

LEGAL CHALLENGES CONCERNING SOME BENEFICIARIES OF ESTATES GOVERNED BY ISLAMIC LAW IN NIGERIA

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ABSTRACT

Under Islamic law, succession is divided into inheritance (*mirath*) and wills (*wasiyyah*) with detailed rules on how the estate of a deceased Muslim should be distributed. Islamic law of succession of the Maliki school is applicable in Nigeria as part of the personal law of Muslims. The application of Islamic legal norms in the country is generally limited by the parameters set by the state. Islamic law and its administration face many challenges from the absence of a legal framework for a systematic administration of estates governed by Islamic law. Other challenges come from the cultures and social practices of the people and from international human rights law and the bill of rights in the Nigerian constitution that vary from some provisions of Islamic succession law. This article analyses the effects of the above on the following classes of beneficiaries: non-Muslims, female heirs, illegitimate children, adopted children, heirs outside the jurisdiction of the court, orphaned grandchildren, dissenting heirs whose concurrence is required, successors to deceased heirs, and the *Bait ul-Mal* ('Public Treasury'). The article found that in the face of these challenges, Nigeria remains largely faithful to the Maliki School. The article suggests areas where more compliance with Islamic law is needed.

Keywords: Islamic law in Nigeria, inheritance (*mirath*), wills (*wasiyyah*), administration of Muslims' estates, beneficiaries

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CABARAN- CABARAN UNDANG-UNDANG BERKENAAN BEBERAPA BENEFISIARI HARTA DI BAWAH PENTADBIRAN UNDANG-UNDANG ISLAM DI NIGERIA

ABSTRAK

Di bawah undang-undang Islam, pewarisan dibahagikan kepada pusaka (*mirath*) dan wasiat (*wasiyyah*) yang diiringi peraturan-peraturan yang banyak dan terperinci tentang tatacara pembahagian harta seorang Islam yang telah meninggal dunia. Di Nigeria, hukum pewarisan mazhab Maliki digunakan sebagai cabang undang-undang persendirian orang Islam. Aplikasi norma undang-undang Islam di dalam negeri terhad kepada parameter-parameter yang ditentukan oleh negeri. Undang-undang Islam dan pentadbirannya menghadapi banyak cabaran-cabaran disebabkan tiadanya kerangka undang-undang pentadbiran harta yang sistematik untuk mentadbir harta menggunakan undang-undang Islam. Cabaran-cabaran lain datang daripada adat dan amalan sosial masyarakat dan daripada undang-undang antarabangsa mengenai hak kemanusiaan dan rang undang-undang hak di dalam perlembagaan Nigeria yang berlainan daripada undang-undang pewarisan Islam. Makalah ini menganalisa kesan-kesan daripada di atas kepada kelas-kelas benefisiari-benefisiari berikut: bukan Islam, pewaris wanita, anak tak sah taraf, anak angkat, pewaris di luar bidanguasa mahkamah, cucu yatim piatu, pewaris yang berbeza pendapat tetapi persetujuannya diperlukan, pewaris kepada pewaris yang sudah meninggal, dan Bait ul-Mal. Makalah ini mendapati bahawa dalam adanya cabaran-cabaran ini, Nigeria masih setia kepada mazhab Maliki. Makalah mencadangkan bidang-bidang di mana lebih pematuhan kepada undang-undang Islam diperlukan.

Kata kunci: undang-undang Islam di Nigeria, harta pusaka (*mirath*), wasiat (*wasiyyah*), pentadbiran harta pusaka orang Islam, benefisiari-benefisiari

INTRODUCTION

In Islamic law, succession is governed by the laws relating to inheritance (*mirath*) and wills (*wasiyyah*), which roughly correspond to what is described as intestate and testate succession in the common law.¹ Strictly speaking, a Muslim cannot die intestate.² This is because Islam provides copious and detailed rules on how the estate of a deceased Muslim should be shared.³ Most Muslims in Nigeria do not write wills, hence, the whole of their estates are shared according to the sharing formulas prescribed by Islamic law. Nigerian Muslims, especially those in the northern part of the country, adhere to the Maliki school (*madhhab*) that had for centuries been the official school in the region, which was retained as such in the Sokoto and Kanem-Bornu caliphates that formed the bulk of what is now northern Nigeria.⁴ The post-independence northern region of Nigeria also retained the Maliki school as the official *madhhab*.⁵ Thus, rules of the Maliki school governing *mirath* and *wasiyyah* apply in northern Nigeria. The Maliki school is one of the four Sunni schools of

¹ On statutory law of succession derived from English law in Nigeria, see generally Margaret C. Onokrah, *Family Law* (Ibadan: Spectrum Books, 2003, rep. 2007), 291-360.

² M. A. Ambali, *The Practice of Muslim Family Law in Nigeria* (Lagos: Princeton Publishing, 3rd ed., 2013), 389 and Abdulkadir Orire, *Shari'a: A Misunderstood Legal System* (Zaria: Sankore Educational Publishers, 2007), 251. Both authors were variously the Grand Kadi of Kwara State, Nigeria.

³ See expositions of these rules (according to the Maliki school) in A. at Tarjumana and Y. Johnson, trans. *Imam Malik, Al-Muwatta* (Norwich: Diwan Press, 1982), 235-242, Muhammad ibn Yusuf Al-Kafi, *Ihkam al-Ahkam ala Tuhfat al-Hukkam* (Beirut, Dar al-Kutub al-Ilmiyyah, n.d.), 280-297, Ahmad ibn Ghunaym ibn Muhanna al-Nafarawi al-Malikkiyyi al-Azhari ('Ibn Ghunaym'), *Al-Fawakih al-Dawani ala Risalat ibn Abi Zayd al-Qayrawani* (Beirut: Dar al-Fikr, 1995), 2:249-264 and 'Abd al-Sami' al-'Abi Al-Azhari, *Jawahir al-'Ikhlil: Sharh Mukhtasar al-Allamah Shaykh Khalil fi Madhhab al-Imam Malik* (Beirut: Dar al-Fikr, n.d.), 2:327-340. See also Ambali, *Muslim Family Law*, 340-391 and Orire, *Shari'a*, 251-274.

⁴ Abdurahman I. Doi, *Islam in Nigeria* (Zaria: Gaskiya Corporation, 1984), 39, 59 and 206-207.

⁵ See the various Sharia Court of Appeal of the northern States, for example, s. 13 (a), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007. In *Abdulsalam v Salawu* (2002) 6 Supreme Court of Nigeria Judgments, 388-403, the Supreme Court held that the "Islamic personal Law" referred to in the constitution must be of the Maliki school.

Islamic law.⁶ There are often differences of opinions between these schools, even differences in the opinions of scholars within the same schools. Where there are divergent views among Maliki scholars on an issue, the courts in Nigeria have taken the position that the courts should give effect to the popular view, the *mashhūr*, which is, the view adhered to by the majority of the scholars of the school.⁷

Islamic law of succession is applicable in Nigeria as part of the personal law of Muslims. The Nigerian constitution in stating the jurisdiction of the Sharia Court of Appeal defines “Islamic personal law” as including matters concerning “a *wakf* [waqf], gift, will or succession where the endower, donor, testator or deceased person is a Muslim”.⁸ The Kwara State Sharia Court of Appeal has reiterated that once a person professes Islam, Islamic law becomes his or her personal law.⁹ However, this is not always strictly observed especially in the southern part of Nigeria where there are no Islamic courts and customary courts often apply customary law to estates of Muslims.¹⁰

Nigeria is not an Islamic state and the country’s legal system is patterned primarily after common law. Islamic law does not apply as an independent legal system in Nigeria as it has a subordinate status within the Nigerian legal system. The application and enforcement of Islamic legal norms are generally limited by the parameters set by the state. Thus, given the nature of the Nigerian state and its legal system, Islamic law and its administration face many challenges. Most of

⁶ On these schools, see ‘Abdur Rahman Doi, *Shariah: The Islamic Law* (Kuala Lumpur: A. S. Noordeen, reprint 2007), 85-112.

