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Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States

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Abstract

In traditional Islamic law, the sole repositories of law were the individual muslim scholars and their schools of law, not the Muslim state. This tradition has continued until today, even in the most modern Muslim states. In light of a fast-paced, modern world and heightened international scrutiny of Islamic law, reforms must be made in the traditional system. This paper suggests that the best reform would be to treat the traditional Islamic law as a common law for all Muslim states. With that foundation, the legislatures of those nations can bring about change in their respective countries, while keeping intact the authenticity and authority of the law. The scholars would be repositories of only this common law, further developing undeveloped principles and issuing opinions with which the legislature can work, and the states would be the repositories of modern state law. It is through this readjustment of the Islamic legal structure that the law will retain any relevance in the lives of its followers.

Change and Authority in Islamic Law:
The Islamic Law of Inheritance in Modern Muslim States

By

Yasir Billoo

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Introduction

"It is not wisdom but authority that makes a law."[1]

Law is the necessary tool with which society can properly be ordered and organized. It is the law of a country that gives its government the legitimacy of existence through purpose. With this legitimacy, the government also has the responsibility of making sure the law is relevant and least burdensome. This responsibility necessarily acts as the catalyst to progressive change – change that follows the needs of its citizens through the details of the law, even if the foundations of the law remain unchanged.

Contemporary Islamic law is currently facing this challenge of change. Because the state is not the only repository of legal authority in Islamic law, the legitimacy of its governance, and therefore any change to traditional law, is commonly called into question. Where the modern Muslim state has succeeded in bringing about reform of traditional Islamic law, it has done so largely with the help of independent scholars of Islamic law, the true repositories of the law. Although this method of change can be beneficial in some aspects, it is slow and does not serve the pace of modern life well.

Particularly in the area of the Islamic law of inheritance, reform has been slow, if at all present. The weight with which arguments in this field have traditionally been made and the authority with which they have been presented leaves even the most willing reformer unable to bring about change. The Qur'anic laws of inheritance, combined with prophetic precedence on the fusion of divine revelation and customary Arab law, and scholarly consensus acting like

1. Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi 80 (E.J. Brill 1996) (quoting Thomas Hobbes) (citing G.J. Postema, Some Roots of Our Notion of Precedent, Precedent in Law, ed. L. Goldstein (Oxford: Clarendon Press, 1987), 11).

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super glue to hold the two together makes change seem like an act of blasphemy. It is because of this super glue that traditional Arab customs are viewed as identical in authenticity to the Qur'an itself.

In order for real change to occur, Muslim states must learn to look at their options again. Another debate on an unfettered re-reading of the original sources is perhaps not the best answer. This paper suggests that the best solution for change is to treat the traditional Islamic law as a common law for all Muslim countries. With that foundation, the legislatures of Muslim states can bring about change in their respective countries, while keeping intact the authenticity and authority of the law. The scholars would be repositories of only this common law, further developing undeveloped principles and issuing opinions with which the legislature can work, and the states would be the repositories of modern state law. It is through this readjustment of the Islamic legal structure that the law will retain any relevance in the lives of its followers. It is also through this readjustment that injustice, in the name of God, can be avoided.

Islamic Law in General

What is meant by the term Islamic Law? It might be easier to explain what it does not mean. In the context of this study, it does not mean the law of any particular Muslim country[2] or even the law of the whole Muslim world. Instead, it is here used as a foundational law of Muslim countries; so, just as the United States and England are Common Law countries, so too are Pakistan and Indonesia Islamic Law countries.

The term Islamic law, more specifically, means a law derived on the theological foundations of Islam – foundations that declare that a God exists and that God has sent, by way

2. For the purpose of this paper, the term "Muslim country" means those countries in which a majority of the population claims Islam as its religion. This paper, though, will deal only with Sunni Islamic law so reform in Iran is not discussed.

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of revelation, all the rules and guidelines that humans need to prosper in this world and in the afterlife.[3] Because humans must look to the revelations provided by God[4] for legal injunctions on all facets of life and death, the essential purpose of anyone reading the revelations to extract its laws is to inherently extract God's intent.[5] This divine intent has been the foundation for more than fourteen centuries of scholarship in the field of Islamic law.[6] It is partly because of the permanence with which this idea of divine intent has been ingrained into the mind of every Muslim that change in modern Muslim countries must take place within the rubric of Islamic law to retain any authority.

A unique aspect of Islamic law comes to the forefront within the discussion of authority. Unlike the modern nation-state, the Muslim state is not the sole repository of legal authority within its borders.[7] There are two tracts on which Islamic law has run since shortly after its birth in the seventh century, C.E.[8] The tracts divide the authority of Islamic law between the official, government-appointed judges known as Qadis and the unofficial, and more popular, scholars of Islamic law.[9] These scholars are commonly known as Muftis and their opinions are known as

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3. Of course, there is a disagreement about whether these rules truly apply to every facet of life. *See* Chibli Mallat, Islamic Family Law 3 (Chibli Mallat & Jane Connors eds., Graham & Trotman 1990) for a brief explanation of the Islamist-Muslim debate as one example of this disagreement.

4. Further discussed in the "Sources of Islamic Law" section infra.

5. Jackson, *supra* note 1, at xxx.

6. Bernard G. Weiss, The Spirit of Islamic Law 10 (The University of Georgia Press 1998).

7. Jackson, *supra* note 1, xiv (introduction).

8. Weiss, *supra* note 6, 6.

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9. *Id*. at 7.

