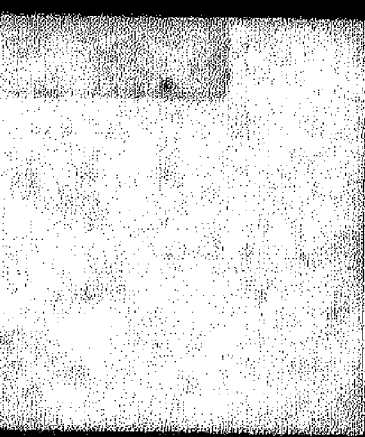


SOME ISSUES IN ISLAMIC LAW OF EVIDENCE
A STUDY ON THE ADMINISTRATION AND
APPLICATION OF THE LAW
THE SYARIAH COURT

11

.....



PO 8525

DECLARATION OF AUTHOR'S RIGHTS

The copyright of this thesis belongs to the author under the terms of the Copyright Act, 1987 (Act 332) Due acknowledgement must always be made of the use of any material contained in, or derived from this thesis.

INTERNATIONAL UNIVERSITY
NEW YORK
Copy no: 612231
Date: 10/2/2008 NY 1 (6)



SOME ISSUES IN ISLAMIC LAW OF SUCCESSION:
A STUDY ON THE ADMINISTRATION AND
APPLICATION OF THE LAW IN
THE SYARIAH COURT

BY

MOHAMAD ASMADI BIN ABDULLAH

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF COMPARATIVE LAWS

KULLIYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA

OCTOBER 1999

ABSTRACT

This thesis anticipates to assess the paramount importance of having a codified Islamic law of succession in Malaysia. The ambiguity of the jurisdiction of the Syariah Court with regard to the probate and administration of Muslim estate will be discussed in order to ascertain which court is actually competent to settle disputes. Despite the fact that matters of Islamic law are conferred to the state legislature by the Federal Constitution, and the distribution of Muslim estate is presumed to be within the power of the Syariah Court, current practices show that probate and administration of Muslim estate are, to some extent, reviewed and heard by the High Court.

The work will also discuss the issue of the offspring of an irregular marriage and a *syubhah* sexual intercourse. The purpose is to ascertain whether they are entitled to the inheritance of their father's (as claimed to be) estate, as the status and determination of paternity is extremely important and become the basis of inheritance. The work will also highlight the position and the succession of orphaned grandchildren (whose parent predeceased their grandparent). The question is whether they are entitled to the estate of the deceased grandparent or not since they are excluded by the surviving sons and daughters of the *praepositus* under the principle of *al-hajh*. As it is known, the rule of obligatory bequest and the system of succession by right have been applied respectively in the Middle East and Pakistan. These shall be discussed in order to determine their rights and to provide any constructive suggestions should the said rule be applied in Malaysia.

خلاصة البحث

ترمى هذه الدراسة إلى تقييم الأهمية المتزايدة لوجود قانون مستقل بالتركات للمسلمين بماليزيا، وقد تمت مناقشة غموض اختصاص المحاكم الشرعية فيما يتعلق بالإشهادات الشرعية وإدارة التركات (probate and administration) للمسلمين بهدف تحديد المحكمة المختصة فعليا بحل النزاعات المتعلقة بالوصايا والتركات للمسلمين.

بالرغم من أن الدستور الفيدرالي قد جعل أمر التشريع الإسلامي من اختصاصات المشرع الولايتي، كما أنه من اختصاصات المحاكم الشرعية إلا أن الممارسة الفعلية للمحاكم تشير إلى أن أمر الإشهادات وإدارة تركات (probate and administration) المسلمين تتم مراجعتها والنظر فيها، إلى حد ما، بواسطة المحكمة العليا.

كما ناقش البحث أيضا موضوع توريث الذرية الناشئة عن نكاح فاسد ووطء الشبهة. وذلك بهدف تحديد مدى مشروعية ذلك التوريث و هل يحق لهؤلاء ميراث آبائهم-المدعون- وذلك لما للأبوة -وصفا وتحديدًا- من أهمية قصوى من التوريث بل تعتبر أساسه.

كما ركز البحث أيضا على وضعية وكيفية توريث اليتامى من أحقاد الذين يتوفى أحد أبويهم قبل وفاة جدهم أو جدتهم، والسؤال المهم هنا هو هل يحق لهؤلاء الأحقاد ميراث جدهم المتوفى أم لا؟ إذ أنهم في هذه الحالة مستبعدون (محبوبون) من الميراث لوجود الأحياء من أبناء وبنات المتوفى وفقا لمبدأ الحجب.

