USEFULLNESS OF IKHTILĀF IN EXPLAINING KNOWLEDGE OF MĪRĀTH IN
MUHAMMAD SAYYID ALI BADA'YI'S MANUSCRIPT:
ĪḌĀH AL-GHAWĀMIḌ LIL MUBTADĪ FĪ 'ILM AL-FARĀIḌ

NOOR MOHAMED AIDARUS

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Arts in Religious Studies of Pwani University

November, 2019
DECLARATION AND APPROVAL

This thesis is my original work and has not been presented for a degree in any other university or any other award.

Signature.............................................................. Date 15th July 2020
Noor Mohamed Aidarus
AG22/PU/36257/17

We confirm that this thesis has been submitted for examination with our approval as University supervisors.

Prof. Hassan A. Mwakimako, PhD
Department of Philosophy and Religious Studies
Pwani University.

Signature.............................................................. Date 15th July 2020

Dr. Ali Hemed Awadh, PhD
Department of Philosophy and Religious Studies
Pwani University.

Signature.............................................................. Date 15th July 2020
DEDICATION

This study is dedicated to my mother for her relentless prayers, love and support.
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I would like to acknowledge everyone who played a role in my academic accomplishments;

To my supervisors, Prof. Hassan A. Mwakimako and Dr. Ali Hemed Awadh for their guidance throughout the study. Their intellectual input not only enhanced my understanding in drawing various themes of this study but also helped me acquire valuable research skills.

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To my family, who supported me with love and understanding. Without you, I could never have reached this current level of success.

Thank you all for your unwavering support.
A portrait of Muhammad Sayyid Ali Badawy.

Portrait courtesy of Riyadha Mosque and Islamic Centre Library, with permission from Swaleh Muhammad Sayyid Ali.
ABSTRACT

Manuscripts production is a significant component of knowledge tradition of Islam in East Africa. Manuscripts are produced for academic instruction and for the preservation of and as sources of knowledge. In Lamu, one of the prominent centers for Islamic religious learning in East Africa, scholars have produced many manuscripts. One of the famous scholars to have written a number of manuscripts is Muhammad Sayyid Ali Badawy (1925 – 1979) of whose one of his known manuscript is in the area of mīrāth (Islamic inheritance) titled: Īḍāh Al-Ghawāmiḍ lil Mubtadī fi ‘Ilm Al-Farāḍ (Clarifying ambiguities for beginners in the science of inheritance). This study is an English translation of the doctrines of ‘Awl (proportionate reduction of shares) and Radd (redistribution of shares), the concepts of al-Khunthā (the hermaphrodite), al-Mafqūd (the missing person), al-Ḥāmil (the expectant mother) and Ḍāwī al-arḥām (the distant kindreds) as used in the manuscript to explain, clarify and pass knowledge on the laws of mīrāth. To understand better the knowledge on the concepts, this study analyses how the use of ikhtilāf will assist in clarifying, explaining and analyzing the laws of mīrāth found in the manuscript. While Muhammad Sayyid Ali Badawy correctly explains doctrines of ‘Awl and Radd and the concepts of al-Khunthā, al-Mafqūd, al-Ḥāmil and Ḍāwī al-arḥām in the distribution and allocation of shares of inheritance, he does not consider the differences of opinions and diversities in explaining these concepts in general but also in particular deploying them to solve problems of inheritance. The study recognizes this as a major shortcoming, and therefore uses the notion of ikhtilāf (difference of opinion) to elaborate on the diversities of opinions from other scholar’s views on the same. By analyzing the use of the concepts in Muhammad Sayyid Ali Badawy’s manuscript, this study uses ikhtilāf to provide additional dimensions, clarifications and applications by other scholars for further clarity in the use of these concepts, in order to avoid conclusions that are sometimes inconsistent with the actual diverse meanings of the concepts as used. This is a qualitative study that used oral interviews to collect primary data on the biography of the author of the manuscript, Muhammad Sayyid Ali Badawy, and the history of the application of the law of mīrāth in Kenya. Moreover, the study utilized secondary sources of data which included published books, magazines, journal, articles and online database. In order to generate meaningful information from the data collected, the study adopted the content analysis method as its main data processing tool.
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ACRONYMS

P.B.U.H - Peace be upon him

R.A (Radhi’ Allahu anhu) – May Allah be pleased with him

(n.d) – No date

LCM – Least Common Multiple
GLOSSARY OF NON-ENGLISH TERMS DERIVED FROM ARABIC LANGUAGE

‘Alim  Scholar
‘Aqīda  Creed
‘Asr  Late afternoon prayer
‘Awl  Proportionate reduction of shares
Balāgha  Rhetoric
Bayt al-Māl  Treasury
Darsa  Lesson
Dū al-Arham  Distant kindred
Fajr  Early Morning Prayer
Fiqh  Jurisprudence
Hadīth  Prophetic saying
Ḥāmil  Expectant mother
Hujb  Depravation
Ibtida’iyah  Primary
Iddat  Waiting period for a widow or divorcee
Ijtihad  A process of legal reasoning
Ikhtilāf  Difference of opinions
‘Ilm al-arūq  Science of poetry
‘Ilm al-Farāq  Science of Islamic Inheritance
‘Ilm al-Mīqat  Science of determining times for prayers
Imam  Leader
Janīn  Foetus
Khunthā  Hermaphrodite
Maḏhab  School of thought
Madihi  Religious praises
Madrasa  Muslim school
Mafqūd  Missing person
Maghrib  Evening prayers
Mantiq  Logic
Marhala  Level
Maulid  Birthday celebrations of Prophet Muhammad
Mīrath  Laws of Islamic Inheritance
Minbar  Pulpit
Mujtahid  A person who is qualified to perform Ijtihad
Murid  Disciple
Murshid  Guide
Mustalah al-hadith  Terminologies of Prophetic traditions
Mutawasitah  Intermediary
Nahw  Grammar
<table>
<thead>
<tr>
<th>Term</th>
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<tr>
<td><em>Qadi</em></td>
<td>Muslim judge</td>
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<td><em>Qawā’id Fiqhiyah</em></td>
<td>Legal Maxims of Islamic jurisprudence</td>
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<td>Rules of the theory of law</td>
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<td><em>Rabiul Awwal</em></td>
<td>4th month of Islamic calendar</td>
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<td><em>Radd</em></td>
<td>Redistribution of inheritance</td>
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<td><em>Shariah</em></td>
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<td><em>Sharīf</em></td>
<td>Descendant of Prophet Muhammad</td>
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<td><em>Shaykh al-Islām</em></td>
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<td><em>Sufī</em></td>
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<td><em>Tarawīh</em></td>
<td>Optional prayers consisting of 8-20 rak‘āt performed at night in <em>Ramāḍān</em></td>
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<td><em>Tarīqa</em></td>
<td>Sufi path/order</td>
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<tr>
<td><em>Taswawuf</em></td>
<td>The science of Islamic mysticism</td>
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<td><em>Thanawiyah</em></td>
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OPERATIONAL TERMS

**Education:** The formal or informal processes of acquisition of knowledge, skills and attitudes which are aimed at developing all faculties of a person.

**Gross Inheritance:** All movable or immovable property left behind by deceased whether the deceased earned it, inherited it or was gifted this property.

**Heir:** A relative who may potentially inherit from the wealth of deceased

**Islamic Education:** The education which aims at developing beliefs and ideals of Islam based on the Qur’an and Sunnah of Prophet Muhammad (PBUH).

**Islamic Inheritance:** A science of distribution of a deceased person’s legacy in accordance with the law of *Shariah*.

**Madrasa:** A formal institution that provides Islamic education offering literacy mainly in the Islamic sciences and Arabic.

**Secular Education:** This is a formal institution of western education with a well-structured curricula and syllabi at every level of education.

**Will:** An order for allocation of certain amount of property of deceased after death based on his/her order. This is not allocated during the person’s lifetime rather is asked to be allocated after death.
CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The science of inheritance or ‘ilm al-farāʾid in Arabic, is a significant component of Islamic jurisprudence. It involves knowing the rules for dividing inheritance and distributing it so that each of the heirs receives his/her proper share. Farāʾid is the plural of farīda which means religious duty; divine precept or ordinance of God.\(^1\) Since the Qur’an has fixed the shares of the different heirs in the estate of the Murīṭh, this branch of knowledge is called Farāʾid and inheritance is called Mīrāṭh.\(^2\)

The importance of the knowledge of the principles of inheritance is particularly stressed in the Qur’an where the law of inheritance is explained in details of clear entitlement of shares that heirs are supposed to inherit from the remaining estate of the deceased. The Qur’an states that:

> With regard to your children, God commands you to give the male the portion of two females, and if they be females more than two, then they shall have two-thirds of that which their father hath left: but if she be an only daughter, she shall have the half; and the father and mother of the deceased shall each of them have a sixth part of what he hath left, if he has a child; but if he has no child, and his parents be his heirs, then his mother shall have the third; and if he has brethren, his mother shall have the sixth, after paying the bequests he shall have bequeathed and his debts. As to your fathers or your children, ye know not which of them is the most advantageous to you. This is the law of God. Verily God is Knowing and Wise.\(^3\)

Furthermore, Hadīth of Prophet Muhammad (p.b.u.h) indicated the need for Muslims to learn and teach the laws of inheritance. It was narrated by Abu Hurairah that the Messenger of Allah (p.b.u.h) said:

> O Abu Hurairah, learn about the inheritance and teach it, for it is half of knowledge, but it will be forgotten. This is the first thing that will be taken away from my nation.\(^4\)

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\(^3\) Qur’an 4: 11 - 14

\(^4\) Sunan Ibn Majah, Vol. 4, Book 23, Hadith 2719 (grade: Da’if)
Abu Hurairah also narrated that the Messenger of Allah (p.b.u.h) said:

> Learn the laws of inheritance and the Qur’an, and teach the people, for I am a mortal.\(^5\)

It is also narrated by Abdullah bin Umar that Allah's Messenger (p.b.u.h) said:

> It is not permissible for any Muslim who has something to will to stay for two nights without having his last will and testament written and kept ready with him.\(^6\)

From the readings of the Qur’an and the Hadīth we can argue that knowledge of the laws of \textit{mīrāth} is important to Muslims and Islamic laws of inheritance have been integrated in the constitutions of many countries in the world. For instance, in East Africa, the constitutions of Uganda\(^7\), Tanzania\(^8\) and Kenya\(^9\) have provided a window for Muslims to engage the \textit{shariah} in matters appertaining to marriage, divorce and inheritance.

The study at hand is an effort to show how Muhammad Sayyid Ali Badawy’s manuscript titled \textit{Īḍāh Al-Ghawāmiḍ lil Muḥtada ḥi’l Mubtada fi ‘Ilm Al-Farā’id} \(^{10}\) elaborates the knowledge aspects of laws of \textit{mīrāth}. The manuscript was written as an instructional manual for students studying Islamic laws of inheritance at the Muslim Academy of the Riyadh Mosque Lamu and is considered a reliable instructional manual for various \textit{madrasas} in East Africa that base their teaching methodology on the traditional sufī path of Alawīya and the Shafī’i’ jurisprudential school of thought. Some of these \textit{madrasas} include:

1. Māhad Islāmī, Riyadh – Lamu, Kenya
2. Madrasatul Badru Islāmīa – Lamu, Kenya
3. Al-Ghannai al-Islāmīa – Mambrui, Kenya
4. Madratun Nur Islāmīa - Mambrui, Kenya
5. Shamsul Hudā Islāmīa – Mambrui, Kenya
6. Manazil Abrar Islāmīa – Mambrui Kenya
7. Al-Ghannai Islāmīa, Ulu – Malindi, Kenya
8. Madrasatu Sabqi Islāmīa – Malindi, Kenya

\(^6\) Sahih al-Bukhari, Vol. 4, Book 55, Hadith 1 (grade: Sahih)
\(^7\) Legal Notice of 1951 Vol. 7 Subsidiary Legislation Caps 31-101
\(^8\) The Probate and Administration of Estate Act 1
\(^9\) The Laws of Succession Act of Kenya, Chapter 160 section 2 subsection 3 & 4
\(^{10}\) Literally translated: Clarifying ambiguities for beginners in the science of inheritance
9. Markaz Sheikh Abubkar bin Salim, Kasujini – Malindi, Kenya
10. Makarimul Akhlaq Islamia – Malindi, Kenya
11. Madrastul Azhar lil Banat – Malindi, Kenya
12. Markaz Nur Islamia – Timboni, Kenya
13. Markaz Haddad Islamia – Watamu, Kenya
14. Markaz Swalihina Islamia – Mombasa, Kenya
15. Madrastul Majma’ Bahrain – Mombasa, Kenya
16. Markaz Fayaz, Kilifi – Mombasa, Kenya
17. Markaz Nur Islamia – Msambweni, Kenya
18. Al-Ghannai Islami, Pangani – Nairobi, Kenya
19. Shamsul Maarif Islamia – Tanga, Tanzania
20. Madrastul Annahja Sawiy – Daresalam, Tanzania
21. Madrastul Riyadha Islamia – Mwanza, Tanzania
22. Madrastul Fauz wa Salam – Aruwa, Uganda

The manuscript is neatly handwritten in Arabic language and comprises of two codices i.e volumes I and II of 25 pages and 46 pages respectively. The content is divided into 16 distinct lessons dealing with a specific concept of ‘ilm al-farāid that is meant for easy reading and understanding for beginners. In the manuscript, simple tables are also provided in order to offer guidance on the fractional distribution of shares to the heirs. After a discussion of each topic, an illustration of an inheriting situation is presented so that the reader is able to grasp the concept followed by the questions section. In all madrasas, the manuscript is taught at marhala thanawiya where codice I is taught at level one and codice II is taught at level two of the marhala thanawiya.

In almost, all of the madrasas students copy (in handwritten form) contents of the manuscript in their exercise books as presented by their teacher. According to some teachers, their biggest challenge is to obtain clearly readable original copies of the manuscript because in most cases, some pages of the manuscript are defaced due to frequent photocopying. However, Al-Ghannai Islamia of Mambrui, has embarked on a programme to digitally print their course texts in a single compilation at each level of their madrasa syllabus where the manuscript is incorporated at thanawiya level; codice I in level one and codice II in level two respectively.
1.2 Statement of the Problem

This study is an analysis of six concepts in mīrāth and how they have been used in Īdāh Al-Ghawāmiḍ lil Mubtadī fī 'Ilm Al-Farā'id written by Muhammad Sayyid Ali Badawy (d.1979), as an instructional manual for students studying Islamic laws of mīrāth.

Over the four decades,11 since it was first written (n.d), the manuscript is considered a reliable instructional manual on the laws of mīrāth. It is used in various madrasas in East Africa that base their curriculum on the traditional sufī path of Alawīya and the Shafī‘i jurisprudential school of thought. Some of the concepts used in the manuscript to explain and clarify the knowledge on mīrāth include ‘awl, radd, al-khunthā al-mafqūd, al-ḥāmil and Dhāwī al-arhām. However, after close scrutiny it has been found out that the author of the manuscript has not provided a variety of explanations of these important concepts, meaning therefore that ikhtilāf as an important concept in clarifying and explaining diversity of meanings has not been used. This makes the knowledge in the manuscript inadequate as it fails to provide a complete framework of knowledge, analysis and clarity on the concepts discussed.

This study problematizes the absence of ikhtilāf as a major weakness of the manuscript and uses ikhtilāf in order to further explain, analyze and clarify on the various concepts to provide diverse knowledge on them. Such understanding will discern the diverse interpretation of the concepts in accordance to diverse authorities of shariah, in order to avoid conclusions that are sometimes inconsistent with the actual diverse meanings of the concepts as used.

11 The author of the manuscript Muhammad Sayyid Ali Badawy passed on in October 1979, therefore it is assumed that since he wrote the manuscript and taught it himself, the manuscript has been in use for at least four decades.
1.3 Research Objectives

The study was guided by four main objectives as follows:

a) To document a brief biography of the author of Īḍāh Al-Ghawāmiḍ lil Mubtadī fī 'Ilm Al-Farāḍ Muhammad Sayyid Ali Badawy, (1925 – 1979)

b) To use ikhtilāf to explain and analyze the doctrines of ‘Awl and Radd.

c) To use ikhtilāf to explain and analyze the concepts of al-Khunthā, al-Mafqūd, al-Ḥāmil, and Dhāwī al-arḥām

d) To explain the sources of the above-mentioned doctrines and concepts

1.4 Research Questions

This study was guided by four research questions as follows:

1. Who is Muhammad Sayyid Ali Badawy, the author of Īḍāh Al-Ghawāmiḍ lil Mubtadī fī 'Ilm Al-Farāḍ?

2. What are the divergent opinions of scholars on the application of the doctrines of ‘Awl and Radd?

3. What are the divergent opinions of scholars on the application concepts al-Khunthā, al-Mafqūd, al-Ḥāmil and Dhāwī al-arḥām.

4. What are the sources of the above-mentioned doctrines and concepts?
1.5 Scope and Limitations of the Study

The scope of this study is to translate, explain and analyze some aspects of knowledge of mīrāṭh as expounded in Īḍāh Al-Ghawāmid lil Mubtadī fī 'Ilm Al-Farāiḍ by Muhammad Sayyid Ali Badawy. This work is not an entire translation of the text, but that of selected concepts that are deemed important in the knowledge of mīrāṭh. These concepts have been explained and elaborated upon by Muhammad Sayyid Ali Badawy, but his explanation is incomplete because of his use of the perspective of the shafii’ school of Islamic jurisprudence only. The analysis is based on the author’s knowledge, but this study includes the use of ikhtilāf to bring the views of other scholars in an effort to clarify and add into the knowledge of the concepts discussed. The study also provides a brief biography of the author in order to contextualize the environment in which the manuscript was produced.

Other notable local scholars who have contributed valuable literature on the same subject include Sayyid Ali bin Ahmad Badawy’s (d.1988) Bullat ‘Awām fee Ahkām Ḍāwī al-arḥām 12, Shaikh Abdallah Saleh al-Farsy’s (d.1982) Urathi13 and Shaikh Nassor Khamis (n.d)14. These are in manuscript form and remain unpublished.

