

## THE CONTEMPORARY APPLICATION OF THE RULES ON *AL GHARAWAINI* (THE TWO BRIGHT STARS): REVISITING *UMARIATĀN* CASES

JAMEL R. CAYAMODIN\*

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*This paper revisits the application of the rules on Al Gharawaini (The Two Bright Stars) or also popularly known as Umariatān Cases in the classical period. It proposes juridical application of the rules in a certain situation that requires broader dimension of Islamic law especially in the contemporary Muslim society. It endeavors to highlight formulae used for the rectification of solution and just distribution of inheritance (mīrath) of a deceased Muslim considering some inevitable circumstances that might have been overlooked during the first inception of the rules in the classical period. The study provides guidelines on how to properly apply such rules according to fundamental teachings of the Qur'an and Sunnah. It underlines the application of the rules in two distinct situations so as to uphold the Islamic principles of mercy to all mankind (rahmatan lial'ālamīn) and humanitarianism without repealing what was advanced by Caliph 'Umar bin Al Khattāb (R.A.), thus contribute and lend suitable exertion in the contemporary interpretations and application of Islamic law.*

**Keywords:** *Islamic Law, Al Gharawaini, Humanitarianism, Succession, Inheritance, Umariatān*

### Introduction

In the words of Coulson “if law reflects the soul of a society, one would expect the laws of succession to reflect social change because the law of succession is a mirror of social values and family ties.”<sup>1</sup> One of the unrelenting questions on the implementation of Islamic law on succession and inheritance, given the constant social change in the society, is its relevance across cultures and nations whether or

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\* Assistant Professor and College Secretary at the Institute of Islamic Studies, University of the Philippines. He is a Shari'a law Practitioner, and former Special Shari'a Bar Reviewer and Examiner under the Supreme Court of the Philippines.

not Muslims are dominant population in the subject country of implementation, and the challenges posed by the accelerating pace of modernization. This question affects Muslims socially and economically given the nature of Islam as a way of life that does not separate spiritual, legal and material meanings. The challenge posed by this gap is even bolder in the plight of Muslim minorities in various countries including the Philippines since the codification of P.D. 1083.<sup>2</sup> This issue on the implementation of Islamic law on succession incites Islamic legal scholarship in order to portray the significance of Islamic legal institutions and basic tenets and maintain their relevance in the modern society.

There was nothing inevitable as opined by Powers about the shape taken by the science of inheritance, as the understanding of early Muslim communities on the Qur'anic verses and Prophetic traditions on this science become the subject of controversy during the lifetime of the Prophet Muhammad (S.A.W.) and in the years immediately following his death.<sup>3</sup> However, one must be acquiescent on the nature of Islamic law which has been likened, as explained by Nyazee, to an ever-growing tree which seed was sown in the hearts and minds of men by the Noble Prophet (S.A.W.) fourteen hundred years ago.<sup>4</sup> Since then, Islamic law, as characterized by graduality and universality, has taken the foundation, consistently developed, and, in one way or another, institutionalized its branches in almost every corner of the world.<sup>5</sup> Its evolution and growth never ceased reaching different cultures, peoples, and races, which often times subjected to circumstantial requirements.

One of the components of Islamic law on succession that face controversies in the classical era and confusions in the contemporary period, which was also put under debate between and among legal scholars during the orthodox Caliphates particularly during the reign of Caliph 'Umar bin Al Khattāb (R.A.), is the rule governing *Al Gaharawaini* (The Two Bright Stars) or also popularly known as the *Umariatān* Cases. The debate on the application of these rules had seemingly appeared to have been ended during its first inception with only light disagreements postured on its adoption, without critically analyzing its broad and rational application in the contemporary

Muslim societies which should be subjected to circumstantial requirements. The main thrust of this paper is to fill in this gap found in the existing literature on the law of succession and inheritance in Islam, and shed light on the controversy on the rules governing *Umariatān* cases.

### **The Origin of *Al Gharawaini* (The Two Bright Stars) and its Governing Principles**

*Al Gharawaini* (The Two Bright Stars) or also known as *Umariatān* cases refer to the two cases decided by Caliph ‘Umar bin Al Khattāb (R.A.), which stand as precedents for the mother’s share of one-third of the residue when she concurs with the father and any of the spouses. The fixed share of the mother in the Qur’an is one-third when she concurs with the father and in the absence of child[ren] or son’s child[ren], how low so ever, or two or more brothers or sisters whether full or half.<sup>6</sup> However, Caliph ‘Umar bin Al Khattāb (R.A.) during his reign decided to give the mother one-third of the residue if she concurs with the father who inherits two-thirds of the residue after one of the surviving spouses gets his/her share. This view was widely accepted by the majority of companions (*jamhūr*), which were called “*AlGharawaini*” (The Two Bright Stars) because of their popularity in the second quarter of the 7<sup>th</sup> Century.

