

## **Revisiting the classical Islamic jurisprudence with the Advance in Modern Medicine and Technology (An applied study on "Inheritance by Estimation and Anticipation" in the Islamic law of inheritance)**

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### **Abstract**

Through an analytical method, this paper emphasizes the role of modern medicine and the advance in technology in reshaping the “inheritance by estimation and anticipation” in the classical Islamic law of inheritance. Main areas of concentration include: determining the sex of the hermaphrodite, the sex of the fetus/fetuses and their numbers during pregnancy. In addition to these is determining the sequence of the death of individuals in a disaster involving the same heirs, such as those killed by drowning, ship wreck, fire, and the like. These are very important factors which greatly affect the decisions on inheritance of the heirs when any of the above circumstances occurs, only that these factors were all treated based on anticipations and estimations in the classical Islamic jurisprudence of inheritance, with difficulties in achieving accurate measures to unravel these circumstances.

In order to achieve a more relevant and practical application of the classical Islamic jurisprudence of inheritance, this article works on updating the anticipations and assumptions mentioned earlier. Rulings which were based on presumptive interpretations were treated with a balance between the principles of Islamic law and the discoveries in modern medicine. However, the rulings which were based on definitive interpretations were not the area of concern.

**Keywords:** Classical Islamic jurisprudence, Inheritance by assessment and anticipation, Definitive evidences and/or interpretations, indefinite evidences and /or interpretations.

## 1. Introduction

Islam is a religion, which deals with the problems of mankind in a comprehensive and a detailed manner. It answers their unlimited problems in all perspectives of life and the hereafter. This indeed- is one of the unique characteristics of Islamic jurisprudence which attracts to it a broad research and wide academic contributions in all important fields of knowledge.

From this perspective, the Islamic jurisprudence has witnessed numerous changes in *fatwas* and *ijtihad*. This comes as a result of changes in significant elements which influence *ijtihad* and *fatwa*, like change of place, customs, and traditions, just as the popular legal maxim in the Islamic jurisprudence says: "changing of rulings should not be denied by the change of times".

In the world of findings and discoveries, there has been a tremendous advancement in the field of science and technology. This - therefore- calls for an academic revision of the classical Islamic jurisprudence, in its different specializations, which include the family law, the Islamic jurisprudence of finance and the *fiqh* of crimes and punishments. This is necessary because there are significant chapters of discussion -in the classical Islamic jurisprudence- which were widely affected by the non-existence of the modern science discoveries experienced today, in which these discoveries could have aided *ijtihad* positively, and also limit the difference in opinions - among scholars- to its lowest minimum.

In line with the above, this paper is a contribution to the study of the Islamic law of inheritance in the advent of science and technology, with a balance between the theories of Islamic inheritance and the discoveries in modern medicine.

### 1.1. Research Questions

The research questions are:

- What are the possible modifications to the assumptions and estimations in the classical Islamic law of inheritance with the aid of modern medicine?
- What appropriate methodology is suitable for the revisiting of the classical Islamic jurisprudence?

### 1.2. Research Aims and Objectives

The main aims and objectives of the research include the following:

- Bridging the gap between modern discoveries and the Islamic jurisprudence.

- Revising the classical Islamic jurisprudence with a balance in approach and methodology.

## 2. Literature Review

Islamic Jurisprudence (*Fiqh*) is the knowledge and understanding of the practical aspects of Islamic law, which are deduced from specific evidences such as the divine revelations in the glorious *Qur'an* and the Sunnah (Badawi, 2009). Taking aback the history lane, the history of *fiqh* can be seen as a comprehensive one as discussed by *Ibn khaldun* (1958) in his *Muqaddimah*. In a nutshell, Kizilkaya (2016) established in his review of *Ibn Khaldun's* work that Islamic Jurisprudence witnessed a classical period of traditional Islamic scholars across different schools of thought, as there is also a modern era of Islamic jurisprudence which encompasses different approaches to the interpretation of Islamic law.

