uncle.
diminished shares.
uterine paternal uncle.
full paternal uncle.
paternal aunt.
father's paternal aunts.
prophets.
settled Muslims of Medina.
acknowledge/affirm.
contract.
contract of sale.
contract of gift.
beliefs.
sane.
a sane female.
sanity.
relatives.
relatives of the prohibited category (for marriage).
residuaries.
special causes.
reasons for revelation.
residuary.
ascendants of the deceased.
endowment for a mosque.
physical assets of the estate.
general Quranic verses.
verses revealed in Medina.
Ayat Makkiyah
Ayat tafsiliyyah
Azwaj
Bait al-mal
Baiyinah
Balaghah
Banat al-ibn
Banat shaqiqa
Banat sulbiyyah
Banu Isra'il
Bid'ah
Bint (pl banat)
Bint akh li abb
Bint akh li umm
Bint akh shaqiqa
Bint al-ibn
Bint 'amm (bint 'ammah)
Bint ibn al-bint
Bint khal (bint khalah)
Bint sulbiyyah
Bintan sulbiyyatan
Birr
Bulugh
Bunuwwah
Butlan
Dā'in
Al-da'in al-gha'ib
Dain (pl duyun)
Dawam
Dhawi al-arham
Dhimmi

verses revealed in Mecca.
detailed Quranic verses.
spouses.
State treasury.
proof.
rhetoric.
daughters of the son.
full daughters.
own daughters.
the Jews/Israelites.
Innovation.
daughter.
daughter of the consanguine brother.
daughter of the uterine brother.
daughter of the full brother.
daughter of the son.
female paternal cousin.
daughter of the son of the daughter.
female maternal cousin.
own daughter.
two own daughters.
virtuous deeds.
pubescence.
being a son.
void or invalid.
creditor.
absent creditor.
debt.
permanency.
uterine relatives.
nonmuslims living under Muslim rule.
Dhukurah
Din
Dinar (pl danānir)
Dirham (pl darahim)
Diyah (pl diyāt)
Fard
Fatwā (pl fatāwa)
Fidyat al-siyām
Al-fiqh
Fiqhi
Ghulat

Al-hadānāt
Hādin
Hadinat
Hajr
Al-Hajb

Hajb al-hirman
Hajb al-nuqṣan
Hakim

Haml
Hawa

Al-ḥuquq al-ʿāmmah
Al-ḥuquq al-khāṣṣah
Ibn (pl abnāʾ)
Ibn al-ʿāmm (pl abnāʾ al-ʿāmm)
Ibn al-ibn
Ibn bint al-bint

Ibn ibn al-ibn
'Iddah
'Iddat al-talaq

'Iddat al-wafat

Al-iflas
Al-ijarah
Al-ijma
Al-ijma' al-sarih
Al-ijma' al-sukūti
Al-ijtihād
Imām
Imām (pl a'immah)
Al-imām al-akbar
In'iqād al-wasiyyah
Inkah
Iqrār (pl iqrārat)

Iqrār bi al-nasab

Iirth
Al-istiḥsan
Al-istishab

Jadd (pl aijdad)
Al-jadd al-fāṣid
Al-jadd al-saḥīh
Jaddah (pl jaddāt)
Al-jaddah al-fāṣidah
Al-jaddah al-ṣaḥīḥah
Al-jaddāt al-abawīyyat
Al-jaddāt al-umāmiyyat

son of the son.
son of the daughter of the daughter.
son of the grandson.
period of waiting.
period of waiting of a divorcee.
period of waiting of a widow.
insolvency.
leasing or hiring.
consensus.
clear consensus.
silent consensus.
juristic inference.
leader of Muslims.
mosque prayer leader.
Head of State.
enacting of a legacy.
marrying of (someone).
affirmation/admission acknowledgment.
acknowledgment of lineage.
in the best interest of or refined analogy.
confirming an existing situation.
grandfather.
untrue grandfather.
true grandfather.
grandmother.
untrue grandmother.
true grandmother.
paternal grandmothers.
maternal grandmothers.
Ja'fari

