

# **Accelerating Distribution of Muslim Inheritance in The Light of *Irtikāb Akhaf al-Dararayn* (Act-on Lesser of The Two Harms)**

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## **ABSTRACT**

*Islamic inheritance is one of the ḥudūd in Islamic law that observes strict regulations in the textual evidence. However, the quest for the acceleration of inheritance in recent times is due to fear of greater harm from the violation of the rights of weak heirs since there are reported cases of possible denial of female children, women, underage and baby in the foetus, which requires protection in the estate of the bequeather. This study explores the juristic interpretation of the term "death of the bequeather" as a condition of distributing the estate and the juristic implication of the dire circumstances that may trigger the acceleration before the death of the bequeather in contemporary realities. This study uses the doctrinal approach in the qualitative method to explore the implication of death of the bequeather a primary condition in the distribution of the estate in Islamic inheritance, and the possibility of applying the principle of Akhāfu al-Dararayn to establish the acceleration of distribution of Islamic inheritance. The study found that the quest for the acceleration of the distribution of inheritance is mostly related to the Muslim minority society where Shariah is not recognised and applied in family-related issues triggering the call for a safety net to protect the interest of the weak among the heirs to achieve the higher Shariah objective of protection of family and wealth through the transfer of ownership and benefit. This study suggests*

*the need to assess the implications of applying the principle of Irtikāb akhāfu al-dararayn in the acceleration of wealth distribution.*

**Keywords:** Accelerated distribution, Islamic inheritance, *Irtikāb Akhāfu al-dararayn* (Act on lesser of the two harms)

## INTRODUCTION

Accelerating the distribution of Islamic inheritance is the process of calculating and distributing an estate during the life of the bequeather. However, since Islamic inheritance is categorised as one of the *ḥudud* (strict regulation) in Islamic law, strict adherence to the primary source of Shariah (Quran and Sunnah) applies (Ahmad Abdul Majeed, 2022). Considering the changes in circumstances from places and time, some issues spur the dire need to accelerate the distribution of Muslim inheritance to achieve the fundamental objective of the Shariah on Islamic estate management, which is embedded in equity, justice, and fairness. In the normal scenario, everyone should adhere to the rules of Shariah. However, in situations where the bequeather is concerned during his lifetime about the fate of the weak heirs, especially children, women, and physically and mentally challenged persons, that situation might trigger the necessity for a protection mechanism against the evil of injustice (Bulbul, 2013).

Despite the concern for challenges confronting the establishment of equity and fairness of the Maqasid Shariah in the inheritance, employing acceptable means and approaches is a condition in Islamic law. Moreover, correcting an evil with evil falls under the prohibition of *la darara wa la dirara* (do not harm nor reciprocate harm). Nevertheless, there are considerations of applying lesser harm in confronting two harms. The former harm is the danger of denying the weak heirs their legal right in Shariah while accelerating the distribution. It is the later harm that violates fundamental conditions of Islamic inheritance that distribution can only be affected upon confirmation of the principal's death.

*Irtikāb akhāf Al-darrarayn* (acting on the lesser between the two harms) is an Islamic maxim related to socio-economic and environmental realities (Shettima et al., 2016). Applying this maxim in wealth management relates to the issues and challenges confronting wealth generation, preservation, and transfer. This study examines the possibility of a convergent between *Irtikāb akhāf al-darrarayn* and accelerated inheritance distribution to ensure a fair

transfer of inheritance to the appropriate heirs. This study will explicate recent findings on the subjective matter from the literature review. The next section discusses the concept of accelerated inheritance and the death of the bequeather as a fundamental condition for the distribution of inheritance in Islam. Finally, the study explains juristic views on the understanding and application of *Irtikāb akhāf al-darrarayn* (act on the lesser between the two harms) in protecting the right of the weak among the heirs in the interest of justice and fairness in Shariah. The study concludes with the findings, relevant policy and practical recommendations for further studies.