وكما هو معلوم فإن قانون الوصية الإلزامية ونظام التوريث بالحق قد تم تطبيقهما من الشرق الأوسط وباكستان على التوالي وقد تمت مناقشة تلك الأنظمة بغرض تحديد حقوق هؤلاء الأيتام بناءة إذا تم تطبيق ذلك النظام في ماليزيا.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.



Name: Dr. Ismail Mohd @ Abu Hassan

Supervisor: Dr. Ismail Mohd @ Abu Hassan

B.A. (Hons. Class One) Syariah (UKM)

LL.M (London), Ph.D (Manchester)

Assistant Professor

Department of Family & Islamic Law

Kulliyah of Laws, International Islamic University Malaysia

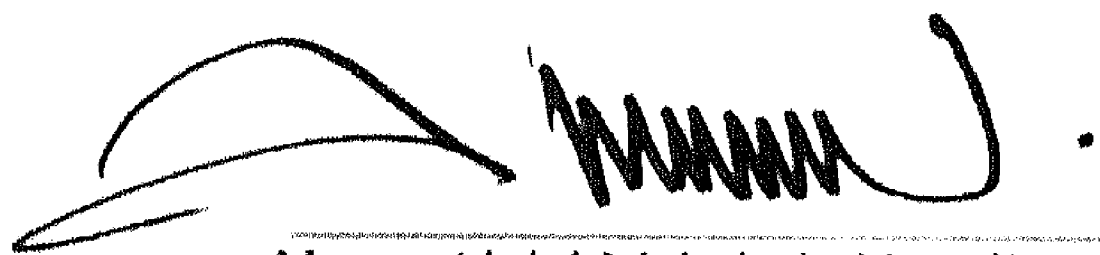
Jalan Gonggok, 53100 Kuala Lumpur

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.



Name: Abdullateh Amr baten
Examiner

This thesis was submitted to the Law Centre and is accepted as partial fulfillment of the requirement for the degree of Master of Comparative Laws.

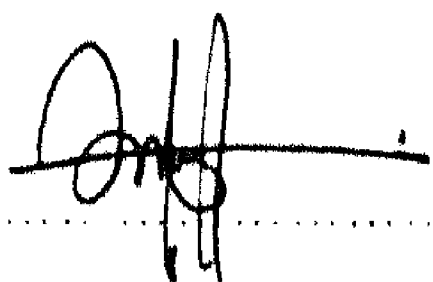


Name: Abdul Mohaimin Noordin Ayus
Acting Dean, Kulliyah of Laws

DECLARATION

I hereby declare that this thesis is the result of my own investigations except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended

Name: MOHAMAD ASMADI BIN ABDULLAH

Signature: 

Date: 30.10.1999

© Copyright by Mohamad Asmadi bin Abdullah and
International Islamic University Malaysia

*Dedicated in gratitude and affection to my beloved mother and father, my beloved wife,
Tengku Mas Ayu, my late nephew, Nur Hisham bin Hj. Semsudin, and to Abe Din, Kak
Na, Abe Jik, Kak Dah, Hj. Din, Kak Ije, Abe Lae, Kak Yah, Lukmae, Dilla, Mira, Ellie,
Alrya, Zakwan, Ettie, Raie, Aje, Rash, Shahirah, Emmie, An, Ammar and Sarah.*

ACKNOWLEDGEMENTS

The author wishes to take this opportunity to express great appreciation for the direction and consideration of his supervisor, Dr. Ismail bin Mohd (a) Abu Hassan who was extremely helpful in bringing this effort into being. His continuous help and support and generous contribution are gratefully appreciated. I also wish to express sincere thanks to the former Director of the Law Center, Dr. Abdul Mohaimin bin Noordin Ayus who is currently the Acting Dean of the Kulliyyah of Laws, for his advice and guidance.

I also wish to take this opportunity to convey my grateful acknowledgement to all lecturers who taught me the MCL courses. Finally, the unexpressable debt to Allah s.w.t. for His guidance and blessings without which this dissertation would not become a reality. I must express my sincere gratitude and appreciation to my beloved father and mother, my brothers and sisters and my nephews and nieces for their explicit support and contribution throughout the process of completing the research and writing.