⁷ *Garba v Abdu* (2006) 3 Sharia Law Report (Pt. 2) 118 (CA) (‘*Ijma*’) and *Idowu v Akanbi* (2003) Annual Report Sharia Court of Appeal (Kwara State) 126, 130-131.

⁸ S. 277(2)(c), 1999 Constitution.

⁹ See *Shittu v Shittu* (1998) Annual Report Sharia Court of Appeal (Kwara State) 93, 98.

¹⁰ See Hakeem A. Olaniyan, “Personal Law of Succession in South Western Nigeria: The Dilemma of Muslims,” *University of Ilorin Law Journal* 2 (2005): 1-20, Abdulmumini A. Oba, “Complexities and Complications in the Administration of Islamic and Customary Laws in Nigeria: *Rabiu v Abasi* (1996) Revisited,” in *Administration of Justice in the Customary Courts of Nigeria: Problems and Prospects*, eds. N. M. Jamo and A.M. Madaki (Zaria: Department of Private Law, Ahmadu Bello University, 2009), 412-438 and A. O Yekini, “Judicial Imbalance in the Application of Islamic Law As a Personal System of Law in Nigeria: Making a Case for Legislative Reforms,” *Journal of Islamic Law and Culture* 15 (2014): 31.

these challenges stem from the fact that unlike the administration of the common law inspired statutory marriages, there is no law for systematical administration of estates governed by Islamic law. Other challenges come from the cultures and social practices of the people. In addition, international human rights law and the bill of rights in the Nigerian constitution pose challenges to some norms of Islamic succession law.¹¹

This article analyses the nature of Muslims' estates under Islamic law and the legal framework for the administration of these estates in the Nigerian legal system. The paper examines the challenges posed within Islamic law, by state law and from other sources to some categories of beneficiaries of estates governed by Islamic law in Nigeria. The paper examines how the courts have navigated these challenges. Beneficiaries in these categories include non-Muslims, female heirs, illegitimate children, adopted children, heirs outside the jurisdiction of the court, orphaned grandchildren, dissenting heirs whose concurrence is required, successors to deceased heirs, and the *Bait ul-Mal* ('Public Treasury'). The article relies essentially on classical textbooks of the Maliki school used in Nigeria courts, judicial decisions, and works of modern scholars. The article also relies on interviews of persons connected with administration of estates governed by Islamic law in Nigeria. We also relied on our experiences as legal practitioners and law teachers involved in the administration of Islamic law in Nigeria.

LEGAL FRAMEWORK FOR ISLAMIC LAW OF SUCCESSION IN NIGERIA

The scope of wills is very wide under Islamic law. In Islamic law, the purpose of a will is not merely to dispose of properties but also to make provisions for important issues such as rights and dues owned to Allah and other persons and admonishment of heirs.¹² The Prophet

¹¹ On the tension between the Nigerian constitution and Islamic law of inheritance, see a previous study in Abdulmumini A. Oba, "Constitutional Abrogation of Aspects of Islamic law in Nigeria," *Ahmadu Bello University Law Journal* 17-18 (1999/2000): 120. The current paper updates this earlier discussion.

¹² Muhammad al-Jibaly, *The Inevitable Journey Part 2: Inheritance - Regulations and Exhortations* (Arlington, Texas, US: Al-Kitaab and As-Sunnah Publishing, 2nd ed., 2005), 111-114.

(SAW) emphasized the importance of wills to a Muslim by saying that “It is not proper for a Muslim who has something to bequeath to sleep two consecutive nights without having his will written with him”.¹³

There are differences of opinion among scholars as to whether leaving a will is obligatory on Muslims. Majority of the scholars from the four Sunni schools say that “leaving a will is only a recommended act (*mandūb*) [and] not obligatory (*wājib*), unless the testator is a debtor or a creditor”.¹⁴ This is so widely accepted that some scholars say it is the unanimous view of the four schools.¹⁵ However, a few scholars think that it is obligatory on Muslims to leave a will. These include scholars of the Zāhiri school such as Dawūd Az-Zāhiri (the founder of the school) and Ibn Hazm and other scholars such as Ibn Jarir At-Tabari, Al-Jassas.¹⁶ They argue that it is compulsory for a person to make a will in favour of his or her non-heir relatives and that if such a person dies without leaving a will, it is the duty of his or her heirs to make provisions from the deceased’s estate for those relatives. If the heirs fail to do this, they can be compelled by a *Qadi*. The quantum of such provisions is not fixed but it must not exceed a third of the estate.

In Nigeria where the Maliki school is the prevailing *madhhab*, the courts cannot compel an obligatory bequest.¹⁷ Nonetheless, there are many reasons why writing a will is desirable and even a compulsory religious obligation. An example is making bequests to cater for

¹³ ‘Abdul Hamid Siddiqi, trans. *Imam Muslim, Sahih Muslim* (Beirut: Dar al-Arabiyyah, undated), Vol. III, *Kitab al-Wasiyya*, 865-866 (Hadith Nos. 3987-3990).

¹⁴ Ahmad bin Saalih Aal ‘Abdus-Salaam, “Harmful Discretionary Actions Regarding Wills and Testaments”, *Al-Adl* 55: 144, 147 citing “[Abi Abd Allah Muhammad ibn Muhammad ibn Abd al-Rahman Al-Ṭarabulusi, *Mawahib al-Jalil li-Sharh Mukhtasar Khalil*], 6/364” among others from the Maliki school. See also Ibn Ghunaym, *Al-Fawakih al-Dawani*, 2:132-133.

¹⁵ ‘Abdus-Salaam, “Harmful Discretionary Actions Regarding Wills and Testaments”, 148-149.

¹⁶ Ibid., 148-149 citing “[Ali bin Ahmad Ibn Hazm, *Al-Muhalla*] 6/312. [Abu Ja’far al-Tabari, *Tasfir al-Tabari: Jami’ al-Bayan ‘an ta’wil ay al-Qur’an*] 3/396 ... [and] ...[Abu Bakr Jassas, *Ahkam al-Qur’an*, commentary on Quran] 1/200”. See also Razali Nawawi, “Towards a Muslim Law of Will in Malaysia,” *IIUM Law Journal* 1(1) (1989): 165, 166-170.

¹⁷ On Muslims’ will under Islamic law and as applicable in Nigeria, see generally Abdulmumini A. Oba, “Can a Person Subject to Islamic Law Make a Will in Nigeria?: *Ajibaiye v Ajibaiye* and *Mr. Dadem’s Wild Goose Chase*,” *CALS Review of Nigerian Law and Practice* 2, no. 2 (2008): 131-145.

dependants who are not legal heirs. In addition, certain bequests that earn spiritual reward such as testamentary gifts and pious endowment (*waqf*) can be done through a will. Some contemporary scholars are emphasising the obligatory nature of wills. Their concern is not only about obligatory bequests for non-heir relatives alone, but also about other purposes of wills. Muhammad al-Jibaly, writing a practical manual for Muslims gives some of these as the need to clarify one's affairs relating debts owed to Allah and to fellow human beings.¹⁸ He argues rightly that Muslims living in non-Muslim countries should make wills that make Islamic law the law applicable to their estates and the law binding on executors and heirs in connection with the estate. This is to avoid the estate being subject to the local intestate laws of foreign non-Muslim countries. He also added that any testator that has minor children should also appoint a responsible person as guardian for his children in case he or the wife dies suddenly leaving the children orphans. Such a guardian should be one who can bring up the children in an Islamic manner. It is acceptable to say these are obligatory and cogent reasons to leave a will.

There are three important limitations to testamentary power in Islamic law. Firstly, according to the Maliki school, a testator cannot make a bequest in favour of any of his or her legal heirs, that is, those that are legally entitled to inherit him or her, except if all the other heirs agree to the bequest.¹⁹ Secondly, a will cannot be for an illegitimate purpose.²⁰ Lastly, the properties disposed under the will should not be more than a third of the whole estate unless all the heirs consent that the portion in excess of a third of the estate be so disposed.²¹

The limiting of testamentary powers to a third of the estate conflicts with the unlimited testamentary powers granted under the Wills Act applicable as a federal law and the various Wills laws of the states, which has occasioned controversies among Muslims in

¹⁸ Al-Jibaly, *Inevitable Journey*, 98-100.

