

AN EXAMINATION OF THE NATURE AND OPERATIONS OF ISLAMIC AND STATUTORY LAWS OF TESTATE SUCCESSION IN KADUNA STATE, NIGERIA

Ahmadu Seidu Maliki, PhD

Department of Sociology, Ahmadu Bello University, Zaria, Nigeria

Abstract

This study investigates and analyzes the nature, content, character, scope of operation, and relationship, between Islamic and statutory Laws of testate succession with a view to demonstrating the implications for family and social stability in a Muslim society. It probes the awareness, perception, preferences and satisfaction of Muslim citizens in Zaria town (in Kaduna State of Nigeria) with the two laws. The research problem revolves around the relationship between the two bodies of law, what happens in case of conflict, and the citizen's preferences in matters of succession. The study employs essentially doctrinal (review of statutory and case laws) methods supplemented by an empirical survey (interviews). Among the major findings is that the respondents prefer Islamic laws of succession and would prefer that it is given pre-eminence over statutory law. The paper recommends inter alia, that government should embark on a massive public awareness to sensitize citizens on rules of succession, even while retraining lower court judges for a better exercise of judicial discretion in succession matters.

Keywords: Laws, Succession, Property, Statute, Case law, Islam, Death, Testate, Intestate

Introduction

The distribution of the estate of a dead person, especially if he was the head of a family, has implications for the persistence of family solidarity and by extension social stability. To protect the family as the basic unit of social organization, all societies have over time, evolved rules of succession for the devolution of property of a dead person regardless of

whether he/she (hereafter the masculine pronoun also denotes the feminine) died testate or intestate.

A person dies intestate, when he dies without leaving a valid Will or when the will he left is invalid due to non-compliance with the Law. In such a situation, the right of succession to the estate is determined according to laws. The relevant law to be applied, whether statutory customary or Islamic, would largely depend on the personal law of the deceased. This in turn is largely ascertainable from the kind of marriage he/she contracted during his/her lifetime.

The rules of testate succession, on the other hand, apply where a deceased person had died, leaving a valid Will. The advantages of making a Will are many. It excludes the rules of inheritance flowing from the “Administration of Estates Law” (for marriages under the marriage Act), and provides a means for the testator to state his wishes in the distribution of his estate (though this is to a limited extent under Islamic Law). Imhanobe (2002) also notes that a Will enables the testator to appoint executors in his lifetime, give instructions about his burial, ensure continuity, appoint a guardian for his infants or dependents, confer powers of trustee, and so on. Many Nigerians are however, reluctant to make wills. The prevailing attitude is that it is somebody who is thinking of death that makes a will. The typical response encountered by this author whenever he broached the subject of making wills was; “are you planning to kill me? For many others it is the confusion surrounding the whole notion of wills and how they take effect after death that discourage them from making wills. For yet others, it is the fear that making wills is tantamount to ousting the operation of their customary and religious beliefs which they cherish (see Adubi, 1995; Oba 2008; and Oyesina, 2010). This paper examines the nature and operations of statutory and Islamic laws of testate succession in Zaria, a preponderantly Muslim community in Kaduna state, northern region of Nigeria.

Methodology

Data for this study came from primary and secondary sources. The secondary data came from Statutes and Case law. Primary data were generated from a survey interview administered to 80 respondents in Zaria. Data analyses therefore involved both Content Analysis and analysis of empirical data.

Comparing the Two Laws of Testate Succession: A Review of Relevant Literature and Laws

According to Obilade (1985), Onokah (2003), and MODO et al. (2006), testate succession in Nigeria is governed by both customary (including Islamic) law and statutory (English) law. The Islamic Law of succession and the Wills Law are two bodies of Laws, which have evolved from radically different backgrounds. Islamic Law of succession is based on the divine and universal principles of the Sharia, which govern Muslims all over the world (Coulson 1971, Schacht 1979, Esposito 1991, and Orire 2007). The Wills Law evolved from the English Wills Act, 1837, which is a statute of General Application reflecting the values of the English society with their prescriptions of Christian religion (Imhanobe 2002, Maliki 2005, Gurin 2008).

In a situation where such two radically different Laws operate side by side and citizens are given the freedom to choose under which one they want their lives to be regulated (expressly or impliedly) it is inevitable that situations of conflict of interpretation will arise in applying the Laws (see Obilade, 1985; Ikejiani-Clarke, 2009; and Balogun, 2011). The two laws may be compared at six levels, viz: validity of wills, testamentary intention and capacity, limits to testamentary freedom, alteration and revocation of wills, lapse of gift, and conflict between the two laws.