Abdullah et al (2013) noted that the Islamic jurisprudence witnessed different approaches as a result of changes and developments in human life. These approaches include the traditionalism which belief that all the problems in human lives had been discussed by the classical scholars. On the other hand is the reformism and the modernism approach which believe in reconstructing Islamic tradition but mostly from the modern paradigm as detailed by Abdullah et al (2013). Meanwhile, the correct approach is to interpret the Islamic law by applying flexible approach to its practical aspects, while – at the same time - a firm attach to the basic values in the main sources of Islamic law should be considered. Kayadibi (2008) argued that this approach would strike the balance between religion values and the constant transformations in life.

Arif (2022) described the Islamic law of inheritance as one of the few rulings of Islamic law which are comprehensively explained and detailed by the basic primary source of Islamic law, the Glorious *Qur'an*. This is unlike many other aspects of Islamic jurisprudence which their fundamental theories and rulings are revealed in selected verses of the *Qur'an*, while their comprehensive understandings are detailed in other sources of Islamic law, like the sayings and actions of Prophet Muhammad - peace be upon him-. This can be exemplified by the rulings on Zakat, Fasting and Hajj (pilgrimage) rites.

Meanwhile, this detailed explanatory nature of the Islamic law of inheritance - from the primary source of *shari'ah*- was not a barrier to *ijtihad* among the Muslim scholars, starting from the companions of the prophet (Omar & Muda, 2017).

For this reason, scholars were able to give answers to contemporary issues on inheritance in their era. This was achieved by building on the established theories extracted from the *Qur'an* and the *Sunnah*, as the law of inheritance is concerned.

Although, the then contemporary issues on inheritance were not really influenced by science and technology, it remains contrary to the problematic issues in this contemporary era of advance in science and technology, which is to be showcased in this paper. Owing to this, Mahmud and Mainiyo (2015) upheld the fact that there is always a need to find solutions to contemporary issues in Islamic jurisprudence, especially in this world of modernity where technology is actively connected to the day-to-day activities of human. In addition to that, technology also influences the rationale behind some rulings and discussions in the broad Islamic law, including the Islamic family law as a whole.

If Islamic jurisprudence (*fiqh*) means the efforts to understand and interpret the Islamic law; then the understanding exercised by human intellect is prone to change and reform amidst significant developments and changes in situations. In view of this, the section of the classical Islamic jurisprudence on "inheritance by estimation and anticipation" needs to be revisited as also argued by Muhammad (2022). This is because the intellectual efforts exercised in that section were characterized by uncertainties without clear evidences from the *Qur'an* or *Sunnah*. Thus, there is still room for a revisit as contributed by Uddin (2021). This is necessary in order to update the classical understanding which could have been much better - in this particular aspect- with the advance in science and technology.

### **Considering the classical Islamic jurisprudence as a source of law in Islamic law**

The Islamic law consists of various sources which can all be categorized into two different sources, namely the primary sources and the secondary sources. In Tallyn's (2018) overview of Islamic law, the primary sources are limited to the *Qur'an* and the *Sunnah*, while the secondary sources comprises of derivative legal reasoning, such as *Ijma'* (general consensus among authoritative Islamic scholars on a matter relating to an act of worship, after the death of the prophet Muhammad - peace be upon him-) and *Qiyas* (analogical reasoning). Taking a close look at these sources from a methodological aspect, Kamali (2006) tagged the primary sources as divine revelations, while the secondary sources are human understandings extracted from the primary sources.

This credibly means that the primary sources are agents of revelation, while the secondary sources are the results of *ijtihad* (interpretation of the legal sources of the Islamic law by a qualified expert in the field).