¹⁹ At-Tarjumana and Johnson, *Imam Malik, Al-Muwatta*, 357, para. 37.5 and Al-Kafi, *Ihkam al-Ahkam*, 245. See also Ambali, *Family Law*, 386 and Orire, *Shari'a*, 262.

²⁰ Ibn Ghunaym, *Al-Fawakih al-Dawani*, 2:132-133. See further examples of illegitimate purposes as stated by scholars of the various schools in 'Abdus-Salaam, "Harmful Discretionary Actions," 159-160.

²¹ At-Tarjumana and Johnson, *Imam Malik, Al-Muwatta*, 356, para. 37:3.4 and Ibn Ghunaym, *Al-Fawakih al-Dawani*, 2:132-133. See also Ambali, *Family Law*, 342 and Orire, *Shari'a*, 263.

northern Nigeria. In *Yunusa v Adesobukan*,²² a Muslim testator made a will whereby he bequeathed the sum of £5 to one of his sons while he bequeathed houses and larger sums of money to his two other sons. This violated Islamic law of inheritance in many ways. The trial court held that the testator being a Muslim in Nigeria could not make a will whose terms violate the terms of Islamic law. In reversing this decision on appeal, the Supreme Court held that anybody can make a will under the Wills Act and that there is no such limit to testamentary powers under the Act.²³ The Supreme Court decision generated a lot of controversy.²⁴ Subsequently, the Wills laws were amended across the country by making testamentary powers subject to Islamic law and customary law. For example in Kwara State, the amendment provides that the Wills Law does not apply “to any property which the testator had no power to dispose of by will or otherwise under customary law to which he was subject” and “to the will of a person who immediately before his death was subject to Islamic law”.²⁵ The purport of this amendment was considered in *Ajibaiye v Ajibaiye*²⁶ and the Court of Appeal held that the amendment prohibited Muslims from making wills that are inconsistent with Islamic law of inheritance. However, this decision has not stopped the controversies. Some argued that the decision deprived Muslims of the power to make wills.²⁷ The correct position is that the decision merely affirmed the position of Islamic law that limits a Muslim’s testamentary powers to a third of his or her estate.²⁸ This was evident in the

²² (1968) Northern Nigeria Law Report 97 (HC). See also (1961-1989) 1 Sharia Law Report 15.

²³ (1971) Northern Nigeria Law Report 77 (SC). See also (1961-1989) 1 Sharia Law Report 26.

²⁴ See Abdulmumini A. Oba, “Islamic Law as Customary Law: The Changing Perspective in Nigeria,” *International and Comparative Law Quarterly* 51, no. 3 (2002): 817, 828-829.

²⁵ S. 4(1) (a) and (b), Kwara State Wills Law, Cap. K58, Laws of Kwara State, 2007.

²⁶ (2007) All Federation Weekly Law Report (Pt. 359) 1321 (CA). See an analysis of this case in Oba, “Person Subject to Islamic Law”.

²⁷ For example, see Yusuf Y. D. Dadem, “Can a Person subject to Islamic Law Make a Will in Nigeria? *Ajibaiye v Ajibaiye* Reviewed,” *CALS Review of Nigeria Law and Practice* 2 no. 1 (2008): 52-61.

²⁸ See generally Oba, “Person Subject to Islamic Law” and Ismael Saka Ismael & Salihu Abdulrauf Abdullah, “Unfettered Right of Muslims to Make *Wasiyyah* (Will) in a Plural Legal System like Nigeria,” *University of Maiduguri Law Journal* 14 (2016): 189-200.

manner that the Sharia Court of Appeal distributed the estate when the estate came to the court subsequent to the decision of the Court of Appeal. The court recognized bequests to non-heirs (provided the bequests are not above one-third of the estate) and disallowed the bequests to heirs.²⁹ The Islamic rule as to the one-third limit is now firmly established in Islamic courts in Nigeria.³⁰

Although Islamic law relating to *mirath* and *waṣīyyah* is recognized and enforceable in Nigeria, the legal framework for its enforceable is less than adequate. Unlike in the High Court where there are statutory provisions and rules of court for administration of estates governed by statutory law, there are no express provisions concerning probate matters for estates governed by Islamic law in the rules of court applicable in the Sharia Court of Appeal. This arrangement gives rise to some challenges in the administration of estates governed by Islamic law which we have discussed elsewhere.³¹

CHALLENGES CONCERNING CERTAIN CATEGORIES OF HEIRS

Non-Muslims

The Islamic law of inheritance prohibits inheritance across religions. This derives from these prophetic traditions: “The followers of two different religions may not inherit from each other”³² and “A Muslim is not to inherit a disbeliever and a disbeliever is not to inherit a Muslim”.³³ Scholars and courts in Nigeria have consistently affirmed this principle.³⁴ A possible challenge to the principle comes from the

²⁹ For example, see *The Estate of Ajibaiye* (2008) Annual Report of the Sharia Court of Appeal, Kwara State, 81 at 93, 99, 103, 105 and 122.

³⁰ See *Usman v Usman* (2005) NNLR 449, 450, *Garba v Abdu* (2006) 3 SLR. (Pt. 2) 118 (CA), *Ajibaye v Ajibaye*, op cit., and *Estate of Ajibaiye* (2008) Annual Report of the Sharia Court of Appeal, Kwara State, 81.

³¹ Abdulmumini A. Oba and Ismael Saka Ismael, “Challenges in the Legal Framework for Islamic Law of Succession in the Sharia Courts of Appeal in Nigeria,” (on file with the authors).

³² Nancy Eweiss, trans., and Selma Cook, ed., *Imam Ibn Hajar, Bulugh Al-Maram Min Adillat Al-Ahkam* (El-Mansourra, Egypt: Dar Al- Manarah, 2003), 351 (Hadith No, 976).

³³ *Ibid.*, 351 (Hadith No. 974).

³⁴ Ambali, *Family Law*, 345 and Orire, *Shari'a*, 255.

constitutional provision that provides that there should not be discrimination on grounds of religion.³⁵ However, it is clear that the Islamic bar to inheritance across religions cannot be said to be inconsistent with the constitutional provision of non-discrimination because the bar applies to Muslims and non-Muslims heirs equally.³⁶ Given the inter-marriages and close social interactions between Muslims and non-Muslims, scholars have encouraged the use of devices such as *wasīyyah* (wills) and *hibah* (gifts) as legitimate and legal means within Islamic law by which Muslims can provide for their non-Muslims relatives such as parents and wives.³⁷ This arrangement is not necessarily disadvantageous to the non-Muslim relatives vis-à-vis Muslims of similar relationship with the deceased. For example, there is nothing inherently discriminatory or prejudicial to a Christian co-wife because she may get more, less or equal to what her Muslim co-wife/wives inherit(s).³⁸ Although bequests through a *wasīyyah* cannot exceed a third of the estate, there is nothing stopping a husband from making a bequest of up to a third of the estate in her favour. Whereas, her Muslim co-wife is entitled to inherit either one eighth of the estate (if there is issue) or a quarter of the estate (if there is no issue) if she is the only wife (entitled to inherit) and if there are also Muslim co-wives, they are only entitled to share one eighth of the estate (where there is issue) or share a quarter of the estate (where there is no issue).

Female Heirs

In the past, female heirs faced challenges in parts of northern Nigeria, where cultural or other extraneous reasons prevented women from

³⁵ s. 42(1), 1999 Constitution. See also Abdulmumini A. Oba, "Constitutional Abrogation of Aspects of Islamic law," 125-128.