Regarding validity, Section 7 of the Kaduna State Wills Law categorically states that for a will to be valid, it must be in writing, it must be signed by the testator in the presence of two or more witness, and the witnesses must attest and subscribe the Will in the presence of the testator. The object of the section according to Gurin (2008) is clearly to prevent fraud. It must be stressed, however, that it applies only to Wills made in accordance with English Law. A Will executed according to Islamic Law need not comply with the provisions above. Wills (*wasiyyah*) under Islamic Law of testate succession need not be in writing nor in any particular form. Hence “it can be made by writing, verbally or even by signs, so long as it is apparent that the intention of the testator is to make a disposition operative on his death”(Gurin, 2008:96).

Regarding testamentary intention and capacity, Onokah (2003) and Orire (2007) observe that under both Laws, the testator/testatrix is required to have full legal capacity before he/she can make a valid Will. Hence, an under age, insane, or a person without a discriminating mind cannot make a valid Will. The specifics of these requirements may vary sometimes but the spirit is essentially the same.

As for limits to testamentary freedom, Gurin (2008), relying on a *Sunnah* (Prophetic tradition) narrated by Ibn Abu Waqqas, argues that there are four broad limitations to the testamentary freedom of a testator under Islamic law of testate succession. First, he can not validly bequeath more than one-third of his property unless the ultra-vires bequest is consented to by his legal heirs after the testator's death. Second, a testator cannot make a valid bequeath to a person who is a legal heir, unless the other heirs consent to it after his death. Third, a bequest to a person who is by Islamic Law barred from inheriting the testator (e.g his killer) is also invalid. Finally, ability to meet the requirements of testamentary capacity may constitute a limitation to testamentary freedom. Imhanobe (2002) however, notes that under the Wills Act of 1837, which is still applicable in some states in Nigeria, there is virtually no limit to the testamentary freedom of a testator. He can dispose all of his property by Will and to whoever or whatever he wishes.

Kaduna State has however enacted its own Wills Law and as such, the Wills Act (1837) is no longer applicable. The Kaduna State Wills Law restricts the testamentary freedom of a testator in four major ways. First, the testator cannot dispose of any property, which he had no power to dispose of by Will under customary and Islamic Law (Section 4(1). Second, he must have made reasonable financial provisions for his family and dependants, failure of which they can apply to the court for an order (Section 5(1). Third, a marriage under the Marriage Act automatically revokes Wills made before then unless the will was made in contemplation of the celebration of that marriage (Section 14). Finally, a testator cannot make valid bequests to attesting witnesses or their spouses (Section 11. See also *Ross V Countess* (1980) CH 297).

It is apparent that the provisions of the Kaduna Wills Law have brought the provisions of the Wills Act to be more in tune with Islamic Law of testate succession as far as testamentary freedom is concerned. In fact, even though it is a statutory/superior law, it subjects itself to Islamic Laws of testate succession in its Section 4 and goes further to enact the spirit of Islamic law of intestate succession in Section 5. This it did by codifying the need for the testator to make provisions for those "near-related" (see Gurin (2008), also re *Small Wood, Small Wood V St Martins Bank Ltd* (1951) CH 369.). This is quite commendable.

Now to the issues of "Alteration", "Revocation", and "Revival" of Wills. The Sharia does not require that the alteration of Wills must take any particular form. It must however, be witnessed by at least two adult male Muslims. The requirement for alteration can not, after all, be more rigid than those for making the Will itself. Adubi (1995) and Imhanobe (2002)

argue that the position is similar under the Wills law, where as all that is required is a codicil which is just a miniature or supplementary Will.

Revocation of a Will, whether in part or as a whole, can be done at any time before the testator's death, under both Laws. Furthermore, the revocation can be express or implied, provided it is done voluntarily (i.e with mental capacity), with full intention, and effort must have been made to put the intention into effect. It can also be revoked by the operation of law irrespective of testamentary capacity or intention.

On the doctrine of lapse of gift, the position is the same under both Kaduna State Law and the Islamic Law. When a beneficiary predeceases a testator, the gift to the beneficiary automatically lapses.