Jahannam
Ja'lib al-manfa'ah

Jama'ah

Jannah
Jihad

Jiran (sing jār)
Judiwwah
Al-junūn
Al-junūn al-mutbiq
Juz (pl ajza')
Juz jaddīhi

Kaffarah (pl kaffarat)

Kafil

Kafil al-laqīt

Kalami
Khāl (pl akhwāl)
Khalaf

Khāl li abb
Khāl li umm
Khāl shaqiq

Khalah (pl khalat)
Khālal ah abī al-saghīr

Khālal al-shaqqiqah

---

a branch of the Shi'a school of thought.
Hell.
requisition of benefit.
a congregation or a group.
Paradise.
struggling in the utmost in the path of Allah including fighting in the path of Allah.
neighbours.
being a grandparent.
insanity.
permanent insanity.
a part.
descendant from a grandparent.
penance/fine for a religious infringement.
legal guardian (of a parentless minor)
legal guardian of a foundling.
thecomological.
matrianl uncle.
early scholars of shari'ah.
consanguine maternal uterine maternal uncle.
full maternal uncle.
uncle.
matrianl aunt.
matrianl aunt of the minor's father.
full matrianl aunt.
consanguine maternal aunt.
uterine maternal aunt.
caliph/successor/ruler.
rule of the first four caliphs after the death of the Prophet (s.a.w).
the four righteous caliphs.
hermaphrodite.
books of legal opinions/dispensations.
foundling (male).
foundling (female).
mutual imprecation.
autistic.
principles.
belonging to the city of Medina in Arabia.
juridical schools.
juridical schools.
a juridical school.
debtor.
a missing person.
cancelled.
placed under curatorship.
the governed.
a person you are prohibited from marrying.
an insane person.
belonging to the city of Mecca in Arabia.
wealth or possessions.
a follower of the maliki school of law.
approved/recommended.
usufruct/benefit.
Mansukhah
Muqasamah
Maqāsid (sing qasd)
Marji' al-hukm

Al-masādir al-asliyyah
Al-masādir al-tabā'īyyah
Mašā'il ijtihiādiyyah

Masakin (sing miskin)
Masālih (sing maslahah)
Al-masālih al-mursalah
Masālīm
Masjid (pl masajid)
Maslaḥat al-saghīr
Mawaddah
Mawlā
Mawaqīt (sing miqat)
Mawqūf 'alaihi
Mawqūf 'alaihim

Al-mirāth
Mu'āyiyan

Mu'ālīmūn (sing mu'allim)
Mu'amalat

Mufassirūn (sing mufassir)
Muftūn (pl mufti)

Muḥaddith (pl muḥaddithūn)
Muhājir (pl muhājirūn)
cancelled.
coinheritance.
aims.
final authority in legal matters.
original sources.
secondary sources.
issues based on juristic inference.
the needy.
public interest.
public interest in law.
famous.
mosque.
interest of the minor.
love/affection.
freed slave.
boundaries for pilgrimage.
beneficiary of an endowment.
beneficiaries of an endowment.
succession.
specified/fixed/designated.
teachers.
daily social transactions which have legal bearings.
exegetists.
experts entitled to give legal opinion.
 scholar/authority in hadith.
emigrant Muslim from Mecca.
Muharram
Mujtahidun (sing mujtahid)

Mukallafah (masc mukallaf)

Mula'anah
Multaqit
Mumaiyiz

Munasakhah
Muntaziman
Muqtadayat 'aqd al-nikah

Murtadd (fem murtaddah)
Musabih
Musalah
Musalahum
Mushaf
Mus

Muslim (fem Muslimah)
Mustaghraaq bi al-dain
Mustahab

Mu'taddah talaq al-raj'i

Al-mutallaqah al-ba'inah
Mutalaziqan
Mu'taq
Mutawalli
Mutawatir
Mutlaqan
Mutun (sing matn)
Muwakkil