In the *Al Muwatta* of Imam Malik bin Anas, he explains that mother always inherits one-third of the property when there is no surviving child[ren], son’s child[ren] or how low so ever, or two or more siblings of the decedent, except for two cases which Imam Malik was referring to the *Umariatān* cases.<sup>7</sup> He argued, concurring to the views of Hussain<sup>8</sup> and Arabani<sup>9</sup>, that the one-third share of the mother, which will be taken from the residue should she survived with the father and spouse only, was based on the Qur’anic verse below:

وَلِأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ  
إِن كَانَ لَهُ وَلَدٌ ۚ  
فَإِن لَّمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَتْهُ أَبَوَاهُ  
فَلِأُمَّهَ الْثُلُثُ ۚ فَإِن كَانَ لَهُ إِخْوَةٌ فَلِأُمَّه  
السُّدُسُ ۚ

*And for one's parents, to each one of them is a sixth of his estate if he left children.*

*But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth.<sup>10</sup>*

However, the above verse did not specify whether the one-thirdshare of the mother should be taken from the whole inheritance or only from the residue. Likewise, in some cases the presence of two or more siblings of the decedent will decrease the share of the mother to a sixth despite the presence of the father. This fluctuating nature of the share of the mother when she coexists with the child[ren] and/or two or more siblings of the decedent whether or not the father exists indicates that her one-third share or *thuluth* as literally revealed in the abovementioned verse should be taken from the whole inheritance and she should not inherit as residuary heir. Other inevitable reasons of why the mother should always inherit her one-third Qur'anic share from the total inheritance will be discussed clearly in the subsequent sections.

On the other hand, Alauya, one of the few Muslim-Filipino jurists on Islamic law on succession and inheritance, explains that the very basis of the adoption of *Al Gharawaini* is the Qur'anic verse below:

لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثَيَيْنِ ۗ

*“for the male, what is equal to the share of two females”.*<sup>11</sup>

The subjects of the above verse in the study of Islamic law on succession and inheritance are always attributed to descendants and the collaterals of the decedent with the exception of uterine brothers and sisters (*kalālatan*) and descendants who have female interventions or also known as distant kindred (*dhaw-ul-arbām*). Conversely, by means of comparison, the son, son's son, german brother, and consanguine brother have no specific shares being legal residuary heirs in their own rights (*asabah bi-nafsihi*) while the father has specific share if he does not inherit as residuary heir unlike the formers. In other words, all residuary heirs in their own rights have no specific

shares as they always inherit the residue which is not applicable to the father. This is because the father, based on the language of the law, is not a legal residuary heir in his own right, as well as the mother who is not also a legal residuary heir in another's right compared to son's daughters, son's son's daughters, german sisters, or consanguine sisters. This is to say, concurring to the views of Qadri<sup>12</sup>, the legal definition of residuary (*'asabah*) does not comprise both parents. The parents were never categorized as residuary heirs in the Qur'an and during the lifetime of the Prophet (S.A.W.) until the reign of the first Caliph Abubakr (R.A.), they were only categorized as residuaries when Caliph 'Umar bin Al Khattāb (R.A.) adopted the rules during his caliphate. In addition, the one-third or one-sixth share of the mother from the inheritance is not sanctioned by the presence of the father because whether or not the father survives, the mother will inherit her one-third or one-sixth share from the decedent's inheritance subject to the presence of descendants and/or two or more brothers and sisters whether full or half.<sup>13</sup>

It can also be argued that both parents have specific shares as mentioned in the Holy Qur'an when they are categorized as Qur'anic heirs (*ashāb-al-furūdh*) who can never be totally excluded. Although the father may inherit under the first category of residuary heirs in his own right (*'asabah bi-nafsihi*), the mother has never been considered as among the residuary heirs in all categories of residuaries specifically in another's right (*'asabah bi-ghairihi*) or together with another (*'asabama'a al-ghair*) as embodied in some Islamic treatises and other works on Islamic law such as the Code of Muslim Personal Laws of the Philippines.<sup>14</sup> Another legal concern that supports our claim that the above verse implying that males should have a share twice larger than the shares of females are applicable only to the case of siblings and not to parents is that there is a possibility that the ratio of the number of surviving male and female agnates increases in both sides. While in the case of parents, there is no instance that they will increase their number on either side in relation to their deceased child. The complexity of this legal quandary may become denser when we literally consider the term ascendants, as explained by Ronsing<sup>15</sup>, to include both true grandfather and true grandmothers

whose relationships do not equate with that of the siblings of the deceased. Among the resilient rationalizations this study would like to put forward, in order to support our argument, concurring to the view of Kimber<sup>16</sup>, is that the share of male residuary heirs in their own right decreases as the number of female residuary heirs in another's right increases, in which decrease and increase of shares due to the increase of the number of heads do not happen to the case of the mother and father.