## LITERATURE REVIEW

### Islamic Inheritance and Its Conditions

The history of Islamic inheritance is as old as the Islamic hijrah when the companions migrated from Makkah to Medina with the Prophet PBUH. The Prophet PBUH initiated brotherhood between the Muhajirin and Ansar. At the inception, the brotherhood relation among the companions permitted a brother by faith to inherit from one another until the establishment of the Islamic state in Medina when the entitlement was limited to blood and marriage relationship (Nasr Farid Wasil, 1995). This is stated in the Quran:

"And those who later believed, migrated and struggled alongside you, they are also with you. However, only blood relatives are now entitled to inherit from one another, as ordained by Allah. Surely Allah has 'full' knowledge of everything" (Al-Anfal:72).

There are three conditions that must be observed before the distribution of inheritance according to Islamic *hudūd* (strict regulations). First, to establish the death of the bequeather; second, the life of the heirs; and third, the absence of obstacles (*māni' u*) like murder and slavery. For this study, the death of the bequeather is a prerequisite to distributing inheritance among the heirs. The death of the bequeather can be confirmed through real death and legal confirmation by the law court (Sabuni, 1968). The underpinning juristic wisdom of inheritance in Islamic law is fundamentally servitude to the command of Allah (*hudūd*). Islamic inheritance enhances close family ties and strengthens the spirit of cooperation among family members to build a righteous society based on the noble character of being subservient to the command of Allah. The Islamic law of inheritance prevents strife and eliminates bickering and fighting between the heirs. The wisdom to make the male double the female's, as the man's need for money is greater than the woman's, and justifiable because male

children must take care of personal family needs. Also, as a reason for an inheritance, marriage has the wisdom to sanctify the relationship between spouses and highlight their loyalty. Inheritance in Islam has pillars that the inheritance system cannot be established without (Sabuni, 1968).

### ***Irtikāb Akhāf al-Dararayn* (Acting on the lesser of two harms)**

The Islamic Legal Maxim of *Irtikāb akhāf al-dararayn* is one of the secondary maxims derived from the primary maxims: (*la darara wa la dirāra* - do not harm nor reciprocate harm). The maxim of *Irtikāb akhāf al-dararayn* entails the prohibition of actions and inactions that implies infringement on other persons' rights. The socio-economic realities dictate that a person's action should not frustrate, overpower, or set back the other party's interests (Saiti & Abdullah, 2016).

The main maxim, *la darara wala dirāra* (do not harm nor reciprocate harm), implies that the prohibition on the infliction of harm extends to harming oneself, harming others, and becoming causative of harm. This principle is not absolute; rather, it is accompanied by the justifiable fact that harm might be inflicted to prevent bigger harm (Abdul al-Latif, 2003 & Ahsan Lahsasnah, 2014).

Thus, certain circumstances justify the permissibility of harm when it is based on legitimate evidence, such as retribution rules and corporal punishment, which is not carried out to violate the right of others primarily but reaction or consequence to an ab initio action like the punishment in the conviction for murder and legal demotion of an employee for a valid reason or disciplinary action.

There are five major Shariah legal maxims spread into various other legal maxims. One is "*La darara wa la dirāra*" (do not cause or reciprocate harm). One of the divisions that form this main maxim is "*Irtikāb akhāf al-dararayn*" (Act on the lesser of two harms). The main principle of *La dirar wa la dirar* is preventing harm to the subject. This maxim means that if harm is unavoidable, one must choose the lighter harm as reflected in the maxim that states that the lesser of the two harms must be chosen (Ahmad Muhammad Al-Zarqa, 1989). Therefore, the maxim of *Irtikāb akhāf al-dararayn* narrows the scope of avoiding bad, which means choosing lesser harm when confronting two or more harms in a situation. The maxim provides some important choices to endure minor harm to counteract major harm.

The maxim of *Irtikāb akhāf al-darrarayn* implies that in the presence of two harms, a commission of the lesser is recommended, and omission of the greater harm is better. This maxim aims to protect *maṣlahah* by accepting the commission of the lesser harm rather than the greater, which is likely to cause more evil to the public. The determination of lesser harm between the two evils is based on its impact on human socio-economic and environmental relations. This maxim suggests the need for extrajudicial intervention in the consequences of understanding and application of Shariah to contemporary realities. For instance, there are traditions of the Prophet PBUH that prohibit the fixing of ceiling prices of market communities; however, in the advent of violation and abuse of the market to exploit the consumer, some scholars are unanimous that the purpose of this reverts juristic rule is to prevent the injustice of the sellers in making excessive profit through monopolistic practices and hoarding. The generations after the companions agreed it is permissible to set a benchmark for the maximum price of commodities in the market to prevent injustice and market distortion upon the buyers.