The sources of Islamic law – both the primary and secondary sources – are either definitive or presumptive in evidence and in authenticity. As for the *Qur'an*, all its verses are authentic in narration. This verdict about the *Qur'an* is well established and well proofed beyond reasonable doubts from both the scholars in the classical era and the contemporary academics. A detailed explanation - on this claim- can be found with the likes of Al-A'zami (2020) and Khalifa (1989). However, this established authenticity of the *Qur'an* doesn't automatically translate to mean that all rulings gained from its verses are definitive in evidence. The evidences can only be definitive if the interpretation of a particular verse or ruling has no other presumption except only one meaning. Examples of these are rulings regarding figures, like the waiting period of a wife after the death of her husband (Salleh et al, 2020).

Almighty Allah says in *Qur'an* 2 verse 234: "And those of you who die and leave wives behind them, they (the wives) shall wait (as regards their marriage) for four months and ten days".

The interpretation here is definite in evidence, as figures can only be interpreted in a single meaning without having doubts of any other possible interpretation. In other words, the "four months and ten days" mentioned in the verse is definitive in its interpretation.

Like the above discussion regarding the *Qur'an* as a source of law in Islam, the traditions of the prophet Muhammad - as a significant source of Islamic law- are mostly presumptive in evidence and interpretations, while a significant portion of it is definite in evidence and interpretation as well (Zumaro, 2022).

Similar to the above is the classical Islamic jurisprudence which can be regarded as the intellectual efforts of the classical jurists in interpreting the main sources of Islamic law. It is also made up of definitive evidences and likewise the presumptive ones. This – however -depends on the nature of the source of law which was relied upon in a particular case, and the possibility of having different reasonable opinions and interpretations to the provided evidence. Thus, the classical Islamic jurisprudence - in general- is not a final judgment in Islamic law, specifically on discussions which are greatly influenced by human discoveries and the intellect,

And not the discussions reached on definitive evidences. Razi (2014) supports this argument by stating that the classical Islamic jurisprudence can turn to a dilemma, rather than being a blessing. This is bound to happen if it is (Classical Islamic jurisprudence) regarded as a divine revelation as witnessed in some parts of the Muslim world towards the end of the 4th century of the Lunar calendar when there was a stagnation of the Muslim's knowledge due to blind-following of traditional jurists by their disciples in some parts of the Muslim world.

Focusing on the law of inheritance as part of the classical Islamic jurisprudence, the fundamental theories and rulings guarding the discipline are mostly definitive in evidence. This perception is based on the fact that the comprehensive understanding of inheritance is narrated in the *Qur'an*, while the verses themselves are nothing but definitive in their interpretations, as they mostly involve figures with their designated heirs. Meanwhile, there are significant parts of the inheritance which are firmly based on *ijtihad*, such as some discussions in the chapter of the "inheritance by estimation and anticipation" as mentioned earlier. For this reason, the concerned parts (in the inheritance by estimation and anticipation) are presumptive in evidence, regardless of them being discussed in the classical Islamic jurisprudence.

At this juncture, it is satisfactory to conclude that the classical Islamic jurisprudence might sometimes need to be updated and rechecked, but by adhering strictly to research ethics in general, and specifically to the principles guiding the Islamic jurisprudence. Thus, the "inheritance by estimation and anticipation" is open to objective criticism, reformation, and revision.

