ON SOME RECENT LAWS ON THE ISLAMIC LAW OF INHERITANCE*

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Some years ago J. N. D. Anderson (1965:349–365)[1] made an *excursus* on some recent reforms regarding succession in the Islamic countries. In the last few decades, several other laws on intestate succession have been promulgated, among those the law no. 72–61 of June 12, 1972, in Senegal[2]; the Syrian law no. 34 of December 31, 1975, which has partly modified the decree no. 59 of September 17, 1953[3]; the Algerian law no. 84–11 of Ramaḍān 9, 1404/June 9, 1984[4]; and the Kuwaiti law no. 51, enacted on Šawwāl 8, 1404/July 7, 1984, and came into force on October 1, 1984 (art. 347)[5]. Worthy of note is that the Kuwaiti law seems quite a copy of the Syrian

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[1] Anderson has examined the Egyptian Law of Intestate Succession (1943) and the Law of Testamentary Dispositions (1946), the Syrian Law of Personal Status (1953), the Tunisian Law of Personal Status (1956), the Moroccan Code of Personal Status (1958), the Iraqi Law of Personal Status (1959), the Pakistan Muslim Family Laws Ordinance (1961), and some other provisions of the law concerning the succession. For references to the classical Islamic law of inheritance, I make use of Cilardo 1993, 1994.

[2] The Senegalese "Code de la Famille" is composed of eight Books: I: Persons (arts. 1-99); II: Marriage (arts. 100-187); III: Filiation (arts. 188-253); IV: Relationship and affinity (arts. 254-272); V: Incapacities (arts. 273-367); VI: Marriage régimes (arts. 368-395); VII: Successions *ab intestat* (arts. 396-653); VIII: Gratuitous dispositions in one's favour *inter vivos* and bequests (arts. 654-854). Book VII on successions *ab intestat* includes general rules common for all people (*Titre I. - Dispositions générales*) (arts. 396-514); rules regarding the succession *ab intestat* of common law (*Titre II. - Des successions ab intestat de droit commun*) (arts. 515-570); and rules regarding succession *ab intestat* of the Islamic law (*Titre III. - Des successions en droit musulman*) (arts. 571-653).

[3] The Syrian Code is composed of six Books: I: Marriage (arts. 1-84); II: Dissolution of marriage (arts. 85-127); III: Filiation and its effects (arts. 128-161); IV: Juridical capacity and legitimate representation (arts. 162-206); V: Bequest (arts. 207-259); VI: Inheritance (arts. 260-308). Ḥasan 1976 provided a commentary on this Code.

[4] The Algerian law contains general rules (arts. 1-3), then it is divided in four Books: I: Marriage and its dissolution (arts. 4-80); II: Legitimate representation (arts. 81-125); III: Succession (arts. 126-183); IV: Free gifts, bequest, gratuitous disposition in one's favour *inter vivos* and religious endowment (arts. 184-220). It ends with final rules (arts. 221-224). On the Algerian Code, see Mitchell 1997.

[5] The Kuwaiti law on "Personal Status" includes three parts: I: Marriage (arts. 1-212); II: Bequest (arts. 213-287); III: Intestate succession (arts. 288-336). It ends with final rules (arts. 337-347). This law is supplied by an *Explanatory Memorandum* (*al-muḏakkira al-īḍāḥiyya*). Both texts can be found in *al-Muḥāmī. at-Tašrīʿāt al-kuwaytiyya* 8. 1984.

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Code, with some variations, however[6]. A comparison between them shows that the first was deeply influenced by the second, even in its title. The scheme, in fact, is the same, and the text of the articles, too, is much similar[7].

The first issue highlighted by Anderson concerned whether "a testator has complete freedom to make legacies he likes, whether to heirs or non-heirs, within the bequeathable third, and... any such bequests which he may make to an heir are no longer subject to the other heirs' consent" (Anderson 1965:354-355). This doctrine has now been decreed in Sudan, Egypt and Iraq (*ibid.* 354). Among the four modern legislations, only the Senegalese Code follows this rule. As a matter of fact, in various places it states that, according to the Islamic law, the bequeathable share is a one-third and that, for the attribution of the amount exceeding such a share the heirs' consent is needed[8]; however, art. 659[9] clearly provides that every person, except those declared incapable by law, can either dispose or receive, by a gratuitous

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[6] Certainly, the Syrian law is more coherent in its provisions than the Kuwaiti Code because it follows the Ḥanafī school (art. 305); in fact, it privileges immediate family ties; so that it is more obvious for it to admit the return of the surviving spouse (art. 288) and the inhertiance of the maternal relation (arts. 289-297).