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Fatwas. While a Qadi issues formal, binding opinions of law, the Mufti issues sometimes formal, sometimes informal, non-binding opinions of law.[10] The world of Muftis and the authority they hold is not ruled by any formal hierarchy or superstructure.[11] Despite the lack of any formal hierarchy, as scholars consolidated opinions and interpretations within the field, schools of law developed and within those schools of law, a hierarchy developed. [12]

The schools of law themselves consolidated, leaving four major schools for the Sunni world to operate under. These schools – the Hanafi, Maliki, Shafii, and Hanbali schools[13] – became, and now operate as, the framework within which Muslim scholars must work.[14] Although the schools of law brought order to a seemingly chaotic scene of Muslim scholars issuing legal opinions[15], they also brought an overwhelming amount of restraint on the individual scholars' ability to take the reigns of the law and freely discover divine intent.[16] After the

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10. Muhammad K. Masud, Brinkley Messick, & David S. Powers, Islamic Legal Interpretation: Muftis and Their Fatwas 3 (Muhammad K. Masud, Brinkley Messick, & David S. Powers eds., Harvard University Press 1996).

11. Jackson, *supra* note 1, at xvi. This is not to say that no structure exists within which Muftis operate. Under the classical rubric of Islamic law, a process of acquiring and passing on legal authority from teacher to student existed, but a final judgment on matters was not forthcoming, because no one person or body of people was given the authority to deem what is, or is not, law. *See also* Weis, *supra* note 6, at 128 (discussing the informalities of bestowing the title of Mufti on someone).

12. *See* Jackson, *supra* note 1, at 89-102 for a detail on the structure of scholars within each school of Sunni law and the informal rankings of scholars at work.

13. The schools of law are named after the eponyms of their respective schools.

14. Jackson, *supra* note 1, at xxx.

15. *Id.*

16. *Id.*

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formation of the schools of law, and once the regime of taqlid[17] had set in, independent Muslim scholars needed to work within the constraints of their particular school in order for their opinions to have any authority.

Sources of Islamic Law

In the formative period of Islamic law[18], Muslim scholars regularly employed four key sources of Islamic law -- four methods with which the divine intent can be realized.[19] The Qur'an is considered to be the first source of Islamic law by all scholars.[20] It contains more than six thousand verses[21] of moral and legal injunctions, which Muslims believe were revealed by way of an angel to Mohammed, a prophet who could neither read nor write.[22] Although it is said that only about five hundred verses of the Qur'an contain legal prescriptions, thereby negating the idea that the Qur'an is primarily a legal document,[23] there are suggestions that the verses that do prescribe law are generally twice as long as the non-legal verses.

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17. *See*, *infra* note 63, for an explanation of the phrase "regime of taqlid."

18. The period in which the schools of law began to take control of a nearly free market of opinions is commonly known as the formative period of Islamic law, presumably because it brought order to a system initially without order. *See* Wael B. Hallaq, A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh 1-36 (Cambridge University Press 1997).

19. Mohammad Hashim Kamali, Principles of Islamic Jurisprudence 9-10 (Islamic Texts Society 1997). Although other sources exist, the four Sunni schools of jurisprudence unanimously accept these four sources.

20. *Id.* at 14.

21. *Id.* at 19.

22. Mohammad M. Azami, Studies in Early Hadith Literature 3 (American Trust Publications 1992).

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23. *See* Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 Alb. L. Rev. 511 (1997) (footnote 54). *But see* Kamali, *supra* note 18, at 20 for

From the legal verses of the Qur'an, scholars created two classifications. The first, called Qat'i, or definitive, are those verses that the scholars of Islamic law have deemed clear and unequivocal.[24] The subject matter of these verses, though initially open to interpretation, is now closed for interpretation. One example of definitive verses are those verses containing quantitative prescriptions such as "The adulterer, whether a man or a woman, flog them each a hundred stripes."[25] Other subject matters closed for interpretation are those verses containing specific injunctions regarding daily prayer, fasting, and the specific shares in inheritance.[26] The second class of verses, called dhanni, or speculative, are open to interpretation and can be used to bring about change within Islamic law.[27] An example of a speculative verse is "Prohibited to you (in marriage) are your mothers and your daughters."[28] Although it is clear that the verse is prohibiting a man from marrying his mother or daughter(s), the speculative aspect of the verse is the meaning of "daughters", which, according to one of the Sunni schools of thought, does not include an illegitimate daughter.[29] So, according to the Shafii school of law, a man can marry his

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an argument that "such calculations tend to differ according to one's understanding of, and approach to, the contents of the Qur'an."

24. Kamali, *supra* note 19, at 20.

25. Qur'an, 2:196. The quantitative prescription of "a hundred" is, according to Islamic legal scholarship, not available for interpretation because it is clear. Of course, the very notion of clear and unclear verses is doubtful because if a particular scholar sees the need to interpret the verse, maybe it's not very clear. This idea depends greatly on the weight of authority the idea of consensus carries, which will be discussed as the fourth source of Islamic law.