Similarly, in wealth transfer, there needs to be a consideration on the protection of the weak heirs from falling to greater injury after the death of the principals by allowing accelerated distribution of the inheritance to every legal beneficiary based on Shariah even though it violates the condition of legal confirmation of the death of the bequeather before the distribution of Islamic inheritance (Johan et al., 2015).

The word *ḍarar* refers to harm, infliction of evil, and infringement on the rights of the heirs, which is the opposite of benefit. Some scholars also viewed harm as the infliction of emotional distress on others. According to Aḥmad Mawāfi, *darar* means "the violation of the legitimate interests (*Maṣlahah mashrū'ah*) of one's own or others caused by the infringement of rights, abuse of power or due to negligence on the part of others".

Scholars postulate several conditions to determine what actions and inactions are considered harmful. Firstly, the harm must be real because assumed harm may not be considered harm in Shariah. Secondly, the harm is excessive and not ignorable considering its impact (*fāḥishah*). Thirdly, the infliction must occur from infringement or arbitrariness, or negligence. Finally, the harm must have been inflicted on the legitimate benefit of ownership.

Shariah requires obligatory prevention of harm before it occurs and compulsory elimination after its occurrence. The maxim *la darara wa la dirāra* (do not harm or reciprocate harm) encapsulates four hierarchical order

dimensions in dealing with harms: (1) non-infliction of injury, (2) prevention of harm, (3) removal of harm, and (4) minimisation of harm. Accordingly, if someone causes damages to another person or the property of someone else, the harmed person does not have the right to reciprocate the same to the injurer except through legal means. The injured are entitled to claims and retribution against the injurer only through the court of law to avoid social disorder and enhance equity, fairness and justice (Shettima et al., 2016). Among the juristic arguments deriving from the above Prophetic Tradition is: if someone has caused damage to another party's property, it is not permissible for the affected party to retaliate by damaging the person's property. This is because such action is deemed to aggravate the damages without any benefits in return; hence it is harmful. The alternative is paying compensation for the same value of the damaged property to avoid further harm to the owner's property. The preceding basic rule of Shariah is treated as a fundamental principle of Islamic law.

The maxim *Irtikāb akhāf al-dararayn* (Act on the lesser of two harms) is related to other maxims like “*Dar al-mafasid ‘awla min jalb al-manafi*” (prevention of harm is better than attracting better) because harm must be eliminated irrespective of benefit. There may be occasions where an action provides certain benefits while also causing corruption and inequality. Despite the apparent benefits in such cases, Shariah would prohibit and ban such practices. As a result, if an old canal inflicts water logging and salinity, it should not be allowed to remain stagnant because this violates others' rights.

*Irtikāb akhāf al-dararayn* (Acting on the lesser of two harms) is also related to “*Al-dararu yudafu'u bi-qadril-imkan*” (Harm is eliminated to the extent is possible) (Saiti & Abdullah, 2016). A practical demonstration of this maxim is validating the option of defect or *khiyār al-'ayb* in Islamic law, designed to protect the buyer against harm. Therefore, when a customer buys a car and discovers that it is substantially defective, he has the option to revoke the contract. There is a legal presumption under Shariah that the buyer concluded the contract on the condition that the object of sale was not defective. The rules afterwards present the practical guidelines (Faruq et al., 2010). Although absolute harm is not permitted to be eliminated with other harm based on the maxims “*Al-dararu la yuzal bi al-darar*” (Harm is not eliminated by another harm), a buyer can return goods when it is found faulty. However, purchased products that are defective in possession of the buyer cannot be returned to protect the seller from violating the buyer thus: “*Al-Darar al-'ashaddu yuzalu bi al-darar al-'akhāf*” (A greater harm is eliminated utilising lesser harm). When presented with a choice between two detrimental options, the maxim states that the one that causes the least harm should be picked.