[7] The main differences are: BEQUEST: * Syr. art. 208 = K. art. 214: K. is more developed; Syr. has only the first paragraph. * Syr. art. 209 = K. art. 215: Syr. has only the first paragraph. * Syr. art. 210 = K. art. 216: 216.ğ is absent in Syr.. * Syr. art. 211 = K. art. 217: Syr. has only art. 217.'.b, with some changes. * Syr. art. 212 = K. art. 218: Syr. has only K. 218.1.2. * Syr. art. 216 = K. art. 222: K. is more developed. * Syr. art. 217 = K. art. 223: the reference to *al-ḫuluww* is absent in Syr.. * Syr. art. 220 = K. art. 226: K. contains only Syr. 220.b.ğ. * Syr. art. 221 = K. art. 228: Syr. has only the second paragraph. * Syr. art. 222 = K. art. 229: K. is more developed. * Syr. art. 223 = K. art. 228: K. has the same contents, but with a different formulation. * Syr. arts. 224-226 are not present in K. * K. arts. 230-235 on *qabūl* and *radd* (cf. Syr. arts. 220-229), K. arts. 236-246 on *aḥkām al-waṣiyya* (cf. Syr. arts. 230-237), K. arts. 247-259 on *al-mūsā bihi* (cf. Syr. arts. 238- 245), and K. arts. 260-272 on *al-waṣiyya bi-l-manāfiᶜ* (cf. Syr. arts. 246-253) are differently formulated. * K. Section IV (arts. 273-279) concerning *al-waṣiyya bi-l-murattabāt* is not present in Syr.. * Syr. art. 254 = K. art. 280: K. has only Syr. 254.1.2. * Syr. art. 255 = K. art. 281: K. 281.b is absent in Syr..* Syr. art. 275 on *al-waṣiyya al-wāğiba* in not present in K.

INTESTATE SUCCESSION: * Syr. art. 263 = K. art. 295: K. has a new paragraph. * Syr. art. 264 = K. art. 293: K arts. 293-294 are more developed. Syr. 264 does not treat the case of the *murtadd*. * Syr. art. 279 = K. art. 310: the minimum share allotted to the grandfather is a one-third in Syr. law, while is a one-sixth in K. law. * Syr. art. 290 = K. art. 320: K. law is more developed. * Syr. art. 298 = K. art. 328: K. art. 328.'.ğ are not present in Syr.. * Syr. art. 300 = K. art. 330: K. is more developed. Syr. law has only the K. first paragraph. * K. art. 333 on *mafqūd* and K. art. 334 on *ḫunṯā* are absent in Syr.. * Syr. art. 305 = K. art. 343: K is more developed. Syr. has only the K. first paragraph. * Syr. arts. 306-308 are peculiar reflecting a local situation.

[8] See, for instance, arts. 504-505 (in *Des successions ab intestat. Dispositions générales*, hence valid for the whole Senegalese people), and arts. 649, 2nd par., 651, 653 (in *Des successions en droit musulman*).

[9] In *Des donations entre vifs et des testaments. Dispositions générales communes.*

disposition *inter vivos* or by a bequest as well. On the contrary, Syria[10], Algeria (art. 189) and Kuwait (art. 247)[11], wholly follow the traditional Islamic provisions on this point.

The second topic treated by Anderson was whether "the spouse relict might take the residual estate of the deceased, by the doctrine of the 'return', in the absence of any agnate, quota-sharer, or other relative" (Anderson 1965:356). This concession in favour of the widow/widower was made in Sudan, Egypt and Syria (*ibid.*)[12]. In modern legislations, with almost identical words, the same is stated in the new Syrian Code (art. 288), in Algeria (art. 167) and in Kuwait (art. 318)[13]. As far as Senegal is concerned, the doctrine of the "return", presented as a general rule for all the heirs, is also valid. In fact, art. 596.3 provides that, if there is a remainder after the allotment of the shares to the heirs by quota and there are no agnates, the residual amount of the estate shall be increased to the quota-sharers and divided among them *pro rata*. In this text no specific reference is made to the spouse relict, presumably included among the quota-sharers.