In addition, the Qur'anic injunction pertaining to the ratio of the shares of male and female heirs is agreed upon by some scholars including 'Abd al-'Ati<sup>17</sup> to be particularly applicable only to male and female siblings such as children or son's children of a deceased Muslim, as well as both the german and consanguine brothers and sisters whose relationships to the decedent were by blood and cannot be severed. The verse has nothing to do with the parents contrary to the rules adopted in the first inception of *Al-Gharawaini* advanced by Caliph 'Umar bin Al Khattāb (R.A.). This is because the relationship of parents by affinity can be severed while both are still alive in case of divorce in which situation the parents will no longer be legally responsible to each other, unlike in the case of sons and daughters, son's sons and son's daughters or how low so ever, or either the german and consanguine brothers and sisters who will always remain siblings and be subjected to enforced legal responsibilities from the lenses of the law and customs (*'urf*) because of their nonseverable blood relationships. This kinship statuses, this study argues, was not taken into consideration during the first inception of the rules on *Al Gharawaini* which might not uphold some principles of Islamic inheritance system which encompass time and space.<sup>18</sup> Accordingly, these two *Umariatān* cases were applied in isolated cases in the classical period without considering various circumstances that might occur in the latter generations of Muslims as heirs of a deceased Muslim. It is believed that these rules on *Al Gharawaini* were innovations of Islamic law and only adopted through consensus (*Ijma'*) of the Prophet's companions (*Sahāba*) during the reign of 'Umar bin Al Khattāb (R.A.) which he upheld and had since become jurisprudence on Islamic law of inheritance and succession.

**Illustrative Examples of Cases Requiring the Rules of Al Gharawaini**

To give illustrative examples of the cases governed by the rules on *Al Gharawaini* which are the main subjects for discussion of this paper as well as innovative formulae to rectify the solutions in the distribution of inheritance, there are five (5) possible cases that the rules of *Al Gharawaini* shall apply. The five illustrative examples below, for purposes of comparison, show two types of solutions when a child[ren] died survived by his/her mother, father, and spouse[s] only. First, the solution is based on the established Qur’anic and Prophetic rule whereby the mother, concurring with the father and spouse[s], inherits her one-third share from the whole inheritance (*mīrath*). Second, the solution is based on *Al Gharawaini* rule whereby the mother, concurring with the father and spouse[s], inherits one-third of the residue. In Case No. 1, we presumed that the decedent is a daughter while in Cases Nos.: 2, 3, 4 and 5 the son is presumed to have died in four different scenarios. In all of these illustrative examples we assumed that the child who died is the only child with a total net estate (*mīrath*) worth 120,000 Php across all the cases. In our solutions, we only used abbreviations of the “Root of the Problem” (*aslal-mas’ala*) as RP, and “Corrected Root of the Problem” (*tas’heal-aslal-mas’ala*) as CRP.

**Case No. 1:** Assuming that a person dies leaving Husband, Mother and Father, she left a Net Estate (*Mīrath*) worth P120,000. How does Islamic law resolve this case under the established Qur’anic and Prophetic Rule vis-à-vis *Al Gharawaini* Rule?

**A) SOLUTION BASED ON ESTABLISHED QUR’ANIC AND PROPHEPIC RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Net Shares:</u>
Husband	1/2	3 x 20,000	= 60,000
Mother	1/3	2 x 20,000	= 40,000
Father	Residue	<u>1</u> x 20,000	= <u>20,000</u>
		6/6	120,000

**Net Estate:**  $\frac{120,000}{6} = 20,000$

**B) SOLUTION BASED ON *AL GHARAWAINI* RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Corrected Portions:</u>	<u>Net Shares:</u>
		Juz' Al Siham: 3		
		RP: 2x3	CRP: 6	
Husband	1/2	1x3	3	x 20,000 = 60,000
Mother } Father }	Residue } (2:1)	1x3 } 2	3 } 2	1 } 2 x 20,000 = 40,000
		<u>2/2</u>	<u>6/6</u>	<u>120,000</u>

**Net Estate:**  $\frac{120,000}{6} = 20,000$

**Case No. 2:** Assuming that a person dies leaving wife, mother and father, he left a net estate (*Mirath*) worth P120,000. How does Islamic law resolve this case under the established Qur'anic and Prophetic Rule vis-à-vis *Al Gharawaini* Rule?