On the inevitable conflict between the two laws, the legal system provides guidelines for amicable resolution. Hence, there are various "incompatibility tests" and "choice-of-Law" rules for determining the applicable law in appropriate cases (See Obilade 1985, Maliki 2005, Orire 2007, and more specifically Section 34(1) of the High Court Laws of the Northern States). For example, the general rule is that "customary law is void if it is inconsistent with a local enactment". One area of potential conflict remains however. This is related to the effect of a marriage under the Act upon a Will. **Section 14** of the Wills Law states that such a marriage automatically revokes a will. The potentially conflict issue is, if a Muslim, who is already married in accordance with Islamic rules, decides to contract another marriage under the Act, would this subsequent marriage nullify his previous marriage, and also revoke his previous Will? Obilade (1985) and argues that it appears from a strict interpretation of Section 14 of the Wills Law that this would be the case. Maliki (2005), however, notes that Section 4 of the Kaduna State Wills Law has already excluded Muslims from the provisions of the Wills Law. The implication is that a previous marriage under the Islamic law will continue to subsist.

The case of Yunusa V Adesubokan (1968) N.N.L.R 97 (suit No. J23/67 SCA), both at its hearing in the Sharia Court of Appeal and in the Supreme Court (1971) NSNLR 7 (Appeal no. SC25/70), presents the most illustrative example of judicial handling of conflict between the two laws. The brief facts of the case were that a deceased testator, who was a Muslim (along with his entire family) living in the Northern part of Nigeria, executed a will under the Wills Act 1837. The will purported to bequeath five Pounds to the plaintiff (his eldest son) while giving his two other sons, two plots worth 350 Pounds each respectively. In addition, he gave these two other sons jointly and in equal share, another property located in Lagos as well as his residuary estate.

The letter and spirit of this sharing is clearly contrary to the principles of Islamic law of succession viz; that a testator can only dispose of one third of his property by Will and the remaining two third is to be distributed as if he died intestate. Furthermore, the one-third disposable by Will can only validly go to legal heirs with consent of the other legal heirs. The law of intestate succession applicable to the two thirds requires that male children must have equal shares, each having twice the share of a female.

So the plaintiff, the testator's eldest son, brought this action to challenge the validity of the Will on the ground that, the testator being a Muslim was not entitled to dispose of his properties by his Will, made under the Wills Act, 1837 in a manner contrary to Islamic Law.

Hon. Justice Bello applied section 34(1) of the High Court law which provides that:

The High Court shall observe, and enforce the observance of, every native law and custom which is not repugnant to natural justice equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom.

He interpreted the last phrase in the provisions of section 34 (1) (emboldened above) to mean that, the Wills Act shall not deprive the plaintiff of the benefit of Islamic Law, which in this case requires equal treatment of children. He accordingly set probate of the Will aside and gave judgment for the plaintiff.

On appeal to the Supreme Court, this decision was overruled (and one must say quite unfortunately). The Supreme Court ruled that the construction placed on the last phrase of S.34 (1) by the trial judge, is faulty. It declared unequivocally that, "the provisions of Maliki Islamic law is undoubtedly incompatible with section 3 of the wills Act, 1837". It appears that the Supreme Court in reaching its decision was not interested in any notion of fairness of the law or in any other rule of interpretation, other than the literal rule. Yet its construction of the plain language of the law was obviously unfair to the plaintiff. To cure the inherent defect in the Supreme Court's judgment, several states, including Kaduna state decided to statutorily restrict testamentary freedom. Oba (2008), however argues that in the recent case of *Ajibaiye Vs Ajibaiye* (2007) the Supreme court reaffirmed the rightness of its decision in *Yunusa V Adesubokan* (1968).

Observations and Discussion

As part of the survey component of this study, the researcher directly administered questionnaires to 80 respondents made up of 56 males and 24 females. Their ages ranged from 24 years to 80 years. Their income per month, ranged from zero Naira to N200,000 (\$1,300). Educationally, 44 of them had attained Primary/Koranic school level, 24 had up to secondary school, while the remaining 12 had tertiary qualifications. In terms of occupation, 23 are Students/Applicants/Unemployed, 12 are full time farmers, 29 are traders (either fully or in combination with other work), while the remaining 16 are salaried/paid employees.

The findings from the empirical data generated are quite instructive. The data reveal that respondents were aware of and quite satisfied with the Islamic principles of succession. They had no desire to be bound by any other law. Their satisfaction is particularly with the rules of intestate distribution. Some of them (12 or 15%) were not aware that a Muslim can make a will. None of them had made a will as at the time of the interviews. Eight (or 10%) of the respondents stated that they might make a will (*Wasiyyah*). This is notwithstanding that, Islamic law allows them to bequeath one-third of their property. When their attention was drawn to this, the almost automatic response was “but it is not mandatory”.