The third relevant subject examined by Anderson regarded the obligatory bequest and the right of representation, as a means to prevent an incongruity of the Islamic law of inheritance; how to prevent the damage suffered by grandchildren because of their parents having deceased before their grandparent's death. This problem was tackled in Egypt (in 1946) by means of the device known as "obligatory bequests." This device appears in this form: "where a grandparent fails to make a bequest in favour of any orphaned grandchildren, if they would not be entitled to any share in his or her estate on intestacy, of what their predeceased father would have received had he lived, provided always that this does not exceed the bequeathable third, the court must act as though he had — unless, indeed, he had made them some smaller bequest or had made a gratuitous disposition in their favour *inter vivos*, in which case the court must make this up to the sum which their deceased parent would have received or the bequeathable third, whichever is less; if, instead, the grandparent had

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[10] Art. 238. See also the Syrian Hasan 1976: 148-149. At p. 149 it is said that a bequest is permitted in Egypt and among the Druses either in favour of an heir or other persons within the bequeathable share of one-third or more.

[11] See also the *Kuwaiti Explanatory Memorandum*, pp. 381-382. The first two paragraphs of this article are formulated in the same way as the Syrian ones.

[12] According to Anderson, "similar (although not quite identical) provisions are included in the Egyptian Law of Intestate Succession, 1943, and the Syrian Law of Personal Status, 1953". But I find that the provisions on *radd* are at the whole identical in all the laws.

[13] The *Kuwaiti Explanatory Memorandum* (pp. 443-446) well points out that there were many divergences among the ancient Muslim scholars on the question of the proportional increase of the shares (*radd*). They may be reduced to five doctrines, not always exactly related in this *Memorandum*: 444-445. Cf. Cilardo 1994: 47-52.

made bequests in favour of others, then the obligatory bequests in favour of the grandchildren should take priority, within the bequeathable third, over any other disposition; and that this entitlement should be divided between such grandchildren according to the principle of a double share to males..." (Anderson 1965:358).

The device of the obligatory bequests was adopted in Syria (in 1953) and in Morocco (in 1958); for in both these countries this kind of bequest was confined to grandchildren through a predeceased son or son's son. By contrast, "the Egyptian law includes in its scope the children of a predeceased daughter or of a predeceased son's daughter, presumably on the ground that the daughter and son's daughter would themselves have been quota-sharers, although it does not, in fact, include the children of a predeceased daughter's child, presumably because the predeceased daughter's dead son or daughter would themselves have been neither a quota-sharer nor an agnate. And the Tunisian law, although it does not extend to great grandchildren at all, yet follows the Egyptian model in giving relief to grandchildren through a predeceased son or daughter — which is the more significant in that the Tunisian law, following *Mālikī* principles, makes no other provision for 'uterine heirs' in any circumstances whatever" (*ibid.* 359)[14].

The Senegalese Code[15] reflects the Islamic rules regarding the partial and total exclusion, thus rejecting the obligatory bequest or the right of representation as well, while the new Syrian Code (1975) (art. 257; Ḥasan 1976:159) resumes the provisions of the previous law. As far as the Kuwaiti law is concerned, it only mentions the obligatory bequest (art. 291.3), but it does not give any other explanation of it. Neither in the articles devoted to the legatee (*al-mūṣā lahu*) (arts. 236–246) nor in the *Explanatory Memorandum* (370–381) on them any reference is done to people entitled to the *waṣiyya wāǧiba*. However, the *Memorandum*[16] gives a concise prospect of the

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[14] For Egypt, see also Ḥasan 1976: 159.

[15] See *Titre III: Des successions de droit musulman*. Only arts. 521-522 (*Titre II: Des successions ab intestat de droit commun*) are devoted to the right of representation. But these provisions are evidently to be applied to non-Muslim people.

[16] 423: after the payment for inhumation and debts, the bequests must be paid within the limit of a one-third of the estate, with the observance of the articles regarding the obligatory bequest (which?). No question if the one-third suffices for the payment of all the bequests. If, instead, it is not enough, the persons (who?) entitled to the obligatory bequest have precedence, whether the *de cuius* has made a bequest in their favour or not; they have right to it on the basis of the provision of the law (which?). If the amount to which they have right is more than the one-third of the estate and the heirs do not give permission for the surplus payment, they shall receive no more than a one-third. But if they have right to less than the bequeathable one-third, they shall take only their minor share, while the remainder of the one-third shall be given to the persons entitled to voluntary bequests.

A further short reference to the *waṣiyya wāǧiba* is in the *Explanatory Memorandum* (418) with reference to the presence of numerous bequests, where the same rules as above are repeated. The precedence is due to the *waṣiyya wāǧiba*, whether the *de cuius* has made a bequest or not; then the voluntary bequests

rules concerned, which correspond to those of the Syrian Code. Thus, also in the case of the obligatory bequest the Kuwaiti law makes implicit reference to the Syrian rules and strictly reflects the Syrian Code.