## **Juristic Opinion on Accelerating Distribution of Inheritance**

There are people from different societies accustomed to denying women their right to an inheritance which triggers other people's fear that daughters will be deprived of their right to inherit after their death. There has been an incessant quest to know the juristic legality of dividing the estate property among potential heirs according to the provisions of Islamic law before the death of the bequeather to protect the right of all the heirs according to the provision of Shariah (Rahman et al., 2020 & Ramlan et al., 2022).

The basic rule of Islamic inheritance is that the estate is divided after the death of the testator, not during his lifetime. However, there are several *fatwā* (religious verdicts) in the present day that posits the permissibility of accelerating the distribution of one's property between the potential heirs during the lifetime of the bequeather. Accelerating distribution is against the fundamental condition of "death of bequeather" as a prerequisite in distributing Islamic inheritance; however, some scholars opined that its permissibility is against the opinion of most scholars (Muhammad, 2020).

The initial rule is that the estate shall be distributed upon the legal confirmation of the death of the bequeather according to Islamic law. Islamic intent on wealth management is based on the fundamental Maqāsid of protection of wealth through wealth creation, wealth protection, and wealth distribution (Busari et al., 2021; Husni et al., 2022). After the death of the owner of wealth, there are Shariah legal provisions on the process and requirement to transfer the property to the heir for continuity of ownership because Islam does not permit *sahib* (unknown ownership) (Muhammad, 2020; Sukarti & Rais, 2018).

The first opinion argued that there is no justification to exit the status quo of "death of bequeather" as a condition before the distribution of the inheritance among the heirs. The second opined that in the case of necessity and fear that some people may violate the *hudūd* (strict regulation) of Shariah, such as depriving the weak heirs among women, daughters, and children of due rights, then such circumstance requires a migration from the original rule to new rule for the purpose protection of family, life and wealth of heirs (Ahmad Abdul Majeed, 2022).

Considering the juristic evidence from the two opinions, the first states that the death of the bequeather is a prerequisite to distributing estate based on the conditions of Islamic inheritance. According to the theory of Islamic

jurisprudence, *shartu* (condition) is the prerequisite whose absence necessitates the absence of the *hukm taklīfī*, but its presence does not obligate the *hukm* (Zaidan, 1976).

The *shartu* (condition) in the distribution of Islamic inheritance is confirmation of the death of the testator, i.e., ascertaining the death of the bequeather and verifying that, or legal decision by the judge in the law court such as a missing person for a period ruled by the judge as been perished based on evidence, or such as a foetus that fell from his mother's womb because of a felony against her. According to the Quranic text, the death of the bequeather is an underpinning criterion: should a man die childless but have a sister, she shall have one-half of what he has left behind (al-Nisa, 4: 176). According to Ibn Kathīr (1997), the verse is unambiguous that inheritance is due upon confirmation of the death of the bequeather and that the inheritors are alive. The death of the deceased can be ascertained in three ways: firstly, to physically confirm the death of a deceased person; secondly, to receive authentic news about the death of the deceased; and thirdly, the testimony of two just men on the death of the benefactor either from medical experts (Sabuni, 1968).

The Quran also mentions:

“It is prescribed that when death approaches any of you if they leave something of value, a will should be made in favour of parents and immediate family with fairness.<sup>1</sup> ‘This is’ an obligation on those who are mindful of Allah” (al-Baqarah, 2:180).

Although the verse above has been abrogated in the context that writing a will is not meant for the heirs among the children and the parents that are entitled to a fixed portion in the Quran, however, the verse shows that death is an indication of inheritance for the purpose transfer of ownership and continuous benefit of the property to the heirs (Al-Bagwī, 1997).

Other similar verses of the Quran suggest death as a prerequisite to the estate distribution among the heirs.

“In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child” (al-Nisa, 4:12).

“Allah (thus) directs you as regards your Children’s (Inheritance): to the male, a portion equal to that of two females” (al-Nisa, 4:11).



"To (benefit) everyone, We have appointed shares and heirs to property left by parents and relatives. To those, also, to whom your right hand was pledged, give their due portion. For truly Allah is witness to all things" (al-Nisa, 4: 33).