**A) SOLUTION BASED ON ESTABLISHED QUR'ANIC AND PROPHETIC RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Net Shares:</u>
		RP: 12	
Wife	1/4	3	x 10,000 = 30,000
Mother	1/3	4	x 10,000 = 40,000
Father	Residue	5	x 10,000 = 50,000
		<u>12/12</u>	<u>120,000</u>

**Net Estate:**  $\frac{120,000}{12} = 10,000$

**B) SOLUTION BASED ON *AL GHARAWAINI* RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Net Shares:</u>
		RP: 4	
Wife	1/4	1	x 30,000 = 30,000
Mother } Father }	Residue } (2:1)	3 } 2	1 } 2 x 30,000 = 60,000
		<u>4 / 4</u>	<u>120,000</u>

**Net Estate:**  $\frac{120,000}{4} = 30,000$



**The Contemporary Application of the Rules on Al Gharawaini.../ 407**

**Case No. 3:** Assuming that a person dies leaving 2 wives, mother and father, he left a net estate (*Mirath*) worth P120,000. How does Islamic law resolve this case under the established Qur'anic and Prophetic Rule vis-à-vis *Al Gharawaini* Rule?

**A) SOLUTION BASED ON ESTABLISHED QUR'ANIC AND PROPHETIC RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Corrected Portions:</u>	<u>Net Shares:</u>
2 Wives	1/4	3x2	6 x 5,000	= 30,000 ÷ 2 = 15,000
Mother	1/3	4x2	8 x 5,000	= 40,000
Father	Residue	5x2	10 x 5,000	= 50,000
		12/12	24/24	120,000

**Net Estate:**  $\frac{120,000}{24} = 5,000$

**B) SOLUTION BASED ON AL GHARAWAINI RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Corrected Portions:</u>	<u>Net Shares:</u>
2 Wives	1/4	1x2	2 x 15,000	= 30,000 ÷ 2 = 15,000
Mother } Father }	Residue }	3x2 }	6 } 2 x 15,000 4 } 4 x 15,000	= 30,000 = 60,000
		4/4	8/8	120,000

**Net Estate:**  $\frac{120,000}{8} = 15,000$

**Case No. 4:** Assuming that a person dies leaving 3 wives, mother and father, he left a net estate (*Mirath*) worth P120,000. How does Islamic law resolve this case under the established Qur'anic and Prophetic Rule vis-à-vis *Al Gharawaini* Rule?

408 / *Jamel R. Cayamodin*

**A) SOLUTION BASED ON ESTABLISHED QUR'ANIC AND PROPHETIC RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Net Shares:</u>
3 Wives	1/4	3	= 30,000 ÷ 3 = 10,000
Mother	1/3	4	= 40,000
Father	Residue	5	= 50,000
		12/12	120,000

**Net Estate:**  $\frac{120,000}{12} = 10,000$

**B) SOLUTION BASED ON AL GHARAWAINI RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Corrected Portions:</u>	<u>Net Shares:</u>
3 Wives	1/4	1x3	3	= 30,000 ÷ 3 = 10,000
Mother } Father }	Residue } }	3x3 } }	9 } }	3 x 10,000 = 30,000 6 x 10,000 = 60,000
		4/4	12/12	120,000

**Net Estate:**  $\frac{120,000}{12} = 10,000$

**Case No. 5:** Assuming that a person dies leaving 4 wives, mother and father, he left a net estate (*Mirath*) worth P120,000. How does Islamic law resolve this case under the established Qur'anic and Prophetic Rule vis-à-vis *Al Gharawaini* Rule?