The question of the orphaned grandchildren excluded from inheritance on intestacy by direct descendants has been radically solved in Algeria. In fact, the main innovation in the Algerian Family Law (arts. 169–172) is the introduction of the right of representation, a Western juridical doctrine completely unknown to the Islamic law of inheritance because it fundamentally contradicts the Islamic agnatic rule. As a matter of fact, one of the basic principles of the Islamic system is that an heir must be alive at the *de cuius*' death; further, that the closest heir excludes the most distant (Cilardo 1994:34–35, 139–144). But one can easily stress the state of injustice caused to the grandchildren by their exclusion from inheritance because of their parents having deceased before their grandparent's death.

Having accepted the principle of representation, Algerian law makes, however, a compromise between the requirement of such a doctrine and the demands of the Islamic law. In conformity with the doctrine of representation, the Algerian law states that the amount due to grandchildren must be the same as what their predeceased father would have received had he lived. But, according to the Islamic *šarīʿa*, the law makes this rule conditional by the imposition that such an amount must not be more than the bequeathable third (art. 170); that grandchildren cannot represent their predeceased parents if they are already quota-sharers, or a bequest was made in their favour, or the *de cuius*, during his lifetime, gave them, without return, an amount equivalent to what grandchildren can claim by this bequest; however, if the bequest in their favour was less than the share to which they are entitled, they can claim the difference between the two (art. 171); lastly, the well-known Qur'ānic provision to give a male a double share is in force (art. 172).

Besides the considerations on the previous main three points of doctrine, some further remarks may be done on the four Codes here considered.

In their titles we face a terminology unknown to the Islamic law. The Algerian law is entitled "Family Law" (*Qānūn al-usra*), while the law of Senegal is named "Code de la Famille", words extraneous to the usual language of Islam (Cilardo 1985: 68). Contrary to Senegal, where the expression "Code de la Famille" is partly justified either because it refers to all Senegalese people, including non-Muslims, and because the structure of the Code is similar to that of the Western Codes, Algeria has adopted a Western expression which constitutes a true innovation in the modern legislations of the Islamic countries.

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come. Lastly, with reference to the *waṣiyya wāǧiba*, the *Explanatory Memorandum* (360-361) states that, if the conditions of its validity are fulfilled at the time of its institution and nothing has happened of what can invalidate it till the testator's death, the bequest is valid and it shall become obligatory. But, if it was not instituted by the testator, it shall be effected all the same.

The Syrian and Kuwaiti laws have the words, generally used in the modern legislations, of "Personal Status" (*al-aḥwāl aš-šaḫṣiyya*), which, too, are not of Islamic origin, but they are resumed from Western usage. The concept of "Personal Status" is not well defined in modern Islamic law systems, which, generally, have recourse to it without fixing its contents. However, a definition of "Personal Status" is found in Egypt, although it keeps now a mere doctrinal value, as a consequence of the abolition of mixed tribunals. Art. 13 of the Egyptian law no. 147 of 1949 regarding the judiciary, abrogated by the law no. 43 of July 19, 1965, on the judiciary power, stated:

Personal Status includes disputes and questions concerning the status of persons and their juridical capacity, or those concerning the rules regarding the family, like as a request of a woman's hand in marriage, reciprocal rights and obligations of spouses, bridal money, dower, rules concerning the property of spouses, repudiation, separation, divorce, filiation, acknowledgement and negation of paternity, relation among ascendants and descendants, obligation of maintenance in favour of relatives and cognation, attestation of blood ties, adoption, tutorship, curatorship and testamentary curatorship, guardianship, interdiction, authorization to the administration of property, absence and how to consider a missing person as dead. Likewise, Personal Status includes disputes concerning inheritance, bequest and gratuitous dispositions in one's favour to be fulfilled after the *de cuius*' death (Cilardo 1993a:23–24).