Applying the Islamic legal maxim *Irtikāb akhāf al-dararayn* (Act on the lesser of two harms) to the issues of accelerating distribution, when one harm contradicts another, by implication, the lesser harmful of the two is considered to avoid the greater harm. Similarly, the violations that might cause the female child, children, and women heirs to lose their rights in inheritance are greater than the lesser harm of acceleration of the distribution of the estate, which violates a condition of inheritance that requires confirmation of the death of the bequeather. Even if the acceleration of inheritance before death is done under a gift to the children before death, there is the challenge of economic independence of the bequeather before the end of his/her life. Hence, he should leave something to meet basic needs because the children may not be able to reciprocate towards all his/her needs, while some might be stingy and may be harmful to the giver; therefore, it is preferable to leave the distribution until death (Ibn Mufli, 2004).

Also, the formula of equal share or based on the shariah prescription of inheritance (male gets double of female) is an argument if the estate is distributed among the children before the death of the bequeather. According to Ibn Qudāmah Al-Maqdisī, accelerating the distribution of inheritance is not preferable because it is against the condition of inheritance, which is the confirmation of the death of the bequeather, to protect the right of the heir. After all, other children might be born before his death; rather, the estate should, upon confirmation of the death of the bequeather, under the *ḥudūd* (strict regulation) of Shariah (Ibn Qudāmah, 1997).

Few scholars of the Hanbali school of law opined that acceleration of inheritance between the heirs during the lifetime of the bequeather is permissible if the circumstance requires it. However, it must be based on the prescribed formula in Shariah. It must accommodate the possibility of a new born child with the possibility of retrieval and redistribution among heirs in the event of miscarriage or stillbirth (Al-Karami, 2004).

## **The implication of *Irtikāb Akhāf al-Dararayn* (Acting on the lesser of two harms) to Acceleration of Inheritance**

The Islamic legal maxims are juristic principles that can be applied to several related *fiqh* issues. These parameters in applying these maxims enhance compliance with the lawgiver's intent (Maqasid Shariah) and avoid violating the rules in the Quran and Sunnah. The concept of Islamic inheritance requires the establishment of the death of the bequeather and the heir's life before the distribution and transfer of the inheritance. Nevertheless, the differing opinions on the acceleration of the distribution of inheritance all recognise and accept that death of the bequeather is a prerequisite in the distribution of the estate; however, the basis of difference is the possibility of violating the rule in the advent of necessity such as fear of denial of female or children their heir right after the death of the bequeather (Ahmad Abdul Majeed, 2022).

The concept of inheritance is to transfer ownership of the estate to enhance the continuity to protect wealth embedded in Shariah's higher objectives. Some people may divide their money before death among their heirs if there is a specific interest in doing so, while others may distribute it as a gift among the heirs. Some scholars permit this, especially if there is fear of depriving some of the heirs right after the bequeather's death. Without cogent reasons, it is better to leave the matter until after his death (Ahmad Abdul Majeed, 2022). Scholars recommend equality between the male and the female in giving a gift related to basic needs and healthcare without giving preference to the male over the female (Zuhaili, 2006). The majority of the Maliki, Shafi'i and Abu Yusuf from the Hanafi school of law viewed the father should equate males and females in the gift based on the evidence from the tradition of the Prophet PBUH said: "Maintain equity among your children in gifts, and if I were to prefer anyone, I would prefer women" (Al-Tabrani, 360 C.E.). Scholars are unanimous about maintaining equality among children when sharing gifts. However, they differ on the permissibility of using the Islamic inheritance formula to share gifts among children (male gets double of female).

## **DISCUSSION OF FINDINGS**

According to Islamic law, one of the conditions for the distribution of inheritance is the confirmation of the death of the bequeather. The objective of Shariah aims at continuous protection and sustainability of wealth through the closest relatives.

Therefore, the discussion of acceleration of inheritance in this study was brought to the limelight because of the situation that may permit violation of the rules to achieve the higher objective of Shariah in the protection of family and wealth. The reason for the acceleration of inheritance in this context is the fear of denying some of the weak heirs their due share after the death of the bequeather. This study also established that distribution of the estate among children and other family members is permissible with the gift's intent. The exchange of gifts between family members is highly recommended to promote love and care in the family by fulfilling the condition of the gift, not the inheritance, in maintaining equality among children. For instance, if a father made a gift to one of the children from his estate, then other children should be given the same from the estate during his lifetime; however, if the gift was made to one of the children during his lifetime and others were not given before death, scholars posit that the gift must be returned to the entire estate and subjected to the inheritance rule. Nevertheless, gifts and inheritance are permissible but different from one another.