The interviewer probed the responses of a particular respondent who felt offended at being asked to make a will. The following dialogue ensued:

Interviewer: But are you not aware of a Prophetic tradition that requires a Muslim not to sleep for two night without making a Will? Or don't you know of the advantages? Through a Will you can correct to a certain extent, the Laws of inheritance, provide for relatives who are excluded but dear to you and recognize strangers who have helped you.

Respondent: (in anger) what do mean by saying I could correct Allah's Laws? I say I am not interested in making a Will, is it by force? May Allah (God) forgive you. Now come and leave because I don't care for this useless talk.

The dialogue reproduced above summarizes the dominant attitude among respondents. They simply do not want to contemplate tampering with Allah's (God) principles and have taken this to the extremity of not making a will. Even when they know it is allowed for them to bequeath one-third. It is noteworthy, however, that for some of them, it is not so much a fear of tampering with the divine principles, as much as their inherent

satisfaction. They feel that Allah has catered for all the needs that need to be catered for and there is no point in generating unnecessary tension after their deaths by making a will.

It should also be noted that in general, males appear more satisfied with the intestate rules of Islamic succession than females. The interview data revealed that while all the 24 females initially expressed agreement and satisfaction with the intestate rule, eight (33%) of them upon further probing, admitted that they “sometimes think the rules appear” discriminatory against women. Most of them were, however, quick to add “Allah knows best”. It is also noteworthy that a higher proportion of the females (11 or 46%) were more favourably disposed to Islamic will making than males (7 or 9%). This is probably an unconscious expression of the yearning by women that wills can provide opportunities to remedy the “harshness” of Islamic intestate laws against women. The women’s benign view of wills had however not translated to their making wills (most of them claimed they have no property to bequeath in the first place). Three of the women expressed the view that men should make bequests in favour of female relations, especially wives and daughters who have proved quite devoted and hardworking.

Apart from the above indications from the empirical data, a major observation made from the doctrinal/documentary data, is that Muslim from the Northern part of Nigeria are generally reluctant to undertake litigation. This is obvious from the paucity of relevant cases in the Law reports. Cases where succession under Muslim Law were litigated are quite few and far in between. There were so few cases from Kaduna State that the researcher had to rely on other Muslim States in the northern region of Nigeria in search of relevant cases to illustrate judicial applications of the relevant principles.

Conclusion

The findings of this study suggest that Islamic Law of succession is more in tune with the wishes and aspirations of Muslim citizens in Northern Nigeria. The logical implication of this is that Islamic law should be accorded legal pre-eminence over the statutory law in regulating succession among Muslims in Northern Nigeria. This will go a long way in bringing the operating laws in tune with existing realities, reduce rancour and what amounts to miscarriages of justice to Muslim citizens in Kaduna State, and make the devolution of property more predictable and devoid of bitterness. Towards the optimal realization of this objective, recommendations are proffered below.

Recommendations

First, while acknowledging the improvement of the various Wills Laws of the States upon the Wills Act, it is suggested that there is a need to go beyond just inserting a restriction clause in the Laws. If it is conceded that Islamic principles of succession are superior to English principles, as has been demonstrated in this study, and as the Wills Laws seem to implicitly acknowledge, then what is needed in any state where the predominant majority are Muslims is to encode those principles. In other words, instead of enacting English values as the statutory Law and then expressly exempt Muslims from its provisions, it is better to enact Muslim values as the statutory law and then expressly exempt non-Muslims from its application. This is not a novel suggestion for it is actually what many of the northern states have since done with regard to Criminal Law in States where Sharia codes have been enacted. If these States can obstinately go on to adopt Sharia Criminal Codes in spite of widespread opposition and concerns over constitutional matters, then it will even be easier to enact Sharia Civil Codes of succession, whose fair and superior principles are widely acknowledged even by non-Muslims.