26. Kamali, *supra* note 19, at 20.

27. *Id.*

28. Qur'an, 4:23.

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29. Kamali, *supra* note 19, at 21. Just as it was noted in *supra* note 23, the fact that someone can think it is unclear would make the verse an unclear verse, thereby making it available for

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illegitimate daughter, hence the rule that illegitimate children cannot inherit from their biological parents.[30]

In the discussion of the Islamic law of inheritance, the Qur'an is the cornerstone because it provides all of the starting points for the rules of inheritance.[31] And within the broader discussion of change and Islamic law, the arguments for what part of the law is closed for interpretation and why, are hurdles every Muslim country will have to cross at some point.

The second source of Islamic law, also now unanimously agreed upon as such, is the Sunnah, or normative practices, of Mohammad.[32] These normative practices are said to be complementary of the Qur'an, because they describe how Mohammed embodied the moral and legal injunctions of the Qur'an.[33] The idea that the normative practices of the Prophet are to be followed comes from the Qur'an, which describes the conduct of Mohammad as an excellent example.[34] The Sunnah of Mohammad is embodied in written works called the Hadith; the

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interpretation. The fact that the verses prohibiting the marriage of a man to his daughter was interpreted before the "closing" of interpretation simply makes those who come after the closing victims of history. Again, the authority of consensus holds this idea together.

30. *Id.* at 22.

31. *See* David S. Powers, The Islamic Inheritance System: A Socio-Historical Approach, in Islamic Family Law 16-18 (Chibli Mallat & Jane Connors, eds., Graham & Trotman 1990) for a discussion of the Qur'anic legislation as proto-Islamic law.

32. Kamali, *supra* note 19, at 44. The fact that the use of such normative practices for legal arguments was justified at all probably means that not all scholars of the formative period of Islamic law were completely convinced on its uses, particularly because of the problems of authentication of such practices. Kamali, *supra* note 19, at 45 (the Sunnah might have been introduced into legal theory approximately 90 years after the death of Mohammad).

33. *Id.* at 61-62.

34. Qur'an, 33:21; Kamali, *supra* note 19, at 44.

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authenticity of these Hadith and their function within the legal framework are still the subject of discussion within scholarly circles.[35]

The authenticity of the Hadith is judged primarily either by the chains of transmission with which they were related or the subject matter that is being transmitted.[36] Until they were written into the massive collections available today, Hadith were orally transmitted from person to person, through generations.[37] Within the chains of transmission, several factors are taken into consideration about each transmitter such as her moral character, the strength of her memory and the place of her residence during her lifetime.[38] Entire, multi-volume books are dedicated to the characterization of every transmitter to have ever narrated a hadith to another person.[39] From these chains of transmission, scholars specializing in Hadith created several volumes of the most authentic hadith.[40] In the process of collecting and compiling Hadith, these scholars also created methods by which to weed out those hadith they considered weak.[41]

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35. Because legal opinions based on the Sunnah turn on the arguments of the authenticity of these reported normative practices, the authenticity of individual hadith is often called into question.

36. Kamali, *supra* note 19, at 50 and 68.

37. See Azami, *supra* note 22, at 233 for an example of a chain of transmission.

38. Kamali, *supra* note 19, at 68. The residence was taken into consideration to ensure that the transmitter had an opportunity to actually receive this Hadith from the person she claims to have heard it from.

39. The subject of an interesting article might be whether any of these characterizations were contested by descendants of narrators who were characterized as being of bad moral character.

40. Six collections have become the standard of accepted hadith, although several other hadith collections exist.

41. This process was helped considerably by scholarship on the narrators of hadith.

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Within the study of the Islamic law of inheritance, the Sunnah serves mainly as precedent to understanding the usage of the Qur'an. Because all of the Sunnah purport to have occurred during the lifetime of Mohammad, they dealt primarily with any tensions between the newly formed Qur'anic legislation and the centuries old Arabian, tribal customs. The right amount of custom allowed to be blended in with Qur'anic law serves as an important avenue of change, although much of the Sunnah on the Islamic law of inheritance is closed to interpretation because of a claim to Ijma, or scholarly consensus.[42]

The third source of Islamic law is Qiyas, or analogical deduction.[43] Qiyas can be used when stating that the original case, on which a certain rule was developed, is similar to a new case and should have a similar outcome.[44] A recourse to Qiyas is only warranted when the solution cannot be found in the more authoritative sources of Islamic law – the Qur'an and the Sunnah – because the rules deduced from these sources, along with Ijma to a certain extent, act as the basis of the analogy.[45] Within the four sources of Islamic law, Qiyas holds the most promise for change within Islamic law. Because Qiyas is simply an extension of existing law, Islamic legal scholars hold that a new rule brought about by Qiyas does not amount to a new rule at all.[46] This view perhaps makes it easier for legal change to occur within the guise of Qiyas.

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42. Discussed here as the fourth source of Islamic law.