This study is divided into six chapters including the introduction in chapter One. Chapter two narrates a brief biography of Muhammad Sayyid Ali Badawy (the author of manuscript). Chapter three analyzes the development of Islamic laws of inheritance in Kenya from pre-colonial era to the current constitution dispensation and its application particularly in Mombasa County. The six concepts are intentionally divided into two major categories; the doctrines of ‘Awl and Radd that deal with issues of distribution of the property are discussed in chapter four. The other four concepts that deal with issues of special cases individuals; al-Khunthā, al-Mafqūd, al-Ḥāmil and Ḍāwī al-arḥām are discussed in chapter five. Finally, the conclusions and recommendations of the study are presented in chapter six.

12 An Arabic language treatise written in poetic form that specifically deals with the inheritance of distant kindred heirs.
13 A Kiswahili language treatise that deals with the basics of the laws of Islamic inheritance
14 A Kiswahili language treatise that deals with the basics of the laws of Islamic inheritance
1.6 Rationale / Justification of the Study

Since it was first written, Īḍāh Al-Ghawāmiḍ lil Mubtadī fī ‘Ilm Al-Farāḍiḍ. has neither been introduced nor commented upon into any other language from its original Arabic. Therefore, this study, which is an English translation of some concepts of the manuscript, will enable it gain wide readership. Hence the study engages in the work of preserving Islamic scholarship for wider audience which is in line with a long tradition of Islamic practices, of knowledge preservation through translation.

Another significance of the study is that it provides a platform to explore the type of scholarship and knowledge production along the coast of East Africa in the wider scholarship and the need to recognize the lives and works of local scholars in order to show their contribution in the production of knowledge.

Above all, it is my intention that the final text of this project will be a valued addition to the scarce literature available on the subject with reference to the Kenyan society, especially in the English language, and that it will be an integral handbook at the office of the Chief Qadi and its subordinate offices.
1.7 Literature Review

This study has a wealth of research by others drawn upon. To begin with, Al-Jibali defined ‘Ilm al-farād as the subject of the injunctions concerning inheritance and that it involves knowing the rules for dividing the inheritance and distributing it so that each of the heirs receives his/her proper share.\textsuperscript{15} Zuleika and Desinthyia stated that farād is a science of distribution of a deceased person’s legacy in accordance with the law of teaching of shariah, which is also known as ‘Ilm al-Mawārīth or the science of inheritance.\textsuperscript{16} Halim described the laws of inheritance as Succession, known as mīrath or irth or farād and that it denotes the fixed shares of inheritance allocated to the various relatives (legal heirs) by the Qur’an and Sunnah.\textsuperscript{17} Yusup elaborately defined ‘Ilm al-farād as the law of inheritance which describes the procedure of dividing the property of a deceased person to the heirs entitled to receive it, the word inheritance itself can mean either the inherited as a subject or a process.\textsuperscript{18}

Although the importance of ‘Ilm al-farād is anchored in the Qur’an and Sunnah, nevertheless, Idakwoji observed that, ‘Ilm al-farād is one of the most significant sciences in Islamic jurisprudence as the Qur’an provides a detailed information on how to administer or distribute the estate of a deceased Muslim amongst his successors.\textsuperscript{19} Even one of the most notorious critics of Islamic law and institutions Anderson concurred that there is no part of sacred law that has been worked out with the detailed thoroughness, meticulous precision, extravagant detail or such a spirit of religious devotion which has been accorded so lavishly by jurists to the Islamic law of succession.\textsuperscript{20}

As for the allottees, ‘Ilm al-farād provides detailed number of shares each deserves to get from the existing estate and that the Prophet (p.b.u.h) noting that this important knowledge

\textsuperscript{15} al-Jibali, M (1999). \textit{Islamic Will and Testament Booklet}. Al-Kitab wa Sunnah Publishing. p 52
\textsuperscript{17} Halim A.H (2015). \textit{Islamic Law of Succession}. Kuala Lumpur: Islamic University of Malaysia. p 1
might be neglected by his followers, warned that all Muslims must seek it at all cost.\textsuperscript{21} Halim noted that \textit{Ilm al-farāid} contributed to the reformation of society because it deliberates that inheritance is not only based on blood relationships but also in marriage and that it ensured both man and woman can inherit and that parents and children will surely get their portion.\textsuperscript{22} According to Yusup, the \textit{Qur'an} has explained the laws relating to the right of inheritance based on a sense of justice for everyone. It is part of family law that plays an important role, even it determines and reflects the system and form of law that occurs in society.\textsuperscript{23}

In a discussion on the knowledge about how to allocate shares, Hussain Ahmed highlighted that one should be proficient in dealing with fractions.\textsuperscript{24} This is because the shares are distributed between heirs according to the portions provided in the Qur’an and \textit{Sunnah}. Thus, Aung concluded, the heirs are known as Qur’anic heirs because their shares are prescribed and fixed in the Qur’an and that the Qur’an has fixed six different shares such as half, quarter, one eighth, two thirds, one third and one sixth.\textsuperscript{25}

In the Kenyan context, local scholars have produced treatises and studies addressing themselves to the subject of inheritance. Most of the local texts discussing the subject have been written in Arabic and Swahili languages and only give general elaborations on the rules and principles of \textit{mīrahth} such as Sayyid Ali Badawy’s (d.1988) \textit{Bullat ʿAwām fī Ahkam Dawil Arhām}\textsuperscript{26} and Abdullah Saleh al-Farsy’s (d.1981) \textit{Urathi}.\textsuperscript{27}

On the subject of manuscripts, it is discerned that the practice of manuscripts production is a significant component of the East African \textit{madrasa} education tradition for academic instruction and in the preservation of knowledge, hence manuscripts are an important source of knowledge. Sean O’Fahey described that in East Africa, particularly the coastal region, is home to a literary tradition that is unique in Islamic Africa, namely a highly

\textsuperscript{26} Literally translated: Precipitation of the people in the laws (of inheritance) of agnate heirs.
\textsuperscript{27} Literally translated (from Swahili): Inheritance
developed literature in a living African language, Swahili, written for centuries in the
Arabic script. However, manuscripts in the Arabic language have also been produced by East African scholars for several centuries. O’Fahey further explained that the earliest indigenous Arabic writing is the Kilwa chronicle entitled al-Sulwa fi Akhbār Kilwa written by an unnamed author who was born in 15 May 1499, however, little in Arabic has survived before the 19th century except for some Ibadi texts dating from the 17th and 18th centuries, brought to Zanzibar under the sultanate and since the dominant madhab in East Africa is Shafī’, much of the Arabic writing concerns that school’s jurisprudence.

According to Bang, the use of written texts as instructional manuals became prominent in East Africa towards the end of the 19th century as part of reformation of religious precepts of the ‘Alawiyya Tariqa initiated in Hadhramout by a renowned teacher and saintly figure Ali Muhammad al-Hibshi (d.1915). The ripples of this movement reached Riyadh Mosque College in Lamu through Habib Salih (d.1935). Bang further argued that rather than restricting transmission to the personal relationship between a murshid and his murid, Islamic knowledge was now understood as a set of texts that could be taught in classes, following an organized curriculum and, as a consequence, institutions emphasized written authority, in the sense that they favored text (and, specifically text in Arabic) over oral transmission.

The main argument in this study is based on the fact that although Muhammad Sayyid Ali Badawy correctly presents the concepts of mīrath in his manuscript Īdāh Al-Ghawāmiḍ lil Mubtadī fi ‘Ilm Al-Farāiḍ he does not account for ikhtilāf on their interpretation and application. This monolithic approach is problematic and proves inadequacy of the use of the manuscript as a source of knowledge as it does not show divergent views of Islamic schools of thought. According to suggestions of some of his students and other

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29 Literally translated: The history book concerning the pleasures of Kilwa
32 Ibid.
33 Sayyid Abdallah Saggaf and Swaleh Muhammad Sayyid Ali (Personal communication, June 15, 2019.Lamu)
scholars\textsuperscript{34}, the author did not employ \textit{ikhtilāf} in the manuscript because of the following reasons:

1. The author was an adherent of the \textit{maḏhab} of Imam Muhammad ibn Idrees ash-Shafii’ and thus the basis of his interpretation and application of the concepts was solely on the Shafii’ school of thought
2. The socio-religious environment of Lamu was predominantly of Shafii’ school, therefore he may have found no reason to factor opinions of other jurisprudential schools of thought.
3. The author’s intention to write the manuscript was for the purpose of instruction for beginners in the science of ‘\textit{Ilm al-farāīd}, as the title suggests, therefore he may have deemed unnecessary to engage new learners in the complexities of diverse juristic views and opinions.

However, for the manuscript to qualify as a substantial source of knowledge on \textit{mīrāṭh}, there is need to expound the interpretation of the concepts of ‘\textit{awl}, \textit{radd}, \textit{al-khunthā}, \textit{al-mafqūd al-hāmil} and \textit{Ｄāwī al-arḥām} to include diverse opinions of other jurists in order to explain, clarify and analyze their diverse use in Islamic jurisprudence. As a critic of this manuscript, this study provides insights and elaborations on how issues would have been addressed clearly were the author had considered that his were not the only available explanations of the concepts. Knowledge on \textit{mīrāṭh} would have been better served if the diverse and sometimes contradicting opinions of other scholars was given space. This is because contradictions and diversity of opinions (\textit{ikhtilāf}) is an important and critical analytical framework in understanding the development of Islamic jurisprudence. Therefore, this study vests to manifest the diverse application and interpretation of the concepts in accordance to diverse authorities of Shariah, in order to avoid conclusions that are sometimes inconsistent with the actual diverse meanings of the concepts as used.

\textbf{What is \textit{Ikhtilāf}?}

For the purpose of this study \textit{ikhtilāf} is understood as a critical concept in Islamic Jurisprudence. It literally means difference, dissimilarity, disparity, diversity, variety;

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\textsuperscript{34} Sheikh Harith Swaleh, Ustadh Mahmoud Abdulqadir, Ustadh Twalib Mbarak and Shariff Mu’taman al-Biydh (Personal communication, June 11 – 15, 2019. Mombasa, Lamu and Malindi)
variant, variation; difference of opinion, disagreement, controversy. As a technical term, Azizy & Azizy explained that it refers to the differences of opinion amongst authorities of religious law, both between the several schools and within each of them. More importantly, Kamali elaborated that the concept of *ikhtilāf* basically operates in the realm of *fiqh*, while the dogma of Islam and its moral teachings are not open to *ikhtilāf* and that even the slightest disagreement over the normative validity of belief in the essentials of faith and the essence of moral virtue is not tolerated and the ‘*ulama*’ have spoken in no uncertain terms on this.

Reference to *ikhtilāf* is derived from a hadīth narrated by Abdullah ibn Abbas (r.a) that the Messenger of Allah (p.b.u.h) said:

> “Whatever is brought to you of Allah’s book, act upon it and no one is exempt from leaving it. If it is not in the book of Allah then (act upon) my Sunnah and if it is not in my Sunnah, then (act upon) what my companions have said. My companions are like stars in the sky; whichever you take you will be guided and the *ikhtilāf* of my companions is a mercy upon you…”

Moreover, Walbridge noted that the most important example of institutionalized disagreement is the existence of the four *Sunni* legal schools, with the Twelver *Shi’ite* often effectively being a fifth school and that the *maḏahib* do not differ greatly, even if *Shi’ism* is included, but they arose out of deep controversies in early Islam about the sources and methods of Islamic jurisprudence. Companions of the Prophet (p.b.u.h) disagreed with each other but disagreement posed no intellectual problem in those glorious days: issues could simply be put to the Prophet (p.b.u.h), who would settle them. It was not until two centuries after the death of the Prophet (p.b.u.h) and the emergence of distinct legal schools that the question of disagreement became a serious intellectual problem.

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concern. Gradually, though, fair minded scholars realized that they faced the risk of splitting Islam over fine points of law on which there could be honest disagreement.

Qualified Muslims are allowed to analytically find solutions to issues not categorically solved by the Qur’an or Sunnah. This is called Ijtihad and Imran defined it as the total expenditure made by a jurist in order to infer, with a degree of probability, the rules of shariah from their detailed evidence in the sources (Qur’an and Sunnah) in a manner a Mujtahid feels unable to exert any more effort.

Indulgence of jurists into ijtihad is encouraged by a hadīth narrated by Amr ibn al’As (r.a) that he heard the Messenger (p.b.u.h) saying:

*If a judge gives a verdict according to the best of his knowledge and his verdict is correct (agrees with Allah and His Apostle’s verdict) he will receive a double reward, and if he gives a verdict according to the best of his knowledge and his verdict is wrong, (against that of Allah and His Apostle) even then he will get a reward.*

Imran further elaborated that it is important to note that for a person to do ijtihad, there are four necessary conditions that must be fulfilled, the conditions are:

1. The person performing ijtihad is qualified to do so (pious, just and trustworthy Muslim who is knowledgeable in the understanding and interpretation of the Qur’an and Sunnah).
2. The issue is open to ijtihad. Scholars have identified certain matters to which ijtihad should not be exercised. They are: existence of Allah, truthfulness of Muhammad (p.b.u.h) and authenticity of the Qur’an.
3. The person exerts his utmost in trying to arrive at the correct ruling.
4. The person has some form of evidence which he uses to justify his position.

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40 Ibid.
41 Ibid.
43 Sahih al-Bukhari. Vol 9, Book 92. Hadith no. 450
As for the concepts of *ikhtilāf* and *ijtihad* in relation to *mīrāth*, Yusup stated that during the times of the companions, a progressive idea or *ijtihad* to understand the distribution of inheritance developed, especially when there were contradictions, such as the cases of *al-awl* and *radd* and that means, although the division of *mīrāth* is absolute with explicit numbers in certain aspects, more analysis is still needed in the form of *qawā'id usuliyah* (legal maxims of Islamic jurisprudence) and *qawā'id fiqhiyah* (rules of the theory of law) in deriving Islamic law. On the same breadth, Nachi described that there is no doubt *ikhtilāf* must have an ordinary sense, the use of which is found in everyday life and should, therefore, suffice to remain attentive to the flow of everyday life in order to produce an account of the way in which, in discussions and conversations, above all, in arguments and disputes between friends and neighbors, and in public spaces as well.

In order to provide a detailed and balanced argument, this study will also substantially harvest from other publications, in addition to those mentioned above, that deal with *'ilm al-farā'īd* in the English language and will include the works of contemporary scholars such as Muhammad Mustafa Khan (1989), Al-Hajj Muhammad Ullah (1990) and Majlis Ulama of South Africa (2005). On the other hand, the works in *‘ilm al-farā’īd* of Al-Kalwadhani (d.451 AH), Al-Khabari (d.476 AH), Al-Shanshuri (d.999 AH), Al-Uthaymeen (1983), Bin Baz (1989), Al-Mubarak (2006) and Al-Ahdal (2007) will help provide useful conceptual material in the explanation of *‘ilm al-farā’īd* in the Arabic language. Other literature dwell on specific areas of expertise as in the case Adelina Zuleika and Ni Putu Desinthya who examine *mīrāth*’s economic implications while others base their studies on their countries of residence judicial and community background. Majority of the Arabic language literature available thus far, are madrasa and Islamic university’s course texts.

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1.8 Theoretical Framework

The study is based on two theoretical perspectives or approaches as follows:

a) Biographical analysis

The use of biographical analysis from and developed through different disciplines has proven to be an excellent way of making theoretical sense of social phenomena. Johanna Bjorkenheim and Synnove Karvinen-Niinikoski observed that the biographical narrative research has spread during the last decades from the research of literature, sociolinguistics, history and philosophy to other sciences such as social sciences and psychology and that biographical analysis does not have one unified and clearly defined theoretical – methodological structure but is rather an open net of discussion with the term ‘narrative’ in common. Moreover Mc Alpine noted that narratives incorporate temporality, a social context, complicating events, and an evaluative conclusion that together make a coherent story. It is from such a perspective that this study adopts the theory as a compass in shaping and directing the biography of the author of the manuscript, Muhammad Sayyid Ali Badawy.

b) Descriptive analysis

This study bases its theoretical framework on the use of descriptive analysis as the thesis of the research is anchored in describing and analyzing some concepts of ‘ilm al-farāid. Zikmund explained descriptive analysis as the transformation of raw data into a form that will make them easy to understand and interpret; rearranging, ordering and manipulating data to generate descriptive information. Descriptive research can be either quantitative or qualitative. The Association for Educational Communication and Technology elucidated that descriptive analysis can involve collections of quantitative information that can be tabulated along a continuum in numerical form, such as scores on a test or the number of times a person chooses to use a certain feature of a multimedia program, or it

can describe categories of information such as gender or patterns of interaction when using
technology in a group situation. The main purpose of this study being to describe,
explain and validate the selected terms, principles, concepts, injunctions and statutes in
‘ilm al-farāid as presented in the stated manuscript, the descriptive analysis theory is
incorporated in line with an interdisciplinary approach to other subjects in Islamic studies.

1.9 Research Methodology

1.9.1 Data Collection Procedure

The study is anchored on qualitative techniques as its main research tools. The adoption
of qualitative research tools particularly oral interviews and stratified semi-structured
purposive interview guides were necessary to facilitate the collection and analysis of
discourses and information on the life of the author of the stated manuscript and its
contents. Keeping in line with the research questions and objectives, a total of 17
respondents were selected as research participants. The sample of the study was
categorized into four subsets/subgroups inclusive of:

1) Family members of the author, (2 sons the eldest 66, 2 daughters eldest 68 years and
   1 wife 80 years old) to provide a close and personal information about the life of the
   author of the manuscript.
2) Students, (3 males between the ages of 60 and 75 years) to provide information about
   how the author used to teach the manuscript and the learning experiences under the
   author of the manuscript.
3) Prominent Muslim scholars (2 in Lamu, 1 in Malindi and 2 in Mombasa) to provide
   information on the impact of Islamic laws of inheritance in Kenya and the importance
   of the manuscript in enhancing the knowledge of mīrath.
4) Madrasa teachers, (4 males) who use the manuscript in their lessons.

The study used both primary and secondary sources during field work to generate data for
research. On one hand, primary data was generated through qualitative semi-structured
oral interview schedules comprising semi-structured questions which were used to
conduct interviews with the students, family members of the author and other important

50The Association for Educational Communications and Technology (2001). What Is Descriptive
personalities. On the other hand, the study utilized secondary sources of data which included published books, magazines, journals, articles and online database or sources available at the Pwani University Library (Kilifi, Kenya), The Kenya National Library Services (Mombasa, Kenya), Imam Bukhari Islamic Library (Mombasa, Kenya), the office of the Chief Qadi in Mombasa.

