SALIENT EFFECT OF MALIKI'S SOLUTION TO THE PROBLEM OF 'GRANDFATHER AND COLLATERALS IN COMPETITION'

BY

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ABSTRACT

This paper is a critical analysis of the solution adopted by the Maliki school of Law to solve the knotty problem of **"grandfather and collaterals in competition"** in Islamic Law of Intestate Succession. It examines the various doctrines: Al-Malikiyya, Al Shibh Al-Malikiyya, Al-Akdariyya as propounded by the school to boost the share of the grandfather as a result of the adverse affect of the solution adopted by the school has on the grandfather in resolving the problem of superiority of claim between the grandfather and the collaterals. Upon the analysis, it is discovered that the purpose of the propounded doctrines is to give the grandfather a kind of leverage over the "claim" of the collaterals as upheld by the Hanafi School of Law in resolving the problem of Grandfather and Collaterals in Competition in Islamic Law of Intestate Succession.

INTRODUCTION

The solution[2] adopted by the Maliki School of Law jurists to resolve the problem of grandfather and collaterals in competition is commendable and equitable. However, on a critical analysis, the solution tends to give the collaterals a leverage over the grandfather in the same cases[3] thereby

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2 This is Zaid Bin Thabit's Solution adopted by Maliki School of Law and the applicable school in Nigeria. See ABDULSALAM Vs SALAWU (2002)F W L R Pt. 117, Pg. 1103 @ 1113 where the Supreme Court of Nigeria held that the Islamic Personal Law must be of Maliki School governing matters enumerated in Section 262 of the 1999Constitution of the Federal Republic of Nigeria and Section 242 of the 1979 Constitution.

3 Ismael, Saka Ismael, "Grandfather and Collaterals in Competition" : - A Knotty Problem in Islamic Law of Intestate Succession; The Journal of International and Comparative Law, Department of Jurisprudence & International Law, Faculty of Law, University of Ilorin, Nigeria, (2000), Vol.4

portraying the collaterals as being more close to the deceased than the grandfather.

Due to the adverse effect the solution adopted by Maliki jurists has over the grandfather in these cases,[1] Islamic Law jurists, especially those of the Maliki School of Law, have applied Ijtihad to propound certain doctrines to boost the position of grandfather where his co-existence with the uterine[2] and germane[3] brothers on the one hand and the urine and consanguine[4] on the other and the Qur'anic heirs would adversely affect him in such a way that the large portion of the estate would have been taken by the latter heirs.[5]

These doctrines are:-

THE DOCTRINE OF AL-MALIKIYYA

The doctrine of Al-Malkiyya, as the name implies, is a product and peculiar feature of Maliki Law. It deals with cases in which a deceased Maliki Muslim is survived by say: Husband, mother, grandfather, uterine and consanguine brothers. The doctrine provides that the uterine would be excluded by the grandfather to his advantage because under normal circumstance, the consanguine, without the grandfather, cannot inherit because the estate would be exhausted by the Qur'anic heirs.[6] Thus, in this hypothetical case, the heirs will share the estate as follows:

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1   Mu'adda and Al-Mukhtasara cases.
2   The same mother but different fathers (Akhyafi)
3   The same father and mother otherwise known as full brother or sister (Haqeeqi)
4   The same father but different mothers (al-lati)
5   Gurin, Aminu Muhammed, An Introduction to Islamic Law of Succession (Testate and Intestate), Center for Islamic Legal Studies ABU, Zaria, 1987, p.139
6   Coulson, N.J; Succession in the Muslim Family, London: Cambridge University Press, 1971, p.80

Husband	=	½ of the net estate.
	=	0.5
Mother	=	1/6 of the net estate because of collaterals
	=	0.167
Uterine Brother	=	0. Excluded by grandfather to his advantage,

thereby automatically excluding the consanguine brother totally too. Thus, grandfather ends up taking a share of:

	1/6	+	1/6
(Qur'anic share of Grandfather)		+) Qur'anic share of Uterine Brother)
		=	1/3
Grandfather		=	0.333

THE DOCTRINE OF AL-SHIBH AL-MALIKIYYA

This is also a Maliki Law doctrine and like the previous, it determines the position of the germane brother (s) by reference to the heirs other then the grandfather[1] hence it deals with cases in which a deceased person is survived by say: husband, mother, uterine brothers or sisters, germane brothers and of course grandfather. It provides that uterine brother or sister would be excluded by grandfather to grandfather's advantage because under normal circumstance, the germanes without the grandfather, cannot exclude them but would rather share a portion of one-third of the estate equally under Himariyya[2] doctrine.