43. Kamali, *supra* note 19, at 197.

44. *Id.*

45. *Id.*

46. Kamali, *supra* note 19, at 198 ("Qiyas is a means of discovering, and perhaps of developing, the existing law.").

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In order to properly conduct an analogy between the original case and a new case, the ratiocination, or the effective cause, of the original case must be determined so that a proper analogy can be made.[47] Intoxication is an example of an effective cause of the prohibition of alcohol.[48] An extension, by way of analogy from the prohibition of alcohol, can be the prohibition of narcotics, because of the latter's ability to intoxicate, in some cases even more than alcohol. So, narcotics can be prohibited in Islamic law without any particular divine text prohibiting it or even expressly acknowledging that the effective cause of the prohibition of alcohol is intoxication. This method of extending the divine intent to matters not expressly mentioned by the divine can also be used to contract the divine intent when matters are not as the divine intent dictated. So, just as when the effective cause of a law exists in a new situation, the law can be extended, the same is true when the effective cause of a law no longer exists, even in the original case; the law, in such a case, also ceases to exist.[49]One of the limits placed on the use of Qiyas is that any extended rule cannot conflict with a definitive verse of the Qur'an.[50]

The fourth and final source of Islamic law is Ijma, or scholarly consensus. Like Qiyas, Ijma is not divine revelation but it is justified as a rational proof for the law.[51] Although all of the schools of law are in agreement that Ijma is binding proof, like the first three sources of Islamic

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47. The effective cause for any given rule can be expressed within the texts of the law or it can be implied, which prompts the Islamic legal scholar to search for the effective cause. *See* Kamali, *supra* note 19, at 211.

48. The prohibition of alcohol comes from the Qur'an, 5:90. See Kamali, *supra* note19, at 200 for a detail of the Qiyas making it prohibited to intake narcotics.

49. *See* e.g. Kamali, *supra* note 19, at 213 (examples of when the effective cause is not present).

50. *Id.* at 223.

51. *Id.* at 168.

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law, not all of them agree on how to prove Ijma.[52] For example, although Ahmad ibn Hanbal, and his school of law, is said to have accepted Ijma as a binding source of Islamic law, he is also noted for his famous words: "Whenever a man claims consensus he lies; for there may be dissenters of whom he is unaware and of whom he did not take notice."[53]

A basic question that arises when dealing with the idea of Ijma is a consensus of whom? Some scholars only required a consensus of living scholars while others required a consensus of scholars through the generations – a universal consensus with no room for disagreement.[54] According to al-Shafii, one of the four eponyms of the schools of law, a universal consensus can only be said to exist on the obligatory duties such as the daily prayers and those rules on which the Qur'an and Sunnah are definitive.[55] Another question that arises is whether, once formed, a consensus can ever be disrupted and if so, how large of a dissent is required to disrupt the consensus? Does the strength of the dissent depend solely on the number of scholars dissenting or can one, brilliant scholar's dissent be enough? Within the discussion of the Islamic law of inheritance, Ijma seems to play an integral role. Several decisions of interpretation that would otherwise be approachable are beyond approach because of a consensus that a consensus exists.[56]

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52. *Id.*

53. Jackson, *supra* note 1, at xxxiv.

54. Kamali, *supra* note 19, at 168.

55. *Id.* Of course, this brings about a circular problem – consensus can only exist on those verses that are definitive and certain verses are definitive or certain acts are obligatory because there is scholarly consensus on that. *See also* Kamali, *supra* note 19, at 169 (if consensus can only exist on definitive matters, there is no need for it because the matter is already definitive, making the use of consensus redundant).

56. Whether a consensus really exists on any substantive matter is unknown.

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Does the Door Exist? Ijtihad and the Law's Capacity to Change

Ijtihad literally means exerting an effort to do something;[57] in the context of Islamic law, it is used to signify exerting an effort to the emergence of a new law or the reform of an old law.[58] It was suggested by several modern scholars of Islamic law[59] that at some point during the history of Islamic law, scholars created a door of ijtihad and then shut that door to any changes in the law that might come from a re-reading of the original sources. This view was later refuted by others[60] as unfounded, attempting to prove that in theory and in practice, the door of ijtihad, if there was such a door, was never closed.[61]

It is not yet clear whether the meaning of ijtihad was the same during the formative and the post-formative period. There are suggestions that, after the establishment of the schools of law, ijtihad meant the reform of law within the rubric and restraints of the school of law, as opposed to unfettered re-reading of the original sources.[62] What followed the establishment of the schools of law was what Professor Sherman Jackson calls the "regime of taqlid."[63] Taqlid

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57. Muneer G. Fareed, Legal Reform in the Muslim World 19 (Austin & Winfield 1996).

58. Hallaq, *supra* note 18, 117.

59. Jackson, *supra* note 1, 74. Professor Schacht and his *An Introduction to Islamic Law*, published in 1964, became the leading authority on the idea that a door of ijtihad existed and at some point during the history of Islamic law, that door was closed.

60. *Id.* In 1984, Professor Hallaq disrupted a "near consensus" on the closing of the door of ijtihad by arguing that ijtihad was indeed practiced all through the history of Islamic law.

61. Islamic Legal Interpretations, *supra* note 10, at 37. (generally describes a hierarchy of jurists, at the top of which were jurists who could and did perform ijtihad when new matters arose.

62. Fareed, supra note 57, 25.

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63. *See* Jackson, *supra* note 1, at 79-96 for a detailed look into the world of taqlid, including the levels of taqlid and its uses within the schools of law. Prof. Jackson argues not that the door

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simply means the acceptance of another person's claim, without proof of its veracity, and it is often considered the counterpart of ijtihad.[64] Within the context of the present situation of Islamic law, especially the Islamic law of inheritance, taqlid signifies the possible end of Muslim history.[65] It seems that Islamic law has reached the end of all legal talent that could operate within the regime of taqlid. Even in legal systems where the constraints to follow precedent or prior rulings are rigorous, a time inevitably comes when the original sources have to be re-read, if not re-written, to avoid tyranny through law.[66]

The Islamic Law of Inheritance[67]

The Islamic law of inheritance is often said to be "half of all knowledge".[68] It is a complicated system of rules derived, in part, from the primary sources of Islamic law and in part from Arab custom,[69] and upheld in its current form largely by the authority of Ijma.[70] While the

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of ijtihad was closed, simply that the door of taqlid was opened. It provided a way for the schools to keep a tighter control on the opinions that were issued and allowed individual scholars enough room within which to explore their legal talents. It is when the scholars could not simply create new law that the art of legal scaffolding was born. *See* Jackson, *supra* note 1, at 96 for more on legal scaffolding.