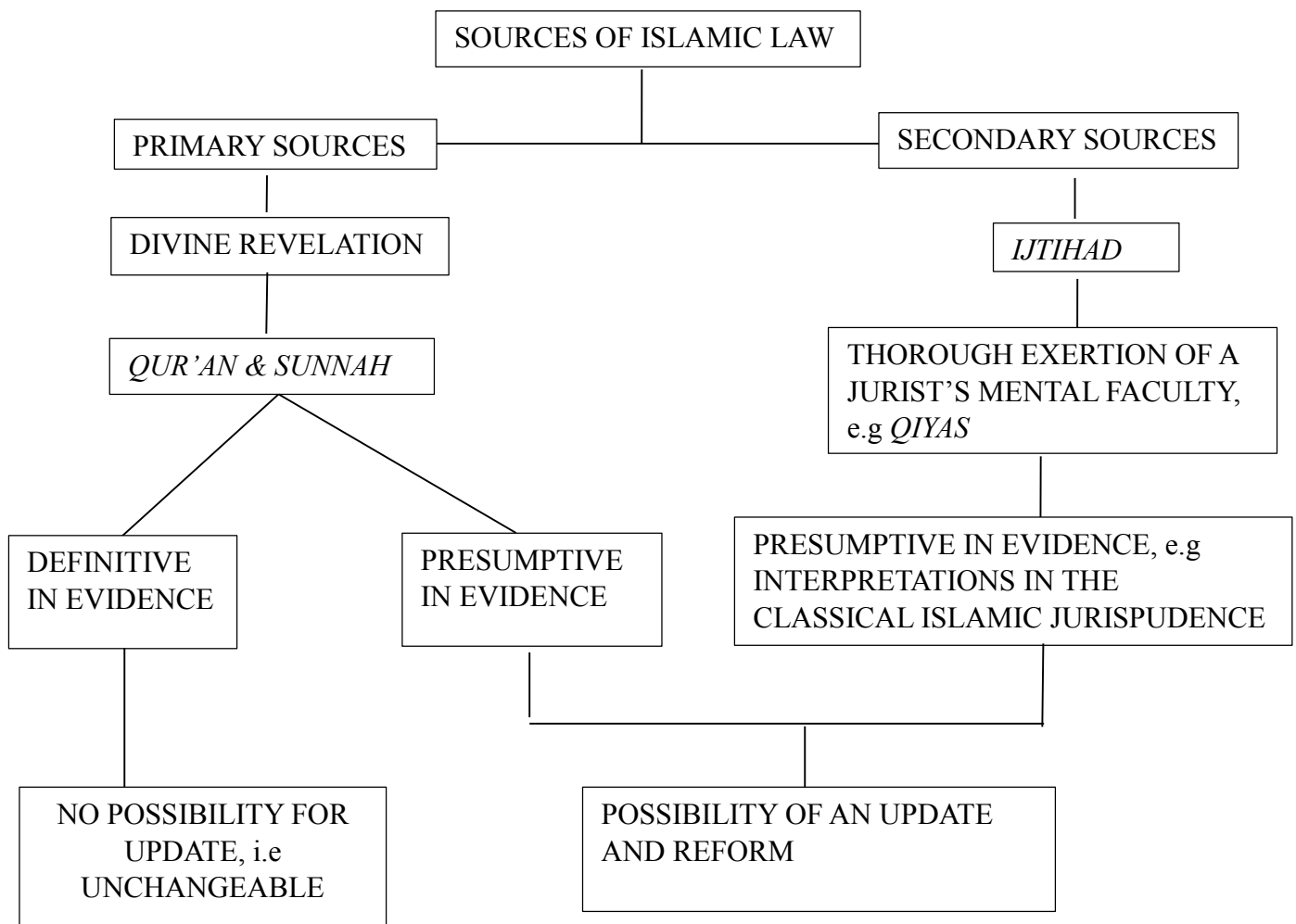


Illustration 1. The Sources of Islamic law as Definitive and Presumptive in Evidence.

### Inheritance for the unborn child

As a first approach to the discussions in this section, it is important to have an understanding of the motive behind the maximum gestation in human, and the connection between this and inheritance in the Islamic law.

In the *Qur'anic* verses of inheritance, the heirs to the inheritance and their appropriate portions are duly stated. However, the order of inheritance and portions to be inherited is based on the heirs involved. In some cases, heirs might be excluded from the inheritance due to the presence of a superior heir. For example, a brother is not expected to have a portion of the inheritance when there is a son as an heir to the deceased. Also, there is a reduction in the portion of the husband's or wife's inheritance if either of them has at least a child to inherit him/her. This means that the sharing of inheritance is based on the heirs involved in the inheritance.