Therefore, since the germanes in this case inherit in the character of uterines, they will retain this character even in the presence of grandfather who would exclude all of them as uterine brothers proper to his advantage. Thus, in the hypothetical case above, the heirs will take the following shares:

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1   Coulson, N.J: Op. Cit., Pg. 80.
2   The Doctrine is equally known as Mushtaraka and Hijiriyya. It deals with germane and uterine brothers in competition and it arises whenever germane brother as residuary heirs would be totally excluded from inheritance owing to the presence of uterines.

Husband	=	½ of the net estate.
	=	0.5
Mother	=	1/6 of the net estate because of collaterals
	=	0.167
Uterine Brother	=	0. Excluded by grandfather to his advantage

and by that too, automatically excludes the germane brother.

Thus, grandfather takes:

	1/6	+	1/6
(Share of Grandfather)		+	(Share of Uterine Brother)
		=	2/6
Grandfather		=	0.333

THE DOCTRINE OF AL-AKDARIYYA

This doctrine was originally propounded by Zaid Bin Thabit and adopted by the Hambali, Shafi'l and Maliki Schools. It consists of a set of two special rules to apply in a typical case of grandfather and collaterals in competition. According to rule one[1] of the doctrine, whenever grandfather co-exists with germane or consanguine brothers or sisters and there are no other relation who are Qur'anic sharers, he takes a special share of Muqasimah or one third of the whole estate, whichever is bigger.

This share of Muqasimah is calculated by supposing the grandfather as one of the brothers, and a share is assigned on the basis of rule: two shares to male and one to female. For example, if a Maliki Muslim dies and is survived by say: a germane sister, two consanguine sisters and a true grandfather, the Muqasimah share of the grandfather will be calculated by supposing him to be a brother coexisting with three sisters. Thus:

Brother to Grandfather	=	2/5 of the net estate
	=	0.4
Each Sister	=	3/5 x 1/3 of the net estate.
	=	3/15
	=	0.2

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1   Rumsey Almaric, *The Muhammadan Law of Inheritance and Rights and Relations Affecting It* (Sunni Doctrine), London: W. Allen and Co;1980, Pg. 165

The grandfather will therefore take two-upon five of the net estate as it is bigger than one-upon three of the whole estate.

The second special rule on the other hand deals with situations where there are also other relations who are Qur'anic sharers. By this rule, the grandfather will take the biggest of these three shares: From Muqasimah or one upon three of the residue or one upon six of the whole estate.[1]

However, in one particular case which was christianed Al-Akdariyyah because it occurred on the death of a woman belonging to the tribe of Akdar,[2] Zaid Bin Thabit refused to follow this second special rule in order to give the grandfather a lion share.

In that case, a woman died leaving behind her husband, mother, sister and grandfather. After giving the husband and mother their respective Quranic share of half and one upon three of the estate, only one-sixth of the estate was left as residue. Then the three shares were calculated according to the second special rule in order to obtain the biggest share for the grandfather, thus:

1. Share from Muqasimah: Supposing the grandfather as brother, there is one brother and one sister. Giving share on the basis of two shares to male and one to female, the brother or grandfather will get:

$$= \quad 2/3 \text{ of residue}$$
$$= \quad 2/3 \text{ of } 1/6$$
$$= \quad 2/18$$
$$= \quad 0.111$$

2. Share from one upon three of residue is:

$$= \quad 1/3 \text{ of residue}$$
$$= \quad 1/3 \text{ of } 1/6$$
$$= \quad 1/18$$
$$= \quad 0.055$$

3. Share from one-sixth of the net estate is:

$$= \quad 1/6$$
$$= \quad 0.167$$

1 Rumsay Aimeric, Op. Cit. p.166.
2 Al Nafarawi, Ahmad B. Ghonaim B. Salim B. Muhammad, Al-Fawakin Al-Dawani Shayh Risalat Ibn
Abi Zaid Al-Ghayrawani, Vol.2. p.288. 1988.