The object of enacting a Sharia code on succession would be to make Islamic principles of succession more certain and readily available to the masses. At present, the citizens only know broad principles and tend to be at a loss when it comes to the technicalities of fractions and exclusions. The effect of this is that justice is sometimes miscarried. Yet the citizens, as shown in this study, rarely embark on litigation. Their general attitude is that Allah's (God) will be done. Even when it is suggested to them that their trust in the administrator of the estate is misplaced, they remain very reluctant to litigate. The danger of the current scenario of leaving estate distribution to an administrator's (judge) interpretation of the broad principles in the "Inheritance verses" of the Holy Quran is that it can lead to miscarriage of justice. This is underscored by the fact that most of these estate administrators are not qualified to so act as they have been shown to flunk simple succession arithmetic when put to the tests relating to distribution of hypothetical estates (see Gurin, 2008). Yet these local administer estates and preside over litigation on estate distribution.

It is recommended that a committee to be made up of learned Islamic jurists and scholars be set up to undertake the drafting of the rules of succession, in clear and simple language. The setting up of this committee could be at the instance of the northern governors as a body or in the alternative, by the respective governors. The draft code may then be adopted and passed into law by the respective State Assemblies in states of northern Nigeria preponderated by Muslims. Many countries in Asia have already done a similar thing and it is

working well for them (see Orire, 2007). There is no reason why it should not work in Nigeria.

In the meantime, the Alkali's and other judges of lower courts should be made to undertake periodic refresher courses to keep them "knowledgeable" in the Sharia principles of succession. Towards this, the various governments should liaise with the Centre for Islamic Legal Studies (located in Ahmadu Bello University, Zaria). This Centre can organise Workshops and Seminars to update the judges on the relevant issues. This is very important because majority of the few cases that are litigated do not go beyond the lower courts. As a result, opportunities for review at higher courts where the judges are more learned do not often arise.

Finally, there is a need for massive public awareness and enlightenment campaign to educate Muslims not only about the principles and rules of succession, but also to develop a spirit of litigation when it is clearly called for. The belief that everything is "Allah's" Will and nothing can happen if it is not the desire of Allah, while true must not necessarily translate into an attitude of sheepish docility

References:

- Adubi, C. O. (1995). *Drafting, Conveyancing and Wills*. Lagos: The Lighthouse Publishing Co. Ltd.
- Balogun M.J. (2011). *The Route to Power in Nigeria*. Lagos: Malthouse Press. Coulson
- N. J. (1971). *Succession in the Muslim Family*. Cambridge/Oxford: Cambridge University Press.
- Esposito J. L. (1991). *Islam: The Straight Path*. Oxford: Oxford University Press.
- Fiqh-al-Sunnah; Volumes: One to Nine.
- Gurin A. M (2008). *An Introduction to Islamic Law of Succession: Testate/Intestate*. Zaria: Jodda Press Ltd.
- Ikejiani-Clarke M. (2009). *Peace Studies and Conflict Resolution in Nigeria: A Reader*. Ibadan: Spectrum Books Limited.
- Imhanobe S. O. (2002). *Legal Drafting and Conveyancing*. Abuja: Secured Titles Publishers.
- Maliki A. S. (2005). *A Comparative Appraisal of Islamic and Statutory Laws on the Devolution of Property after Death*. Zaria: An Unpublished LL.B Project Submitted to the Faculty of Law, Ahmadu Bello University Zaria.
- Modo V.O.I., Oluwabamide A.J., Akpa O. & Ekpa A. (Eds) (2006). *Issues in Peace and*

Conflict Resolution. Lagos: Lisjohnson Resources Publishers.

Oba A. A. (2008). “Can a person subject to islamic law make a will in Nigeria?:*Ajibaiye v Ajibaiye* and Mr. Dadem’s wild goose chase”. *Review of Nigerian Law and Practice*

Obilade A.O. (1985). *The Nigerian Legal System*. Ibadan: Spectrum Law Publishing.

Onokah M. C. (2003). *Family Law*. Ibadan: Spectrum Books Limited.

Orire A. (2007). *Sharia: A Misunderstood Legal System*. Zaria: Sankore Educational Publishers Ltd.

Oyesina T. (2010). “Misconceptions and Benefits and Making a Will”.

<http://www.tribune.com.ng/index.php/tribune-law/2901-misconceptions-and-benefits-of-making-a-will>.

Schacht J. (1979). *The Origins of Muhammadan Jurisprudence*. London: Oxford University Press.

Vol. 2(2).

Legal Documents

The (English) Wills Act 1837

The Kaduna State Wills Law, Cap 163, Laws of Kaduna State.

The Holy Quran.

The 1999 Constitution of the Federal Republic of Nigeria.