To all, my deep thanks. However, I am fully responsible for any mistake, omission and imperfection.

TABLE OF CONTENTS

Abstract	ii
Abstract (Arabic)	iii
Approval Page	iv
Declaration	v
Acknowledgements	viii
List of Cases	xi
List of Statutes	xii
List of Abbreviations	xiii
Transliteration	xiv
CHAPTER ONE: Introduction	1
1.1 Statement of problem	1
1.2 Hypothesis	2
1.3 Scope of study	3
1.4 Methodology	4
1.4 Literature review	4
CHAPTER TWO : The position of the offsprings of an irregular marriage and a <i>syubhah</i> sexual intercourse	7
2.1 Introduction	7
2.2 Causes of inheritance	8
i) Marriage relationship	8
ii) Blood relationship or <i>nasab</i>	10
iii) <i>Al-walā'</i> or patronage	11
2.3 Causes of <i>nasab</i>	12
i) Valid marriage	13
ii) Irregular marriage or <i>nikāh fāsid</i>	15
ii) <i>Syubhah</i> sexual intercourse (<i>waḥ' al-syubhah</i>)	17
2.4 Conclusion	19
CHAPTER THREE : The position of the orphaned grandchildren of the predeceased parent; the rule of obligatory bequest and the system of succession by right	21
3.1 Introduction	21
3.2 Basis of obligatory bequest	23
3.3 The obligatory bequest in favour of the orphaned grandchildren	

	and its application in the Muslim Countries	28
3.4	System of succession by right and its application in Pakistan	33
3.5	Conclusion	37
CHAPTER FOUR:	The administration and application of the Islamic law of succession in Syariah Courts	39
4.1	Introduction	39
4.2	Jurisdiction of the Syariah Court	39
4.3	Article 121 (1A) of the Federal Constitution	44
4.4	The administration of the Islamic law of succession	51
4.5	Conclusion	62
CHAPTER FIVE:	Conclusion	64
BIBLIOGRAPHY		69

LIST OF CASES

<i>Abdullah bin Omar v Esah bt Taib</i> [1996] 11 JH 179.....	59
<i>Abdullah, In the Goods of</i> (1835) Ky Ecc. 8	54
<i>Abdul Rahim v Abdul Hamid</i> [1983] 2 MLJ 78	55
<i>Ainan bin Mahmud v Syed Abubakar</i> [1939] MLJ 209	46
<i>Amanullah v Hajjah Jamilah</i> [1975] 1 MLJ 30.....	55
<i>Awang b Abdul Rahman v Shamsuddin b Awang</i> [1997] 11 JH 193	59
<i>Awang b Said v Dollah b Jusoh & Anor.</i> [1986] 5 JH 130	60
<i>Bahadun bin Haji Hassan, decd., Re</i> [1974] 1 MLJ 14	57
<i>Barkath Ali bin Abu Backer v Anwar Kabir b Abu Backer & Anor.</i> [1997] 2 AMR 2057.....	48
<i>Bunga bt Ibrahim v Ita (a) Zila bt Abdullah & Ors.</i> [1990] 9 JH 198	59
<i>Commissioner of Religious Affairs, Trengganu & Ors. v Tengku Mariam</i> [1969] 1 MLJ 110	45
<i>Dalip Kaur v Pegawai Polis Bukit Mertajam</i> [1992] 1 MLJ 1	47
<i>Faridah bt Dato' Talib v Mohd Habibullah b Mahmood</i> [1993] CLJ 264	47
<i>Hajjah Saudah v Harafi & Ors.</i> [1990] 8 JH 66	58
<i>Ismail bin Rentah, decd., Re</i> [1940] MLJ 98	57
<i>Jumaaton & Raja Delila v Raja Hizaruddin bin Raja Nong Chik</i> (1989) unreported	51
<i>Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman</i> [1992] 2 MLJ 1675	47
<i>Mamat b Adam v Abdullah b Mahmood & Anor.</i> [1986] 5 JH 222	59
<i>Man bin Minhat, Re</i> [1965] 2 MLJ 1	57
<i>Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur</i> [1998] 1 MLJ 681.....	50
<i>Mutchilin, Re</i> (1960) 26 MLJ 24	55
<i>Myriam v Ariff</i> [1971] 1 MLJ 265	45
<i>Nafisah v Abdul Majid</i> [1969] 2 MLJ 174	46
<i>Ng Stew Pian v Abdul Wahid bin Abu Hassan, Kadhi Daerah Bukit Mertajam</i> [1992] 2 MLJ 425	47
<i>Ng Wan Chan v Majlis Agama Islam Wilayah Persekutuan & Anor. (No. 2)</i> [1991] 3 MLJ 487	49
<i>Saeda bt Abu Bakar v Haji Abdul Rahman</i> [1928] 1 F.M.S.L.R. 352	55
<i>Semek bt Mamat v Siti Zubaidah bt Yasin & Ors.</i> [1995] 11 JH 198	59
<i>Shaik Zolkaffily bin Shaik Natar v Majlis Agama Islam Pulau Pinang</i> [1997] 3 MLJ 281.....	49
<i>Shaik Abdul Latif v Shaik Elias Bux</i> [1915] 1 F.M.S.L.R. 204	54
<i>Timah, Re</i> (1941) 10 MLJ 51	56
<i>Tunku Abdul Rahman Putra Ibni Al-Marhum Sultan Abdul Hamid, In the Estate of, v Tunku Khadijah & 2 Others</i> [1999] 1 AMR 30	53