**A) SOLUTION BASED ON ESTABLISHED QUR'ANIC AND PROPHETIC RULE**

<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Corrected Portions:</u>	<u>Net Shares:</u>
4 Wives	1/4	3x4	12 x 2,500	= 30,000 ÷ 4 = 7,500
Mother	1/3	4x4	16 x 2,500	= 40,000
Father	Residue	5x4	20 x 2,500	= 50,000
		12/12	48/48	120,000

**Net Estate:**  $\frac{120,000}{48} = 2,500$

B) SOLUTION BASED ON *AL GHARAWAINI* RULE

Juz' Al Siham: 4					
RP: 4x4    CRP: 16					
<u>Heirs:</u>	<u>Shares:</u>	<u>Portions:</u>	<u>Corrected Portions:</u>	<u>Net Shares:</u>	
4 Wives	1/4	1x4	4	x 7,500	= 30,000 ÷ 4 = 7,500
Mother } Father }	Residue }	3x4 }	12 } 8 }	x 7,500	= 30,000 = 60,000
		4/4	16/16		120,000

Net Estate:  $\frac{120,000}{16} = 7,500$

16

The above illustrative examples show the five cases in which the established Qur'anic and Prophetic rule as well as *Al Gharawaini* rule apply. In Case No. 1, the mother supposed to inherit twice larger than the father had the established Qur'anic and Prophetic rule been applied. By applying the *Al Gharawaini* rule, the father makes the mother as residuary heir subject to 2:1 rule. Hence, the mother inherits 1/3 of the residue instead of 1/3 of the net estate, which made her inherits lesser than what she supposed to inherit had the problem been solved according to the established Qur'anic and Prophetic rule. Thus, the father inherits 40,000 twice larger than the 20,000 share of the mother. And the husband inherits 60,000 which is half of the whole inheritance.

Cases Nos. 2, 3, 4 and 5 are the second category of instances where a spouse coexists with the parents and the father makes the mother as residuary heir. The mother inherits 1/3 of the residue instead of 1/3 of the net estate, which made her inherits lesser than what she supposed to inherit had the problem been solved according to the established Qur'anic and Prophetic rule. By applying the *Al Gharawaini* rule the father inherits 60,000 twice larger than the 30,000 share of the mother. The Case No. 2 is the original case considered in *Al Gharawaini*, while the Cases Nos. 3, 4 and 5 are additional cases in this paper with the assumption that the deceased husband who is the son of the mother and father might have had two or more spouses (wives) during his death.

**Discussion**

The main question among Islamic law practitioners and scholars pertaining to this subject of discourse is do these rules on *Al*

*Gharawaini* violate Qur'anic injunctions when it indeed modified what is being prescribed in the Holy Qur'an as the shares of the decedent's parents? Or do these rules warrant the abrogation of a Qur'anic injunction and Prophetic tradition by a consensus (*Ijma*) which such instance of abrogation is nowhere to be found in the theory of abrogation, as explained by Abdul Rasak<sup>19</sup> and Nyazee<sup>20</sup>, under Islamic law? These two questions had never been thoroughly discussed in the contemporary legal scholarship because of the lack of analytical consideration on cases of succession and inheritance whereby parents both inherit in odd situations. This study, in order to clarify this legal issue, attempts to address this gap found in the literature on Islamic law on succession using another Qur'anic injunction and Prophetic tradition. Allah (SWT) says:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ  
 وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ ۗ  
 فَإِن تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ  
 وَالرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِاللَّهِ  
 وَالْيَوْمِ الْآخِرِ ۚ ذَلِكَ خَيْرٌ وَأَحْسَنُ  
 تَأْوِيلًا

*O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.*<sup>21</sup>

Ali Unal, who is one of the renowned interpreters of the Holy Qur'an in our time, explains the abovementioned verse as to how Muslims should obey Allah (S.W.T.), the Messenger (S.A.W.), and those who have been given the authority including the 'Ulama (scholars) who have been given the authority of 'ilm (knowledge). He explains that the obligation for obeying without qualms, as laid down in the Qur'an and *Sunnah* as the term obey "atī'u" denotes, is only applicable to Allah (S.W.T.) and the Prophet (S.A.W.), as the term obey both precedes Allah (S.W.T.) and the

Prophet (S.A.W.) but not in the case of those who have authority (*uli-al-amr*). This is because, as Unal further explains, that the Qur'an and *Sunnah* are infallible sources of knowledge but not the works of the scholars which are often subjected to cultural and circumstantial requirements.<sup>22</sup> This leads to our argument that the rules on *Al Gharawaini* categorized as work of scholars may not be followed as a general rule, but people may resort to following the established rules as taught by the Qur'an and *Sunnah* in certain circumstances, which such exertion is considered to be the best way and best in result as contained in the Qur'anic injunction:

ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا

*That is the best [way] and best in result.*<sup>23</sup>

This paper asserts the proper contextualization of the shares of parents when they, together with the spouse[s], coexist upon the death of their child or children in a given circumstance. The basis of our assertion is the verse 11 of Chapter 4 (Surah AnNisah) of the Holy Qur'an as mentioned above that has explicitly stated the subjective share of the mother which is one-third in the absence of child[ren] or two or more siblings of the decedent. It must be noted that this one-third share of the mother was not specified in the verse (*ayat*) whether it should be taken from the whole inheritance or the residue, although it was interpreted by the proponents of *Al Gharawaini* including Caliph 'Umar bin Al Khattāb (R.A.) as one-third of the residue. We further substantiate our argument with the Prophetic tradition in order to strengthen our proposition that the rules on *Al Gharawaini* may not be followed as a general rule in conjunction with the encompassing Islamic principles of mercy and humanitarianism pertaining to protection of the rights of the weak and disadvantaged. In this case, we are more inclined to protecting the rights of the mother over the father in a given circumstance following the *Sunnah*. It was narrated in a Hadith:

*“A man came to the Prophet (S.A.W.) and said, ‘O Messenger of God! Who among the people is the most worthy of my good companionship?*

*The Prophet (S.A. W.) said: Your mother. The man said, 'Then who?'*  
*The Prophet (S.A. W.) said: Then your mother. The man further asked,*  
*'Then who?' The Prophet (S.A. W.) said: Then your mother.*  
The man asked again, 'Then who?'  
*The Prophet (S.A. W.) said: Then your father"<sup>24</sup>*

The above prophetic tradition suggests that mothers, contrary to the *Al Gharawaini* rules, have more rights over the return services of the children than the fathers. They deserve more shares than the fathers in almost all aspects be it emotional or material reciprocation from their children both when they are alive and in case of children's death leaving inheritance. This Prophetic tradition supports our argument that in some circumstances, the one-third Qur'anic share of the mother which is more than the share of the father when the deceased is a male is based on the standing principles of the Qur'an and *Sunnah*.

Another basis that supports the argument of this paper, as explained by Hussain and Alauya, is the opinion of 'Abdullah bin 'Abbās (R.A.) and 'Alī bin AbīTālib (R.A.), who were considered among the finest companions of the Prophet (S.A.W.) who did not agree on the adoption of *Al Gharawaini* from the very beginning as, according to Ibn 'Abbas, it contradicts Qur'anic injunction and was not practiced in the time of the Prophet (S.A.W.).<sup>25</sup> Although those scholars in the classical period who did not agree on the rules of *Al Gharawaini* had not provided juridical justification of their assertions without foreseeing the evolution of the society, the contextualization of these rules is left to the discretion of the law practitioners and scholars in response to social change in the contemporary period.<sup>26</sup> The study argues that although the rules on *Al Gharawaini* gained popularity among scholars of Islamic law in the classical era, it does not necessarily restrict contemporary scholars and practitioners of Islamic law to revisit such law for further interpretations based on fundamental sources of Islamic law without necessarily repealing the same rules. This exertion is expected to widen the interpretation of Islamic law that applies across time and space.

Allah (S.W.T.) in his infinite mercy did not specify if the word *thuluth* one-third in the abovementioned Qur'anic verse should

be taken from the whole inheritance or from the residue, which question, as explained by Alauya, was also the subject of debate between 'Abdullah bin 'Abbās (R.A.) and Zaid bin Thābit (R.A.) who, the latter, was then the main proponent of the rules on *Al Gharawaini* before it was agreed upon by majority of companions (*jambūr*), subsequently endorsed by Caliph 'Umar bin Al Khattāb (R.A.) and followed by the succeeding generations of Muslim legal scholars up to our time.<sup>27</sup> These two companions (R.A.) were regarded as among the notable companions of the Prophet (S.A.W.) who had significant contributions on the applications, interpretations and development of Islamic legal thoughts. In other words, our view is that the term *thuluth* can be taken from the residue following the rules on *Al Gharawaini*, and also in meritorious cases it can be taken from the whole inheritance. Thus, there are at least two possible situations which our main propositions will fall under.

**First Situation:** In case a person dies survived by his/her spouse[s] and parents who are still married to each other; and the father still maintains the households, the rules on *Al Gharawaini* or *Umarīatān Cases* whereby the mother inherits 1/3 of the residue shall apply.

**Second Situation:** In case a person dies survived by his/her spouse[s] and parents who are no longer married to each other while the *'iddah* (waiting period) has already expired; the established Qur'anic and Prophetic rule whereby the mother inherits 1/3 of the whole inheritance shall apply.