64. Jackson, *supra* note 1, at 79.

65. The phrase "end of history" is borrowed from Francis Fukuyama's "The End of History", which envisioned the end of history with regard to ideology after an alleged world conquest by Western Civilization and its ideologies.

66. If it seems too difficult to break away from taqlid, it might be easier to bend its rules enough to allow some breathing room.

67. Inevitably, because of the length and time constraints of this paper, all possible rules of inheritance or exceptions thereof will not be discussed. Some details will be discussed to serve as background information while other information will serve to further the thesis of this paper.

68. Chaudhry, 61 Alb. L. Rev. at 527.

69. Powers, *supra* note 31, at 18.

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Islamic law of inheritance has been praised for being such an elaborate system of rules,[71] it has also been criticized for being impractical because it treats real and personal property equally, making it extremely difficult to divide the former into the many divisions mandated by the law.[72] First, it should be noted that the law, as it currently stands, does not differentiate between testate and intestate succession[73], with the exception of the one-third allowable bequest.[74] This bequest, usually for charitable purposes, can be given for non-charitable purposes, as long as it is not given to anyone already named as a permanent sharer in the decedent's estate.[75] This means that because the spouse is one of the permanent sharers in the decedent's estate, the one-third bequest cannot be left to a spouse.

Two classes of relatives exist under the inheritance law: the inner family and the outer family.[76] The inner family consists of two sub-groups, the Qur'anic Sharers and the Agnatic Residuaries.[77] All other relatives constitute the outer family. Within each group, an order of

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70. *Id.* at 16-18.

71. Al Haj Muhammad Ullah, The Muslim Law of Inheritance i (Kitab Bhavan 1999) (1934).

72. Martha Mundy, The Family, Inheritance and Islam: A Re-examination of the Sociology of Fara'id Law 3, in Islamic Law: Social and Historical Contexts (Aziz Al Azmeh, ed., Routledge 1988).

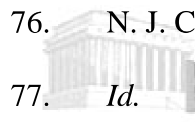
73. *See* Powers, *supra* note 31, at 18 for an argument that prior to Arab custom being applied to the law of inheritance, the law differentiated between testate and intestate succession.

74. *Id.* at 18.

75. *Id.* at 23.

76. N. J. Coulson, Succession in the Muslim Family 31 (At the University Press, 1971).

77. *Id.*



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priorities operates to exclude some relatives at the benefit of others.[78] Specifically, the Qur'anic Sharers take their allotted portions first and the Agnatic Residuaries take, as their title suggests, the residue of the estate, also working under operation of a system of priorities within their sub-group.[79] If no Agnatic Residuaries exist, members of the outer family, in order of the closest such member, take the residue of the estate.[80]

There are twelve specific Sharers:[81] The husband, wife, father, true grandfather[82], mother, true grandmother[83], daughter, son's daughter, full sister, consanguine sister, uterine brother and uterine sister.[84] The Sharers have a Qur'anic share and their shares cannot be taken away for any reason, unless they themselves agree to give up their share for the benefit of another beneficiary.[85]

A spouse can only inherit as a Qur'anic heir. The Qur'an specifies the husband's share as half of his wife's estate if the wife left no descendants.[86] If the wife left descendants, the husband

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 35.

82. Referring to the father's father.

83. Referring to the father's mother.

84. It should be noted that although they are included under the class of Qur'anic Sharers, the Qur'an did not specifically designate the granddaughter, grandfather and grandmother; they were added to the list by Islamic legal scholars through Qiyas. Coulson, *supra* note 76, at 35.

85. In giving up a share of the inheritance, they can name the person they want their part of the inheritance to go to. So, if a son wants to decline his inheritance and wants his share to go to his mother, he can do that.

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86. Qur'an 4:12; Coulson, *supra* note 76, at 41.

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inherits one-fourth of his wife's estate.[87] In the case of the wife, she inherits exactly half of what her husband would have received: one-fourth if the husband left no descendants and one-eight if he was survived by descendants.[88] It should be noted that because Islam allows a man to have up to four wives at the same time, in the case of a polygamous marriage, all of the wives would share the one-fourth or one-eighth share, depending on whether the husband left descendants or not.[89]

The shares of the children are also divided according to Qur'anic decree, which requires that daughters receive half the share of sons.[90] If the decedent is survived by two or more daughters and no sons, the daughters share in two-thirds of the inheritance. If only one daughter is left with no sons, she inherits half of her parent's estate.[91] When a parent is survived by one or more sons, the children, including the daughters, act as residuary heirs, giving the sons twice the share of inheritance than that of their sisters.[92] An example of this is if a man dies and is survived by his wife, two sons, two daughters, and a brother. In this case, the wife would receive her Qur'anic share of one-eighth. The two sons and the two daughters would inherit the

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87. Coulson, *supra* note 76, at 41.