forbidden.
legal experts who infer laws.
a woman who reached puberty and is then responsible for her actions.
moral imprecation.
finder of a foundling.
a discerning youth (male).
replacement.
properly administered.
requirements of a marriage contract.
a wet nurse.
an apostate.
actual legacy.
legatee.
legatees.
the Qur'an.
legator.
a Muslim person.
insolvent.
preferred/desirable encouraged.
woman in the period of waiting in a revocable divorce.
irrevocable divorcee.
inseparable.
freed slave.
administrator/trustee.
numerously reported.
absolutely.
texts.
principal.
Muwarrith
Muwarrithah
Nafaqah
Al-nafs
Naḥw
Nasab
Nasara
Nāsikhah
Nāṣîr
Naskh
Al-nasl
Nazir
Nikāḥ (pl ankiḥah)
Nikāḥ bāṭil
Nikāḥ fāsid
Nikāḥ saḥīḥ
Nubūwwah
Nuṣrah
Qabūl
Qaḍā
Qaḍā al-duyūn
Qadhf
Qādī (pl qudat)
Qādir
Al-qaʿīdah al-fiqhîyyah
Qaiyim
Al-qaʿrābAH al-nasabiyyah
Qarabah bi al-raḍaʿah
Al-qatl al-ʿamd
Al-qatl al-jari majra al-khataʿa
Al-qatl al-khataʿa
testator.
testatrix.
maintenance.
self/person.
grammar.
lineage.
Christians.
still valid in law.
helper.
process of cancellation
and substitution of new
laws.
offspring.
manager or administrator
of an endowment.
mariage.
void marriage.
voidable marriage.
valid marriage.
prophethood.
help or assistance.
acceptance.
judicial process.
settling of debts.
slander.
Muslim judge.
capable.
a fundamental legal
principle.
a righteous Muslim.
related by lineage.
related by fostering.
intentional homicide or
killing.
homicide resembling
accidental homicide.
homicide in error or
killing in error.
homicide by cause.
probable intentional
homicide/resembling
intention to kill.
fundamental legal
principles.
death penalty or
retaliation.
ruling of a companion
of the Prophet (s.a.w).
value.
division to an estate.
analogy.
apparent analogy.
physical strength.
nearness (to God).
strength.
fostering.
redistribution of the
residue of an estate
9th month of the Islamic
calendar.
mature of mind (for
administering one’s
possessions).
supervision.
interest (monetary) which
includes usury.
soul.
maturity of mind.
a discerning boy.
a discerning girl.
patience/endurance.
dowry.
customary dowry in a
family.
Sadaqah (pl sadaqat)
charity.
Sadd al-mafsadah
blocking evil.
Safah
prodigality.
Safi
prodigal.
Saghir (pl sagha'ir)
a minor male.
Saghirah
a minor female.
Sahabah (sing sahabi)
companions of the Prophet
Salaf
(s.a.w).
Salah (pl salawat)
later scholars of
Sarf
shari'ah.
Shafaqah
prayer.
Shafi'is
etymology.
Shahadah
followers of the shafi'iyi
Sha' i'an
school of law.
Shaqi q (pl ashiqqa')
evidence.
Shaqi qah (pl shaqi qat)
non-separated articles
Shar'an
or possessions.
Sharh
full brother.
Shari'ah
full sister.
Sharh
according to shari'ah.
Shari'ah
explanation.
Sharh
Islamic law of Islamic
Shura
injunction.
Sifah
condition.
Silah
that branch of Muslims
Silah
who recognise 'Ali, the
Siyam
Prophet's (s.a.w) son-in-
Al-sughr
law as his rightful
Sukna
successor.
Shura
mutual consultation.
Sifah
lewddness.
Silah
blood relationship or
link.
Siyam
fasting.
Al-sughr
minority.
Sukna
lodgings.
Sultan
Sunnah (pl sunan)

Sunni

Surah (pl suwar)
Surat al-Fatihah

Surat al-Nas

Ta'amul
Al-ta'aqud
Ta'awun
Al-tabannā
Tabdhir
Tabi'īn (sing tabi'i)