In its text Syrian law has used a new terminology in some cases, which is almost completely resumed by the Kuwaiti Code; and the *Kuwaiti Explanatory Memorandum* (465) makes observe that such words are different from those found in the Islamic *šarīᶜa*: *al-ǧadd al-ᶜaṣbī* (Syria, arts. 265.2, 266, 275.2.4, 279, 283.2, 284) or *al-ǧadd al-ᶜāṣib* (Kuwait, arts. 209, 296, 297.b, 302.ǧ, 305.2.4, 313.d, 314), which are as correct as the words *al-ǧadd aṣ-ṣaḥīḥ*, a true grandfather, used in the Islamic sources; *al-ǧadd ar-raḥimī* (Syria, art. 265.2, 290; Kuwait, art. 320), instead of *al-ǧadd al-fāsid* or *al-ǧadd ġayr aṣ-ṣaḥīḥ*, a not true grandfather; *al-ǧadda aṯ-ṯābita* (Syria, art. 265.1–2, 272, 283.1; Kuwait, arts. 296, 302.ǧ, 313.a), instead of *al-ǧadda aṣ-ṣaḥīḥa*; *al-ǧaddāt ġayr aṯ-ṯābitāt* (Syria, art. 290) or *al-ǧadda ġayr aṯ-ṯābita* (Kuwait, art. 320), instead *of al-ǧadda al-fāsida* or *al-ǧadda ġayr aṣ-ṣaḥīḥa*. Lastly, *al-ǧānib* (Syria, arts 292, 295–297; Kuwait, art. 326), instead of *al-ḥayyiz*.

As regards the effectiveness of these laws, obviously Islamic rules are valid for Muslims. But, for Senegal (art. 571), given the peculiarity of its "Code de la Famille", it seems not so strange that it states special provisions for persons who, during their lifetime, have expressly or by their behaviour manifested their will to have their estate be divided following the rules of the Islamic law. So it seems that also non-Muslims can ask for the application of the Islamic system of inheritance. However, a true innovation was introduced in the Algerian law which makes no further distinction among Muslim and non-Muslim citizens. Further, one of the final rules of the Algerian Code (art. 221) states that the provisions of this law are effective not only

for all Algerian citizens, without any other distinction, but also for residents in Algeria.

In general, modern legislations have recourse to the well-known methods of *talfīq*, *taḫayyur* and *tarǧīḥ* (Cilardo 1985:69 note 7, 71 note 12). Such methods are also followed in the four laws here considered, where Ḥanafī, Mālikī, Šāfiᶜī, Ḥanbalī, Ibāḍī, and Zaydī doctrines coexist. The cohabitation of rules of different schools is evident if we consider some particular cases.

— In the *Dispositions générales* of the Senegalese Code, hence valid for all people, art. 398 deals with persons, who are relatives, dying in a same accidental event without any possibility to determine which of them has died first. In such a case, according to the Ḥanafī, Mālikī and Šāfiᶜī doctrine, they do not inherit from one another, but only their own surviving relatives inherit from each one of them (Cilardo 1994: 534–536).

— The Algerian law devotes Section IX of its Code to some special questions. There are five particular cases which gave rise to a peculiar doctrine or to solutions differing from one another within the law schools. Now, the case called *al-akdariyya* or *al-ġarrā'* (art. 175)[17] is solved in accordance with the Mālikī, Šāfiᶜī and Ḥanbalī doctrine, whereas the case called *al-muštaraka* or *al-mušarraka* is solved on the basis of the Mālikī, Šāfiᶜī and Ibāḍī doctrine[18]. The remaining three cases are solved in accordance with the Sunnī, Zaydī and Ibāḍī doctrine. These cases are called *al-ġarrawāni* or *al-ᶜumariyyatāni*[19], *al-mubāhala*[20], and *al-minbariyya*[21].

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[17] Grandfather, mother/grandmother, husband, and full or consanguine sister. The husband has right to a one-half, the mother/grandmother to a one-third, the grandfather to a one-sixth, and a sister to a one-half: 1/2+1/3+1/6+1/2=9/6, which will become 9/9 by means of the proportional reduction (*ᶜawl*). Then grandfather' and sister's shares must be summed up: 1/9+3/9=4/9, which must be divided between them giving a grandfather a double amount as a sister: 4/9:3=12/27. Lastly, all the shares must be summed up: 3/9+2/9+12/27=27/27, of which 9/27 to the husband, 6/27 to the mother/grandmother, 8/28 to the grandfather, and 4/27 to the sister. See Cilardo 1993: 274-276, 314-315, 357, 542, 546, 604.

[18] Algeria, art. 176. This doctrine is also followed in Senegal (arts. 615, last par.; 638). That is: husband, mother/grandmother, two or more uterine brothers/sisters, and one or more full brothers. Both kinds of brothers shall divide the one-third share on an equal footing without taking into account their sex; the husband has right to a one-half, and the mother/grandmother to a one-sixth (see Cilardo 1994: 140, 219-223, 225, 236, 256-257, 258).

[19] Algeria, art. 177: 1) father, mother, and husband. The husband has right to 1/2=3/6, the mother to 1/3 of what remains (=1/6), instead of 1/3=2/6 of the whole estate, whereas the father has right to the remainder (=2/6). 2) Father, mother, and wife. The wife has right to 1/4=3/12, the mother to 1/3 of what remains (=3/12), instead of 1/3=4/12 of the whole estate, whereas the father has right to the remainder (=6/12). See Cilardo 1994: 199-200.