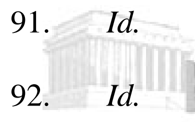
88. *Id.*

89. *Id.* at 41.

90. *Id.*

91. *Id.*

92. *Id.*



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remaining estate, to the exclusion of their uncle. The sons each would receive seven-twenty-fourths of the estate, while their sisters would receive half of that, seven-forty-eighths.[93]

Until this point in the structure of the inheritance law, not much happened in the way of scholastic activism; the shares of the spouses, sons and daughters have been followed along the lines of the Qur'an.[94] With the shares of the parents, scholastic activism comes to the forefront. According to the Qur'an, "to each parent goes one-sixth of the inheritance if the deceased has left a child. If there is no surviving child and the parents are the legal heirs, the mother takes one-third, except where the deceased has left brothers, when the mother takes one-sixth."[95] A few changes were implemented through the use of customary Arab law and interpretative maneuvering to change what Professor David Powers calls "proto-Islamic law."[96] Although the father is only mentioned once in the Qur'anic verse quoted, two things are read into the verse, which a plain reading will not make apparent. The first is that although the father's share is only mentioned in the case that the decedent left no children, the father will inherit as an Agnatic Residuary.[97] The second point read into the verse is that the father can never have a share less than the mother.[98] When a person dies, leaving only his wife and two parents, their shares are divided as follows: the wife receives one-fourth of the estate, the mother receives one-fourth as

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93. Seven-Eights was the residuary after the wife's share. The sons and the daughters, it can be said, receive a total of 6 shares, 2 for each brother and one for each sister.

94. *See* Qur'an 4:11-12 for a comparison.

95. Qur'an 4:11

96. Powers, *supra* note 31, at 16.

97. Coulson, supra note 76, at 44.

98. *Id.* at 45.

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well and the father takes one-half.[99] After the spouse's share, the father and mother take the residue of the estate, to the exclusion of collaterals, with the father taking twice the share of the mother.[100]

The shares of collaterals have equally been the targets of scholastic activism.[101] The shares of brothers and sisters are outlined in the Qur'an, similar to the shares of sons and daughters.[102] The difference between the shares outlined for sons and daughters in the Qur'an and the shares outlined for collaterals is that two separate verses exist in the Qur'an regarding the latter.[103] To resolve the apparent contradiction between the two verses, scholarly consensus holds, through the use of the Sunnah of Mohammad, that one of these verses specifies the shares of uterine brothers and sisters[104], while the second verse specifies the shares of consanguine[105]

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99. *Id.* at 45-46 (although Ibn Abbas held that, as the Qur'an commanded, the mother in this case should receive one-third of the estate, the majority of Sunni scholars hung their hats on the Ijma of the companions of Mohammed. Quoting, al-'Adawi, a scholar from the Maliki school of law, Prof. Coulson stated that this result occurred only to avoid the possibility of the mother of the deceased taking a greater share in the inheritance than the father because such a result would lead to a "contradiction of basic principles.").

100. *Id.* at 45.

101. *Id.* at 65-78. This is not to say that the structure created through such activism never served a purpose. Instead, it is to maybe encourage the would-be activist to follow the dictates of past scholars – in essence, to follow a lost tradition of scholastic activism – in taking control of the reigns of the law.

102. *Id.* at 65.

103. *See* Qur'an 4:12 and 4:176.

104. Uterine brothers and sisters are those who are children of the same mother but different fathers. Muhammad M. Khan, Islamic Law of Inheritance: A New Approach 19 (Kitab Bhavan 1989).

105. *Id.* Consanguine brothers and sisters are those who are children of the same father but different mothers.

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and full[106] brothers and sisters. In the absence of any descendents of the decedent, the uterine brother or sister inherits one-sixth of the estate If two or more uterine brothers or sisters survive the decedent, they all share equally, regardless of gender, in one-third of the estate.[107] In the absence of any male descendents of the decedent, the consanguine and full brothers and sisters are grouped together, just as sons, daughters, grandsons and granddaughters are grouped together.[108] Unlike the share of uterine brothers and sisters, the share of consanguine brothers and sisters are not excluded by the presence of female descendants; so, even when a daughter survived her parent, she will not exclude the consanguine and full brothers and sisters of her parent.[109] This is despite the fact that the Qur'an sets the absence of descendants and ascendants as a condition to inheritance by collaterals in both verses regarding collaterals, using the Arabic word Kalala to describe descendants and ascendants.[110]

The second class within the inner family is the class of Agnatic Residuary.[111] An Agnatic Residuary is anyone whose relation to the deceased is traced without the intervention of female

106. *Id.* Full brothers and sisters share the same mother and father.

107. *Id.* at 67.

108. Coulson, *supra* note 76, at 65. The consanguine and full brothers' and sisters' share is similar to the share of descendants, however low, in two ways. The first is that just as the existence of sons and daughters excludes grandsons and granddaughters, the existence of full brothers or sisters generally excludes the consanguine brothers and sisters from a share. Khan, *supra* note 104, 67-68. The second is that when inheriting, the female receives half the share of her male counterpart, whether in the case of full sisters or consanguine sisters. Khan, *supra* note 104, 69. This rule of double the inheritance for the male counterpart does not exist for the uterine collaterals. Khan, *supra* note 104, 71.