1.9.2 Data Processing / Analysis

This study being a textual analysis to derive meanings and gain clarity from the contents of a manuscript utilized the theory of content analysis as its main tool to process data. The primary objective of analyzing data is to determine the categories, relationships and assumptions that inform research respondent’s views on the issue under study as in this case the life of the author and his manuscript on ‘ilm al-farāīd.

In order to apply the theory of content analysis appropriately, I took necessary steps; first, by categorizing my respondents into four main groups which are inclusive of key stakeholders. Secondly, I divided my research questions and objectives in three broad areas of study; biography of the author of the manuscript, development of Islamic law of inheritance in Kenya and a study on terms and concepts on ‘ilm al-farāīd. This made my work easier as each set of data was easily categorized into its respective thematic area. The content analysis technique used ensured responses gathered in oral interviews and questionnaires were directly linked to contexts assessed in the research especially those relating to the biography of the author and the development of Islamic law of inheritance in Kenya. Subsequently, the data was supplemented with a review of literature on ‘ilm al-farāīd enhanced the understanding of the methodology used to analyze terminologies and concepts objectively.
CHAPTER TWO

A BRIEF BIOGRAPHY OF MUHAMMAD SAYYID ALI BADAWY

(1925 – 1979)

2.1 Introduction

In order to contextualize the writing of the manuscript Ḥalāf al-Ghawāmid lil Mubtāḍī fī 'Īlm Al-Farā'id, this chapter discusses a brief biography of its author Muhammad Sayyid Ali Badawy. In Lamu the author is in no doubt that he comes from a pedigree of writers of manuscripts and producers of Islamic knowledge. This trend can be traced beginning with Muhammad Sayyid Ali’s father, Sayyid Ali Badawy, to who several manuscripts are attributed. The chapter focuses on Muhammad Sayyid Ali Badawy’s birth, early life, education, social life, career as a teacher, students, works, family, death and legacy.

2.2 Birth and Early Life

Muhammad Sayyid Ali Badawy’s full name is Muhammad ibn Sayyid Ali ibn Ahmad Badawy ibn Habib Salih ibn Alwy Jamal al-Layl. He was born in Lamu on the 20th of August 1925 CE. Sayyid Ali Badawy, the father of Muhammad Sayyid Ali, was married to Siti Aisha bint Aidarus ibn Habib Salih (d. 1934), the daughter of his paternal uncle and it is through this marriage that Muhammad Sayyid Ali was born, therefore directly linking him through his father and mother as the great grandson of Habib Salih ibn Alwy Jamal al-Layl (1853 – 1935), the famous founder of Riyadha Mosque College - Lamu. In Lamu the Jamal al-Layl family is regarded among the Sharīf families. He was nicknamed Sharif Bahassan by his parents. This was in line with family traditions of seeking blessings from famous ancestral figures. His namesis was the uncle and teacher of Habib Salih during his childhood in Grande Comore.

The Jamal al-Layl family traces ancestry from Hadramout in Yemen through their great grandfather Harun ibn Abdulrahman who migrated to the East African Coast and settled in Patte Island sometime in the 16th Century. Later on, his son Ahmad moved to the

52 Swaleh Sheikh Bahassan (Personal communication, June 15, 2019, Lamu)
53 Ibid.
54 Ibid.
Comoros Islands where Habib Salih was born in the village of Singani on Grande Comore in 1853. At the age of about 18, around 1870, Habib Salih made his first visit to Lamu where he joined his uncle Ali ibn Alwy (d.1915) who had migrated sometime in between 1857-58 and remained in Lamu for a year, studying under several scholars such as Sheikh Abubakar ibn Muhammad ibn Abubakar al-Maawy (d.1882), Sayyid Abubakar ibn Abdulrahman al-Hussain (d.1922), Sheikh Ali ibn Muhammad al-Maawy (d.1924) and his uncle Ali ibn Alwy Jamal al-Layl before his return to Grande Comore. Shortly thereafter, Habib Salih travelled back to Lamu and continued his education under several scholars and permanently resided there. In 1892, he founded the Riyadh Mosque College through a generous endowment of Sayyid Abubakar ibn Abdulrahman al-Hussainy (d.1922). Habib Swaleh passed on in 1935.

According to Noor, the Riyadh Mosque College in Lamu is famous in East Africa because of the significant role it has played in the dissemination of Islamic knowledge and propagation of Islam and as such, the institution is a landmark in the history of Islam in East Africa. Leinhadrt described that the influence of Riyadh Mosque college spreads the length of Kenya and into Tanganyika South of Dar es Salaam and its annual celebration of the Prophet’s birthday, the Maulid, attracts visitors from far and wide. This influence is facilitated by the fact that, the Mosque College has produced students who have traversed East Africa spreading the message of Riyadh Mosque and by establishing madrasas in its model.

The Mosque College prides itself as being the first institution in East Africa to provide boarding facilities to its students. After the completion of the construction of the Mosque in 1901, students used to study inside the mosque and to different teachers across other mosques in town as was the norm, and by the night they would reside in the mosque where

58 Ibid
60 Ibid.
62 Abdulkadir Shariff Bahassan (personal communication, June 15, 2019. Lamu)
beddings and food were freely provided. However, in 1947, Aidarus ibn Habib Salih (d.1968), renovated the mosque and built the Green Dome and the Ribat area which was annexed to the main mosque and was particularly meant for studies and other religious functions.

Muhammad ibn Sayyid Ali Badawy, also popularly known as Sharif Bahassan, was lucky to have been born and bred in an environment consisting of renown relations such as Habib Salih, Sayyid Ahmad Badawy, Sayyid Aidarus and his father Sayyid Ali Badawy. He had an early chance of drinking from the fountains of knowledge surrounding him. His father was a prominent Muslim scholar and jurist and was once appointed the Chief Qadi of Kenya between 1948 – 1950 after the death of Sheikh Al-Amin Mazrui (d.1947).

In 1932 when Madrasatul Falah Islamia in Mombasa was established, Sayyid Ali Badawy was appointed its principal and in 1934, when Madrasatun Najjah Islamia was founded in Lamu, he was requested to head the institution. Later in 1952 on the commencement of the famous Muslim Academy in Zanzibar patronised by Sultan Khalifa ibn Harub, he was appointed as one of the resident teachers. Indeed, Sayyid Ali Badawy was considered among the most prominent scholars of East and Central Africa; apart from being a distinguished educator he was also an eloquent public speaker, prolific writer and poet who authored many treatises.

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63 Ibid
64 Ibid
67 Swaleh Shariff Bahassan (personal communication, June 15, 2019. Lamu)
68 Ibid
69 His works include:
   - Twareeqatul Sahlah li Maarifatil Awqat wal Qiblah
   - Bullat Awwam fee Ahkam Dhawil Arham
   - Khayru Nnida Nadhm Qatru Nnda
   - Twarfatul Ahabb Nadhm Matmul Ahabb
   - Mukhtasar Rub’u Nadhma
   - Mandhumat Nazhatu Nadhar fee Ilmil Mustalah Al-Athar
   - Twarfatul Khallan fee Faanil Bayaan

The above mentioned works are available in manuscript form, none has so far been officially published.
2.3 Family

Muhammad Sayyid Ali was a faithfully family man. As the eldest son, he always had deep love and a caring for his numerous brothers and sisters, majority of whom were as young as his own children. As a polygamous man, he had a large family of his own. From his early twenties, he married several ladies of whom the most prominent are; Fatma bint Said (d.1988), Zahra bint Sayyid Muhammad ibn Sayyid Ahmad Badawy (d.2017) and Sharifa bint Sheikh Ahmad al-Hussainy. From these ladies and others he was blessed with 11 sons and 9 daughters:

Having to take care of such a large family on top of leading a rapidly growing religious institution, meant that his life was eventful yet he never lost focus of what was truly his calling; teaching. Despite economic and social constraints, it was his ambition to be dynamic and improve his teaching styles and methodology so that students will gain better learning benefits.

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70 Sharifa bint Sheikh Ahmad al-Hussainy (personal communication, June 12, 2019. Mombasa)
71 Ibid
72 Shufaa bint Shariff Bahassan and Fatma bint Shariff Bahassan (personal communication, June 11 and 16, 2019. Mombasa and Lamu). The names of his children are:

Male
1. Swaleh Muhammab Sayyid Ali (b.1953)
4. Abdallah Muhammad Sayyid Ali (b. 1964)
6. Hussain Muhammad Sayyid Ali (b. 1965)
7. Alwy Muhammad Sayyid Ali (b. 1968)
10. Mashhur Muhammad Sayyid Ali (b. 1971)

Female
1. Siti Esha Muhammad Sayyid Ali (1949 - 2014)
2. Shufaa Muhammad Sayyid Ali (b. 1951)
3. Ruqaiyah Muhammad Sayyid Ali (b.1955)
4. Fatma Muhammad Sayyid Ali (b. 1957)
6. Muna Muhammad Sayyid Ali (b. 1964)
8. Muzna Muhammad Sayyid Ali (b. 1963)
9. Samaha Muhammad Sayyid Ali (b. 1965)

73 Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
2.4 Education and Training

People who knew Muhammad Sayyid Ali stated that his early education started when he was around four years old and took his earliest walking steps in search of knowledge in the corridors and on the mats of Riyadha Mosque learning how to recite the Qur’an under the tutelage of Sayyid Umar ibn Alwy al-Aidid (d.1961) and Mwalimu Ali ibn Hassan al-Qumry (d.1936) locally known as Mwalimu Bini. During his elementary educative years, the Madrasa, the most common type of school for religious instruction in the Islamic world, had not yet been established in East Africa. The centuries old teaching pedagogy used was rote learning and memorization. From an early age children were taught how to pronounce words correctly, would be sent to a Qur’an teacher to start learning the basics of Qur’an recitation. It was common that upon completion of learning the Qur’an recitation which normally took two years on average, children were allowed to continue with studies on the basic tenets of Islamic doctrine, jurisprudence and ethics. However, in 1934 Muhammad Sayyid Ali joined Madrasatun Najjah of Lamu as one of the first students where his father was the headteacher. Moreover, his paternal grandfather Sayyid Ahmad Badawy ibn Habib Salih had intended to guide him and other students to memorize the Qur’an in its entirety. Unfortunately, Sayyid Ahmad Badawy passed on before Muhammad Sayyid Ali and his circle-mates had completed the memorization of the Qur’an.

As fate would have it, Muhammad Sayyid Ali lost his mother at the age of nine. His mother, Siti Aisha, was one of only two children of Sayyid Aidarus ibn Habib Salih, the other being Siti Fatma, both died during the lifetime of their father. When Muhammad Sayyid Ali reached the age of six or seven his parents divorced. His mother later married Sayyid Muhammad Jawad ibn Abdulwahab Jamal al-Layl (d.2011). He was a scholar form Zanzibar who had been posted to Lamu by the Sultan of Zanzibar, Khalifa ibn Harub.

74 Swaleh Shariff Bahassan (personal communication, June 15, 2019. Lamu)
76 Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
77 Ibid
78 Ibid
79 Abdulkadir Shariff Bahassan (personal communication, June 15, 2019. Lamu)
80 Ibid
81 Ibid.
82 Shufaa bint Shariff Bahassan (personal communication, June 11, 2019. Mombasa)
(d.1960) to occupy the post of Qadi in Lamu.\textsuperscript{83} Upon the death of his mother Muhammad Sayyid Ali was put under the direct care of his maternal grandfather Sayyid Aidarus because of the sudden deaths of his daughters. Sayyid Aidarus showed a lot of affection towards his only grandson.\textsuperscript{84}

The new guardian of Muhammad Sayyid Ali, his maternal grandfather, Sayyid Aidarus was an expert in herbal and Arabic traditional medicine, an art he learnt from his father Habib Salih and Sayyid Muhammad Abi Tayyib (n.d), a scholar from Makkah who resided in Lamu for a few years.\textsuperscript{85} Sayyid Aidarus and Sayyid Ahmad Badawy (the paternal grandfather of Muhammad Sayyid Ali) were brothers who shared the same father but different mothers.\textsuperscript{86} The mother of Sayyid Aidarus was a native of Pate Island on the Lamu Archipelago known as Aisha Bwansalale, whereas the mother of Sayyid Ahmad Badawy was a commorian native Fatma bint Abubakar locally known as Mwana Mkaa.\textsuperscript{87}

When Sayyid Aidarus and Sayyid Ahmad Badawy reached eighteen years, Habib Salih delegated the responsibilities of running the daily activities of the Riyadha Mosque College between them.\textsuperscript{88} Sayyid Ahmad Badawy was six months older than Sayyid Aidarus.\textsuperscript{89} Habib Salih was growing old and weak while at the same time the institution was rapidly expanding in stature and popularity and students were flocking in from different parts of East Africa in large numbers.\textsuperscript{90} Sayyid Ahmad Badawy was handed the duty of teaching while Sayyid Aidarus was given the role of looking after his siblings, welcoming visitors and other socio-economic affairs.\textsuperscript{91} Sayyid Ahmad Badawy passed on in 1939 just four years after the death of Habib Salih at the age of 54 years.\textsuperscript{92} This meant that being the eldest surviving member of the Jamal al-Layl family of Riyadha, Sayyid Aidarus had to shoulder all the responsibilities of the institution. His late brother had left many children including 8 sons, but 6 of them were still too young to be burdened

\textsuperscript{83} Swaleh Shariff Bahassan (personal communication, June 15, 2019, Lamu)
\textsuperscript{84} Ibid
\textsuperscript{85} Noor, M. A. (2014). \textit{A Concise Biographical History of Riyadha Mosque Scholars}. CreateSpace Independent Publishing Platform. p 11
\textsuperscript{86} Swaleh Shariff Bahassan (personal communication, June 15, 2019, Lamu)
\textsuperscript{87} Ibid
\textsuperscript{88} Ibid
\textsuperscript{89} Ibid
\textsuperscript{90} Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
\textsuperscript{91} Ibid
\textsuperscript{92} Ibid
with the demanding duties of Riyadha Mosque College except for two; Sayyid Ali ibn Sayyid Ahmad Badawy (d.1988) and Sayyid Muhammad ibn Sayyid Ahmad Badawy (d.1986).93

Sayyid Aidarus’ upright character and strict stance made him earn respect from the people of Lamu and beyond, young and old alike and devoted much of his time attending to the people who visited him to seek medication from various illnesses and teaching his students the art of traditional Arabic medicine.94 He passed on in 1968 at the age of 85 years.95

Being under the shade of his grandfather, Muhammad Sayyid Ali had a unique opportunity to learn, first hand, the ropes and trade of leading and managing a distinct religious institution, at least as it was at the time.

Under the care of Sayyid Aidarus, Muhammad Sayyid Ali was able to dedicate most of his time to learning. He attended classes at Madrasatun Najjah and participated in various learning circles and was routinely seen transiting from Riyadha Mosque, his main centre of learning, to Masjид Rawdha, Masjид Anisa, Masjид Pumwani, Masjид Jadid and Masjid Nur to benefit from the knowledge. These mosques were patronised by different scholars in Lamu who conducted their darsas such as Sheikh Muhammad ibn Ali al-Maawy (d.1955), Sayyid Muhammad Adnan al-Ahdal (d.1963) and Sheikh Abdallah Khamis (d.1975).96 Surprisingly, Muhammad Sayyid Ali never travelled out of Lamu for the purpose of studying or learning.97 However, his main teacher was his father from whom he learnt on various Islamic sciences like fiqh, taswawuf, aqidah, mustalal al-hadith, tafsir, ‘ilm al-miqat and arabic linguistic and literature subjects such as nahw, sarf, balagha, mantiq and ‘ilm al-arud.98 He also learnt much of ‘ilm al-faraidh, the subject at hand in this study, from his father.99 It is clear that apart from the knowledge that he learnt from his family, Muhammad Sayyid Ali also came under the tutelage of other famous

93 Abdulkadir Shariff Bahassan (personal communication, June 15, 2019. Lamu)
95 Swaleh Shariff Bahassan (personal communication, June 11, 2019. Lamu)
96 Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
97 Abdulkadir Shariff Bahassan (personal communication, June 15, 2019. Lamu)
98 Ibid
99 Ibid
scholars as mentioned above. He took a keen interest in Arabic traditional medicine which he learnt from his grandfather Sayyid Aidarus.\textsuperscript{100}

\subsection*{2.5 Social Life}

People who recall Muhammad Sayyid Ali’s early life reckon that as a young man he was a jovial person, humorous and displayed an easy personality that earned him many friends.\textsuperscript{101} Although his family was perceived to be conservatively religious, it did not hinder him from mingling with all kinds of people from varied social background.\textsuperscript{102} He is said to have taken part in many sporting and leisure activities that young people like himself used to indulge in at the time.\textsuperscript{103} For instance, his greatest hobby was football in which he was a main fixture and played the position of a centerback for his Twaif football club in the local league.\textsuperscript{104} His tall and slightly huge physique gave him advantage in the sport over other players.\textsuperscript{105} He also enjoyed hunting expeditions with his friends within the island and sometimes they would cross to the mainland for a few days for hunting.\textsuperscript{106}

\subsection*{2.6 Career as a Teacher}

In 1942 at the age of seventeen years, Muhammad Sayyid Ali, was given the responsibility of teaching other students at the Ribat of Riyadh Mosque by his father and grandfather Sayyid Aidarus, an endevour he would faithfully devoted himself into until the final days of his life.\textsuperscript{107} The responsibility was handed over to him due to two main factors:

First and foremost, his sharp intellect enabled him to academically surpass many of his contemporaries making him an obvious choice in assisting his father in conducting lessons at the Mosque. It is recalled that he was obedient, selfless and dedicated himself in the service of the institution. There is no record that he engaged in any other business, for profit or otherwise, apart from teaching at Riyadh Mosque College.

\begin{itemize}
\item \textsuperscript{100} Ibid
\item \textsuperscript{101} Mohamed Sheikh Abdallah Khamis (personal communication, June 12, 2019, Lamu)
\item \textsuperscript{102} Ibid
\item \textsuperscript{103} Ibid
\item \textsuperscript{104} Ibid
\item \textsuperscript{105} Ibid
\item \textsuperscript{106} Ibid
\item \textsuperscript{107} Swaleh Shariff Bahassan (personal communication, June 15, 2019, Lamu)
\end{itemize}
Secondly, his father had moved to Mombasa after being appointed the Chief Qadi of Kenya and later lived in Zanzibar to teach at the Muslim Academy. Similarly, the fact that his grandfather, Sayyid Aidarus, was aging and ailing meant that Muhammad Sayyid Ali was to shoulder bigger roles apart from teaching. Together with some of his uncles, especially Shariff Alwy ibn Sayyid Ahmad Badawy (d.2008), who was his agemate, they immersed themselves completely into teaching at the Mosque College. However, Muhammad Sayyid Ali, had to do more and thus literally became the “Pillar of Riyadha” (-Kipia cha Riyadha- in local Kiamu dialect) as many would fondly attribute him. As one package, he became the teacher, principal, administrator and all other functions that had to be carried out despite his young age.