[20] Algeria, art. 178: husband, mother, and a full or consanguine sister. The husband has right to a one-half, the sister to a one-half, and the mother to a one-third: 1/2+1/2+1/3=8/6, which shall become 8/8 by means of the proportional reduction of the shares, of which 3/8 shall be due to the husband, 3/8 to the sister, and 2/8 to the mother. See Cilardo 1994: 69.

— The Kuwaiti law follows the rules of the Mālikī school concerning the Personal Status[22]. In reality, it is not always so. In fact, as for the basic elements of a bequest, the Kuwaiti law (arts. 213–225) agrees equally with the four Sunnī schools as well as with the Zaydī, Ẓāhirī and Imāmī schools[23]. Also as regards the order to be followed in the distribution of the estate, this Code (art. 291) agrees with different law schools; so, the precedence of the inhumation of a deceased person over the payment of debts is in accordance with the Ḥanbalī doctrine, contrary to Ḥanafī, Mālikī and Šāfiᶜī schools. Further, the inhumation of people, as offspring and wife, who have died before the *de cuius* and to whom the *de cuius* himself was obliged to provide maintenance, precedes the payment of debts, according to the Ḥanafī school[24]. Another Ḥanafī doctrine followed in the Kuwaiti Code concerns the "debts of Allāh" (*duyūn Allāh*), i.e. alms taxes (*zakawāt*) and amends (*kaffārāt*), which shall not be paid by the estate, contrary to the doctrine of the generality of the *fuqahā'* (*ibid.* 421–422).

— Grandfather: Certainly, the most complex question concerning inheritance has been at all times the fixation of the position of the grandfather (Cilardo 1990). It is well-known that the Ḥanafī doctrine, reflecting the pre-Islamic *sunna*, is more rigid than the Mālikī, Šāfiᶜī, Ḥanbalī, and Zaydī rule; and that Zaydī system is rather different with respect to the remaining three (Cilardo 1994:265–324). Modern legislations generally adopt these last systems; however, with some differences among them. While Algeria and, with much more detailed rules, Senegal wholly agree with the Mālikī, Šāfiᶜī and Ḥanbalī doctrine, Syria makes a mixture between these last and the Zaydī rule; lastly, Kuwait is clearly influenced by Syria, but it puts aside the elements deriving from the Mālikī, Šāfiᶜī and Ḥanbalī systems, and adopts entirely the Zaydī system.

So, for Senegal and Algeria the Mālikī, Šāfiᶜī and Ḥanbalī doctrine is accepted in the case of a grandfather when in competition either with full or consanguine

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[21] Algeria, art. 179: parents, two daughters, and wife. The father has right to a one-sixth, the mother to a one-sixth, the wife to a one-eighth, and the daughters to two-thirds: 1/6+1/6+1/8+2/3=27/24, which shall become 27/27 by means of the proportional reduction of the shares, of which 4/27 respectively to father and mother, 3/27 to the wife, and 8/27 to each one of the two daughters. See Cilardo 1994: 66, 68-69, 209, 604-605.

[22] See *Kuwaiti Explanatory Memorandum*, p. 5. In the lack of a Mālikī rule, one must revert to what is notorious in the Mālikī school; otherwise, one must follow other law schools. Lastly, if there is no rule at all, one must follow the general principles of the Mālikī school (Kuwait, art. 343).

[23] See *Kuwaiti Explanatory Memorandum*, pp. 337-357.

[24] See *Kuwaiti Explanatory Memorandum*, pp. 421, 422.

brothers[25], or with full or consanguine brothers/sisters and one or more heirs by quota[26]. Further, the Senegalese Code (art. 579.2) provides that a full or consanguine sister becomes *ʿāṣib* when she is in competition with a grandfather, except in the well-known case called *al-akdariyya* (Senegal, art. 640). Moreover, a grandfather is treated as a father (Senegal, art. 620), except that:

1) a grandfather does not exclude a paternal grandmother (Senegal, art. 621.1), as it is the Ḥanafī, Mālikī and Šāfiʿī doctrine (Cilardo 1994:326–327);

2) that grandfather does not cause the reduction of the mother's share in the two cases called *al-ʿumariyyatāni* (Senegal, arts. 621.2, 641), according to the Sunnī doctrine (Cilardo 1994:199–201);

3) that the presence of a grandfather does not cause the exclusion of full or consanguine brothers/sisters (Senegal, art. 621.3), according to the Mālikī, Šāfiʿī, Ḥanbalī and Zaydī doctrine, above examined (Cilardo 1994:269–272). Then, a remote grandfather is considered as a grandfather; thus he cannot be excluded by full or consanguine brothers/sisters (Senegal, art. 634, 3rd par.). Lastly, in the case called *al-muʿādda* the Mālikī doctrine is followed[27].