109. Coulson, supra note 76, at 65.

110. Khan, *supra* note 104, at 71.

111. *Id.* at 31.

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links.[112] Contrary to the perception that the Qur'an specifies Agnatic Residuaries as beneficiaries of inheritance,[113] the only beneficiaries the Qur'an specifies are nine of the twelve Qur'anic Sharers mentioned above. The remaining injunctions in the Qur'an are broad, dealing with equity and justice when dividing the inheritance.[114] Within the class of Agnatic Residuary, descendants have preference over ascendants, who then have preference over collaterals. If descendants exist, they will exclude ascendants and collaterals from inheriting anything under this class.[115] Similarly, if no descendants exist but ascendants exist, they will exclude collaterals.[116] If no other relatives exist under the first two classes, a member of the outer family will receive the inheritance, also operating under a system of priorities.[117]

A dynamic exists within the Islamic law of inheritance. The dynamic is to take advantage of what can be done through the law before a person dies, instead of concentrating on what happens after a person dies.[118] There are methods by which a Muslim can circumvent the laws of inheritance with the uses of devices such as an Inter Vivos Gift or a Family Endowment.[119] Although these are viable ways to dispose of property, the problem is still one of control. If

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112. Chaudhry, 61 Alb. L. Rev. at 530.

113. *Id.* at 529.

114. *See e.g*. Khan, *supra* note 104, at 73-74.

115. Coulson, *supra* note 76, at 33.

116. *Id.*

117. *Id.*

118. Powers, *supra* note 31, at 19-29 (describing the Islamic Inheritance system, which describes several legal ways to circumvent the law).

119. *Id.* at 19-23.

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operating within the laws of inheritance, the Muslim has no control on who will receive the inheritance, except maybe the one-third left by bequest. On the other hand, if the Muslim acts in advance of his death, he has given away his property without any control of it during his lifetime. In the case of Inter Vivos Gifts or Family Endowments, just as with gifts in American property law[120], a delivery and transfer of control of the property is essential to the completion of the gift,[121] leaving the donor of the gift without control of that property.[122]

The Islamic Law of Inheritance in Modern Muslim Countries

Although several other areas of Islamic law have been the subject of change in various Muslim countries, the Islamic law of inheritance seems to have largely stayed unchanged.[123] Because of the centrality of the Qur'an in the deduction of these laws, any change must come about by justifying as change or variation of the Qur'anic injunctions.[124] Additionally, those rules not deduced directly from the Qur'an, like the structure of the Agnatic Residuaries, carry the force of the Qur'an through the authority of Ijma. The inheritance law speaks of the Qur'anic Sharers and the Agnatic Residuaries in the same light.[125] The rules of Agnatic Residuaries were

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120. Jesse Dukeminier & James Krier, Property 183 (Aspen Law & Business 1998).

121. Powers, *supra* note 31, at 25.

122. Although there are methods with which the donor can retain a life estate and interests subject to conditions can also be implemented, these methods are, at best, second best to actually being able to operate within the rules of inheritance. For example, the donor can retain a life estate by creating a tacit agreement with the donee that one year after the initial transfer of property, the donee would grant a life estate to the donor. Powers, *supra* note 31, at 25.

123. Mundy, *supra* note 72, at 3.

124. *Id.*

125. *See e.g.* Chaudhry, 61 Alb. L. Rev. at 529 ("The Qur'an specifies three main classes of heirs…").

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formed as a balance between the new Qur'anic rules and the traditional Arab customary rules of inheritance.[126]

During colonialism, although much of Islamic law was substituted for the law of the colonial power ruling a particular area, the Islamic law of inheritance was left relatively untouched.[127] In fact, it was because of the judiciaries created by these colonial powers that methods of circumventing the law, such as inter vivos gifts, were barred from use.[128] After the end of the Second World War, the Muslim world began to free itself from the grip of European colonialism and attempted to take matters of law into its own control.

Beginning as early as 1943, Egypt passed its Law of Inheritance.[129] Several other countries, including Syria,[130] Tunisia,[131] Morocco,[132] Iraq[133] and Pakistan[134] followed suit within the next twenty years. Although several changes were made to the law of inheritance, none of the changes sought to reform the Qur'anic prescriptions of inheritance shares or the classes of heirs

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126. Powers, *supra* note 31, at 18.

127. This meant that the core system of inheritance law, including the Qur'anic Sharers and Agnatic Residuaries, became central. Interestingly, it seems that even the colonial jurists of the law of inheritance applied the rules of the Agnatic Residuaries, despite their insistence on following the scheme set out by the Qur'an.

128. Powers, *supra* note 31, at 28.

129. Coulson, *supra* note 76, at 138.

130. *Id.* (the Law of Personal Status of 1953)

131. *Id.* at 139 (the Law of Personal Status of 1956 and its supplement in 1959)

132. *Id.* (the Code of Personal Status of 1958)

133. *Id.* (the Law of Personal Status of 1959 and an amendment of it in 1963)

134. *Id.* (the Muslim Family Law Ordinance of 1961)

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created through consensus. Those laws that did challenge such laws were either later amended or altogether repealed. For example, Iraq's Law of Personal Status passed in 1959 changed how the property of the deceased would be divided.[135] It allowed Iraqi citizen the right to create a will if they wished to dispose of their property according to the traditional Islamic law of inheritance.[136] Absent a will, the government would divide the land according to a system that openly defied the Islamic law of inheritance.[137] This change in the Islamic law of inheritance lasted about four years. In 1963, 'Abd al-Karim Qasem, the Iraqi leader at the time, was executed and one of the first things to go with him was the change in the inheritance law.[138] This is also a good example of change not taken within the rubric of Islamic law. Such change will not gain the authenticity laws require to be effective.