³⁶ Abdulmumini A. Oba, "Between Willingness and Unwillingness: Christians as Litigants and Accused Persons in Islamic Courts in northern Nigeria," in *Religious Freedom and Religious Pluralism in Africa: Prospects and Limitations*, eds. Pieter Coertzen, M. Christian Green and Len Hansen (South Africa: SUN MeDIA Stellenbosch, 2016), 177, 187.

³⁷ Ismael Saka Ismael & Abdulmumini A. Oba, "Navigating Inheritance across Religions by Muslim and Non-Muslim Heirs in Nigeria" (paper presented at the *International Conference on Religious Pluralism and Heritage: Legal and Social Development in Africa*, Addis Ababa, Ethiopia May 22-25, 2016).

³⁸ Ambali, *Family Law*, 345.

inheriting houses and farmlands.³⁹ Nowadays, the courts have consistently affirmed women's right to inherit any kind of property. In *Muhammadu v Mohammed*,⁴⁰ the plaintiffs filed a case at the Upper Area Court, Kebbi against their brothers claiming their own share of inheritance in the estate of their father who died 36 years ago. The defendants maintained that their sisters are not entitled to inherit farmlands and grazing land. The Upper Area Court rejected this defence and gave a verdict in favour of the plaintiffs. On appeal, the Kebbi State Sharia Court of Appeal affirmed this judgment. On further appeal to the Court of Appeal, the court in affirming the judgments of the lower courts held that God designated the heirs under Islamic law and that no one can deny females their right to the inheritance under Islamic law. The court also held that in line with Islamic law, the properties in question should be distributed among the parties with the sons taking twice the portion of females. Some have argued that the 2 to 1 ratio apportioned to sons and daughters respectively is discriminatory as it violates the principle of gender equality.⁴¹ This position reflects the challenges to the Islamic inheritance scheme that have come from international human rights concepts of gender equality and the principle of non-discrimination. However, Muslims have argued that the inheritance scheme under Islamic law is based on equity reflecting the responsibilities placed on the genders rather than on a strict principle of equality that does not take into consideration the social conditions and cultures of

³⁹ Steven Pierce, "Farmers and 'Prostitutes': Twentieth-Century Problems of Female Inheritance in Kano Emirate, Nigeria," *Journal of African History* 44 (2003): 463-486 and Abdulmumini A. Oba, "The Judicial Practice in Islamic Family Law and Its Relation to 'Urf (Custom) in Northern Nigeria," *Islamic Law and Society* 20 no. 3 (2013): 272, 310-311.

⁴⁰ (2001) 6 Nigerian Weekly Law Report (Pt. 703) 104.

⁴¹ For example, the case of *Muhammadu v Mohammed* (above) provoked an extra judicial comment from another justice of the Court of Appeal who opined that the court should have set aside the 2 to 1 formula on the grounds that it violates the principle of gender equality, see C. C. Nweze, "A Critical Appraisal of Judicial Decisions relating to Women's Rights in Nigeria" (paper presented at a WACOL organized colloquium, at Grand Hotel, Asaba, Delta State, March 1-2, 2003) 5-7 quoted in Muhammed Tawfiq Ladan, "The Protocol on the Rights of Women in Africa and the Islamic Perspective on Gender Equality and Justice" (Seminar paper, African Union Summit, Khartoum, Sudan, 16-24 January, 2006) accessed on 18 November 2016, <https://www.dawodu.com/ladan4.htm>.

Muslims.⁴² Islamic courts in Nigeria have continued to adhere strictly to the prescribed portions for males and females.⁴³ In *Raheem v Raheem*,⁴⁴ the Kwara State Sharia Court of Appeal set aside the judgment of the Area Court No. 1, Offa whereby the estate of a Muslim was distributed according to customary law which gave the sons and daughters of the deceased equal portions in the estate. The Sharia Court of Appeal held that “the position of Islamic law is very clear on the distribution of inheritance, where it is stipulated on Quran 4 verse 11”.⁴⁵

Illegitimate Child (*Walad ul-Zinā*)

Legitimacy is an important issue in Islamic law. The protection of lineage is one of the fundamental objectives (*maqasid*) of Islamic law.⁴⁶ Illegal sexual intercourse (*Zinā*) consisting of both fornication and adultery is punished severely.⁴⁷ A child born out of wedlock is not affiliated to the biological father but to the mother.⁴⁸ The presumption is that a child born within wedlock is legitimate if the child is born after the stipulated minimum and before the maximum periods of gestation.⁴⁹ This is subsumed under the concept *al-walad*

⁴² Hammudah ‘Abd al-‘Atī’, *The Family Structure in Islam* (Lagos: Islamic Publications Bureau, 1982), 267-270.

⁴³ For example, see the distribution of the estates of *Issa Usman, Yahaya Adisa, Abdulrasaq Jimoh, Abdullahi Salaudeen, Ahmed Olumoh, Bashir Adebayo and Abubakar Amasa Jidda* by the Kwara Sharia Court of Appeal reported in (2015) Annual Report of the Sharia Court of Appeal, Kwara State, 184, 195, 206, 214, 220, 226, and 231 respectively.

⁴⁴ (2015) Annual Report of the Sharia Court of Appeal, Kwara State, 167.

⁴⁵ *Ibid.*, 177-178. Quran 4:11 provides thus: “Allah commands you as regards your children’s (inheritance): to the male, a portion equal to that of two females;...”.

⁴⁶ Mohamad Akram Laldin, *Introduction to Sharī’ah and Islamic Jurisprudence* (Kuala Lumpur: Cert Publications, 2nd edn., 2008), 23-25.

⁴⁷ Ibn Ghunaym, *Al-Fawakih al-Dawani*, 2:204-206 and Doi, *Shariah*, 236-241. See also the Sharia Penal Codes in force in parts of northern Nigeria, for example, the offence of *zina* in ss. 126-127, Shari’ah Penal Code, Law No. 20 of 2000, Zamfara State.

⁴⁸ Ibrahim bin ‘Ali Ibn Farhūn, *Tabṣīrah al-ḥukkām fī usūl al-aqḍiyah wa manāīj aḥkām* Beirut: Dār al-kutub ‘Ilmiyyah. 2001) 2:268 and Al-Azharī, *Jawāhir al-‘Ikhlīl*, 2:338. See also Ambali, *Family Law*, 344 and Orire, *Shari’a*, 255.

⁴⁹ Jurists agree on the stipulated minimum period of gestation is six lunar months or six lunar months less five days but differ on the maximum period. According to Imam Maliki it is five years while some of his disciples say it is seven years: Imran Ahsan Khan Nyazee, trans. *The Distinguished Jurist’s Primer (Ibn Rushd,*

lil firash (literally, a child belongs to the matrimonial bed). The concept of *al-walad lil firash* and the requirement of *li'an* to rebut the same has been upheld frequently by Nigeria courts.⁵⁰ Where a husband seeks to disown the paternity of a child born within wedlock to him to his wife, he needs to prove adultery on the part of the wife. However, the evidential burden in this regard is very high.⁵¹ Where no such evidence is available, the only option open to the husband is to take the oath called *li'an* (cursing oath).⁵² This position has been upheld in Nigerian courts.⁵³

Under Islamic law, an illegitimate child, that is, a child born out of wedlock or disowned by the *li'an* oath, cannot inherit his or her biological father and the father too cannot inherit such a child.⁵⁴ This legal concept faces challenges from customary law and state law. The customary laws in many parts of the country allow a man to legitimise his children born out of wedlock by simply acknowledging such children and with that, those children acquire the same and equal rights with his children born within wedlock.⁵⁵ Although this applies

Bidayat al-Mujtahid wa Nihayat al-Muqtasid) (Reading: Ithaca Press Garnet Publishing, 2000), 2:433-434.