LIST OF STATUTES

Administration of Islamic Law (Selangor) Enactment, 1989.

Islamic Family Law Enactment of Selangor, 1984.

Islamic Family Law (Federal Territory) Act, 1984.

Islamic Family Law Enactment of Perak, 1984.

Federal Constitution.

Probate and Administration Act, 1959.

Small Estates (Distribution) Act, 1955.

Court of Judicature Act, 1964.

Subordinate Court Act, 1948.

Moroccan Code of Personal Status, 1958.

Syrian Code of Personal Status (Amendment) Law, 1975.

Tunisian Code of Personal Status (Amendment) Law, 1981.

Jordanian Code of Personal Status, 1976.

Kuwaiti Law on Obligatory Bequest, 1971.

Egyptian Law on Bequest, 1946.

Ottoman Law of Family Rights, 1917.

LIST OF ABBREVIATIONS

(a)	alias	n.p.	no place; no publisher
AMR	All Malaysia Reports	no.	number
Anor	another	Ors	Others
©	copyright	p./pp.	page/pages
CLJ	Current Law Journal	p.b.u.h.	peace be upon him
decd.	deceased	<i>Re</i>	In the matter of
ed.	edition	vol.	volume
e.g.	(<i>exemphgrana</i>); for example	v	(<i>versus</i>): against
F.M.S.L.R.	Federated Malay States Law Reports	s.w.t.	<i>subhānahū wa ta 'ālā</i>
ibid.	(<i>ibidem</i>); in the same place/book		
i.e.	(<i>id est</i>) that is		
JH	Jurnal Hukum		
JUUM	Jurnal Undang-Undang dan Masyarakat		
Ky Ecc	Kyshe's Reports of Ecclesiastical Cases		
MLJ	Malayan Law Journal		
n.d.	no date		

TRANSLITERATIONS

Letters of the Alphabet

ا	a	ض	d
ب	b	ط	t
ت	t	ظ	z
ث	th	ع	'
ج	j	غ	gh
ح	h	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	dh	ل	l
ر	r	م	m
ز	z	ن	n
س	s	و	w
ش	sh	ه, ة	h
ص	ṣ	ء	'
		ي	y

Vowels and Diphthongs

اَ	a	آ	ā	أَ	á
إِ	i	يِ	ī	أَو	aw
أُ	u	وُ	ū	أَي	ay

Chapter One

Introduction

1.1 Statement of Problem

There are a few number of Muslims who are learned in the field of Islamic law of succession or *farā'id* these days. Despite being an important branch of discipline within the ambit of Muslim personal law, ignorance seems to prevail. This is probably a signification of what the Prophet s.a.w. once said, in that this knowledge would be the earliest one that should be taken by Allah s.w.t. from the heart of a Muslim.

In Malaysia, the administration of the Islamic law of succession is still largely confusing. Even though article 121 (1A) of the Federal Constitution provides that civil court cannot interfere with Islamic matters since they fall under the jurisdiction of the Shariah Court, the High Court still hear the cases with respect to the probate and administration of the Muslim estates. This situation manifests itself even though it is clearly provided in the states' enactments that the division and inheritance of testate or intestate are within the power of the Syariah Court.