There is no doubt that teaching was Muhammad Sayyid Ali’s top most priority. Muhammad Sayyid Ali’s daily schedule rotated largely around conducting lessons at the Mosque to his ever increasing circle of students from all over East Africa. The routine involved holding darsas after fajr prayers, mid morning, after ‘asr prayers and after maghrib prayers. These darsas turned Riyadha into a beehive of activities posing a major time constrain for Muhammad Sayyid Ali. His students were divided into three categories; ibtida’iyah, mutawasitah and thanawiyah and he based his teachings on the Shafii’ School of Jurisprudence. On Wednesdays after maghrib prayers, he initiated a darsa of tafsirul Qur’an for general public. This darsa continues to be conducted nowadays under the auspice of his son Sheikh Swaleh Bahassan (b.1953).

In between the darsas Muhammad Sayyid Ali attended to individuals who were seeking medication for various illnesses, visiting the sick and performing personal chores. It was his habit to go to the post office everyday at 10:00 am. He rarely travelled out of Lamu unless there was a very important engagement that needed his personal attendance. For this reason, his students had the opportunity to interact with him almost on a daily basis and so learning would take place throughout the year except in the Arabic

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108 Aidarus Shariff Alwy (personal communication, June 15, Lamu)
109 Ibid
110 Abdulkadir Shariff Bahassan (personal communication, June 15, 2019. Lamu)
111 Ibid
112 Ibid
113 Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
114 Ibid
month of *Rabiul Awwal*, the month of Prophet Muhammad’s (p.b.u.h) birthday, when the annual *Maulid* Festival take place at Riyadh Mosque.\(^{115}\)

The *Maulid* of Riyadh is usually a four days festival, and is considered the largest and one of its kind in East Africa.\(^{116}\) It was initiated by Habib Salih and through the decades has gained massive popularity amongst the followers of Sufi Islam. At the time of the year, as expected, Muhammad Sayyid Ali was extremely busy. Visitors flocked in the vicinity of Riyadh Mosque from all parts of the world. They all needed to be attended to by means of meals and accomodation. Apart from religious rituals, traditional and cultural dances were incorporated into the festivities.\(^{117}\) Coordinating and managing the festival was an enormous task to the institution’s leadership and more so to Muhammad Sayyid Ali who carried much of the burden of responsibilities to ensure its success because funding for the *Maulid* depended largely on the benevolence of well wishers, Muhammad Sayyid Ali spent a significant time in the preparation and fund raising for the *Maulid*.\(^{118}\)

During the month of *Ramadan* Muhammad Sayyid Ali’s students got some respite from their teacher as the normal *darsas* were closed. This time was dedicated to *Qur’an*, *tafseer* and *madihi* recitations.\(^{119}\) The *madihi* recitations are conducted after *tarawīh* prayers, which uniquely take place after 12:00 am at Riyadh Mosque.

### 2.7 A Glimpse of his Students and Works

Muhammad Sayyid Ali dedicated all of his adult life to teaching and in propagation of Islam. Hundreds of students passed through him making it practically impossible to name all of them. For the purpose of this work, it will suffice to name just a few, among those who were the most prominent. These include\(^{120}\):

1. Shariff Hussain ibn Sayyid Ahmad Badawy (b.1933) – Lushoto, Tanzania
2. Sayyid Ahmad ibn Ahmad Badawy (b.1939) – Malindi, Kenya

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\(^{115}\) Swaleh Shariff Bahassan (personal communication, June 15, 2019. Lamu)


\(^{117}\) Abubakar Sayyid Muhammad Badawy (personal communication, June 13, 2019. Malindi)

\(^{118}\) Ibid

\(^{119}\) Swaleh Shariff Bahassan (personal communication, June 15, 2019. Lamu)

\(^{120}\) Ibid
4. Maalim Abdillah ibn Uthman an-Naufal (d.2016) – Kismayo, Somalia
5. Sheikh Zubeir Kayongo (d. 2015) – Former Mufti of Uganda
6. Sheikh Ramadhan Musa Sungu (b.1944) – Arusha, Tanzania
8. Sayyid Abdallah Saggaf (b. 1953) – Siu, Kenya
10. Sayyid Abdulkadir ibn Muhammad Sayyid Ali (b. 1954) – Lamu, Kenya

Apart from teaching, Muhammad Sayyid Ali also took from his father other talents including prose and poetry writing. Some of his major works in these genre include:

- Ïḍāh Al-Ghawāmiḍ lil Muḥtадī fī 'Ilm Al-Farāḍī.\textsuperscript{122}
- Ṭas - ḥilūl Adīlāt fī Istikhrāj Aqwāt Swalāt waļ Qiblāh\textsuperscript{123}
- Ītihadul Anam fī ma yatā’laq u be Swiyām\textsuperscript{124}
- Qesswatul Mīraj\textsuperscript{125}
- Hidayatul Muḥtadī’n fī Siyratil Sayyidil Mursaiļn – incomplete.\textsuperscript{126}

These works still in manuscript form were authored specifically as instructional manuals to be used at Riyadh’s Madrasa institutions. In the study of Meerath, the Ïḍāh Al-Ghawāmiḍ lil Muḥtadī fī 'Ilm Al-Farāḍī became the most commonly used.\textsuperscript{127}

\section*{2.8 Death and Legacy}

As the principal of the Mosque college, Muhammad Sayyid Ali had many plans for the institution.\textsuperscript{128} For one, he had a vision of building an academy adjacent to the main mosque. Although he laid the foundations of the building, he passed on a little over a year before the official opening of Mā’had Thaqafa al-Islami\textsuperscript{129} in 1981. The academy has

\begin{itemize}
\item Literally translated: Explaining the ambiguous for beginners in the science of Inheritance
\item Literally translated: Simplifying the evidences in deriving times of prayers and the direction of Qibla
\item Literally translated: Pacification of servants in matters related to fasting
\item A poem in Swahili (Utendi) on Prophet’s Muhammad (p.b.u.h) journey/ascendance to heaven
\item Literally translated: Guidance for the beginners on the life history of the Masters of the Prophets.
\item Swaleh Shariff Bahassan (personal communication, June 15, 2019, Lamu)
\item Abdulkadir Shariff Bahassan (personal communication, June 15, 2019, Lamu)
\item Literally translated as: College of Islamic Culture.
\end{itemize}
been renamed to *Mā’had al-Islami*¹³⁰ at Riyadh Mosque Lamu.¹³¹ Through the years the institution has evolved into what is known today as The Riyadh Mosque and Islamic Centre and is gazetted as a national monument by the government of Kenya¹³². His sudden death at the age of 54 in October 1979 was caused by a stroke while in Lamu.¹³³ He was flown to Mombasa on the same day for medication but succumbed on the way at Malindi.¹³⁴

News of of his death reached Lamu like wildfire. Many were shocked, more so his father who had entrusted him with all the responsibilities of running the Riyadh Mosque College while himself took a background role of advisory and ceremonial leader.¹³⁵ His body was returned to Lamu for burial where a huge crowd attended the funeral prayers.¹³⁶ The magnanimity of sadness that rocked his family, the people of Lamu and particularly his father was massive, he penned down a stanza in a long eulogy in Arabic noting:¹³⁷

كان السّراج مضيئاً منه نورهدي
فأظلم القطر لما ضوؤانكتما
وكان ركن رياض الخيرزاد بما
تراث أجداده أحيا علا وسما

Literal translation: *He was a lamp illuminating the light of guidance, but the lighthouse darkened when the radiance disappeared. He was a pillar of the good Riyadh upon which he expanded, the heritage of his fore-fathers reviving it high in the sky.*

The work and name of Muhammad Sayyid Ali Badawy still resonate with the majority of those engaging in madrasa education in East Africa today, significantly because of his many students who dispersed all over the region and beyond. More crucially his treatises like *Īḍāh Al-Ghawāmid lil Mubtadī fī ‘Ilm Al-Farāid* provides an avenue in the work of preserving Islamic knowledge for a wider audience.

¹³⁰ Literally translated: The Islamic College.
¹³¹ Abdulkadir Shariff Bahassan (personal communication, June 15, 2019. Lamu)
¹³² Gazette Notice no. 3149 dated 06th April 2018
¹³³ Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
¹³⁴ Swaleh Shariff Bahassan (personal communication, June 15, 2019. Lamu)
¹³⁵ Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
¹³⁶ Ibid
¹³⁷ This eulogy in Arabic called *Mirthat* was composed by Sayyid Ali Badawy, the father of Muhammad Sayyid Ali Badawy.
CHAPTER THREE

DEVELOPMENT OF ISLAMIC LAWS OF INHERITANCE IN KENYA

3.1 Introduction

The significance of Muhammad Sayyid Ali Badawy’s text on knowledge of *mīrāth* makes more sense when its contents are explained and clarified with the context of development of Islamic personal laws in Kenya. This chapter therefore, is a discussion of the development of Islamic laws of inheritance in Kenya since the pre-colonial era. It indulges in locating Islamic laws of Inheritance in the constitution of Kenya, analyzing the current situation in the application of the laws of inheritance by the Muslim community and highlights the wisdom behind the legislation of the laws of inheritance in Islam.

3.2 Locating Islamic Laws of Inheritance in Kenya

As judicial officers, *qadis* have made tremendous contributions on the East African coast and have played a role of jurist-consultants in their respective communities and even served as consultants to the state in religious matters at various capacities.\(^\text{138}\) The importance of the *qadis’* court in Kenya is discerned by currently having 38 *qadis* (including the ranks of Chief *Qadi*, Deputy Chief *Qadi*, Principal *Qadi*, *Qadi* I and *Qadi* II) having jurisdiction in the countrywide geographical areas as follows; Mombasa, Nairobi, Kisumu, Malindi, Kilifi, Eldoret, Moyale, Hola, Lamu, Isiolo, Nyeri, Kwale, Garissa, Bungoma, Voi, Nakuru, Wajir, Mandera, Kitui, Machakos, Migori, Kajiado, Thika, Murang’a, Marsabit, Kakamega, Kibera, Garsen, Lodwar, Kitale, Wajir and Kakamega.\(^\text{139}\)

One of the main three avenues that the constitution of Kenya, as shall be highlighted in this chapter, has conferred upon *qadis* in personal law is inheritance, the others include marriage and divorce. The Laws of Succession Act provides for the devolution of the estate to be governed by Muslim law so long as the person professes Islam. Therefore, for proper application of Islamic law of Inheritance, it is imperative that the practitioners, in this case the *qadis* be well grounded in the subject. It is for the purpose of providing a

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strong foundational knowledge of mīrāth that the manuscript of Muhammad Sayyid Ali comes in handy, as one of the very few locally produced texts on mīrāth, and has been used to teach the subject and many qadis in the country would have benefited from its contents but also as students.\textsuperscript{140}

The manuscript of Muhammad Sayyid Ali is also relevant in the effort to analyze the development of Islamic law of inheritance in Kenya, as it offers a critical understanding on the background upon which qadis have applied the law of mīrāth in their execution of duty; the manuscript is solely based on the fiqh school of Shafii’ and so are the majority of the qadis jurisprudential adherence. There may be elements of other fiqh schools in the application of the laws of mīrāth in qadis’ courts in Kenya, specifically from the Hanafi school, but a discussion on the issue is beyond the scope of this study.\textsuperscript{141}

The Islamic laws of inheritance in Kenya are anchored in the country’s constitution which is the sovereign law of the land and supersedes all other laws whether divine or man-made. The Laws of Succession Act of Kenya, Chapter 160 section 2 states:\textsuperscript{142}

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

\textsuperscript{140} Refer to chapter one Page 5
\textsuperscript{141} Kadhi Mohamed Mwambele (personal communication, June 08, 2019. Mombasa)
\textsuperscript{142} Published by the National Council for Law Reporting with the Authority of the Attorney-General. Revised edition 2012.
(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.

From the above-mentioned Act, it is clear that Muslims have a reprieve and have been granted a window in subsection (3) of the Act to apply and implement Islamic laws of inheritance through the institution of the Qadis’ court which is provided in the Qadis Court Act in Chapter 11 of the Constitution of Kenya.

Prior to the British colonial rule, the Kenyan coastal strip was under the territorial patronage of the Sultan of Zanzibar. It should be noted that although no comprehensive information existed on the judicial system in Zanzibar before the arrival of the Sultan in the early 1830’s, Islamic law was the fundamental law administered by the qadis.143 When the qadi was officially recognized by the then Sultan, there existed no official court rooms and disputes were resolved in private homes or even along public streets144.

Initially the British colonial government was not in favour of establishing qadis courts beyond the coastal strip of Kenya, however, the government recognised the existence of religious leadership so as to consolidate its political power and avoid the creation of ‘undesirable centres of powers’.145 Therefore, upon taking over the administration of the Sultans’ territory the British colonial government embarked on so many reforms that included the recognition of Muslims in the 1897 Native Courts Regulations through Section 87 which permitted the application of Islamic law.146 Under British rule, qadis were expected to serve as legal advisors and to decide all cases affecting the personal status of coastal Muslims in regard to marriage, divorce, inheritance and religious disputes. Also, in 1897, an Order-in-Council created the new position of Shaykh al-Islam,

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144 Ibid
later changed to Chief Qadi, charged with hearing appeals from qadis’ courts and serving as Islamic legal advisors to the High Court.\textsuperscript{147}

The Courts Ordinance of 1907 unified the system of Subordinate Courts, re-established the Muslim courts, and made provision for the establishment of purely native tribunals, this in effect redeemed the old pages of observing shariah law and custom on the coast.\textsuperscript{148} This continued until 1920 when the Mohammedan, Divorce and Succession Ordinance was passed.\textsuperscript{149} It recognized existing and future Islamic marriages and applied pre-colonial Qur’anic law in personal law and succession.\textsuperscript{150}

At independence in 1963, the jurisdiction of the qadis’ court was limited to personal status, marriage, divorce and inheritance where all parties profess Islam as their faith and in 1967 the qadis’ Court Act no. 14 was enacted by the parliament of Kenya.\textsuperscript{151} During the promulgation of the new constitution in 2010 the qadis’ Court was retained under Article 170 of the Constitution. Their jurisdiction remained limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess Islam and submit to the jurisdiction of the qadis’ courts.\textsuperscript{152}

\textsuperscript{150} Ibid
\textsuperscript{151} Article 66 (5), The constitution of the Republic of Kenya 1963 (as amended 2008).
3.3 Current Situational Analysis in the Application of the Laws of Inheritance: A Case Study of Mombasa County

Although Islamic law of inheritance is applied in all the *qadis’* courts established in Kenya, the significance of its application is explained and analysed in this chapter through examples from the *qadis’* court in Mombasa. The court in the county of Mombasa is chosen because it is not only one of the oldest courts to have been established it is also one of the busiest. Mombasa County is a densely populated cosmopolitan city with a large Muslim community and is representative of a rapidly developing Kenyan coastal towns that shares the same historical, cultural and religious background like Malindi and Lamu. It is also representative of other major towns in Kenya such as Nairobi, Kisumu and Nakuru in terms of demographic composition and administrational organization. According to Kenya National Bureau of Statistics the population of Mombasa is projected to be 1,266,358 in 2018.¹⁵³

Data collected from the offices of the *qadi* in Mombasa show a clear trend on the need of Muslims seeking arbitration in matters of inheritance at the *qadis’* courts. Generally, Muslims endeavour to conform with *shariah* requirements and they find comfort to abide by it rules. However, there are situations where matters have to be arbitrated before a *qadi* in order to obtain authoritative means to resolve family disputes such as in issues of succession.¹⁵⁴ Tayob observed that Muslim citizens in Kenya turn to the *qadis* to seek redress against other Muslims who are depriving them of their rights in terms of Islamic law.¹⁵⁵ Some Muslims engage in other informal means to solve succession disputes like consulting local *sheikhs* and *imams*.¹⁵⁶

Muslims in Kenya have the opportunity to apply the laws of Islamic inheritance. The political governing system being not only secular but also based in the Judeo-Christian tradition, the government could as well have mandated that all its citizens must adhere, in

¹⁵⁴ Kadhi Mohamed Mwambele (personal communication, June 08, 2019. Mombasa)
¹⁵⁶ Kadhi Mohamed Mwambele (personal communication, June 08, 2019. Mombasa)
all aspects of their lives, to the laws of the country as instituted in the constitution. But as far as marriage, divorce and inheritance are concerned the window opened to Muslims for application of their divine laws is unrestricted, therefore it is only logical that they utilize this opportunity to the maximum. Although the major impediment to the full implementation of Islamic laws of inheritance for Muslims is the fact that those dissatisfied with the qadis’ ruling can have access to the national courts and the qadis’ decision is rendered null and void. This problem is compounded as noted by Hirsch, by the fact that in Kenya the qadis’ courts operate under close supervision of the secular state and that this supervision takes a variety of forms; qadis must comply with the edicts concerning the administrative operation of the courts; their work is periodically reviewed; and any appeals of their decisions are heard in the Kenyan High Court rather than in an Islamic Court of Appeal.

Unfortunately, some Muslims are dissatisfied with Allah’s laws and instead of seeking to resolve their succession disputes Islamically they end up in national courts of law. This may be as a result of an individual’s greed, arrogance or ignorance. It is the duty of Muslim leaders and scholars to educate people and propagate for the application of the divine laws that they have been allowed to use, although they would love to apply the shariah in its entirety, they cannot afford to waste the opportunity they have.