⁵⁰ *Wangara v Kara* (2006) Sarauniya Law Reports (Pt. 168, *Shehu v Abdu* (2006) Sharia Quarterly Law Report (Pt. 1) 84, *Uku v Uku* (2013) 1 Sharia Quarterly Law Report (Pt. 4) 35, and *Rungamawa v Rungamawa* (2015) 3 Sharia Quarterly Law Report (Pt. 2) 304. See also *Maiwake v Modu* (2007) 13 NWLR (Pt. 1050) 167, *Rabiu v Amadu* (2006) Sarauniya Law Reports (Pt. 1) 1 and *Olo v Kaju* (2014) 2 Sharia Quarterly Law Report (Pt. 4) 643.

⁵¹ Abdulmumini A. Oba, "Gender Equality and Proof of Illegal Sexual Intercourse (*Zina*) Under the Shari'ah Penal Codes" in *Contemporary Issues in Nigerian Law, Legal Essays in Honour of Justice Umaru Abdullahi* eds. S. M. G. Kanam and A. M. Madaki (Zaria: Department of Private Law, Ahmadu Bello University, 2006), 456, 457-459.

⁵² Al-Azharī, *Jawāhir al-'Ikhlil*, 1: 380-381 and Ibrahim bin 'Ali Ibn Farḥūn, *Tabṣīrah al-ḥukkām fī usūl al-aqḍiyah wa manā'ij aḥkām* (Beirut: Dār al-kutub 'Ilmiyyah. 2001) 1:380-381. See also Ambali, *Family Law*, 290-293 and Orire, *Shari'a*, 323.

⁵³ *Rabiu v Amadu* (2013) Sharia Quarterly Law Report (Pt. 1) 1 (SC), *Rungumawa v. Rungumawa* (2006) 3 Sharia Law Report (Pt. 2) 204 (CA) and *Wangara v Kara* (2006) 3 Sharia Law Report (Pt. 1) 168 (CA).

⁵⁴ The child inherits her and she together with the child's maternal siblings (if any) inherits the child: At-Tarjumana and Johnson, *Imam Malik, Al-Muwatta*, 242 (para. 27.15.16) and 264 (para. 29.14.36), and Ibn Farḥūn, *Tabṣīrah al-ḥukkām*, 2:268 and Al-Azharī, *Jawāhir al-'Ikhlil*, 2:338. See also Orire, *Shari'a*, 255 and Ambali, *Muslim Family Law*, 343-344.

⁵⁵ S. O. Tonwe and O. K. Edu, *Customary Law in Nigeria* (Lagos: Renaissance Law Publishers, 2007), 175-178.

to marriages contracted under customary law, some have tried to extend it to Islamic law marriages. In the past, this was done openly but nowadays if done at all it is not done openly.⁵⁶

The challenge from state law comes from the fundamental rights provisions enshrined in the constitution which provides inter-alia that “No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth”.⁵⁷ Although, the Supreme Court has held that constitutional provision has abolished discriminations against children born out of wedlock,⁵⁸ the provision has never been invoked in Islamic family law context. This is probably because this provision, which came into the Nigerian constitutional law for the first time in the 1979 Constitution, was not intended to apply to Islamic marriages.⁵⁹ Another reason could be that Islamic family law has constitutional recognition and therefore has equal legal status with the constitutional provisions relating to fundamental rights. Thus, all norms of Islamic family law have legal validity unless expressly excluded by the constitution.

In the administration of Muslims estates in Nigeria, legitimacy issues usually arise not with children born out of wedlock *per se* because such fathers are aware of the legal position that such children cannot inherit from their biological father’s estate and thus would make other private arrangements for the welfare of such children. The oft seen case is that of husbands repudiating children born within wedlock without complying with the requirement of *li’an* oath. The result is that children are often bastardised and consequently deprived of their inheritance without the parents going through the *li’an* procedure. This is due to the reluctance of administrators of estates to interfere in matters pertaining to illegitimacy.

In the Ilorin Emirate, informal administrators of estates do not usually concern themselves with resolving questions of legitimacy. Usually, they ask the family to resolve such preliminary matters and present a list of heirs as agreed by the family. The approach has also

⁵⁶ Oba, “Judicial Practice,” 304-308.

⁵⁷ S. 42(2), 1999 Constitution.

⁵⁸ *Salubi v Nwariaka* (2003) 2 Supreme Court of Nigeria Judgements 47. See analysis of the decision of the Court of Appeal (which was upheld by the Supreme Court) in A. A. Oba, “At Last, The Judicial Triumph of the Illegitimate Offspring in Nigeria, *Dr Salubi v Mrs Nwariaku*,” *Port Harcourt Law Journal* 1 (1999): 163-166.

⁵⁹ See A. A. Oba, “Judicial Triumph,” 164-165 and Oba, “Constitutional Abrogation”, 123-125.

been adopted by the Kwara State Sharia Court of Appeal panels.⁶⁰ For example, in *the Estate of Alaya*,⁶¹ when the estate was being distributed in 2006, there were complaints that the paternity of some children of the deceased (all born within wedlock) was disputed by the extended family. One of the wives alleged that she had the three children from the deceased in 1973, 1984 and 1987 respectively and eventually was “packed out” of the deceased’s house in 1989. She claimed that after her husband died, his family disclaimed the last two children. When the issue was raised before the Sharia Court of Appeal estate distribution panel, the panel referred the matter to the family. The family ruled that either she “swear by the Holy Quran” to authenticate her claim or that she “should persuade and convince [the] other children [of the deceased] of her claim”.⁶² She rejected both options and withdrew her claim saying that she is leaving the matter to “the Almighty Allah ... [who knows] ... every detail of the matter” to judge accordingly.⁶³ The Sharia Court of Appeal thus excluded the two children from the estate. Again, another wife alleged that the family disowned one of her children. It appears that the deceased in his lifetime had disowned the paternity of the child and as a result, formally divorced the wife. The Sharia Court of Appeal panel also referred the matter to the family. It was not clear what then transpired but eventually, she withdrew her claim and left “everything for Almighty Allah who knows more than any of us to judge”, and the child was disinherited.⁶⁴ At last, when these controversies were resolved and the panel finally settled down to distribute the estate, a sister of the deceased raised another paternity issue. She said that a man had come to the family to claim the paternity of another child that the family had included in the list of heirs submitted to the panel. The panel resolved that since that man had not formally complained to the panel, the panel could not take cognizance of the complaint. The panel held that the matter is one between that man and the wife of the deceased and that man should take his claim before a competent court.⁶⁵ The panel ruled that this matter could not delay the

⁶⁰ Oba, “Judicial Practice,” 307-308.

⁶¹ *Distribution of the Estate of Alaya* (2006) Annual Report of the Sharia Court of Appeal, Kwara State 338.

⁶² *Ibid.*, 354.

⁶³ *Ibid.*, 358.

⁶⁴ *Ibid.*, 362.

⁶⁵ *Ibid.*, 377-378.

distribution of the estate and that the disputed child will be given his portion which the family will withhold until the issue is resolved.⁶⁶ It should be noted that in all these cases, there was no evidence that the formal process of *li'an* was complied with by the parties in all the instances.

Another legal challenge is whether a man can make a bequest to his illegitimate child. Many scholars in the past did not discuss this, as it was not a common thing to have children out of lawful wedlock. Even in the contemporary era, this holds true for countries where the Islamic law against *zinā* (unlawful intercourse) is in force. However, in Nigeria, having children out of wedlock is not unusual. What appears to be an impediment to a testator making a bequest for his illegitimate child is that *zina* is a crime and a child conceived through *zina* is not affiliated to the biological father and hence such a child cannot inherit from the biological father. One scholar contends that a bequest made in respect of such a child would violate the rule against making a bequest for an illegal purpose.⁶⁷ Others argue to the contrary. They argue rightly that since the illegitimate child does not come within the legal heirs prohibited from benefiting ordinarily from bequests of their fathers, there is nothing prohibiting such bequest.⁶⁸ Many Islamic scholars in Nigeria are inclined to accept that such a bequest is lawful because there is no express legal prohibition of such bequests. In addition, the perceived crime/sin of *zinā* (illegal sexual intercourse) is attached to the parents and not to the child and the burden of their sin is discharged by their receiving legal punishment for the offence of *zinā* or through sincere repentance, even though this does not make the child legitimate. On the contrary, the child is a victim having been wronged by the parents who deprived him or her of an honourable lineage and a right to maintenance by own father. Thus, it is recommended that the father try to ameliorate these wrongs by helping the mother of the child in providing for the child.