A gift is possible during the lifetime of the giver, while inheritance is possible after the confirmation of the death of the bequeather. The entitlement of the estate from inheritance goes to the heirs, while the entitlement of the gift goes to the beneficiaries. The distribution of inheritance is based on *ḥudūd* (strict rules) in the Quran and Sunnah. At the same time, the gift beneficiaries are recommended to be based on fairness, equity, and justice according to the need of the children.

Acceleration of inheritance is a contemporary issue that affects Muslim societies. It seems more rampant in Muslim minority societies where there are no Shariah authorities and practices to implement and enforce the rule of Islamic law. According to Ahmad Mustakim Zulkifli, (2022); Ali & Ahmad (2021), about RM70 billion frozen assets are in Malaysia due to disputes in managing *farāid* among the heirs. Another empirical study on the implication of Islamic law of inheritance on the Muslim society in Sri Lanka suggests that most Muslims lack a basic understanding of the essence of *farāid* and thus prefer to use the legal will system of distributing the bequeaths among the heirs equally (Saujan, 2022).

However, some jurists support the idea of a short-term solution of protecting weak heirs from violation through the consideration of gifts or acceleration of inheritance during the lifetime of the bequeather. It is fair to note that while some contemporary scholars considered *Irtikāb akhāf al-dararayn* (Act on the lesser of two harms) to the acceleration of inheritance by choosing

the lesser harm of distribution during lifetime over risking the right of the weak among the heirs.

Another implication in the application of accelerated inheritance is the transfer form. Hence, some Muslim minorities have designed a combination of will and inheritance to enhance an adaption of the discussion. For example, an accelerated inheritance written and legally sealed in a will for legal execution after the death of the bequeather might be another good suggestion. Since inheritance is permissible after death, and the bequeather fears violating the right of the weak heirs, the calculation is based on the Islamic law of inheritance and the execution by conventional law of the country. This conditioning is good with potential challenges, such as what should be the permissibility of combining Shariah and conventional law to accelerate the inheritance. This combination might trigger an appeal to the court among the heirs since it is based on the conventional court. In essence, the application of *Irtikāb akhāf al-dararayn* (Acting on the lesser of two harms) to accelerate the inheritance because of necessity and fear of denying the interest of the weak has other implications based on the law of the society.

## CONCLUSION

This study examines the juristic ruling of acceleration of distribution of Islamic inheritance based on the legal maxim of *Irtikāb akhāf al-dararayn* (Acting on the lesser of two harms). The study highlights the death of the deceased as the prerequisite for the distribution of inheritance based on the intent of transfer of ownership and benefit of the estate. However, the significance of the study in exploring the possibility of an accelerated approach is spurred by the challenges of the distribution of inheritance in contemporary society. Especially in the Muslim minority society where Islamic law is not implemented, there is incessant fear that certain groups of heirs that are weak, mostly children, females, and foetuses, might be denied their rights after the death of the bequeather. This study found that the idea of accelerating the distribution of inheritance is common in places where shariah law is not recognised and applied in family matters and thus triggers the quest to accelerate the estate transfer during the life of the bequeather.

The study also clarifies the difference between gifts and inheritance. The former is established during the life of the giver, while the former is executed after the confirmation of the death of the deceased person. However, there is the possibility of a combination of writing the inheritance as a form of will during the life of the bequeather and postponing its execution until after the

confirmation of the will based on the conventional law in that particular environment. However, this study suggests the need for caution on the application of acceleration of inheritance and the need for further study on the implication of a combination of Shariah and conventional law in achieving the end goal of protecting the right of the weak among the heirs.

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## CONFLICT OF INTERESTS

The authors declare no competing interests such as financial or personal relationship, regarding the writing of this article.

## AUTHORS' CONTRIBUTIONS

Saheed Abdullahi Busari designed the study and gathered the literature. and wrote the article.

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