One of the major factors causing family disputes in Kenya is due to succession wrangles. Siblings and family members often end up in bad blood and even cut family ties and relationships due to misunderstanding during the distribution of inheritance shares. The table below represents the number of monthly succession cases reported at the qadis’ court in Mombasa in the years 2017, 2018 and up to the month of March 2019.

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157 Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
158 Ibid.
161 Sheikh Mahmoud Abdulkadir (personal communication, June 15, 2019. Lamu)
162 Sheikh Harith Swaleh (personal communication, June 11, 2019. Mombasa)
163 Data sourced from the Kadhi’s court in Mombasa on June 08, 2019.
Table 3.3.2: Number of Succession Disputes Reported at the Kadhi’s Court in Mombasa

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<td>November</td>
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<tr>
<td>December</td>
<td>23</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td><strong>Total number of succession cases reported</strong></td>
<td>267</td>
<td>319</td>
<td>76</td>
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**Percentage of succession cases reported per year**

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<th>2017</th>
<th>2018</th>
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<tbody>
<tr>
<td><strong>Percentage</strong></td>
<td>18.80%</td>
<td>20.13%</td>
<td>31.93%</td>
</tr>
</tbody>
</table>

It is important to note that most succession cases reported at the qadis’ court are a result of a disagreement between heirs claiming inheritance of property. Otherwise, the heirs would have amicably resolved their disagreements at home or through a local ‘alim. Examples of case laws that can be cited of these disputes and conflicts over distribution of inheritance shares, just to mention but a few, include\(^\text{164}\):

1. *Qadi’s* court case No. 131 of 2013 between Salim Abdalla vs Swabra Abdalla.
   The dispute in this case in the share of inheritance between Salim Abdalla the eldest son of Abdallah Ahmed Uwed (deceased) and his sister Swabra Abdalla who claims that the estate of their father has been shared out as a wedding cake and the residential premises which he (the father) used to stay had become the property of her brother.

2. *Qadi’s* court case No. 18 of 2015 between Hassan Mohamed Abdalla, Fayadh Mohamed Abdalla and Munib Mohamed Abdalla against Nadh’ya Mohamed Abdulhussein.

\(^{164}\text{http://kenyalaw.org/caselaw/cases. Retrieved June 24, 2019.}\)
The dispute in this case in the share of inheritance between siblings over parcel of land no. Lamu/Block/609 wherein a four storey building stands. Apparently, the suit premise is family property which has been passed down from generation to generation.

3. *Qadi’s adhi’s* court case No. 207 of 2015 in the petition by Abdalla Haji Iddi Chaurembo in the matter of the estate of Khadija Mzee Khamis.

In this case, the petitioner Abdalla Haji Iddi Chaurembo deponed that the late Khadija Mzee Khamis was survived by a widower, three sons and four daughters and left stated shares in properties in Kenya and Tanzania. He prayed for; determination of estate-heirs and their respective shares, distribution of the estate among the heirs, vesting of the estate to heirs and any other relief the court deemed just to grant.

4. *Qadi’s* court case No. 17 of 2016 in the matter of dissolution of the *waqf* of Mohamed Bakari in the application of Omar Mohamed Bakari.

In this case, the applicant Omar Mohamed Bakari deponed that he is the only surviving beneficiary of the first generation, all others are deceased left no children except Maamun and Ali Bakari whose children agreed to the dissolution of *waqf*.

From the above shown data, it can be deduced that issues concerning distribution of inheritance are among the major factors contributing to disputes within Muslim families in Kenya.

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165 Endowment
3.4 The Wisdom behind Legislation of Inheritance in Islam

Rules and customs of succession of Arabia before Islam were similar to that of other regions. Highlight of these customs were total restriction of females from inheritance.\textsuperscript{166} Females were as well as reduced property to be sold, bought and inherited and even assigned as payment of debts. Inheritance was mainly for man, fictitious relationship by adoption, oath of brotherhood and patronage were common and boys below the age of puberty could not inherit.\textsuperscript{167}

The situation in pre-Islamic Arabia, and other countries where there had been tribal societies, not only were women deprived of the right to inheritance but even weak and sick persons and minors (children) were given no share in the inheritance. The common practise was that “he alone is entitled to inherit who wields the sword.”\textsuperscript{168}

Generally, inheritance systems in the world and the various laws applicable to them may be classified into two categories; testate and intestate. The bulk of the discussion of the Islamic inheritance system is the intestate succession and such has been described as one of the most comprehensive systems of intestacy worldwide.\textsuperscript{169} The \textit{shariah} offers a restricted and regulated intestacy system where individuals are stripped off their freedom to stipulate how their estate should devolve after their demise.\textsuperscript{170}

In the Islamic perspective, the law of inheritance is governed fairly and transparently. Islam establishes the right of the ownership of property for every individual both male and female in a very humanist way. Islamic law also prescribes the right of transfer of ownership of a person after death to his or her heirs, of all his or her relatives and off springs, without distinction between men and women.\textsuperscript{171}

\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid.
\textsuperscript{170} Ibid.
There is a perceived controversy about the injunction that the male (son) relative receives a share equal to that of two females (daughters) which has given birth to a vigorous equality debate.\textsuperscript{172} Some argue that the differential treatment on the basis of gender regarding inheritance shares violates international human rights and in Islam women’s share in inheritance is unfair and unjustified.\textsuperscript{173} What the proponents of this argument fail to understand is that, in Islamic inheritance the shares of a male are double than that of a female not because a male is worth more, but because the male has the duty to support his family while the female is exempted from any sort of financial responsibility and can spend it all on herself without the need to share.\textsuperscript{174} The fact that in Islamic law as a whole, women are much favoured financially than their male counterparts for the following reasons\textsuperscript{175}:

1. Before marriage any gift given to women is her own and her husband has no right to claim on it even after marriage.
2. On marriage she is entitled to receive a dowry and this is her own property.
3. Even if the wife is rich, she is not required to spend a single penny for household; the full responsibility for her food, clothing, housing, medications and recreation are her husband’s.
4. Any income the wife earns through investment or working is entirely her own.
5. In case of divorce, if any deferred part of the dowry is left unpaid, it becomes due immediately.
6. The divorcee woman is entitled to get maintenance from husband during her \textit{iddat}.

The beauty or comprehensiveness of Islamic law of inheritance will be understood if it is read with the Islamic law of maintenance. An examination of the inheritance law within the overall framework of the Islamic law reveals not only justice but also abundance of compassion for women.\textsuperscript{176}

\textsuperscript{173}Ibid.
\textsuperscript{174}Ibid.
\textsuperscript{175}Ibid
\textsuperscript{176}Ibid.
The divine justness and equitability of the Islamic laws of inheritance have been correctly appreciated by many non-Muslim scholars such as Rumsey (1825-1899) of King’s college, London who is the author of many works on the subject of the Muslim law of inheritance and a barrister-at-law, stated that the Muslim law of inheritance comprises beyond question the most refined and elaborate system of rules for the devolution of property that is known to the civilized world.177

Another notable scholar who regarded the Islamic laws of inheritance as superior is Radford (b. 1935). During her comparative study between the inheritance rights of women under Jewish and Islamic laws she came to a conclusion that unlike the vague Biblical law, the Qur’anic laws of inheritance are extraordinarily specific and the Islamic approach of guaranteeing intestate shares to certain named female heirs results often in these women having greater rights that they would have under Jewish law.178

Following is a brief outline on the wisdom behind the legislation of laws of inheritance in Islam179:

a) To break up the concentration of wealth and ensure equitable distribution of wealth in the society.

b) To reform the other systems of wealth distribution available before Islam and those that are outside the realm of Islam.

c) To ensure certainty in the fate of one’s property after their death.

d) To enhance respect for right of ownership of individuals that they earned through legal means, and not allow any individual, group or government to confiscate their property after their demise.

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e) By asking individuals to write their wills and providing detailed inheritance law, it provides education that individuals are not absolute master of their wealth, rather it is a trust from Allah that they are authorized to spend according to His instructions.

f) The legislation has also developed a knowledge or system of calculation which has been beneficial to the whole world.

g) It is also legislated to serve as a means of attaining the pleasure or the wrath of Allah thereby emphasizing much on the implementation of such laws as divine based.

h) By being aware of the laws of inheritance and will, man is reminded that death is inevitable.

3.5 Conclusion

This chapter has shown the development of Islamic laws of inheritance in Kenya and that they are an integral legislation in the lives of Muslims in Kenya. Pre-colonial era and subsequent government administrations have provided a window for Muslims for the application of Islamic laws of inheritance in the constitution through the office of the Qadi which is part of the arm of judiciary. Further, the study shows a significant number of Muslims attend to the qadi’s courts to solve disputes in relation to the distribution of inheritance to heirs. Lastly, the study highlights the wisdom behind the legislation of laws of inheritance in Islam and refutes some allegations against perceived unjust implementation of specific aspects of the laws of inheritance in Islam such as the award of more shares to male than female heirs.
CHAPTER FOUR
THE DOCTRINES OF ‘AWL AND RADD

4.1 Introduction

This chapter discusses the concepts of ‘awl and radd in the laws of mīrāth that relate to the property of the deceased and how they have been used in the manuscript of Muhammad Sayyid Ali Badawy. The discussion focuses on how deploying ikhtilāf would have been a better approach in clarifying the use of the concepts, yet the manuscript of Muhammad Sayyid Ali Badawy deployed only a one-sided view of the use of the concepts, sometimes to the exclusive view of Shafii Maḥāb. The doctrines of ‘Awl and Radd are located from page 19 to page 25 of the manuscript.

4.2 The Doctrine of ‘Awl

In the manuscript, Muhammad Sayyid Ali use of the doctrine of ‘Awl can be understood from the way he defined it:

العول هو نقصان في أنصباء وزيادة من سهام ذوي الفروض على أصل المسألة

Literal translation: ‘Awl is the decrease of shares and the increase in the number of those with fixed shares on the original issue.  

The above definition of the term ‘awl in the context of the laws of mīrāth, is also used by other jurists. For example, al-Ahdal defined ‘awl as the increase in the number of those with fixed shares and the decrease on the total number of shares to be inherited. Al-Salman noted that ‘awl is the increase in sharers therefore reducing the total amount of shares. From the above definitions, the concept of ‘awl is understood as the proportionate reduction of shares among heirs.

Moreover, linguistically ‘awl is an Arabic term with various literal connotations such as to deviate from the right course, to oppress, to distress, to lose patience, to lament, to cry,

\footnote{Al-Ahdal, A. (2007). ‘anat Twalib fee Bidayah Ilm al-Fara'idh. Beirut: Darul Twuq wa Najaat. p 70}
to support, to provide sustenance of the family and to help. In the Qur’an the term is used to mean an inclination; Allah states,

\[
فَإِنْ حَفَظُتمْ أَلَّا تَعْدِلُوا فَوَحَدَةً أَوْ ما مَلَكْتَ أَيْمَ نُكُمْ مَلَكَتْ مَا أَوْ فَوْحِدَةً تَعْدِلُوا
\]

“...That is more suitable that you may not incline (to injustice).”

It is important to understand that the doctrine of ‘awl rests upon the view that a Qur’anic share does not represent an absolute entitlement which is fixed in absolute terms, but rather, one which is fixed in ratio to the other Qur’anic shares.

While jurists like Saabiq, al-Ahdal and al-Salman agree on the definition of the doctrine of ‘awl, there is no consensus between them on how it was first used in the laws of mirāṭh because the concept is neither based on the Qur’an or Sunnah. It is critical to identify its source in shariah, as is in all jurisprudential issues in Islam, for the purpose of justification of implementation.

After defining the concept of ‘awl, Muhammad Sayyid Ali does not indicate its source neither does he show the differences of opinions among jurists on how it was first used. Instead, he embarks on elaborating on its application by citing examples how the denominator is increased in order to provide equitable shares among heirs. However, Idakwoji is of the opinion that the challenge of ‘awl started during the reign of Caliph Abubakar as-Sadeeq (r.a) and in consultation with some of the companions they arrived at the doctrine of ‘awl. On the other hand, Saabiq argued that the doctrine was established during the Caliphate of Umar ibn Khattab (r.a) when he judged for the proportionate reduction of shares between the husband and two sisters with the consultation of Ali ibn Abi Talib (r.a) and the approval of Abbas ibn Abdul Muttalib (r.a).

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184 Qur’an 4:3
Elsewhere, the concept of ‘awl is reported to be first used when Caliph Ali bn Abi Talib (r.a) was delivering a Friday sermon in Madina (or Kufah—according to Sābiq) and was asked by a woman to explain the wife’s share in inheritance when her deceased husband left behind both parents and two daughters and Caliph Ali is said to have promptly answered that the wife’s share instead of 1/8 now becomes 1/9 and because Caliph Ali was on the Minbar when he gave the verdict, the narration came to be referred as the Minbariyyah case.\textsuperscript{188} It is also argued that it was Zayd ibn Thabit (r.a) who invented the doctrine of ‘awl.\textsuperscript{189} From this discussion, it is evident that the use of the doctrine of ‘awl in the determination of inheritance occurred in the first century of Islam, but became established as a result of ijma of the companions\textsuperscript{190}.

Another significant ikhtilāf as far as the doctrine of ‘awl is concerned is in its practical application, a fact that is not indicated in the manuscript of Muhammad Sayyid Ali. Consequently, according to his definition of the of ‘awl, he is of the opinion that the doctrine can be applied by increasing the common denominator of all the fractional shares to the same value of the sum of all numerators. The numerators are left unaltered. Thus, the total sum of fractional shares is now one and each share has been proportionately reduced.

For example, a woman dies and leaves behind a husband, a mother and a full sister. Initial distribution of fixed shares is as follows; the husband gets a half; the mother gets a third and the full sister gets a half of the inheritance. This means the inheritance is depleted after the allocation of the husband and the sister as they both get one half of the inheritance, therefore the mother who can never be denied her share of the inheritance ends up with nothing. Due to this anomaly, the common denominator of the shares which is 6 is increased as the sum of the numerators which is 8 and then the fixed shares are recalculated. This alteration will ensure the mother gets her share of the inheritance. Calculations have shown that only a limited number of improper fractions can occur to which the doctrine of ‘awl is applied.\textsuperscript{191}

\begin{flushleft}
\end{flushleft}
Table 4.1: Distribution of shares before ‘Awl.

<table>
<thead>
<tr>
<th>Heir</th>
<th>Shares</th>
<th>LCM* = 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Husband</td>
<td>½</td>
<td>3/6</td>
</tr>
<tr>
<td>Full Sister</td>
<td>½</td>
<td>3/6</td>
</tr>
<tr>
<td>Mother</td>
<td>1/3</td>
<td>0</td>
</tr>
</tbody>
</table>

In table 4.1 the distribution of shares is not equitable as the mother (non-deprivable heir) who, in this case, is supposed to inherit a third of the property, is awarded zero shares of the inheritance. *Least Common Multiple.

Table 4.2: Distribution of shares after ‘Awl

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Shares</th>
<th>Common Denominator= 6</th>
<th>Increase of the Common Denominator to the Sum of Numerators = 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Husband</td>
<td>½</td>
<td>3/6</td>
<td>3/8</td>
</tr>
<tr>
<td>Full sister</td>
<td>½</td>
<td>3/6</td>
<td>3/8</td>
</tr>
<tr>
<td>Mother</td>
<td>1/3</td>
<td>2/6</td>
<td>2/8</td>
</tr>
</tbody>
</table>

In table 4.2, the common denominator 6, is increased to the same value as the sum of the numerators which is 8. The numerator of each fraction share is left unaltered. So instead of 8/6 we have 8/8.

Although the above illustrated application of the concept of ‘awl is supported by a majority in the four major Sunni schools of thought, Abdullah ibn Abbas (r.a) opposed it and was of the view that in situations where the sum of the shares of heirs is greater than one, the heirs who are guaranteed a minimum share (spouse, parents and uterine siblings) should not be further reduced and the burden of necessary reduction should fall on those heirs who sometimes inherit as sharers and sometimes as residuary (daughter, granddaughter, full sister and consanguine sister), as the share of this group of heirs is not guaranteed in the same way, even though the argument of Abdullah ibn Abbas (r.a) is
sound, his opinion was preceded by the judicial authority of Umar ibn Khattab (r.a) and has not been adopted in Sunni jurisprudence.192

For the Shia Imamiyah School of thought, Mughniyyah pointed out that they do not accept the application of the doctrine of ‘awl. In order to balance the distribution of shares, they diminish the share of the daughters or sisters, and the shares of the husband, the wife and the parents remain unaltered. They argue this is in accordance with the view of Abdullah ibn Abbas (r.a) described earlier.193

4.3 The Doctrine of Radd

In the manuscript, Muhammad Sayyid Ali defined the doctrine of radd as follows:

الرد هو زيادة في أنصباء الوراثة، ونقصان في السهام وهو ضد العول، ويكون الرد على جميع أهل الفروض ماعدا الزوجين فلا رد عليهم

Literal translation: Radd is the increase of shares and the decrease in the number of those with fixed shares and it is the opposite of ‘Awl. The Radd is applicable to all those with fixed shares with the exception of the spouses, for Radd does not apply on them.194

The definition shows clearly shows that Muhammad Sayyid Ali is of the view of those who accept the application of the doctrine of radd to all heirs entitled to a fixed share with the exception of the spouses. Accordingly, the definition can be divided into two parts; the first part is that the increase of shares and the decrease in the number of those with fixed shares and the second part is that the doctrine of radd is applicable to all heirs with fixed shares except to the spouses. Although there is ikhtilāf in each part of the definition, it is not mentioned in the manuscript.

As for the first part of the definition, other jurists have also defined the doctrine of radd along the same lines as Muhammad Sayyid Ali. For instance, al-Kalwadhuni defined the doctrine of radd as the redistribution of shares to those with fixed shares in the absence of

192 Ibid.
a residuary heir. Al-Khabari’s definition of the concept of *radd* is that it is the increment in the portions of shares and the decrease in the number of sharers. Consequently, Majlis Ulama of South Africa observed the concept of *radd* as the rule of redistribution and it is the opposite of the doctrine of ‘*awl*. Hence, we can deduce that the concept of *radd* implies proportional return or redistribution of the surplus shares of the estate.