A case solved in the Senegalese Code (arts. 635.1; 639) seems to misunderstand an Islamic rule. It is: husband, mother, uterine brothers/sisters, one or more full or consanguine brothers/sisters, and grandfather. The Code states that full or consanguine brothers/sisters are excluded by uterine brothers, while these last are excluded by grandfather. However, I find that the solution given by the Code is in accordance with the Ḥanafī school, according to which a one–half shall be due to the husband, a one–sixth to the mother, and the remainder to the grandfather. But the grounds of the solution expounded in the Code are wrong; in fact, according to the general consensus, grandfather excludes uterine brothers/sisters, but full/consanguine brothers are not excluded by uterine brothers (Cilardo 1994:268). On the contrary, according to the Mālikī school, the solution is: the husband has right to a one–half and the mother to a one–sixth; the remainder shall be divided among brothers/sisters and grandfather, unless the grandfather's share will be less than a one–sixth; otherwise, the grandfather has right to his minimum quota of a one–sixth, while the remaining one-sixth shall be divided among brothers/sisters according to the principle of a

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[25] Senegal, art. 616; Algeria, art. 148.3, 158. Grandfather has right to the more convenient share for him chosen between the one-third of the whole estate or sharing with brothers being considered as a male; cf. Cilardo 1994: 268-273.

[26] Senegal, art. 622; Algeria, art. 158. Grandfather can choose which share is the most convenient for him: the one-sixth of the whole estate, or the one-third of what remains after allotting the shares to the persons entitled to them, or sharing with brothers being considered as a male; cf. Cilardo 1994: 271-272.

[27] Senegal, art. 636, 2nd par.. That is, consanguine brothers are counted among full brothers in order to fix full brothers' and grandfather's shares; then, the consanguine brothers are excluded from inheritance; thus, they create an advantage for full brothers; cf. Cilardo 1994: 276-278.

double share to males (*ibid.* 271). Thus, only in this particular case regarding grandfather, Senegal agrees with a Ḥanafī doctrine.

The Syrian (art. 279) and the Kuwaiti (art. 310) laws follow the Zaydī doctrine in the case of the grandfather in competition with full or consanguine brothers/sisters, although the *Kuwaiti Explicatory Memorandum* (440) makes confusion considering ᶜAlī's doctrine, followed by the Zaydīs and accepted in this law, as the same and identical with Zayd b. Ṯābit's doctrine, followed by the Mālikīs, Šāfiᶜīs, Ḥanbalīs, Abū Yūsuf and aš-Šaybānī[28]. However, the Syrian Code, while respecting the general structure of the Zaydī rules, agrees with the Mālikī school with regard to the determination of the minimum share of the grandfather, which is not a one-sixth, as it is for the Zaydīs, but a one-third.

In sum, a grandfather shares with full or consanguine brothers according to the following rules:

1) In the absence of heirs by quota, the grandfather must be considered as a brother, and he shares with them, unless his portion will be less than a one-sixth (Syria: one-third).

2) If grandfather, full or consanguine brothers are in competition, consanguine brothers are not counted among the heirs in order to fix the grandfather's share.

3) The grandfather has right to a one-sixth when in competition with descendants. If are present heirs other than descendants, the grandfather is entitled to receive the remainder as agnate after the allotment of the shares to the quota sharers.

4) If a grandfather, a full sister and a consanguine brother are in competition, the full sister has right to her Qur'ānic share of a one-half, whereas the remainder shall be divided halves between grandfather and brother. If brothers are many, the minimum share of the grandfather is a one-sixth (Syria: one-third).

5) If grandfather, full or consanguine sisters are in competition, one or more sisters have right to their Qur'ānic share, whereas the grandfather has right to the remainder as agnate, unless his share will be less than a one-sixth (Syria: one-third), which is his minimum share in any case (Cilardo 1994:272–273).

— Grandmother: Some rules are common to all schools, like that a grandmother is entitled to a one-sixth share[29], which shall be divided among grandmothers if they are more than one and they are of the same degree[30]. Some others are peculiar to

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[28] The main differences between Zaydīs and Mālikīs, Šāfiᶜīs and Ḥanbalīs consist in that these last: 1) make the minimum share of the grandfather a one-third; 2) they count consanguine brothers among full brothers in order to fix grandfather's share; 3) one or more full or consanguine sisters are not considered as heirs by quota when they are in competition with grandfather (see Cilardo 1994: 269-272).