⁶⁶ Ibid., 377-378.

⁶⁷ M. A. Oredola, "The Relevance of *Yinusa v Adesubokan* in a Multi-Religious Society" (paper presented at the 40th NBA Kaduna Branch Anniversary Week Lectures, Kaduna, November 16, 2005) 25-27. See also Oba, "Person Subject to Islamic Law," 143.

⁶⁸ For example, see Ambali, *Family Law*, 344. See also 'Abdus-Salaam, "Harmful Discretionary Actions," 159-161 whose extensive discussion of a Will which "involves a sin or a prohibited act", with various examples from the four Sunni schools of law does not mention bequest in favour of a testator's illegitimate child as one of such examples.

Although this is not a legally enforceable obligation on the father since the father is not legally responsible for the child, the father should do it while he is alive and by a handsome bequest when he (father) dies. From the spiritual perspective, this can be considered as a *sadaqah* (charity) or at least, he reduces the liability for the distress he brought on the illegitimate child.⁶⁹ There has not been a judicial pronouncement in Nigeria on this issue to the knowledge of the authors but it is safe to assume that the courts in Nigeria will uphold bequests made in favour of the testator's children born out of wedlock.

Adopted Children

Islamic law permits adoption (*tabanni*) but unlike in the West and under statutory laws in Nigeria, an adopted child under Islamic law can never attain the legal status of the biological children of his or her adoptive parents.⁷⁰ In Nigeria, the Child Rights Act,⁷¹ which is applicable in the Federal Capital Territory and the Child Rights Law⁷² that is applicable in some states, sever completely the legal relationship between the adopted child and his or her natural parents and establish this relationship between the adopted child and his or her adoptive parents.⁷³ These laws provide inter-alia that an adopted

⁶⁹ The Day when all accounts of good and bad deeds between men will be settled: "And We shall set up Balances of justice on the Day of Resurrection, then none will be dealt with unjustly in anything. And if there be a the weight of a mustard seed, We will bring it. And Sufficient are We to take account", Quran 21:47. Belief in The Day of Judgement is one of the foundations of the Islamic belief, see Siddiqi, *Imam Muslim, Sahih Muslim*, Vol. 1, 1-2 (Hadith No. 1).

⁷⁰ The Quran states the Islamic position as follows: "[Allah] ... has not made your adopted sons your real sons. That is but your saying with your mouths. But Allah says the truth, and He guides to the (Right) Way. Call them (adopted sons) by (the names of their fathers that is more just with Allah. But if you know not their father's (names, call them) your brothers in Faith and *Mawālikūm* (your freed slaves)": Qur'an 33:4-5. See also Qur'an 33:37.

⁷¹ Child Rights Act, No. 26 of 2003.

⁷² For example, Kwara State Child's Rights Law, Cap. K6, Laws of Kwara State, 2007.

⁷³ For example, s. 141 (1), Child Rights Act provides that "On an adoption order being made - (a) all rights, duties, obligations and liabilities, including any other order under the personal law applicable to the parents of the child or any other person in relation to the future custody, maintenance supervision and education of the child, including all religious rights, right to appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished; and

child shall have the right to inherit from his or her adoptive parents.⁷⁴ This is different from the position of the Islamic law and it is therefore not surprising that many states in the north have not passed the child rights law into law in their states.⁷⁵ In Islamic law, an adopted child cannot adopt the names of his or her adoptive parents and there are no inheritance rights between them.⁷⁶ However, the adoptive parents can leave a will in favour of their adopted children to make up for this absence of inheritance rights. In spite of the various child rights laws enacted in some states in the country which give adopted children the same rights as biological children,⁷⁷ the position of Islamic law remains the law applicable to Muslims.⁷⁸ It is

(b) there shall vest in, and be exercisable by and enforceable against the adopter-

(i) all rights, duties, obligations and liabilities in respect of the future custody, maintenance, supervision and education of the child, and

(ii) all rights to appoint a guardian and to consent or give notice of dissent to marriage of the child, as would vest in the adopter as if the child were a natural child of the adopter, and in respect of those matters, the child shall stand in the adopter in the relationship of a child born to the adopter

⁷⁴ S. 141(3), Child Rights Act states: “For the purposes of the devolution of the property on the intestacy of the adopter an adopted child shall be treated as a child born to the adopter”.

⁷⁵ As at May 2017, only 24 out of the country’s 36 states have enacted a child rights law: “Children’s Day: UNICEF calls on Nigeria’s states to adopt the Child Rights Act.” *African Newspace*, Press Release - May 27, 2017, accessed June 6, 2017, <http://africannewspace.net/2017/05/childrens-day-unicef-calls-nigerias-states-adopt-child-rights-act/>. Even in states that have enacted the law, the level of implementation is low, accessed on 18 November 2016, <http://www.premiumtimesng.com/news/161510-nigerias-child-rights-act-non-functional-activists-say.html>.

⁷⁶ Ibid. Inheritance between parents and children is based on *an-nasb* (blood relations): “And to everyone, We have appointed heirs of that (property) left by parents and relatives”, Quran 4:33. See also Nyazee, *The Distinguished Jurist’s Primer (Ibn Rushd, Bidayat al-Mujtahid)*, 2:411.

⁷⁷ For example, see s. 141 (1)-(3), Child Rights Act, Cap. C50, Laws of the Federation of Nigeria, 2004.

⁷⁸ Islamic personal law as defined by the constitution, which includes “any question of Islamic personal law ... regarding family relationship ...”, applies to Muslims in the Federal Capital Territory and in the various states, see ss. 262(2)(b) and 277(2)(b), 1999 Constitution respectively. In addition, marriages under Islamic law is outside the legislative competence of the federal government, see Item 61, Part 1, Second Schedule, 1999 Constitution. Lastly, since the constitution is supreme (s. 1(3), 1999 Constitution), any state law such as the Child Rights Laws cannot abrogate any aspect of the Islamic personal law recognized by the Constitution.

noteworthy that the United Nations Convention of the Rights of the Child⁷⁹ upon which Nigeria's Child Rights Act and laws are based recognizes the "kafalah system of Islamic law⁸⁰" as an alternative to adoption.⁸¹

Heirs Outside the Jurisdiction of the Court

A special kind of challenge can arise where the heirs and properties are outside the country, for example, where the deceased left two wives who are resident with their children in Nigeria and the United States respectively. Both wives and their respective children have never met at all and do not know one another. The deceased owned properties in Nigeria and the United States the details of which are known only to the wife and children in the respective countries. In practical terms, the deceased left two distinct families. In such circumstance, given that Islam mandates the joining of ties of relationships,⁸² the *Wali ul Amr* (the person who directs the estate) should do all he can to unite or at least bring the families together so that the inheritance can be shared normally as prescribed by Islamic

⁷⁹ Convention of the Rights of the Child (CRC), adopted 20 Nov. 1989, entered into force 2 September 1990, G.A. res. 44/25. 44 UN GOAR, Supp (No. 49), UN Doc. A/44/49, 166 (1989).

⁸⁰ "kafala: he put under the care, provided security, placed in charge,... to be responsible for..": Muhammad Mohar Ali, *A Word for Word Meaning of the Qur'an* (Ipswich: Jam'iyat 'Ihyaa Minhaaj al-Sunnah, 2003) 1: 169. See also Usang M Assim and Julia Sloth-Nielsen, "Islamic Kafalah as an Alternative Care Option for Children Deprived of a Family Environment." *African Human Rights Law Journal* 14 (2014): 322-345.