The first situation is justified because the father is still responsible for the maintenance (*nafaqa*) of the family under Islamic law. The second situation is based on the principles of mercy and humanitarianism as espoused in the Qur'an and *Sunnah*; because a peculiar situation might happen that parents may be divorced even after having reached old age. There are at least two scenarios which justify the application of the above second situation in favor of the mother. On one hand, the mother after having been divorced by the father will have limited capacity and low chances of finding sources of livelihood especially in most patriarchal Muslim societies where family maintenance devolved in the hands of the father and other male heirs. In the same manner, the mother will have no chance to

get married again when she reached old age especially upon reaching menopausal period. Likewise, when the mother reached old age she will have no chance to have other descendants due to biological incapacity. On the other hand, the father being his inherent role to provide for his family always has the higher chance to maintain his source of livelihood even up to old age. He also has the tendency and more chances to marry young woman or women who can take care of him even if he reached old age, which scenario gives him opportunity to procreate further and nurture a new family. These two situations may have been overlooked during the first inception of the rules of *Al Gharawaini* but they are inevitable in the contemporary society.

We need to note that the general justification of scholars as explained by Alauya on the “one is to two (1:2) sharing ratio” of the inheritance between and among male and female residuary heirs is mainly due to the enforced responsibilities that devolved to the hands of male heirs particularly on maintenance for the family and other peripheral relatives.<sup>28</sup> Kharofa explains that maintenance for relatives in both vertical and horizontal axes is governed by certain principles in Islam, which may be dropped with the passage of time especially when such enforced responsibilities have ceased from severable and nonseverable relationships.<sup>29</sup> Moreover, this paper argues that such dropped of maintenance can be boldly seen in the case of severable relationship between spouses, as in the case of father and mother, which also requires the cease of enforced responsibilities as well as the suspension of legal rules established for the same purpose such as the *Al Gharawaini Rules*.

Thus, this paper postulates that hadn't Islam made men in charge or protectors of women in almost every aspect of life particularly on maintenance as reflected in Surah An Nisa, when Allah (S.W.T) says:” *Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth*”,<sup>30</sup> the sharing ratio on the inheritance would have been made proportionately equal. In other words, since the adoption of the *Al Gharawaini* rules were based on the presumed enforced responsibilities of maintenance by the father for the mother, such



innovative rules shall be applied provided that its sole purpose still persist. Otherwise, the established rules based on the Qur'an and *Sunnah* shall apply.

### **Conclusion**

To address the issues on the implementation of Islamic law across people and times, one must find its practical application in the contemporary Muslim societies. This is because the interpretations of Islamic law in the classical period may not be sufficed to address the challenges faced by Muslims in the modern times. This leads to the requirement for a wider and further sound interpretations of the various components of Islamic law that might have influence on the study of various fields including politics, economics and other branches of knowledge without deviating from the fundamental sources of Islamic thoughts and the legacies of earlier Muslim scholars.

The Qur'an and the *Sunnah* as infallible sources of Islamic law and other fields of Islamic sciences should be given paramount considerations in responds to the evolution of society so as to maintain the equilibrium among people in their pursuit of justice. The Qur'an says:

وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ  
فَانْتَهُوا ۗ وَاتَّقُوا اللَّهَ ۖ إِنَّ اللَّهَ شَدِيدُ  
الْعِقَابِ

*And whatever the Messenger has given you – take; and what he has  
forbidden you –  
refrain from. And fear Allah; indeed, Allah is severe in penalty.*<sup>31</sup>

This Qur'anic injunction refers to the overbearing requirement of justice for any community to have sustainable progress. Although the verse, in its entirety as explained by Unal, is revealed to command the proportional distribution of the gains of war which should not be concentrated in the hands of rich who are considered as strong elements of society, while the poor who are considered as weak elements of the society should be treated with justice despite their lack of

human facilities and capacities;<sup>32</sup> this can also be equally applied in the proportional distribution of inheritance (*mīrath*) of a deceased Muslim so as to promote justice among heirs and avoid the monopoly of wealth in the hands of male heirs especially when such enforced responsibilities have legally ceased. Moreover, the verse mandated Muslims to regard these two infallible sources as fundamentals in the interpretation and application of Islamic law. This is also embodied in the *Sunnah* of the Prophet (S.A.W.) when he said: "I have *left two things with you*. As long as you hold fast to them, *you will not go astray*; they are the Book of Allah and the *Sunnah* of His Prophet".<sup>33</sup>

Muslims today must avoid jurisprudential limitations in the interpretations of Islamic law that might lead to confusions by people in the contemporary society, especially when a peculiar circumstance arises. Our use of Qur'anic injunctions and Prophetic traditions should not be wavered by the challenges posed by modernity. Fundamental universal principles such as, among others, the teachings of Islam on mercy, humanitarianism, and distributive justice must be upheld in the interpretation and application of any Islamic legal injunctions as well as in the advancement of various fields of knowledge grounded to Islamic worldview.