[29] Senegal, art. 623; Syria, art. 272; Algeria, art. 149.4; Kuwait, art. 302; see Cilardo 1994: 327-328. The Kuwaiti rules are dependent on the Syrian ones.

[30] Senegal, art. 626; Syria, art. 272; Algeria, art. 149.4; Kuwait, art. 302.

some schools, such as a maternal grandmother is excluded only by mother, not by father[31], while a paternal grandmother is excluded by both mother and father, according to the Ḥanafī, Mālikī and Šāfiᶜī school[32]. When more grandmothers are of the third degree or more remote, but not of the same degree, according to the Ḥanafīs, Ḥanbalīs, Zaydīs and some Ibāḍīs (Cilardo 1994:329), the only criterion to be adopted in order to fix which of them has right to inherit is that of the proximity. Syria (art. 283) and Kuwait (art. 313) agree with this doctrine. On the contrary, Algeria (arts. 149.4; 161) and Senegal (art. 627) agree with the solution given by Mālikīs and Šāfiᶜīs (Cilardo 1994:328–329); that is, if a maternal grandmother is closer than a paternal grandmother, she excludes the paternal grandmother; if they are of the same degree or a paternal grandmother is closer than a maternal grandmother, both inherit dividing the one-sixth share between them on an equal footing.

— *Ḏawū l-arḥām*: There exists a well-known divergence on this point of doctrine among the law schools. Some scholars, as Zayd b. Ṯābit, followed by Mālikīs and Šāfiᶜīs, believed that, in the presence of only *ḏawū l-arḥām*, the estate must be devolved to the Public Treasury. On the contrary, many other scholars, followed by Ḥanafīs and Ḥanbalīs, believed that *ḏawū l-arḥām* have right to inherit in the absence of quota-sharers (except husband/wife) and agnates, or after the allotment of the share to the spouse relict[33]. However, during the third century H., also Mālikīs and Šāfiᶜīs stated that the *ḏawū l-arḥām* have right to inherit if the Public Treasury is not well administered[34]. With the admission of such category of heirs to succeed, most importance is given to the immediate family of a deceased person rather than to his extended family of tribal life.

The four modern legislations follow this doctrine. Syria (art. 263.2.4), even here resumed by Kuwait (art. 295.ǧ), and Algeria (art. 139.3) have divided the heirs into three categories: heirs by quota, agnates and maternal relation. Then, Syria and Kuwait have meticulously established the rules regarding the last category of heirs[35], while Algeria (art. 168) gives only some general criteria for the fixation of the precedence among them. As far as the Senegalese Code (arts. 643–644) is concerned, it is very concise, admitting the succession of the maternal relatives till the twelfth degree, without any other specification.

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[31] Senegal, art. 624; Syria, art. 283; Algeria, art. 161; Kuwait, art. 313; see Cilardo 1994: 325-326.

[32] Senegal, art. 625; Syria, art. 283; Algeria, art. 161; Kuwait, art. 313; see Cilardo 1994: 326-327.

[33] *Kuwaiti Explanatory Memorandum*, pp. 446-451. On the inheritance of this category of heirs, see Cilardo 1994:367-380.

[34] See *Kuwaiti Explanatory Memorandum*, pp. 449-450; Cilardo 1994:51-52.

[35] Syria, arts. 289-297; Kuwait, arts. 319-327; see also *Kuwaiti Explanatory Memorandum*, pp. 446-451.

Modern legislations on inheritance are traditional and modern at the same time. They do not reject the classical elaboration, although putting aside some rules no more followed at present, such as the consideration of the patronage as a title to inherit. In fact, the Kuwaiti law (art. 295) mentions only marriage and relationship, omitting the patronage, which is the third title according to the *šarīᶜa*; this is because the slavery is now abrogated. Thus, the doctrine of the agnation founded on a cause, that is the manumission (*al-ᶜuṣūba as-sababiyya*), is now out of date[36]. By means of the methods of *talfīq*, *tarǧīḥ* and *taḫayyur*, the most favourable Islamic rules for the heirs are chosen. However, where Islamic devices fail to give a solution to real problems, one has recourse to innovations, either derived from inside Islam, such as the obligatory bequests, or from Western law systems, such as the right of representation.

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[36] See *Kuwaiti Explanatory Memorandum*, pp. 430, 435.