⁸¹ Art. 20(3), CRC. In spite of this provision, the European Court upheld France's non-recognition of the kafalah system: see Patrick Kinsch, "*Harroudj v. France*: Indications from the European Court of Human Rights on the Nature of Choice of Law Rules and on their Potentially Discriminatory Effect," *Yearbook of Private International Law* 15 (2013/2014): 39-44. For an extensive analysis of the Convention from the perspective of Islam and Muslim states, see Imran Ahsan Nyazee, "Islamic Law and the CRC (Convention on the Rights of the Child)," *Islamabad Law Review* 1, nos. 1 & 2, (2003): 65-121.

⁸² There are many verses in the Quran mandating Muslims to join ties of kinship and prohibiting Muslims from severing it, see for example Quran 4:1, 33:6, 47:22, 16:90 and 4:366. Severing ties of relationship is one of the major sins (*al-Kabair*), see Al-Hafiz Shamsudin al-Dhahabi, *Al-Kabair* (Beirut: Dar al-Fikr, n.d), 47-49. Muslims relatives have more rights over one another than their non-Muslim relatives; see Ibn Ghunaym, *Al-Fawakih al-Dawani*, 2: 292-293.

law.⁸³ This is also desirable because being Muslims, difference in places of domicile of the deceased and his heirs does not constitute a bar to inheritance.⁸⁴ However, this option of bringing the families together is not always feasible and the administrators of such estate will have to devise other ways to distribute the estate. Such was the scenario that the Kwara State Sharia Court of Appeal faced in the distribution of *the Estate of Alabi*.⁸⁵ The court with the concurrence of the deceased's Nigerian-based family resolved that the family in Nigeria should partake exclusively in the properties in Nigeria while the family in the United States should take all the properties in the United States. The court then distributed the properties in Nigeria among the heirs in Nigeria. This is pragmatic because the court does not have jurisdiction over the deceased's family and properties in the United States.⁸⁶

⁸³ The inheritance scheme prescribed by Allah (SWT) is mandatory: "These are the limits (set by) Allah (for ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad [SAW]), will be admitted to Gardens under which rivers flow (in paradise), to abide therein, and that will be the great success. And whosoever disobeys Allah and His Messenger and transgresses His (set) limits, He will be cast into the Fire, to abide therein; and he shall have a disgraceful torment", Quran 4:13-14.

⁸⁴ In the contemporary era, differences in domicile or residence mean differences in nationalities: Abu Zahrah, "Family Law" in eds. Majid Khadduri and Herbert J. Liebesny, (*Law in the Middle East* (Washington: Middle East Institute, 1955), 166. 'Abd al-'Ati' says that some jurists affirm that there is "no mutual inheritance between relatives who reside in different countries, especially if there are no binding pacts between them": 'Abd al-'Ati', *The Family Structure in Islam*, 257. According to Doi, only Imam Abu Hanifah subscribes to this view: Doi, *Shariah* 436. Abu Zahrah and Doi agree that this prohibition is not applicable to Muslims but is applicable only to non-Muslims living in non-Islamic lands who will not be allowed to inherit from non-Muslims living in Islamic territory, Abu Zahrah, "Family Law", 166 and Doi, *Shariah*, 436.

⁸⁵ *Distribution of the Estate of Alhaji Jimoh Alabi* (2011) Annual Report of the Sharia Court of Appeal, Kwara State 147, 148.

⁸⁶ Islamic law permits the appointing authority to limit the jurisdiction of the court in terms of areas of jurisdiction as to place, subject matter and persons: Ibn Farhūn, *Tabṣīrah al-hukkām*, 1:28, Al-Azharī, *Jawāhir al-'Ikhlīl*, 2:222 and 'Abd al-Karīm Zaydan, *Nizam al-qada' fi'l Shari'a al-Islamiyya* (Beirut: Risalah, 3rd ed., 2002), 44-46. The warrant establishing each area court and sharia courts state the territorial jurisdiction the court, for examples, see s. 3(2), Kwara State Area Court Law, Cap. A9, Laws of Kwara State and s. 4(2), Kaduna State Sharia Court Law, 2001 See the affirmation of territorial limitations of area courts from the statutory and Islamic law perspectives in *Zaki v Musa* (2015) 3 Sharia Quarterly Law Report (Pt. 1) 1, 21-24 and *Kpage v Hassan* (2014) Annual Report of the Sharia Court of Appeal, Kwara State, 52, and 55-57. See also

Orphaned Grandchildren

The rule on the inheritance rights of grandchildren whose fathers predeceased their grandfather has generated a lot of concern. The rule is that if other male children survive the grandfather, the grandchildren cannot take the place of their late father to inherit from their grandfather.⁸⁷ Thus, the Maliki school in compliance with this general Islamic principle will not allow the orphaned child to inherit directly from their grandfather if the grandfather is survived by male children of his own.⁸⁸ This rule has generated a lot of concern with some jurists suggesting ways to ameliorate the position of the orphaned grandchild.⁸⁹ Some Muslim countries such as Syria, Tunisia, Egypt and Morocco have enacted statutes giving effect to obligatory bequests in favour of 'orphaned' grandchildren.⁹⁰ In some of these countries, where the deceased did not in fact make such bequest, the court will presume that he has made it and will give effect to it. It is not likely that Nigeria will follow this path. The suggested solution in Nigeria is that such a grandfather should make a will in favour of such grandchildren. Another option is that the grandfather makes a gift inter-vivos (*hibah*) to his orphaned grandchildren. The proviso to gifts in Islamic law generally is that the donee must have taken possession of the gift before the death of the donor.⁹¹ However, there is an exception where the donee is under the guardianship of the donor. In *Ahmad v Umaru*⁹², the Court of Appeal upheld a gift by a grandfather to his orphaned grandchildren even though the grandchildren had not taken possession before their grandfather's death. The court referencing Dasuqi⁹³ held that the gift is valid because the donees were under the care of the donor. The court opined that the gift to orphaned grandchildren by their

Adamu Abubakar, *Islamic Law: The Practice and Procedure in Nigerian Courts* (Kano: Adamu Abubakar & Co., 2008), 29-36.

⁸⁷ Doi, *Shariah*, 318-319.

⁸⁸ At-Tarjumana and Johnson, trans., *Imam Malik, Al-Muwatta*, 235 (para. 27.1).

⁸⁹ Kemal Faruki, "Orphaned Grandchildren in Islamic Succession Law," *Islamic Studies* 4 (1965): 253-274.

⁹⁰ Nawawi, "Muslim Law," 172-176 and Doi, *Shariah*, 464-465.

⁹¹ Ibn Ghunaym, *Al-Fawakih al-Dawani*, 2:153-154. See also Ambali, *Family Law*, 400 and Orire, *Shari'a*, 127.

⁹² (1997) 5 Nigerian Weekly Law Report (Pt. 503) 103.

⁹³ Shams al-Din Muhammad ibn Ahmad ibn Arafah al-Dasuqi, *Hashiyat al-Dasuqi ala Sharh al-Kabir* (Cairo: Dar al-Fikr, n.d.), 4:107.

grandfather was meant to “ameliorate the suffering” they would have faced since they would not inherit from their grandfather who had another surviving son.

Dissenting Heir whose Concurrence is Required

Often the law prescribes that all the heirs must agree before a particular course of action concerning the estate is taken. Common example is where bequest is made to a heir. Since the bequest cannot be valid without the concurrence of all the heirs, a dissenting heir would easily frustrate the bequest. The problem is solved by calculating the bequest on a pro rata or proportional basis that factors in both the conceding and dissenting heirs and the bequest will be reduced by the percentage controlled by the dissenting heirs.⁹⁴ Again, the consent of all the heirs is required where the heirs want to reserve some of the properties for “common use” or where there is a *wasiyyah* to that effect and the value of property so designated is more than a third of the estate.⁹⁵ In Nigeria, this arrangement is common in the case of the family seat or ‘the family house’. It can even be a large sitting room where the deceased received visitors or where family meetings are held. Generally, it is easy to obtain the concurrence of all heirs to designate a property for “family use”.⁹⁶ Where a heir dissents, the courts have resolved this by giving the dissenting heir another property or the monetary value of his or her share of the common property. In *the Estate of Abdurahman*,⁹⁷ the heirs proposed that the deceased main residence be set aside for ‘family use’. One of the heirs objected to this and inheritance

⁹⁴ Sani Idris, “Limits of Testamentary Power under Islamic Law,” *Journal of Islamic and Comparative Law* 23 (2002): 58.