The third share, that is, one-sixth of the net estate (0.167) is obviously bigger and better for the grandfather than the share from Muqasimah or one-third of the residue. However, instead of taking this, the grandfather's share is added to normal share of sister. That is, half of the estate. Thus:

$$= \quad 1/6 \quad + \quad 1/2$$
$$= \quad 4/6$$
$$= \quad 2/3$$
$$= \quad 0.667$$

Then thereafter he (grandfather) is supposed as a brother coexisting with the sister and allotting two shares to the male and one to the female.

Thus:

Brother or grandfather
$$= \quad 2/3 \text{ of } 2/3$$
$$= \quad 4/9$$
$$= \quad 0.444$$

Sister
$$= \quad 1/3 \text{ of } 2/3$$
$$= \quad 2/9$$
$$= \quad 0.222$$

Therefore, the shares of all the heirs will be:

Husband $\quad = \quad 1/2 \; (0.5)$ of the estate
Mother $\quad = \quad 1/3 \; (0.333)$ of the estate
Grandfather $\quad = \quad 4/9 \; (0.444)$ of the estate
Sister $\quad = \quad 2/9 \; (0.222)$ of the estate
Check $\quad = \quad 1/2 + 1/3 + 4/9 + 2/9$
$$= \quad 9/18 + 6/18 + 8/18 + 4/18$$
$$= \quad 27/18$$
$$= \quad 1.5$$

Since the sum total of these shares is more than unity, the actual estate left by the deceased as shown above, the doctrine of "Aul"[1] would apply to reduce the shares of each of the heirs in proportion to their respective shares.

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[1] The doctrine of 'aul is the process whereby the shares are reduced pro rata when the estate is over-subscribed.

Thus:

Husband	=	9/27 of the estate
	=	0.333
Mother	=	6/27 of the estate
	=	0.222
Grandfather	=	8/27 of the estate
	=	0.296
Sister	=	4/27 of the estate
Check	=	½ + 1/3 + 4/9 + 2/9
	=	0.5

The case of Akdariyya is the only case in which the Qur'anic share of the sister together with that of the grandfather is allowed to enter into the calculation of the share in Muqasimah. The doctrine will however apply only where there is one sister. Therefore, where there is a brother or two or more sisters, the doctrine will not apply but that of Muqasimah will apply.

CONCLUSION

It is not an exaggeration that Islamic Law of Inheritance is undoubtedly the most perfect law without a match in any of the modern Legal Systems, whether man-made or divine law. This notwithstanding, if the real issue to be resolved in the problem of grandfather and collaterals in competition is "comparative strength of claims of two classes of agnatic hers" then on a critical analysis of the solution adopted by the Maliki School and bearing in mind the effect of these doctrines above, one is forced to state, with due respect, that the overall solution adopted by the school is nothing but a subtle adoption of the Hanafi solution to the problem.

It is a subtle adoption of the Hanafi solution because these doctrines arose in order to boost grandfather's share as a result of the adverse effects the Mu'adda and al-Mukhtasara cases have on grandfather's[1] share vis á –vis the shares of the collaterals. This is an indirect admission of grandfather's "superiority" over the collaterals. Therefore, since these doctrines have saliently resolved in favour of grandfather his "superiority" over the

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1   Ismael Saka Ismael, Op. Cit, Pg. 22-23

collaterals, then it means the strength of his claim supercedes those of the collaterals hence he be allowed to exclude the collaterals totally as in the Hanafi School Law.