Taking this into consideration, it is hoped that this research will be an eye opener to the Muslim society regarding the importance of having codified laws governing the Muslim estates in Malaysia like the Islamic Family Laws Enactment of every states which we already have.¹ This research will focus on certain issues in the Islamic Law of Succession and more importantly, the role played by the Malaysian Syariah Court in administering and realizing the law

In short, the issues which shall be discussed are:

- 1) The position of the offspring of *syubhah* sexual intercourse and irregular marriage
- 2) The position of the children whose father/mother predeceased their grandparent.
- 3) The administration and application of the Islamic law of succession in the Malaysian Court and the role played by the Syariah Courts.

1.2 Hypothesis

This research focuses on the three topics namely the position of the offspring of the irregular marriage and *syubhah* sexual intercourse, the position of the grandchildren whose parent predeceased their grandparent and the administration and application of the

¹ There are efforts made by the relevant authorities to codify rules governing succession of Muslim estates like the one drafted by Jabatan Kemajuan Islam Malaysia (JAKIM)

Islamic law of succession in the Syariah Court in Malaysia. The discussion then will come to the conclusion that is the importance of having codified laws to govern the Muslim deceased estates in Malaysia. The object of pursuing this research is to examine and highlight to what extent the Islamic law of succession applies in Malaysia and whether the Syariah Court has an absolute power to hear such cases.

1.3 Scope of Study

This research is confined to the three major issues central to the theme. In discussing the first two, analyses made by some of the prominent Muslim jurists in their writings will be examined. And along this line, the corresponding statutory provisions will also be deliberated over. This is crucial in order to have a thorough comprehension of the court's attitude concerning the application of the Islamic law of succession.

The third issue, regarding the administration of Islamic law of succession by the Malaysian Syariah Court, which is the most important one, will be accorded special focus. In this context, the present role played by the Syariah Court and article 121 (1A) will be critically analyzed. And finally the discussion is concluded with the significance of having codified Islamic law of succession which is not rigid to the opinions of the Shāfi'ī school of law.

1.4 Methodology

The methodology used is doctrinal and non-doctrinal approach based on library research. This research takes place in the libraries of the International Islamic University, Malaysia and University of Malaya. The materials used for this research are mainly textbooks, articles, statutes as well as case laws. After relevant information is collected, the analytical study and the legal reasoning are made.

1.5 Literature Review

With regard to the issue of the offspring of an irregular marriage and a *syubhan* sexual intercourse, the material is obtained by studying *fiqhi* manuals of the medieval period by the prominent '*Ulamā*' of the four Sunni schools of laws. The books referred to are *Bidāyah al-Mujtahid* by Ibn Rushd; *Hāsyiyah Radd al-Mukhtār 'alá al-Dur al-Mukhtār* by Ibn 'Ābidīn; *Mughnī al-Muhtāj* by al-Sharbīnī and *al-Mughnī wa al-Syarḥ al-Kabīr* by Imāmayn Muwaffīquddīn Ibn Qudāmá and Syamsuddīn Ibn Qudāmá al-Maqdasī. The information pertaining to the present issue is unorganized in the *fiqhi* literatures. However, they do not touch on the inclusion of the rules in statute and their application in the courts. Therefore, to relate the information obtained in the treatises with the present situation, the state enactments and the laws applied in the Muslim countries are studied to determine to what extent the rules are observed.

The second issue concerns with the position of the grandchildren whose parent predeceased their grandparent. The book '*al-Muḥallā*' written by Ibn Ḥazm provides the vital information as regard to the basic element of the obligatory bequest. However, the discussion is limited to the *ḥukm* of making a bequest and it does not furnish the concept of the obligatory bequest and succession by right as applied at the present time. Therefore, the following articles of *The Problem of Representation in the Muslim Law of Inheritance* by A.B.M. Sultanul Alam Chowdury; *Problems for Orphaned Grandchildren in Succession: A Study of Suggestions* by M. Habibur Rahman; and *Orphaned Grandchildren in Islamic Succession Law* by Kemal Feruki are really beneficial in discussing the application of the rule of obligatory bequest and the rule of succession by right as applied in the Middle East and Pakistan respectively. No discussion has been made on the Malaysian experience. Therefore, these articles could serve as imperative guidelines for the application of the laws in Malaysia.