Meanwhile, the classical Islamic jurists were faced with the challenge of knowing the state of the unborn baby, and thus the maximum time to expect its delivery before a final decision can be made regarding the sharing of the deceased's asset.

However, this uncertainty must be cleared, as rights of the heirs to inheritance are properly guarded in Islamic law of inheritance without neglecting the unborn babies and their entitlements; since they also need wealth to face the twists and turns of life. This is the point of connection between the discussion here and the Islamic law of inheritance.

Like the discussion on the maximum gestation period, there are also some other important issues connected to pregnancy and which also affect inheritance and the shares of the heirs in Islamic jurisprudence. These include the number of fetuses in the womb, and their sex as well. Discussions on these two important factors were always mentioned in the classical Islamic jurisprudence, but without a precise answer and solution.

As for the maximum gestation, there have been wide speculations among the classical jurists in giving an answer to that. Different claims were made based on human knowledge of happenings and occurrences of the maximum gestation, as occurrences are regarded as proofs and evidences. From this perspective, Al-Sarakhsi (2016) narrated that there were claims by the Hanafi school of thought that the maximum gestation period in human is two years, likewise in the Maliki and Hanbali schools of thought, while the Shafi' school of thought pegged it at four years. These stances were merely based on claims of past occurrences of pregnancy periods and not scientific proofs.

Also, there are other claims of three years, five years, six years and seven years as well (Zayla'i, 2010), while there is also a claim of "no maximum years" due to lack of definitive and substantial evidence to ascertain any of the so-acclaimed stances. A further research regarding the differences of opinion among the classical and contemporary scholars regarding maximum gestation period can be found in Serrano-Ruano's (2022) work.

Unlike the maximum gestation period which was based on an admissible evidence of occurrences and happenings in the classical Islamic jurisprudence, that of the "numbers of the unborn babies" and their "exact sex" were not really subjected to an admissible evidence. Some scholars were of the opinion of not sharing the deceased's assets until the birth of the baby; since the possibility of knowing the sex or the exact numbers were impossible back then, while some



prefer the opinion of sharing the assets, especially when the heirs are in dire need of the inheritance (Al-Sarakhsi, 2016).

Considering the latter opinion in the above, different assumptions were made in order to determine the most appropriate way of sharing the assets while also considering the plights of the unborn and the other heirs as well. There is an opinion of assuming the unborn as two males or two females, while the larger portion between the two assumptions would be withheld for caution's sake. Likewise, there were other opinions such as: assuming the unborn to be one male or one female, while the larger portion between the two assumptions would be withheld for caution's sake as in the previous opinion (Zayla'i, 2010).

Starting from issues on maximum gestation period, the contemporary *fiqh* scholars are mostly of the opinion of submitting the pregnancy duration to evidence of modern medicine (Serrano-Ruano's, 2022). Al-Hajj (2012) buttressed this argument by stating that gestational period beyond 9 months is impossible, and this is confidently established on the grounds of conclusive scientific evidences. In that case, Al-Nur (2007) was able to give a convincing answer to the different speculations surrounding the maximum gestation period in the classical Islamic jurisprudence. Al-Nur (2007) argued that some narrations might not be authentically proved, but some still remain authentic, only that these protracted pregnancies might result from false pregnancy, miscalculation, or other possible physiological and psychological factors which leads to imagined pregnancy.

Prevailing on the research of Lindquist et al (2021), a pregnancy of about 42 weeks is a prolonged pregnancy and is associated with a sharp increase in the risk of stillbirth and perinatal mortality (death of the fetus). In a similar opinion, the National Health Service in the United Kingdom (2021) also attributes a higher risk of stillbirth to a pregnancy of 42 weeks and above. Thus, it recommends induction of labor in such situations to avert what can be described as foreseen circumstances. This means that the fetus risks non-survival with any increase in gestation period after subsequent weeks, while a possibility of lasting two years or more - as mentioned in the classical Islamic jurisprudence - is ruled out.