An example of change undertaken by Muslim countries is the Orphaned Grandchildren rule. Under traditional Islamic law, a grandchild only inherits when no person in the class above survives.[139] For example, when a man dies leaving no children but three grandchildren, the grandchildren receive in the place of their parents. If even one child of the decedent survives, all of the grandchildren are excluded.[140] Although this did not cause many problems under the

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135. Chibli Mallat, Shi'ism and Sunnism in Iraq: Revisiting the Codes 78 in Islamic Family Law (Chibli Mallat & Jane Connors, eds., Graham & Trotman 1990).

136. *Id.*

137. *Id.*

138. *Id.* Although it is not clear exactly why the Iraqi leader was killed, the author does quote the Iraqi cabinet as saying, "This event was the cause of an outcry and a rejection which comprised of all classes of Iraqi society, because of the law's opposition to the Holy Book…"

139. Coulson, *supra* note 76, at 143.

140. *Id.*

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classical family structure, it did pose a problem to modern Muslim countries.[141] To respond to this concern, Syria and Morocco allowed the grandson of the deceased to inherit what his father would have received or one-third of the estate, whichever is less.[142] No similar provision was made for the granddaughter.[143] Egypt and Tunisia responded to the problem by allowing either the grandson or the granddaughter to receive up to one-third of the estate.[144] Finally, the widest change in this regard has been made in Pakistan. There, the law created a representational scheme of all grandchildren inheriting per stirpes the inheritance their parents would have received.[145] Despite the far-reaching effects these changes might have on alleviating the plight of those who would have otherwise been disinherited, the change is a minor one within the law itself. The fact is that this was not one of the issues Muslim scholars claimed an unchangeable Ijma on. The authority of the scholars remains in tact despite these changes. In fact, the reason Syria, Morocco, Egypt and Tunisia created a limit of one-third, which could be inherited by such orphaned grandchildren, is because these countries created a mandatory bequest of the allowable one-third.[146] They created this mandatory bequest in such cases to avoid upsetting the settled principles of the Islamic law of inheritance.[147]

Conclusion

141. *Id.*

142. *Id*. at 145.

143. *Id*.

144. *Id.*

145. Coulson, *supra* note 76, at 145.

146. *Id.*

147. *See Id.* for the juristic bases for such mandatory bequests.

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The Islamic law of inheritance is, in several Muslim countries, the last area of primarily traditional Islamic law. The majority of the reform to the traditional law has been in fields of criminal, civil, economic and constitutional law.[148] Even the broad field of family law did not see much reform until 1980.[149] When the field did see reforms, the law of inheritance was largely left out because of its place in the Qur'an and customary Arab law, which was held together with the help of consensus.

The law of inheritance is perhaps the most complicated apparatus within Islamic law. Because of the complications with which it is wrought, both in calculating and later dividing the land according to its rules, the majority of Muslim history saw the development of a complete system of inheritance. This system included within it, rules created to circumvent the rigid prescriptions of the law, such as inter vivos gifts and family endowments.

Even if there was a time, place and manner in which these rules of inheritance were appropriate, and indeed useful, times have drastically changed. The basic social structure evident from the rules of inheritance no longer exists. The rules were created for a large, extended family with a detailed support structure and many traditional rules. The modern family is nearly the opposite. The nuclear family is composed of the parents, children and, in some case, grandparents. The support of agnates, the male members of the extended family, has largely dissipated. In these conditions, that the wife will only be allowed to inherit one-eighth of her husband's estate can amount to nothing but injustice.

When dealing with change in the law of inheritance, certain questions will come up. First, if the Qur'anic prescriptions are modified, how will this change happen? Second, if change is

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148. Mallat, *supra* note 3, at 4.

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scholarly possible, who will decide, for example, what share of the estate the wife will receive under the new rules of inheritance and what will such a share be based on? First, instead of revisiting a debate on whether Ijtihad is necessary, it would be more productive to rethink the overall structure of the law. Instead of four schools of law with rigid rules about who can and cannot issue an opinion on the law, the creation of a myriad of modern Muslim states should usher in the idea of a common Islamic law. Instead of a call to ijtihad by individual scholars, which would likely lead to a myriad of opinions on how to approach change, individual Muslim legislatures should treat traditional Islamic law as a common law with which to base their changes on. This would allow for a common base for all Muslim countries and still give each one enough flexibility to fit the circumstances of those individual countries. So, if the support structure on which the traditional law of inheritance is based still exists in a particular Muslim country, that country's legislature might decide to keep the rules of inheritance until a change in demographics occurs.

Only through the idea of a common Islamic law can Muslim countries give and take law-making authority at the same time. The authority will be given to current scholars of Islamic law to further develop the common law. This will enhance the legislature's understanding of the law as well. On the other hand, the legislature will have the authority to change the law according to the change of social conditions in the particular country. It is this way that the Islamic law of inheritance, and Islamic law in general, will be able to change to meet modern conditions, while upholding its moral authenticity.

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149. *Id.*

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