The most important topic is the administration and the application of the Islamic law of succession in the Syariah Court in Malaysia. There are one influential article written by Ahmad Ibrahim, *The Administration of Muslim Law In Malaysia*, a seminar paper presented by him, *Pembahagian Harta Pusaka* and some decided cases, which provide valuable elaboration for the present topic. However, they do not address the issue of article 121 (1A) of the Federal Constitution with regard to the possibility of the Syariah Court in determining disputes pertaining to the probate and administration of Muslim estate. Another distinguished article written by Mohammed Imam is therefore pivotal to

the key issue where the new interpretation with regard to the State List and the Federal List is furnished. This new interpretation provides the Syariah Court an exclusive jurisdiction in matters pertaining to the probate and administration of the Muslim estates which cannot be interfered by the civil court.

Chapter Two

The position of the offsprings of an irregular marriage and a *syubhah* sexual intercourse.

2.1 Introduction.

According to the Islamic law, the paternity or *nasab* of a child is established and attributed to the father with the existence of a valid marriage between the father and the mother.¹ This is based on a *ḥadīth* where the Prophet (p.b.u.h.) said:

"The boy is for the owner of the bed"²

Hence, by attributing the paternity or *nasab* of the child to the father, it may give rise to the right of succession by the child to the father and vice versa.³ The child is entitled to the right to inherit the property of the father upon the latter's death. A question arises pertaining to the position of a child conceived by his or her mother from an irregular marriage (*nikāḥ fāsid*) and a *syubhah* sexual intercourse (*waḥ' al-syubhah*) whether that particular child is legitimate or not. If the paternity or *nasab* is established and attributed

¹ Ibn 'Ābidīn, *Hāsyiyah Raḥd al-Mukhtār 'alā al-Dur al-Mukhtār*, Dār al-Fikr, n.p., 1966, vol 3, p 549

² Al-Imām Muḥammad Ibn 'Alī Ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār*, Dār al-Ḥadīth, al-Qāhirah, n.d., vol.5, pp. 330-331. The *ḥadīth* reads "*al-walad li al-firāsh*."

³ One of the causes of inheritance is blood relationship or *nasab*. See Muḥammad Ibn Aḥmad al-Sharbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, Syurkah Maktabah wa Maṭba'ah Muṣṭafá al-Bābī al-Ḥalabī wa Awlādiḥī, Egypt, 1933, vol.3, p. 4.

to the father, it means that the child has the right to inherit the property of the father upon his death and vice versa, but if no paternity exists, the right does not arise.

2.2 Causes of inheritance.

There are three causes of inheritance as prescribed by the Muslim jurists namely:⁴

- i) Relationship by marriage
- ii) Relationship by blood or *nasab*
- iii) Relationship by *walā'*.

i) Marriage relationship.

Marriage relationship which creates the right of inheritance between the husband and the wife must be a valid marriage (*nikāh sahīh*). A void marriage (*nikāh bāṭil*) and an irregular marriage (*nikāh fāsīd*) do not entitle both spouses the right of inheritance.⁵ This conveys the idea that if there exists a valid marriage between the husband and the wife,

⁴ Ibn 'Ābidīn, *Hāsyiyah Radd al-Mukhtār 'alā al-Dur al-Mukhtār*, p. 538, Ibn. Rushd al-Ḥafīd, *Bidāyah al-Mujtahid*, Dār al-Fikr, Beirut, n.d., vol. 2, p. 204 and Imānayn Muwaṭṭiqudūn Ibn Qudāmā Wa Syamsuddīn Ibn Qudāmā al-Maqdisī, *al-Mughnī wa al-Syarḥ al-Kabīr*, Dār al-Kitāb al-'Arabī, n.p., 1983, vol. 7, p.3. See also al-Ṣharbīnī, *Mughnī al-Muhtāj*, p. 4. According to the Syafī'is, there are four causes of inheritance and the fourth one is *Islām*.

⁵ See Ibn 'Ābidīn, *ibid*. According to him, it is unanimously agreed by the *fuqahā'* (*ijmā'*) that both spouses of void marriage and irregular marriage have no right of inheritance by way of marriage relationship. See also Muḥammad 'Alā' al-Dīn al-Ḥaskafī, *The Dur al-Mukhtār*, English Translation by B.M. Dayal, Law Publishing Company, Lahore, Pakistan, 1913, p.431