The above definitions of the doctrine of *radd* explicitly or implicitly concur with the literal meaning of the Arabic term *radd* which means to send back; bring back, take back; to return; put back; to resist, to oppose or to decline. The term *radd* has been used in the Qur’an with different connotations, for example in one verse it is used to mean to repel, Allah states:

وَرَدَّ اللَّهُ الَّذِينَ كَفَرُوا بِغَيْبَتِهِمْ لَمْ يَنالُوا خَيْرًا وَكَفَى اللهُ الْمُؤْمِنِينَ أَلْقَاتَالَ وَكَانَ اللهُ قَوِيًّا عَزِيزًا

“*God repelled* the disbelievers in the rage; they gained no advantage. Allah thus spared the believers combat. Allah is strong and Mighty.”

And in another verse, it is used to mean to turn back, Allah states:

فَأَرْتَدَا عَلَى ِعَذَابٍ هُمَا فَصَنَصُّنا

“...And so, they turned back retracing their steps.”

Moreover, the first part of definition of the doctrine of *radd* in the manuscript of Muhammad Sayyid Ali implies that the doctrine of *radd* is applicable in the laws of *mirāth*. This view is supported by other jurists such as Sabiq who claimed it is the most preponderant view and that it is applicable to all heirs entitled with a fixed share with the exception of the spouses, but Sabiq included the father and grandfather as among those illegible to receive the redistribution, a point not mentioned in the manuscript of Muhammad Sayyid Ali, hence Sabiq rendered eight classes of heirs eligible for *Radd*:

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199 Qur’an 33:25
200 Qur’an 18:64
Daughter, Son’s daughter, Full Sister, Paternal Sister, Mother, Grandmother, Uterine Brother and Uterine Sister. This is also the chosen view of Caliphs Umar ibn Khattab (r.a), Ali ibn Abi Talib (r.a), Abdullah ibn Abbas (r.a), and majority of the companions, successors, Imam Abu Hanifa and Imam Ahmad ibn Hanbal according to Sabiq.201

Furthermore, Saabiq argued that the doctrine of radd is not applicable unless there is existence of three pillars202:

(i) Availability of heirs with fixed shares
(ii) Remaining residue
(iii) Non-existence of heirs entitled to the residue.

One of the main evidences for justification of the application of the doctrine of radd is the verse of the Qur’an which states;

وَأَوْلَوْا أَلْقَى مَا بَعْضُهُمْ بَعْضَهُنَّ فَبَعْضٌ فِي كِتَابِ اللَّهِ

“...but family members are nearer to one another in the Book of God.”203

Al-Salman is of the opinion that the verse implies it is worthier to redistribute the residue of inheritance to family members of the deceased than to send it to Bayt al-Māl.204 Due to these narrations therefore, we can establish that the doctrine of radd is sourced from the opinions of the companions.

However, al-Kalwadhuni claimed that Caliph Abubakar as-Sadeeq (r.a), Abdullah ibn Zubayr (r.a), Abdullah ibn Umar (r.a), Zayd ibn Thabit (r.a), Imam Malik and Imam Shafii’ are of the view that oppose the application of the concept of radd; they hold that instead of the residue to be re-distributed it should be sent to Bayt al-Māl.205 Although Saabiq clarified that later Maliki and Shafii’ mainstream jurists accepted the application of the doctrine of radd on the condition that if the Bayt al-Māl is corrupted.206

202 Ibid
203 Qur’an 8:75
As for the second part of the definition of the doctrine of *radd*, Caliph Uthman ibn Affan (r.a) was of the view that spouses should be included in the redistribution of the residue because it is more appropriate that they benefit from the inheritance rather than being returned to *Bayt al-Māl*.\(^{207}\) Again, in the manuscript of Muhammad Sayyid Ali, this divergent view of Caliph Uthman (r.a) is not mentioned.

### 4.3.1 Practical Application of The Doctrine of *Radd*

In the manuscript, Muhammad Sayyid Ali explained the practical application of the doctrine of *radd* by categorising it into two categories as follows:

ينقسم مسائل الرد على قسمين: قسم لا يكون فيه أحد الزوجين وقسم يكون فيه أحد الزوجين

Literal translation: the issues of *Radd* are divided into two categories: A category where there is no existence of any of the spouses and a category where there is existence of one of the spouses.\(^{208}\)

This categorization of the doctrine of *radd* is also prescribed by jurists such as al-Ahdal who enhanced it further into four sub-categories\(^{209}\):

(i) A single heir entitled to a fixed share without the existence of any spouse. For example:

A man dies leaving behind only one daughter as the sole heir. The daughter gets \(\frac{1}{2}\) as a fixed sharer and gets \(\frac{1}{2}\) as *radd*. Therefore, the daughter as the sole heir inherits the whole estate.

(ii) A number of heirs entitled to fixed shares without the existence of any spouse. For example:

A man dies leaving behind two daughters as the only heirs. The two daughters share \(\frac{2}{3}\) of the estate as sharers. They also share the remaining \(\frac{1}{3}\) residue as *radd*. Therefore, each daughter inherits \(\frac{1}{2}\) of the estate.

(iii) A single heir entitled to a fixed share with the existence of one of the spouses. For example:

\(^{207}\) Ibid.
A man dies leaving behind a widow and a daughter as heirs. The heirs are assigned their fixed shares:

**Table 4.3: Distribution of shares of widow and daughter before *radd***

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Widow</td>
<td>1/8</td>
</tr>
<tr>
<td>Daughter</td>
<td>1/2</td>
</tr>
</tbody>
</table>

The total sum of these shares is: \(1/8 + 1/2 = 1/8 + 4/8 = 5/8\).

In the absence of any residuary, the residue of 3/8 is returned to the sharer entitled to *radd*, in this case it is the daughter. The final distribution of the estate is thus:

**Table 4.4: Distribution of shares of widow and daughter after *radd***

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Widow</td>
<td>1/8</td>
</tr>
<tr>
<td>Daughter</td>
<td>(1/2 + 3/8 = 7/8)</td>
</tr>
</tbody>
</table>

(iv) A number of heirs entitled to fixed shares with the existence of one of the spouses.

For example:

A man dies leaving behind a widow, a mother and a daughter as the only heirs. The heirs are assigned their fixed shares:

**Table 4.5: Distribution of shares of widow, mother and daughter before *radd***

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Widow</td>
<td>1/8</td>
</tr>
<tr>
<td>Mother</td>
<td>1/6</td>
</tr>
<tr>
<td>Daughter</td>
<td>1/2</td>
</tr>
</tbody>
</table>

The total sum of these shares is: \(1/8 + 1/6 + 1/2 = 19/24\). In the absence of any residuary, the residue of 5/24 is returned to the sharers entitled to *radd*, who in this case are the mother and the daughter. After the widow has been allocated her share of 1/8, the residue of 7/8 is distributed amongst the mother and daughter in a ratio of 1:3, in proportion to their original fixed shares. The final distribution of shares is thus:
Table 4.6: Distribution of shares of widow, mother and daughter after *radd*

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Shares</th>
<th>Shares + Radd</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mother</td>
<td>¼ of 7/8</td>
<td>7/32</td>
</tr>
<tr>
<td>Daughter</td>
<td>¾ of 7/8</td>
<td>21/32</td>
</tr>
<tr>
<td>Widow</td>
<td>1/8</td>
<td>4/32</td>
</tr>
</tbody>
</table>

It is important to note that when there are residuary heirs or any of those entitled with fixed shares besides the spouses, agnate relatives will not inherit. If the deceased only heir is wife or husband, then in spite of these being heirs entitled with fixed shares they will not deprive agnate heirs. After the spouses have taken their shares, the remainder of the estate will go to agnate heirs since there are no residuary heirs nor those with fixed shares who the doctrine of *radd* applies.\(^{210}\)

### 4.4 Conclusion

In this chapter, two doctrines in Islamic laws of inheritance, the doctrines of *‘awl* and *radd*, related to the property of the deceased have been analysed and how they have been used in the manuscript of Muhammad Sayyid Ali Badawy. Furthermore, a discussion on the deployment of *ikhtilāf* of jurists from different schools of thought who hold varied opinions in the practical implementation of the doctrines is presented. As for the doctrine of *‘awl*, the differences arise from three angles; the origin of the concept, the methodology upon which the doctrine should be implemented and whether it is applicable in *shariah*. In the doctrine of *radd*, the differences are two-fold; its applicability in the *shariah* and the methodology of implementation.

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CHAPTER FIVE
INHERITANCE OF THE HERMAPHRODITE, MISSING-PERSON, FOETUS
AND DISTANT KINDRED

5.1 Introduction

This chapter discusses four types of special cases individuals; *Khunthā, Mafqūd, Ḥāmil* and *Ḍawī al-arḥām* in the laws of *mīrāth* and how the manuscript of Muhammad Sayyid Ali Badawy presents the inheritance of these heirs in a one-sided approach. The usage of the concepts in the manuscript, located from page 45 to 65, is problematic because it does not capture *ikhtilāf* of jurists in relation to how the special cases individuals are supposed to inherit in accordance with the laws of *mīrāth*. The discussion will focus on how jurists have differed on the application of the laws of *mīrāth* on these special cases individuals.

5.2 Khunthā (Hermaphrodite)

In the manuscript of Muhammad Sayyid Ali, the term *Khunthā* is defined as:

الخنثى من له آلة الرجل وآلة المرأة، أوله ثقبة لتشبه واحدا منهما

Literal translation: *Khunthā* is he who has male sexual organs and female sexual organs, or has a flat surface that does not resemble any of the sexual organs.211

This definition of *khunthā* is not indicative of whether there is difficulty in determining the dominant gender of the *khunthā*, an aspect which is crucial in accounting for its inheritance in the laws of *mīrāth*, and which is the basis of *ikhtilāf* among jurists. Al-Uthaymeen offered a more inclusive definition of the concept of *khunthā* by stating that the *khunthā* is a person whose gender is not known whether masculine or feminine, because of the existence of both signs of masculinity and feminine, that cannot be distinguished.212 The Majlis Ulama of South Africa defined that a hermaphrodite is a person who is born with the deformity of having both male and female organs and whose gender cannot be determined.213

The term *Khunthā* is derived from the Arabic word *Khanitha* which literally means to be soft, effeminate, to display effeminate manners.\(^{214}\) In the Arabic feminine form it means hermaphrodite.\(^{215}\) Encyclopaedia Britannica elaborates, that hermaphroditism in humans is a condition that involve discrepancies between external genitalia and internal reproductive organs and is described by the term intersex. The conditions are sometimes also referred to as disorders of sexual development (DSDs) and are extremely rare in humans\(^{216}\). The English word hermaphrodite is derived from the mythological character of the influential Roman poet Ovid, which is used for translation purposes actually denotes an individual with both sex organs, there is no actual English word which denotes the Arabic word *Khunthā* \(^{217}\).

As for the rule on how a hermaphrodite should inherit, Muhammad Sayyid Ali stated in the manuscript:

والحكم في إرثه: أنه إن لم تختلف الحال بذكورته وأنوثته كولد الأم والمعتقت المباشر للعتق، فالحكم للاختلاف فيعطي كل حينذ نصيبه من غير توقف

Literal translation: *And the rule for inheritance is that if there is no confusion on the masculine or the feminine state, like the mother’s son and an emancipated slave, the heirs are given their share without delay.*\(^{218}\)

The above statement implies that, for the purpose of inheritance, if the dominant gender of a hermaphrodite can be easily identified, there is no *ikhtilāf* among jurists that they are awarded their shares in accordance with the most dominant gender, this type of *khunthā* is referred to as *khunthā ghayr mushkil*.\(^{219}\) Hussain elaborated that an individual who

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\(^{215}\) Ibid.


resembles a male inherits as a male; an individual who resembles a female inherits as a female. For example:

A man dies leaving a son, a daughter and a child who is a hermaphrodite. If the hermaphrodite is taken as a male, he inherits as a son, thus:

Table 5.2.1: Distribution of shares of hermaphrodite inheriting as a male

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daughter</td>
<td>1/5</td>
</tr>
<tr>
<td>Hermaphrodite Son</td>
<td>2/5</td>
</tr>
<tr>
<td>Son</td>
<td>2/5</td>
</tr>
</tbody>
</table>

If the hermaphrodite is taken as a female, she inherits as a daughter, thus:

Table 5.2.2: Distribution of shares of hermaphrodite inheriting as a female

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daughter</td>
<td>1/4</td>
</tr>
<tr>
<td>Hermaphrodite Son</td>
<td>¼</td>
</tr>
<tr>
<td>Son</td>
<td>½</td>
</tr>
</tbody>
</table>

5.2.1 Determination of the Dominant Gender of a Hermaphrodite

Determination of the dominant gender of a hermaphrodite is a critical issue in accounting for its share of inheritance. As important an issue as it is, yet in the manuscript of Muhammad Sayyid Ali, there is no mention of it at all.

However, jurists hold varied opinions on how the dominant gender of a hermaphrodite is determined. Sabiq highlighted the following different ways:

a) Before puberty

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- If the individual urinates through a specific male genital organ then is considered a male and if is through the use of a specific female genital organ then is considered a female.

b) After puberty
- If the individual grows a moustache and/or beard is considered a male
- If the individual is able to perform an intercourse with a female is considered male
- If the individual endures wet dreams like those of men is considered male
- If the individual grows breasts like those of a woman is considered a female
- If the individual goes through menstrual periods is considered a female.

Furthermore, Pumbaya claimed that the gender of a hermaphrodite can be determined either by counting the number of rib bones at the bottom left side of the body. If it is obvious that the number of rib bones on the left side is less that the right, is regarded as a male, or by instincts and desire either towards a male or a female and if the instincts and desires incline towards a male, is regarded as a male and if they incline towards a female, is regarded as a female.222

Nevertheless, in the situation that the gender of a person cannot be established, according to the manuscript of Muhammad Sayyid Ali, the shares are calculated as follows:

وأما إذا خلقت الحال بذكورته وأنوثته فيعمل باليقين في حقه وحق غيره، ويعامل كل من الوثرة بالأمر في حقه، ويوقف المشكوك فيه إلى البيان أو الصلح

وكيفيه أن تعمل مسا لتين، الأولى بتقدير الذكور، والثانية بتقدير أنوثته، ثم انظري بين المسألتين

بالنسبة الأربع، ثم انظر مال لكل وارث على كلا التقديرين وأعطه الأقل من ذلك، ومن لا يبره في أحد التقديرين لايعطى شيئا، ويوقف الباقى من الجامعة، لأنه مشكوك فيه إلى البيان أو الصلح.

Literal translation: And if there is confusion about the masculine and the feminine state of a hermaphrodite, those (the rest of the heirs) with certainty are allocated their shares.

accordingly and the allocation of shares of the doubtful one (hermaphrodite whose gender cannot be determined) is delayed until the state is known or resolved.

It is accounted by; firstly, considering the state of masculinity and secondly considering the state of femininity and then determining between the two on the basis of the four methods of calculations. And then determine that what belongs to all the heirs and from the two consideration the least amount is awarded to the hermaphrodite. And those that do not inherit, nothing is awarded to them. And that what remains from the total is withheld because there is doubt until the state is known or resolved.

From the statement above it is clear that Muhammad Sayyid Ali exclusively adopts the view that the hermaphrodite is given the lesser share between that of the male and the female. This is the view of shafii’ fiqhi. This view is also known as the principle of obtainal of the lesser share which simply implies that the khunthā al-mushkil will receive the share of either a male or a female, whichever is the lesser of the two, it is also the view of the hanafi fiqhi. The difference between the hanafi and the shafii’ schools is that, for the shafii’ school the rest of the shares are withheld until the dominant gender of the hermaphrodite is established while in the hanafi school the rest of the heirs are awarded their shares accordingly without awaiting determination of the dominant gender.

In the application of this view, the example shown in tables 5.2.1 and 5.2.2 will imply that the hermaphrodite is given the lesser share which is the share of the daughter (¼). Characteristically of the manuscript, this manifest difference between the shafii’ school and hanafi school is not shown, neither are the views of others schools of fiqh indicated.

For instance, differing with the shafii’ and hanafi opinions on the matter, the maliki school, is of the view that in case the hermaphrodite dies without the dominant gender being established or the gender cannot be determined even upon reaching puberty, the hermaphrodite is given the average share of the male and female, that is to say half of the

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223 at-Tamaathul, at-Tadaakhul, at-Tawaafuq and at-Tabaayun
The share of the male and the female combined.\textsuperscript{229} This opinion is based on the report of Amir ibn Shurahbil al-Sha`abi (d.721) who adopted the view of the prominent companion Abdullah ibn Abbas (r.a) which stated that:

"The hermaphrodite takes half of the combined shares of the male and female."\textsuperscript{230}

The hanbali school holds the same view as that of the maliki in the awarding of the shares of the \textit{khunthā al-mushkil} but with a condition that the remainder is withheld if there is possibility of determining the gender, similar to that of the shafii’ school.\textsuperscript{231} In the application of this view, the example stated in tables 5.2.1 and 5.2.2 the distribution will be thus:

\textbf{Table 5.2.3: Distribution of withheld of shares of hermaphrodite}

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Shares</th>
<th>Withheld Shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Son</td>
<td>2/5</td>
<td>2 portions = 4/9</td>
</tr>
<tr>
<td>Daughter</td>
<td>1/5</td>
<td>1 portion = 2/9</td>
</tr>
<tr>
<td>Hermaphrodite</td>
<td>1/4</td>
<td>1 and ½ portions = 3/9</td>
</tr>
</tbody>
</table>

The remainder is either awarded to the rest of the heirs according to maliki school, or held until a dominant gender of the hermaphrodite is determined according to hanafi school, as stated earlier.