The sex and numbers of babies during pregnancy is not also far from the scope of modern medicine. According to Mehr et al (2021), there is a possibility of uncovering the sex of the fetus at week 13 to 14 of gestation, but a high level of accuracy is expected at the 18th week of

gestation. Going by this information, the uncertainties in the classical Islamic jurisprudence remains the same when there is zero or very low possibility of determining the fetus' sex. However, these arguments become needless with the aid of an ultrasound scan in the 18th week of gestation, when the possibility of uncovering the sex of the fetus is very high, while their numbers are also known.

Based on this, decisions and conclusions on inheritance should be taken according to results from the ultrasound scan, and the sex of the fetus or their number should no more be a matter of controversy. Although, the possibility of wrong sex identification is still not ruled out, as ascertained by Eze et al (2010), in which they claimed that the ultrasound scan is not an exact science. Nevertheless, this is still not a problem since the rulings of Islamic jurisprudence are mostly based on predominance of assumption (*ghalabat-uz-zhann*), especially when the assumption is close to certainty due to strong indications and proofs, as it is here.

### **Inheritance of the hermaphrodites**

The term "hermaphroditism" has been used long ago to refer to disorders in sex development in humans, only that the term seems derogatory in recent developments (Lundberg et al 2018). This has paved way for a new term in medicine, in which it appears more acceptable to the real concept of hermaphroditism. The new term DSD (Disorders of Sex Development) is used to refer to congenital conditions which are characterized by abnormal development of chromosomal, gonadal (reproductive system that produces eggs or sperm) or anatomic sex (Mehmood & Rentea 2023). This definition gives a perfect overview of DSD itself and the real factors responsible for sex assignment, specifically in discussions on inheritance of the hermaphrodites between the classical Islamic jurisprudence and the modern advance in medicine.

In the classical Islamic jurisprudence, there is a serious challenge regarding the actual sex of hermaphrodites, in which some factors were regarded as the key determinants. Meanwhile, these factors are not the real determinants as they are merely agents of physical and biological features in human. Features like: growing of beards, urinating with the male or female genital, growing of the breasts, and having lust for the opposite sex, were the main factors to determine the sex of the hermaphrodite (Al-Sughdi, 1984).

However, it is a clear fact that sex assignment in DSD individuals is a more complex process compared to what was presented by the classical Islamic jurists. Sex disorder in hermaphrodites

is not limited only to the biological features and physical appearances, but it's also connected to the abnormal development of the inner reproductive system, chromosomal disorder, and the general anatomy of the body as previously explained in the definition of DSD/Hermaphroditism. In Ogilvy-Stuart & Brain's (2004) discussions on sex assignment, an overhaul of the body system must be done before sex assignment. This is because an incomplete body assessment would only bring out the traits of a gender, while other important traits which would mostly determine the exact sex are hidden. The assessment processes stated by Ogilvy-Stuart & Brain's (2004) include: examination of external genitalia, determination of internal anatomy through ultrasound or urogenital sonogram. This also includes assessment of adrenal function, DNA Analysis, and also the assessment of the complete chromosomes from the individual cell. Most of these factors were not considered in the classical Islamic jurisprudence,

In that case, uncertainties and assumptions in the inheritance of hermaphrodites/DSD patients can efficiently be solved with the advance in modern medicine (Aziz et al, 2022).

### **Inheritance of persons killed by drowning, fire and debris (Determining the Sequence of Death of the Heirs)**

Determining the time of death of an heir is significant in the law of inheritance in Islamic jurisprudence, specifically when the nature of death involves a number of individuals whom are heirs to one another. This is because an heir is entitled to inheritance on the condition that he/she is known to be alive as at the time of death of the person who is to be inherited. Thus, the sequence of the death of the heirs is important in this sense.

In the classical Islamic jurisprudence, determining the exact time of death was a very hard task which seems impossible, likewise in the modern medicine (Shresta et al, 2020). However, there is a good level of adequacy in estimating the time of death in the modern medicine compared to the classical Islamic jurisprudence, only that the modern medicine is also not an exact science like the classical Islamic jurisprudence (Madea, 2016).