Tadarruj
Tafsir (pl tafasir)
Tahir
Tajhiz al-mayyit

Takharuj

Taklif

Talaq
Talaq marad al-mawt

Tamyiz
Tanfidh al-wasaya
Taqlid
Taqnin

Muslim ruling authority.
practice of the Prophet (s.a.w).
Muslims who accept Abu Bakr as the first of the four successors of the Prophet (s.a.w).
a chapter of the Qur'ān.
opening chapter of the Qur'ān.
final chapter of the Qur'ān.
usage.
contracting (a contract).
cooperation.
adoption.
squandering.
followers of the companions of the Prophet (s.a.w).
gradualism.
exegesis.
pure.
preparation for the burial of a deceased.
exit of an heir from an estate on an agreed amount of property.
accountability due to maturity.
divorce.
divorce in death sickness.
discernment.
execution of legacies.
imitation.
codification.
Taqwa
Tarbiyah
Tarikah (pl tarikat)
Tasarruf al-amwal

Tasarrufat
Tashih
Tashirī'
Tawāruth

Tazāhum al-tarikah

Ṭift (fem tiflah)
Ubuwwah

Ukht (pl akhawat)
Ukht al-raḍa‘ah
Ukht li abb
Ukht li umm
Ukhūwwah

Umm (pl ummahat)
Umm al-abb
Umm al-saghir
Umm al-umm
Umm ḥadīnat
Umm ʿumm li abb

Ummahat al-umm
Umumah
Umm walad al-liʿān

Al-ʿuqubah (pl ʿuqubat)

Usul al-fiqh

Usuli (pl usuliyun)

piety.
education or training.
a deceased estate.
disposal of property and possessions.
right of disposal.
correction.
legislation.
multiple succession or succession rights.
deprivation in a deceased estate.
an infant.
being a father or parentage.
a sister.
foster sister.
consanguine sister.
uterine sister.
brotherhood or being a brother.
mother.
mother of the father.
mother of the minor.
mother of the mother.
custodial mother.
maternal grandmother of the father.
mother of the mother.
being a mother.
mother of the child of mutual imprecation.
punishment/penalty or punitive measures.
principles of jurisprudence.
authority in the
principles of jurisprudence.
depositee.
death.
unqualified opinion.
revelation.
necessary.
agent.
child.
child of mutual imprecation.
legitimate child.
illegitimate child or extra-marital child.
legatee’s child.
guardian.
endowment.
one creating an endowment.
tutor or curator.
legacy.
legacy of the unborn.
permissible legacy.
detested legacy.
compulsory or necessary legacy.
representation or agency.
guardianship.
guardianship over person.
public guardianship.
natural guardianship.
guardianship of custodial care.
custodial guardianship.
compulsory guardianship.
aquired guardianship.
guardianship of
upbringing.
guardianship of marriage.
curatorship.
necessity.
to be sold.
to be given in gift.
to be inherited.
increase.
a follower of a minor
sunni school of law who
believe in literal
interpretations.
followers of the zaidi
school of law belonging
the shi'ah branch and who
are nearer to the hanafi
school of law.
annual compulsory alms.
alms payable at the end
of Ramadan.
husband.
deceased husband.
wife.
deceased wife.
the two spouses.
state of marriage.
adultery.

Al-wilayat al-tazwij
Wisayah
Wujub
Yuba'
Yuhab
Yurath
Zaidah
Zahiriyyah

Zaidiyyah

Zakah
Zakat al-fitr

Zawj
Zawj mutawaffa
Zawjah (pl zawjat)
Zawjah mutawaffa
Zawjan
Zawjiyyah
Zina
Ab intestato by way of intestacy.
Androga same meaning as above.
Androgatio a from adoption in early Rome.
Androgator one making androgatio.
Androgatus one entering androgatio.
Civis a free person.
Connubium capacity to contract a valid marriage.
Cura curatorship.
Decurio municipal counsellor.
Dominium possession.
Fideicommisa Trusts.
Infans a child under 7 years of age.
Ingenuii born free persons.
Libertini made free persons.
Manus a kind of family subjection in which a woman became a member of her spouse's agnatic family.
Pater family head.
Paterfamilias family head.
Potestas authority or power.
Praetor fideicommissarius Trusts magistrate.
Proximus agnatus near agnate.
Tutela legitima legal tutelage.
Tutela testamentaria testamentary tutelage.
Tutela tutelage.
Tutor fiduciarius fiduciary tutor.
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1 There is a title in this bibliography which is virtually similar to this title, hence the inclusion of the author's name here to avoid confusion.
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