All attempts will be made to classify the hermaphrodite either as a male or female. Only when such classification is impossible will the person be classified as \textit{khunthā al-mushkil}. However, with current medical knowledge and advanced science techniques, an individual being labelled as a \textit{khunthā al-mushkil} is very unlikely.\textsuperscript{232} According to Britannica, treatment of hermaphroditism in humans depends upon the age at which the diagnosis is made. Historically, if diagnosed at birth, the choice of sex is made (typically by parents) based on the condition of the external genitalia (which sex organ predominate), after which so-called intersex surgery is performed to remove the gonads of the opposite

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\textsuperscript{229} Ibid.
sex. The remaining genitalia is then reconstructed to resemble those of the chosen sex. In older individuals the accepted gender may be reinforced by the appropriate surgical procedures and by hormonal therapy.\textsuperscript{233}

5.3 Mafqūd (Missing Person)

In the manuscript of Muhammad Sayyid, \textit{al-mafqūd} is defined as:

المفقود هومن خفي خبره ولم تعرف حياته ولا مومته مدة غيبته

Literal translation: The missing person is the one whose news is unknown, neither is it known about his life or death for the period of his absence.\textsuperscript{234}

The above definition provided by Muhammad Sayyid Ali of \textit{al-mafqūd} is fundamentally similar to that of other jurists. For instance, ar-Rawi defined \textit{al-mafqūd} is a person whose whereabouts is not known, his news not available and it is not certain whether he is alive or dead.\textsuperscript{235} Furthermore, Ajani, Abu Bakr and Ibrahim added that the missing person is called \textit{mafqūd al-khabar} and is considered living with regard to his property but dead with regard to others property until his death is ascertained or such a long time passes away in his absence that none of his contemporaries remains alive.\textsuperscript{236}

In the determination of the inheritance of \textit{al-mafqūd}, the bone of contention amongst jurists is about the period upon which it should have lapsed to authoritatively ascertain that \textit{al-mafqūd} is dead beyond reasonable doubt. In his manuscript, Muhammad Sayyid Ali does not capture this contention but rather offers the view of Imam Shafii’ which suggests that the judge should consider the time-period upon which contemporaries of \textit{al-mafqūd} can normally no longer survive, as we shall explain later in this section. On this issue jurists have differed significantly and there are four views:


1. The hanafi school jurists are of the opinion that waiting period for presumption of the death of missing persons is that all their contemporaries in their home town have passed on, and it can also be taken that the life span of individuals is 90 years, thereafter they are presumed dead. It is also reported that the view of Imam Abu Hanifah himself was that the period of 120 years must have lapsed from the time of the birth to presume with a degree of certainty the death of al-mafqūd, but according to his students Muhammad ash-Shaybani the period was 110 years and for Abu Yusuf it was 105 years.

2. Imam Malik was of the opinion that for al-mafqūd to be presumed dead, a period of 70 years must have lapsed from the time of birth. This view is based on a report from the Prophet (p.b.u.h) narrated by Abu Hurairah that the Messenger of Allah said, 

   The life span of (the people from) my ummah is between sixty to seventy years and a few will go beyond that.

3. The most preponderant view of shafii’ jurists for the presumption of the death of al-mafqūd is not the lapse of a specific period of time, but if there is evidence to proclaim death or length of time at the age above which is not normal for life to continue, then a judge can pronounce the death of al-mafqūd. However, in the situation of natural calamities such as plague, shipwreck, battle etc. al-mafqūd can be presumed dead after a waiting period of 7 years.

4. According to hanbali jurists, two situations are put into consideration; if the disappearance was due to natural calamities such as plague, shipwreck, battle etc. the judge is at liberty to pronounce al-mafqūd’s death after a waiting period of 4 years. Otherwise, if the disappearance was due to normal life engagements such as travelling for business purposes, tourism, seeking knowledge etc. the judge has the option to either withheld the presumption of death until after a waiting period of 90 years from

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241 Saheeh Mawaarid al-Dhamma. Hadith no.2087
the time of birth of al-mafqūd or exert expenditure of effort and rule at what he considers most appropriate.\textsuperscript{245}

After defining al-mafqūd, the manuscript of Muhammad Sayyid Ali, elaborated that the inheritance of al-mafqūd is accounted in two ways;

للمفقود حالتان: إرثه من غيره، وإرث غيرمنه، وكل منها حكم

حكم إرثه من غيره: أن يعامل بالأضرافي حق من يرث معه بتقدير حياته وموته


Literal translation: For al-mafqūd there are two states; being a beneficiary and a benefactor, and each has a rule.

The rule for being a beneficiary is that he (missing person) will inherit the least by consideration of his condition of being alive or dead.

And it is confined into three issues: The first is that if there is no difference in shares (by consideration of his condition of being alive or dead), will be given a full share. Secondly, if there is a difference in shares, will be given the least share. Thirdly, if he inherits in one condition and not the other, will not be given anything.\textsuperscript{246}

The statement above implies that the procedure for accounting the shares of missing persons is by first considering that whether they are beneficiaries or benefactors in the inheritance process. As for missing persons being beneficiaries in the inheritance, firstly it should be assumed that they are alive and secondly by assuming that they are dead, shares are allocated by considering the two situations and then they (shares) are set aside.

Al-Ahdal pointed out that in the issue of distributing inheritance to missing persons there is no ikhtilāf among jurists, and provides details on how the shares should be awarded as follows\textsuperscript{247}.

\textsuperscript{245} Ibid.
1. If the amount is similar whether they (missing persons) are considered alive or dead, a full amount is awarded.

2. If the amount is different between the two considerations, the least amount is awarded.

3. If they (missing persons) inherit in one consideration and not the other, nothing is awarded.

For example:

A man dies leaving behind two daughters, a missing son and a son’s son. The estate will be distributed as follows:

Table 5.3.1: Practical application of the distribution of inheritance of missing person

<table>
<thead>
<tr>
<th>Case</th>
<th>Shares for 2 daughters</th>
<th>Shares for Son’s son</th>
<th>Shares for Missing son</th>
</tr>
</thead>
<tbody>
<tr>
<td>If the missing son is alive</td>
<td>½</td>
<td>Excluded</td>
<td>½</td>
</tr>
<tr>
<td>If the missing son is dead</td>
<td>2/3</td>
<td>1/3</td>
<td>-</td>
</tr>
<tr>
<td>Preliminary distribution</td>
<td>½</td>
<td>Nil</td>
<td>-</td>
</tr>
</tbody>
</table>

If the missing son is found to be alive, he will totally exclude the son’s son. A preliminary distribution of the estate can be made as shown in table 5.3.1 until it is determined whether the son is alive or dead.²⁴⁸

reserved for the missing person is distributed among his own heirs.249 Otherwise, if it is established that the missing person died before the death of the benefactor, then the share reserved for the missing person’s heirs devolves upon the heirs of the benefactor who were alive at the time of the death of the benefactor and not upon the heirs of the missing person.250

As for al-mafqūd being a benefactor, the manuscript of Muhammad Sayyid Ali, explained that:

اما ارث غيره منه فحكمه : أن يوقف ماله جميعه إلى ثبوت موتته ببينة أو حكم قاض بموته اجتهادا، وذلك عند مضي مدة لايعيش مثله غالبا،

Literal translation: As for the (mafqūd) being a benefactor, the rule is that all of his/her property will be withheld until his/her death is established or a decree is made by a judge on his death by passing of time upon which all of his contemporaries normally do not live.251

The implication of this rule is two-fold; firstly, as far as the period to determine the life or death of al-mafqūd is concerned, Muhammad Sayyid Ali exclusively adopts the view of Imam Shafii’ upon which there is ikhtilāf with other jurists, as explained earlier in this section. Secondly, with regards to the allocation of al-mafqūd’s inheritance, he adopts the view that because al-mafqūd is a benefactor in the inheritance process, the property will be withheld, and there is no ikhtilāf between jurists. Majlis Ulama of South Africa elaborated that, in this situation missing persons are considered to be alive with regard to their property. Thus, their properties will not be distributed among their heirs by way of inheritance as long as their deaths are not confirmed or decreed by a shariah court.252

The power to determine and decide whether a missing person is alive or dead lies with the court based on evidence, investigation or the expiry of waiting period. When the court decides that a missing person is dead, then his/her time of death is counted as the same

249 Ibid.
250 Ibid.
time the ruling was issued.\textsuperscript{253} If the ruling of a the missing person’s death has been made by the court, but it turns out later that he is still alive, then he would not be able to reclaim the property that has been spent by the beneficiaries, except for leftover property.\textsuperscript{254}

5.4 Ḥāmil (Expectant Mother)

In this section of the manuscript, Muhammad Sayyid Ali does not begin by defining who al-ḥāmil is. It is uncharacteristic with the style of the manuscript when dealing with the other concepts, where the author begins by defining the concept and then explains the laws of mīrāth concerning the particular concept. Peculiarly, with the inheritance of the foetus, the author starts by embarking on explaining the rules appertaining how its shares of inheritance are supposed to be allocated and stated that:

\begin{quote}
يشترط في إرث الحمل شرطان

الأول: أن يعلم وجوده في بطن أمه عند موت مورّثه، بأن ولد لدون ستة أشهر من موت مورّثه
ولأكثر من أربع سنين من موت مورّثه، إن لم تكن الزوجة فراشا لزوج أو سيّد

الثاني: أن ينفصل الحمل كله حيًا حيًا مستقرة، بأن يستهل صارخا ونحوها مما يدل على حياته
\end{quote}

\textit{Literal translation: There are two conditions for the inheritance of an expectant mother:}

\begin{quote}
Firstly, Knowledge of foetus existence in the womb of the mother during the death of the benefactor, and that it should not be born under six lunar months or more than four years if the wife does not share a bed with another husband or master.

Secondly, the foetus must be born alive; an independent life, such that there are manifestations of indications of life like a voice and so on, that informs of it being alive.\textsuperscript{255}
\end{quote}

In order to grasp a proper understanding on how the foetus inherits, it is important to know who the foetus is and comprehend the parameters within which a person is considered a foetus in the context of the laws of mīrāth because it is due to this consideration that there


\textsuperscript{254} Ibid.

is *ikhtilāf* on its inheritance. This fact is glaringly deficient in the manuscript of Muhammad Sayyid Ali.

*Al-Ḥāmil* is an Arabic term derived from the verb *ha-ma-la* which has various meanings including: to carry, bear, hold, convey and to become or be pregnant. In the laws of *mīrāth*, according to ad-Daghistani, *al-ḥāmil* is a child in its mother’s womb. Al-Rawi explained what is meant by *al-ḥāmil* is an embryo which is in the womb of the mother, regardless of whether it inherits or exclude others from inheritance. Hussain defined the foetus as an unborn child entitled to inherit if born alive, it is also known as *Janīn*.

The rules of the inheritance of the foetus provided in the manuscript of Muhammad Sayyid Ali (stated earlier in this section) can be categorised into two aspects; firstly, confirmation of the existence of the foetus in the womb of the mother at the time of death of the benefactor and the period upon which the foetus is conceived to the time of its birth in order to be considered a legitimate child of the benefactor and thus has the right to inherit. Secondly, determination of the life of the foetus at the time of its birth and the rules concerning the allocation of its shares of the property.

As for the first aspect, there is *ikhtilāf* between jurists on the period upon which the foetus is conceived to the time of its birth in order to be considered a legal heir. This period is known as the gestation period which is the period of development of the foetus inside the womb. In the manuscript of Muhammad Sayyid Ali, the gestation period is not less than six months and no more than four years from the time of conception. This is a one-sided view of the matter, there are other views (as shall be explained in this section) that are not mentioned in the manuscript. However, there is *ijma’* among jurists that the minimum

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gestation period is six months\textsuperscript{260} and it is justified by the following two verses of the Qur’an:

\begin{verse}
\text{وَوَصَيْنَا آลِّيِّ النَّاسِ بِوَالِدَتِهِ إِحْسَانًا حُمْلَتْهُ أُمُّهُۥ كُرْهًا وَوَضَعَتْهُ كُرْهًا وَحَمَلَتْهُ وَفِصَّلَهُ ثَلَاثَةَ شَهَرَاتٍ}
\end{verse}

“And We have enjoined upon man, to his parents, good treatment. His mother carried him with hardship and gave birth to him with hardship, and his gestation and weaning (period) is thirty months.”\textsuperscript{261}

\begin{verse}
\text{وَلِلَّدْنِ يُرُضِيْنَ أُوْلَٰدَهُنَّ حُوْلَيْنَ كَانَ مِنْ أَرَادَ أَنْ يُتِمَّ الرَّضَاْعَةَ}
\end{verse}

“Mothers may nurse (breastfeed) their children two complete years for whoever wishes to complete the nursing (period).”\textsuperscript{262}

Since the above verses demonstrate that the nursing and weaning period is twenty-four months (as stated in the second verse) and the gestation and nursing period is thirty lunar months (as stated in the first verse), then it is deduced that the minimum gestation period is six lunar months.

However, there is 	extit{ikhtilāf} on the beginning of the gestation period for presumption of legitimacy of the foetus. According to hanafi school the presumption of legitimacy starts from the time of the marriage contract while for the other three schools (maliki, shafi’i’ and hanbali), the minimum gestation period for presumption of legitimacy of the foetus starts after the consummation of the marriage whether acknowledged by the parties or presumed by law when there is no hindrance to sexual intercourse.\textsuperscript{263}

Furthermore, if the foetus is being carried by a woman who is not the wife of the deceased such as his mother, his sister etc. the child is only eligible to inherit if born within the minimum period of gestation. This is because it is presumed the woman to be having continual sexual relations with her husband.\textsuperscript{264}

In addition, jurists have also differed on the matter of the maximum period for gestation. According to Imam Abu Hanifa and his companions, the longest time of pregnancy is two

\textsuperscript{261} Qur’an, 46:15
\textsuperscript{262} Qur’an, 2:233
\textsuperscript{264} Ibid.
lunar years.²⁶⁵ Imam Shafii²⁶⁶ and Imam Ahmad²⁶⁷ are of the opinion that the maximum gestation period should be four lunar years.²⁶⁸ Imam Malik and Imam Laith puts the limit at five years,²⁶⁹ while Imam al-Zuhri held that the maximum gestation period is nine lunar years.²⁷⁰

The second major aspect in the inheritance of the foetus where there is a manifest ikhtilāf, is the matter of allocation of its shares of the property. Concerning this, the manuscript of Muhammad Sayyid Ali described;

والحكم في ارثه أن يعمل بالأضر في حق من يرث معه بتقدير وجوده، وعدمه، وذكوره وأنثؤته، وانفرادته، وعده، ويوقف المشكوك فيه إلى ظهور حال الحمل

وتنحصر مسائل الحمل إلى أربع مسائل

الأولى: من لايختلف نصيبه بكل تقدير يعطى كاملا من نصيبه، الثاني: من يختلف نصيبه وهو مفترق يعطى الأقل، الثالثة: من حجب بعض التقدير فلا يعطى شيئا، الرابعة: من يختلف نصيبه وهو غير مقدر فلا يعطى شيئا أيضا لأنه لاضبط لعدد الحمل

Literal translation: And the rule of its inheritance (foetus) is to work on the least shares in the rights of those who inherit with it, by considering whether it is in existence, non-existence, masculine, feminine, single and/or numerous, and the doubtful shares are withheld until the state of the foetus is determined.

And the inheritance of the foetus is confined into four issues: Firstly, if there is no difference between shares by all considerations it is given a full share. Secondly, if there is a difference in shares by a consideration it is given the least share. Thirdly, if it is deprived in some considerations it is not given anything. Fourthly, if there is a difference in shares without any consideration it is not given anything because there is no certainty on the number of the foetuses.²⁷¹

²⁶⁸ Ibid.
²⁷⁰ Ibid.
From the above statement, it can be derived that the manuscript of Muhammad Sayyid Ali basically describes that the allocation of the shares of the foetus is based on two conditions:

(i) To consider three factors of the foetus; life, gender and number.

(ii) The minimum number of shares are withheld in trust for the foetus until birth, or deprived depending on the calculations made by taking into consideration of the factors mentioned in point (i).

This approach is definitely long and cumbersome because calculations will have to be undertaken for each scenario depending on the factors in consideration. Other jurists have offered alternative solutions for the determination of the number of shares to be withheld in trust for the foetus, as shall be elaborated in this section.

The justification for the inheritance of the foetus is sourced from a hadīth reported by Abu Hurairah, that the Messenger of Allah (p.b.u.h) said,

“When an infant has raised its voice (and then dies), it will be treated as an heir.”²⁷²

To begin with al-Jibali established that when a person passes away, and if the following conditions hold:

a) It is established that an embryo or foetus exists in the womb of a woman related to the deceased,

b) The foetus’ relationship to the deceased makes it a potential heir,

c) And the foetus is subsequently alive,

This foetus is then a legal heir to the deceased.²⁷³

In such a situation, al-Uthaymeen pointed out that it is advisable to postpone the distribution of the property until the birth of the child²⁷⁴ so as to ascertain its sex, and/or the child may also be stillborn. There are many possibilities for the foetus such as: The

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²⁷² Sunan Abi Dawud, Book 18, Hadith No. 2914
foetus is born dead or is born a living male, or is born a living female or sometimes twins, triplets or quadruplets may be born. To eliminate indulging in all these possibilities, Al-Jibali suggested that modern technological methods, such as the use of ultrasonic scanning may prove necessary.  

However, if the heirs decide on immediate distribution, jurists have differed on the number of shares to be withheld in trust for the foetus. These differences of opinions are not mentioned in the manuscript of Muhammad Sayyid Ali, which otherwise offer a simple approach in determining the number of shares for the foetus, rather than the one presented in the manuscript, as indicated earlier. The views of other jurists in this matter are as follows:

1. According to Imam Abu Hanifa, the portion of four sons, or the portion of four daughters whichever of the two is greater is withheld, and the rest of the heirs are given the smallest of the portions. His companions, Muhammad as-Shaybani is of the view that, portions of three sons or three daughters are to be reserved or whichever of the two is greater while Abu Yusuf’s opinion was that the share of one son and one daughter should be reserved and this latter opinion is the most preponderant in the hanafi school.

2. According to Imam Malik, the distribution of the property is withheld until the foetus is born.

3. According to Imam Shafii’, the share of two sons or two daughters, whichever is greater should be withheld and the shares of heirs who are of the same class as the foetus are also withheld.

4. According to Imam Ahmad ibn Hanbal, the share of two sons or daughters whichever is greater should be withheld.

As per the views presented above, determining the inheritance of the foetus can be complicated and burdensome. In order to avoid such situations, contemporary jurists like al-Jibali, as indicated earlier, have suggested the issue of the foetus can easily be solved in the modern world due to technological advancement. The gender, number and even the period of gestation of the foetus can be determined by the use of ultra sound technology, therefore avoiding unnecessary complications in the allocation and distribution of its inheritance.