A popular opinion in the classical Islamic jurisprudence is that the heirs who died simultaneously should not inherit one another if their actual time of death cannot be ascertained. Although, there are contrary opinions to this, there was no answer to unravel the uncertainties in determining the exact time of death, regardless of the differences among the jurists as to inclusion and exclusion

of the heirs in such occurrences. This is not an unexpected challenge with the low level of discoveries in the traditional medicine compared to the modern medicine.

As for the modern medicine, Ranjan et al (2019) stated that different methods have been deployed in estimating the time of death, and these include physical, chemical, biochemical, histological and enzymatic changes which occur progressively in a body. However, it's most likely possible to arrive at an estimated time of death and not an exact one. Also, the accuracy of the estimated death time mostly depends on the level of delay in the post-mortem examination of the body. (Ranjan et al, 2019). This means that delays in the post-mortem body examination complicates the examination process and also widens the estimated time of death; instead of getting a narrow one or the exact time as conditioned and demanded in the Islamic law of inheritance.

Coming into a conclusion, modern medicine cannot fill the existing gap in the classical Islamic jurisprudence with regards to determination of the sequence of death of the heirs. This challenge remains the same as faced by the classical jurists. Also, the principle of "predominance of assumption" (*ghalabat-uz-zhann*) might not rescue the situation here, even though the principle was earlier embraced in the discussion regarding the determination of the sex of the fetus. This is because there must be "certainty" about the life of the heirs either living or dead, in order to determine who is to inherit and who is to be inherited. This is unlike the determination of the sex of the fetus where "predominance of assumption" is enough as a basis for inheritance sharing.

Thus, the ruling here (determining the Sequence of death of the heirs) in contemporary Islamic jurisprudence remains the same, and the influence of modern medicine is still not far from uncertainties just like the classical Islamic jurisprudence.

### 3. Suggestion

As a suggestion to better the revisiting process of Islamic jurisprudential issues, the *shari'ah* experts/jurists should – themselves - be equipped with a vast knowledge of science and modern medicine, i.e. to the level of specialization and professionalism, and not a fundamental knowledge alone. Although, the advice and expertise of specialists are sought in every matter related to their fields of specialization when the need arises in Islamic jurisprudence, but that is not the best approach. This is because Islamic jurists are in the best position to identify all possible and significant rationales which might affect the rulings in an occurrence.

Specialists in other fields are no doubts experts in their various disciplines, but their expertise does not equip them with the knowledge to know the higher objectives of the Islamic law and to also identify rationales with major priorities when finding solutions to human life through the Islamic jurisprudence.

In that case, the contemporary Islamic jurists are saddled with the responsibility of specializing in modern medicine and other spheres of science, in addition to their expertise in Islamic jurisprudence. This would go a long way in bridging the gap between Islamic jurisprudence and science.

#### 4. Conclusion

It's never a matter of doubt that the classical Islamic jurists exerted their full efforts and mental faculty in solving jurisprudential issues from the philosophy of Islamic law. Their efforts - which were best done in their capacity and in the midst of the available resources - were more than being a commendable one. However, their *ijtihad* is never an impediment to further research and intellectual reformation, specifically in the absence of definitive evidence or a consensus of opinion.

As for the "inheritance by estimation and anticipation", most of its uncertainties in the classical Islamic jurisprudence are ascertainable with the collective intellect of Shari'ah experts and that of modern medicine. Issues like maximum pregnancy duration for inheritance distribution, number of unborn fetus and their sex, and identifying the exact sex of hermaphrodites can all be revisited, corrected, and updated. Although, the uncertainties in the inheritance of persons killed by drowning, fire, debris, and the like, still remain as it is in the classical Islamic jurisprudence; since the determination of time of death of heirs remains uncertain in modern medicine also.

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