#### *Notes*

1. Noel J. Coulson, "A Comparison of the Law of Succession in the Islamic and British Legal Systems", *The American Journal of Comparative Law* (1978), 26(2), 229.
2. Presidential Decree No.1083 otherwise known as "The Code of Muslim Personal Laws of the Philippines" which was approved by the late Philippine president Ferdinand E. Marcos and effected on February 4, 1977. It is "A Decree to Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for its Administration and for other Purposes."
3. David Powers, "The Islamic Inheritance System", *Islamic Law and Society* (1998).5(3), 285.
4. Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad*. (New Delhi: Adam Publishers and Distributors, 2007) 52-55.

***The Contemporary Application of the Rules on Al Gharawaini.../ 417***

5. Ala'eddin Kharofa, *Islamic Family Law: A Comparative Study with Other Religions*. (Petaling Jaya: International Law Book Services, 2004) 14.
6. Saaduddin A. Alauya, *Muslim Inheritance Law*. (Manila: Rex Book Store, 2005), 31-34.
7. Aisha Abdurrahman Bewley (Trans.), *Al-Muwatta of Imam Malik ibnAnas: The First Formulation of Islamic Law* (Scotland: Madinah Press Inverness, 2004) 201.
8. A. Hussain, *The Islamic Law of Succession*. (Riyadh: Darussalam, 2005) 170.
9. Bensauidi I. Arabani, *Commentaries on the Code of Muslim Personal Laws of the Philippines with Jurisprudence and Special Procedure* (Manila: Rex Book Store, (1997) 519-520.
10. Qur'an, Surah AnNisah: 11
11. *Ibid*
12. Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World*. (New Delhi: Adam Publishers and Distributors, 2007) 429-430.
13. Saaduddin A. Alauya, *Muslim Inheritance Law*. (Manila: Rex Book Store, 2005), 31-34; A. Hussain, *The Islamic Law of Succession* (Riyadh: Darussalam, 2005) 171-3.
14. Presidential Decree No. 1083, Articles 124-128.
15. Asnawil G. Ronsing, *Islamic Law on Succession*. (Marawi: MSU University Book Center, 2001) 42-52.
16. Richard Kimber, The Qur'anic Law of Inheritance. *Islamic Law and Society*. (1998) 5(3), 291-325.
17. Hammūdah 'Abd al-'Ātī, *The Family Structure in Islam* (Kuala Lumpur: The Other Press, 2008) 261.
18. David Powers. The Islamic Inheritance System. *Islamic Law and Society*. (1998) 5(3), 285.
19. Azizan Abdul Rasak, *Introduction to Islamic Law and Jurisprudence*. (Quezon City: National Commission of Muslim Filipinos, 1985) 27-31.
20. Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Usul Al-Fiqh)* (Islamabad: The International Institute of Islamic Thought, 2000) 317-323.
21. Qur'an, Surah AnNisah: 59

22. Ali Unal, *The Qur'an: With Annotated Interpretation in Modern English* (New Jersey, USA: The Light, 2006) 198-9.
23. Qur'an, Surah AnNisah: 59
24. Muhammad Muhsin Khan, *Sabih al-Bukhari: The Translation of the Meanings of Sahih Al-Bukhari (English-Arabic)* (Riyadh: Darussalam, 1997).Vol. 8, Book 78, Hadith 5971.
25. A. Hussain, *The Islamic Law of Succession* (Riyadh: Darussalam, 2005) 172; Saaduddin A. Alauya, *Muslim Inheritance Law*. (Manila: Rex Book Store, 2005), 33-34.
26. Noel J. Coulson, "A Comparison of the Law of Succession in the Islamic and British Legal Systems", *The American Journal of Comparative Law* (1978), 26(2), 229.
27. Saaduddin A. Alauya, *Muslim Inheritance Law*. (Manila: Rex Book Store, 2005), 33-34.
28. *Ibid*, 6-7
29. Ala'eddin Kharofa, *Islamic Family Law: A Comparative Study with Other Religions*. (Petaling Jaya: International Law Book Services, 2004) 266.
30. Qur'an, Surah AnNisah: 34
31. Qur'an, Surah Al Hashr: 7
32. Ali Unal, *The Qur'an: With Annotated Interpretation in Modern English* (New Jersey, USA: The Light, 2006) 1123.
33. Aisha Abdurrahman Bewley, Trans. *Al-Muwatta of Imam Malik ibnAnas: The First Formulation of Islamic Law* (Scotland: Madinah Press Inverness, 2004) 380.

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