5.5 Ḩū al- Arḥām (Distant Kindred)

The concept of distant kindred is defined in the manuscript of Muhammad Sayyid Ali as follows;

ذوالْرحام: هم كل قريب الميت لحظ له في الإرث
أصنافهم عشرة: أب الأم والجدة الساقطان، وأولاد البنات، وبنات الإخوة، وأولاد الأخوات
وبنوات الإخوة للأم والعم للأم، وبنات الأعم، والعمات، والأخوال، والخالات، وأولادهم

Literal translation: Ḩū al-arḥām are relatives of the deceased who do not have shares in inheritance.

There are ten classes of agnate heirs: Maternal grandfather, all grandparents who are excluded from inheritance, children of daughters, daughters of brothers, daughters of sisters, sons of uterine brothers, mother’s uncles, daughters of paternal uncles and aunts, maternal uncles and aunts and those who are born through them.²⁸⁰

The above definition of Ḩū al- Arḥām is also shared by other jurists. For example, al-Khatrawy defined Ḩū al- Arḥām as those relatives who do not inherit neither by fixed shares nor residuary.²⁸¹ Al-Kalwadhuni described Ḩū al- Arḥām as all relatives; those who inherit by fixed shares, residuary and those who do not inherit at all but clarifies that in the context of the laws of mīrāṭh, they are relatives who are not fixed sharers or residuary.²⁸² Rumsey explained distant kindred are every relation, who is neither a sharer

nor a residuary. Al-Jibali specified that agnate heirs are relatives through the female lineage whose relationship to the deceased occurs through one or more female links, and do not normally inherit from a deceased.

In the manuscript of Muhammad Sayyid Ali, distant kindred are further classified into ten classes that can be divided into four major categories as follows:

1. Those relatives directly related to the deceased; daughter’s sons and son’s daughter’s children

2. Those relatives who are the roots of the deceased; excluded grandparents, for example, maternal grandfather and paternal grandmother’s father

3. Nephews and nieces not among the sharers nor residuary; sister’s children, brother’s daughters etc.

4. Uncles and aunts not among sharers nor residuary; paternal aunts, maternal uncles etc.

With regards for the validity of inheritance of the distant kindred, it is noted in the manuscript that:

يشترط في توريثهم ثلاثة شروط

الأول: عدم العاصب

الثاني: عدم انتظام بيت المال

الثالث: عدم ذوي الفروض غير الزوجين

Literal translation: There are three conditions for the inheritance of distant kindred:

1. Non-existence of heirs entitled to the residue,

2. Non-existence of uncorrupted Bayt al-Māl

3. Non-existence of heirs with fixed shares except the spouses.

From the above statement, it is discerned that in the manuscript, Muhammad Sayyid Ali exclusively adopts the view of shafi’i school of thought, which allows distant kindred

to conditionally inherit, although Imam Shafii himself was of the opinion that they do not inherit, later shafii’ jurists issued a verdict accepting them to inherit, specifically because of the lack of existence of Baytul-Māl that was not corrupted.287 This view also is the favoured view hanafi288 and hanbali289 schools and it is based on the following verse of the Qur’an;

وَٱلَذِينَءَامَنُوا مِنْ بَعْدِ وَهَاجَرُوا وَجَهَدُوا مَعَكُمْ فَأُولِيكَ مِنْكُمْ وَأُولُوا الْأَرْحَامِ بَعْضُهُمْ بَعْضٍ بِغَيْبٍ فِى كِتَابِ اللَّهِ إِنَّ اللَّهَ بِكُلِّ شَيْءٍ عَلِيمٌ

“And those who accept faith subsequently and adopt exile and fight for faith in your company they are of you, but kindred by blood have prior rights against each other in the Book of God verily God is well acquainted with all things.”290

It is also reported by Aisha that the Messenger of Allah (p.b.u.h) said;

“The maternal uncle inherits from the one who has no heirs.”291

However, in the manuscript, Muhammad Sayyid Ali does not mention the fact that as far as the issue of the inheritance of distant kindred is concerned there is a clear dichotomy of opinions among jurists. The view of the maliki school of thought is that distant kindred are not supposed to inherit,292 because there is no definitive evidence in the Qur’an, therefore, they cannot be considered as heirs. This view is also favoured by Zayd ibn Thabit (r.a).293 The basis of this opinion is the following verse in the Qur’an;

لِلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ ٱلْوَلِيدَانِ وَٱلَّذِينَ بَعْضُهُمْ أَوْلَى بِبَعْضٍ فِى كِتَابِ اللَّهِ إِنَّ اللَّهَ بِكُلِّ شَيْءٍ عَلِيمٌ

287 Ibid.
290 Qur’an 8:75
291 Jam’ at-Tirmidhi, Vol 4, Book 3, Hadith no. 2104
“There is a share for men from what is left by parents and those nearest related, and there is share for women from what is left by parents and nearest related, whether the property be small or large, a decided share.”

Although there is a clear-cut dichotomy of opinions between jurists with regards to the applicability of the laws of mīrāth to distant kindred the most favourable view is that held by the majority of jurists that includes; shafii’, hanafi, hanbali and companions Umar ibn Khattab (r.a) and Muadh ibn Jabal (r.a).

It is also important to understand that some jurists have pointed out that the rules pertaining to the inheritance of distant kindred are as follows:

a. When there are distant kindred of the first category, those of the other three categories will not inherit and similarly through the other categories.
b. In any one category, those closest to the deceased will inherit.
c. In certain cases, a member of the distant kindred will deprive another member on the same level. This happens if the depriving member’s ancestors would have deprived the other member’s ancestor if they both were alive.

Lastly it is appropriate to close this section by providing a couple of practical applications of the concept of inheritance of distant kindred. For example:

1. A deceased is survived by only the children of three granddaughters (daughter’s daughters) consisting of 10 males and 12 females. The estate will be divided into 32 shares. Each male receives two shares and each female 1 share.

2. A deceased is survived by only the children of several grandsons (daughter’s sons) and granddaughters (daughter’s daughters) as follows:
   8 sons and 6 daughters of 3 grandsons
   6 sons and 8 daughters of 4 granddaughters.

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294 Qur’an 4:7
297 These categories are mentioned earlier in the chapter on page 71
Since the heirs consists of offspring of both grandsons and granddaughters, the deceased estate will be divided into three equal shares. Two shares will be awarded to the children of the grandsons (i.e. to the 8 males and 6 females). These two shares will be divided into 22 shares. Each son will receive 2 shares and each daughter 1. 

\[ 8 \times 2 = 16 \text{ and } 6 \times 1 = 6 \Rightarrow 16 + 6 = 22 \]

The remaining one share will be divided among the children of the granddaughters (i.e. to the 6 sons and 8 daughters). This one share will be divided into 20 shares 

\[ 6 \times 2 = 12 \text{ and } 8 = 20. \text{ Each male will receive 2 shares and each female one.}^{299} \]

### 5.6 Conclusion

This chapter’s discussion was on the laws of *mīrāth* of four special cases heirs; the hermaphrodite, missing person, foetus and agnate heirs and how they have been used in the manuscript of Muhammad Sayyid Ali. The discussion focused on how deploying *ikhtilāf* would have been a better approach in clarifying the use of the concepts, yet the manuscript of Muhammad Sayyid Ali Badawy deployed only a one-sided view of the use of the concepts, sometimes to the exclusive view of shafii’ *Madhab*. With regards to the special cases individuals, *ikhtilāf* is mainly based on their application in the laws of *mīrāth* and the methodology of implementation.

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299 Ibid.
CHAPTER SIX
CONCLUSION AND RECOMMENDATIONS

6.1 Introduction
This chapter summarizes the study findings, conclusions and recommendations. The chapter is guided by the main objective of the study which was to study six concepts in Islamic law of inheritance in a manuscript written by Muhammad Sayyid Ali Badawy and analyse the diversity of opinions on the use and application of the concepts. To fulfil the main objective the study specifically sought; to document a brief biography of Muhammad Sayyid Ali Badawy, analyze the development of Islamic laws of inheritance in Kenya, explain the stated six concepts, show how deploying ikhtilāf would have been a better approach in clarifying the use of the concepts and finally make conclusions and recommendations.

6.2 Conclusions
The backbone of this study was anchored in the discussion and analysis of six concepts in Islamic law of Inheritance with specific reference to an Arabic manuscript written by Muhammad Sayyid Ali Badawy titled Īdāh Al-Ghawāmiḍ lil Muftadī fi 'Ilm Al-Farā’ād

Moreover, the study narrated a brief biography of Muhammad Sayyid Ali Badawy, the author of the manuscript. It was found out that he comes from a pedigree of writers of manuscripts on Islamic knowledge like his father who is attributed as the author of several of them. The narration focused on his birth, early life, education, social life, career as a teacher, students, works, family, death and legacy. During the period of the writing of the manuscript, the author was the Principal and Administrator of Riyadhha Mosque College in Lamu. According to some of his students’ accounts, the author wrote the manuscript for the purpose of simplifying the science of Islamic inheritance to his students and as an instructional manual. He also wrote other manuscripts on different subjects that are yet to be published.

Furthermore, this study found out that Islamic laws of inheritance are an integral part of legislation in the lives of Muslims in Kenya. Pre-colonial era and subsequent government
administrations have provided a window for Muslims for the application of Islamic laws of inheritance in the constitution through the office of the qadi which is part of the arm of judiciary. Further, the study realized a significant number of Muslims attend to the qadi’s courts to solve disputes in relation to issues of inheritance. Data collected from the offices of the qadi in Mombasa showed a clear trend in the increase of the number of Muslims seeking to resolve inheritance disputes at the qadi’s court, particularly in areas where there is a large presence of Muslim inhabitants. In the same breadth, the study highlighted some of the wisdom behind the legislation of laws of inheritance in Islam and refutes some allegations against perceived unjust implementation of specific aspects of the laws of inheritance in Islam such as the award of more shares to male than female heirs.

The main focus of this study was to discuss six concepts on the laws of mīrāth which were intentionally divided into two categories; on one hand are the doctrines of Awl and Radd that specifically deal with the property of the deceased, and on the other, are conditions for al-Khunthā, al-Mafqūd, al-Ḥāmil and Ẓāwī al-arhām which are special cases individual heirs.

In the doctrines of ‘Awl and Radd the study showed jurists from different schools of thought hold varied opinions in the practical implementation of the concepts. As for the doctrine of Awl, the differences arose from three angles; the origin of the concept, the methodology upon which the concept should be implemented and whether it is applicable in shariah while in the doctrine of Radd, the differences are two-fold; its applicability in the shariah and the methodology of implementation.

The four types of special cases individuals are the hermaphrodite, missing person, foetus and agnate heirs. The study also presented existence of differences of opinions among jurists in regards to the special cases individual heirs, application in the shariah and the methodology of implementation. For the hermaphrodite, the jurists differed on the ways of determination of the gender and the number of shares to be awarded if it is difficult to identify a dominant gender of the hermaphrodite. The bone of contention amongst jurists as far as the issue of inheritance of the missing person is concerned is about the period upon which it should have lapsed to authoritatively ascertain that the missing person is dead beyond reasonable doubt. In the case of the foetus, if heirs decide on immediate distribution of the property, jurists have differed on the number of shares to be withheld
in trust for the foetus and distributed to the remaining heirs, there is also contention whether the immediate distribution is valid. There is also no agreement among jurists for the length of minimum and maximum periods of gestation. As for agnate heirs, jurists are sharply divided on whether the agnate heirs have a right to inherit or do not have a right to inherit.

The study provided a wide perspective in the application of Islamic laws of inheritance as it offered to identify differences of opinions among jurists and their implementation of the discussed concepts. It showed the diverse application and interpretation of the concepts in accordance to diverse authorities of shariah in order to avoid conclusions that are sometimes inconsistent with the actual diverse meanings of the concepts used.

6.3 Recommendations

Lack of production and availability of literature in relation to Islamic laws of inheritance based in the local social context in Kenya, has resulted in the subject being perceived as cumbersome and incomprehensible by many Muslims. On the contrary, Islamic laws of inheritance are an integral part of shariah, and the fact that it calls for indulgence in its application almost on a daily basis for many Muslim families, therefore, it should provide an opportunity for a clear understanding of the concepts.

A few local scholars have exerted a considerable effort in writing manuscripts in Arabic and Kiswahili in order to explain different concepts and aspects of the Islamic laws of inheritance and as instructional manuals to their students, but the approach has been monolithic and without putting into perspective divergent views in the application of shariah. In most cases, the manuscripts have not been published and the Arabic manuscript of Muhammad Sayyid Ali Badawy is one good example.

There is a need to fill this gap and diagnose the situation to remedy the hustle of Muslim families flocking the qadi courts seeking intervention for unnecessary family disputes, which otherwise, will have been amicably resolved at home. In order to address this problem, I recommend:

1. The fact that the manuscript of Muhammad Sayyid Ali Badawy is considered a reliable instructional manual in the science of Islamic laws of inheritance in madrasas in East
Africa shows it is an important text that provides an avenue for further research on its content in terms of translation and commentary in its entirety as this study partly dealt with analyzing just six concepts.

2. Locally produced manuscripts on the subject of Islamic laws of inheritance, can be utilized by scholars and researchers as a basis for the production of translations and commentaries on a wide perspective of the subject in context with the local societal needs and aspirations.

3. Formulation of ways and means by Muslim scholars and leaders in order to create awareness on the role and importance of Islamic laws of inheritance to solve family disputes. This can be done through publishing relevant literature on the subject, trainings, seminars, meetings and discussions on the matter.

4. Codification of Islamic laws of inheritance in Kenya based on divergent views and the local context in the application of *Shariah*; this will help in simplifying the understanding of the subject and will save time for the common Muslims in researching on the wider corpus of Islamic laws of inheritance as well as other stakeholders who may need firsthand information on Islamic laws of inheritance.
Reference

Books


### Treatises and Journal Articles


Web Articles


APPENDICES

Appendix 1: List of Interviewees.

Appendix 2: Images of some pages of the manuscript
Appendix 3: Muhammad Sayyid Ali Badawy with his father c.a 1976

*Image courtesy of Riyadha Mosque and Islamic Centre Library, with permission from Swaleh Muhammad Sayyid Ali.*
Appendix 4: Photographic image of Riyadha Mosque – Lamu c.a 2018

*Image courtesy of Riyadha Mosque and Islamic Centre Library, with permission from Swaleh Muhammad Sayyid Ali.*
Appendix 5: Photographic image of the entrance to Maahad Islami – Riyadha c.a, 2018

Image courtesy of Riyadha Mosque and Islamic Centre Library, with permission from Swaleh Muhammad Sayyid Ali.
Appendix 6: Students reciting Qur’an at Riyadha Mosque – Lamu c.a 2018

Image courtesy of Riyadha Mosque and Islamic Centre Library, with permission from Swaleh Muhammad Sayyid Ali.
Appendix 7: Interview Consent Form

I am Mohamed Aidarus Noor, a Master’s student in the Department of Philosophy and Religious Studies of Pwani University. I am undertaking this research as a fulfillment of the requirements for the award of degree. My research is on the commentary on the Manuscript of Muhammad Sayyid Ali Badawy (d.1979) titled: (Iydhāh Al-Ghawāmidh Lil Muḥtadī fī 'īlm Al-Farā'idh). I am kindly requesting you to voluntarily participate in this research. The information you will give will be treated with utmost confidentiality and will only be used for research purposes. Thank you in advance for accepting to take part in this study.

I______________________________ (interviewee) hereby authorize Mr. Mohamed Aidarus Noor (interviewer) from Pwani University, to gather information from me for the purpose of research. I fully agree to be interviewed and I will voluntarily give information that will be necessary for the research. For any further enquiries arising from the research you can contact Ethics and Review Committee at Pwani University or my lead supervisor: Dr. Ali Hemed Awadh (email: ali.hemed@pu.ac.ke)

Interviewee

Signature________________________________
Date____________________________

Interviewer

Signature________________________________
Date____________________________
Appendix 8: Interview Guide for Family Members

Dear Sir/Madam

I am Mohamed Aidarus, a student from Pwani University pursuing master’s degree in Islamic studies. I will kindly require your assistance in order to make me able to successfully carry out a research on some aspects of the life of Muhammad Sayyid Ali Badawy.

The following is an outline of questions to be used with the family members.

Form Serial no: ________

Name: _______________________________  Sex __________________________

Age: ________________________________  Relationship: ___________________

  • What do you know about Muhammad Sayyid Ali Badawy
  
  • How is he related to you?
  
  • Please narrate something about his life.

Thank you for your response
Appendix 9: Interview Guide for Students of Muhammad Sayyid Ali Badawy

Dear Sir/Madam

I am Mohamed Aidarus, a student from Pwani University pursuing master’s degree in Islamic studies. I will kindly require your assistance in order to make me able to successfully carry out a research on some aspects of the life of Muhammad Sayyid Ali Badawy.

The following is an outline of questions to be used with the family members.

Form Serial no: ______

Name: ___________________________  Sex: ___________________________

Age: ____________________________  Location: ______________________

Profession: _______________________

• What do you know about Muhammad Sayyid Ali Badawy

• How is he related to you?

• Please narrate something about his life.

Thank you for response.
Appendix 10: Interview Guide for Prominent Muslim Scholars

Dear Sir/Madam

I am Mohamed Aidarus, a student from Pwani University pursuing master’s degree in Islamic studies. I will kindly require your assistance in order to make me able to successfully carry out a research on some aspects of the life of Muhammad Sayyid Ali Badawy.

The following is an outline of questions to be used with the family members.

Form Serial no________

Name________________________________             Sex_________________________
Age_________________________________              Location______________________

• What do you know about Muhammad Sayyid Ali Badawy
• How did you come into contact with him?
• How are Islamic laws of inheritance important in the lives of Muslims in Kenya.
• What are the challenges facing the full implementation of the Islamic laws of inheritance in Kenya?

Thank you for your response.
Appendix 11: Interview Guide for Madrasa Teachers

Dear Sir/Madam

I am Mohamed Aidarus, a student from Pwani University pursuing master’s degree in Islamic studies. I will kindly require your assistance in order to make me able to successfully carry out a research on some aspects of the life of Muhammad Sayyid Ali Badawy.

The following is an outline of questions to be used with the family members.

Form Serial no_______

Name_________________________ Sex_________________________

Age_________________________ Location______________________

• Why do you use Ḥadhāh Al-Ghawāmidh Lil Mubtādī fī 'Ilm Al-Farāīd as an instructional manual?

• How do you use the manuscript?

• What are the advantages and challenges of using the manuscript?

Thank you for your response.