⁹⁵ Oba, “Judicial Practice,” 309-310 and U. S. Abbo Jimeta & U. M. Mafa, “The Tradition of Reservation of Property for Heir’s Common Use in Nigeria: The Islamic Perspective,” *University of Maiduguri Law Journal* 7 (2004): 61.

⁹⁶ In *the Distribution of the Estate of Abdullateef Salaudeen* (2013) Annual Report of the Sharia Court of Appeal, Kwara State 301, 312 the heirs agreed to keep all the deceased books for “the future use of the deceased’s heirs”. In *the Distribution of the Estate of Sheikh Omodele* (2011) Annual Report of the Sharia Court of Appeal, Kwara State 480, 486-487 instead of distribution, the heirs preferred that the school and petrol station business established by the deceased be held by them on a “joint ownership” basis and that the profits be shared pro rata annually.

⁹⁷ *Distribution of the Estate of S. B. Abdulrahman* (2006) Annual Report of the Sharia Court of Appeal, Kwara State 321.

distribution panel of the Kwara State Sharia Court of Appeal “compensated her with [another] property” and the distribution of the estate went smoothly.⁹⁸

Successors to Deceased Heirs

Islamic law mandates that estates of deceased persons should be distributed among his heirs without any unnecessary delay.⁹⁹ However, this rule is often violated. Thus, there are instances when a person dies and his or her estate is not distributed timely and all the heirs die. In such cases, the heirs’ rights do not extinguish. In *Maiwaina v Captain*,¹⁰⁰ the Sharia Court of Appeal of Northern Nigeria held that when some of the heirs have held property connected with inheritance, the complaint of a woman or any of the heirs about the property will always be heard notwithstanding the length of time that has elapsed. Thus, it is still possible to distribute the estate among the heirs that succeed the primary heirs. Here, the estate will be divided first among the primary heirs and these will be distributed among their own heirs (secondary heirs). When the estate is non-contentious and the heirs or their successors attempt to resolve the distribution of the estate in a friendly manner, there is usually no complication and the estate can be distributed quickly and smoothly. For example in *the Distribution of the Estate of Yahaya Gold*,¹⁰¹ the deceased had died in 1969. In 2006 when his estate was being distributed, most of his heirs had also died. His four surviving wives

⁹⁸ Ibid., 336-337.

⁹⁹ *Salimata v Yusuf* (2015) 3 Sharia Quarterly Law Report (Pt. 1) 129, 147-148 citing “*Fatawa al-lajinah al-daimah al-Mubhuth al-‘alimiyyah wa al-iftai al-Mujma’ah al-ula*, *Fatwa* 8817, Vol. 16, 465” [Q 1: “If a person dies and leaves one child and some money, could one of the relatives of the deceased save this money to prevent it from being distributed for one year? A: It is impermissible to prevent this money from being distributed unless there is a legal excuse”: Permanent Committee for Research and Religious Edicts (Dar Al-Ifta), *Fatwas of the Permanent Committee*, Pt. 16:465, *Fatwa* no.8817, online at <http://www.alifta.net/Fatawa/FatawaSubjects.aspx?> 22 May 2017]. See also Abdul Hai Arifi, *Islamic Law of Inheritance* (Translated by Mohammad Shamim) (Karachi: Darul-Ishaat, 1994), 61-62. An example of a legal excuse is waiting until the deceased’s pregnant wife delivers, Al-Azharī, *Jawāhir al-‘Iklīl*, 2:339 and Al-Kafi, *Ihkam al-Ahkam*, 294.

¹⁰⁰ (1961-1989) 1 Sharia Law Report of Nigeria 8-10.

¹⁰¹ *Distribution of the Estate of Yahaya Gold* (2006) Annual Report of the Sharia Court of Appeal, Kwara State 308-320.

died in 1976, 1977, 1989 and 1995 respectively. Out of his three surviving sons, only one was alive in 2006, the others having died in 1989 and 2005 respectively. Of the four surviving daughters, two daughters had died (1982, 2001) while two were alive. The Kwara State Sharia Court of Appeal distributed the estate among the primary heirs. After this, the court distributed the shares due to the deceased heirs among their own heirs. The distribution went on smoothly and the parties were happy that the court has helped them to resolve this complicated scenario.

However, where there is an “inordinate delay”¹⁰² in distributing the estate and the relationship between the heirs or their respective successors is hostile, many contentious legal issues can arise. These include problems in identification of the heirs and the properties that form the estate. This is the scenario in *Opobiyi v Masingba*.¹⁰³ The case concerned the estate of Tukur who died in 1924 leaving two wives (died 1940, 1943), two sons (died 1959, 1960) and three daughters (died 1923, 1938, and 1945). The case was instituted by the heirs of one of the daughters against the heirs of the daughter of one of the son’s. The plaintiffs stated that they are claiming against the defendant “our share of the land that belonged to our grandfather of the mother’s side from the [the defendant] who [selfishly] held the whole land without [releasing] our share”.¹⁰⁴ There is much confusion in the claim. It is not clear if the case is based on the estate of their grandfather or the estate of their mother. It was not clear if the estate of their grandfather had been distributed previously and what share had gone to their mother. These evidentiary challenges are due to the long passage of time and absence of documentary evidence. In addition, the defendants challenged the *locus standi* of the plaintiffs to sue on Tukur’s estate since they are not Tukur’s primary heirs. The case which started in 1979 had gone back and forth through the area court, upper area court, high court, and Sharia Court of Appeal. The case had gone thrice to the Court of Appeal (1982, 2002, 2016) and

¹⁰² See Ismael Saka Ismael, “Consequences of Delaying Distribution of Estate in Islamic Law of Inheritance: The Nigerian Experience,” *Shari’ah Journal* 24 no. 2 (2016): 307.

¹⁰³ The case *Opobiyi v Masingba* (Suit No. 572/79) started in the Ilorin Area Court 2 No. 1, Ilorin on 16 May 1979. The current parties are different since the original parties have died and substituting parties have died. The current parties in the case pending before the Upper Area Court are *Opobiyi v Muniru* (2016).

¹⁰⁴ The record of proceedings of the court on 16 May 1979, on file with the authors.

once to the Supreme Court (2011). As at March 2017, the case is still pending for a retrial by the upper area court.

The Public Treasury (*Bait ul-Mal*)

The *Bait ul-Mal* is an important administrative department (*diwan*) in an Islamic caliphate.¹⁰⁵ The *Bait ul-Mal* is usually described as the public or state treasury in an Islamic caliphate.¹⁰⁶ In reality, the *Bait ul-Mal* is one section of the ‘state treasury’ while the other section consists of revenue derived from *Zakat* (Mandatory charity¹⁰⁷).¹⁰⁸ This is an important distinction: all Muslims are entitled to benefit from the revenues deposited in the *Bait ul-Mal* while *Zakat* belongs only to the defined categories of *Zakat* recipients;¹⁰⁹ also, other revenues could be stored but *Zakat* is to be disbursed to recipients as quickly as possible.¹¹⁰

There is a consensus among Muslim jurists that when a person is not entitled to be inherited by anyone as in the case of an apostate or when a Muslim dies without an heir and leaves no *wasiyyah* (will) the whole of the estate goes to the *Bait ul-Mal*.¹¹¹ In *Radd* (‘return’) cases, that is, where there is a residue after all the legal heirs to an estate have received their canonical shares, some scholars differ on what to do with the residue. While Imams Abu Hanifah and Ahmad favour redistribution of the residue among the heirs (except husband

¹⁰⁵ Wafaa H. Wahba, trans., *The Ordinances of Government: A Translation of al-Ahkām al-Sulṭāniyya wa al-Wilāyāh al-Dīniyya* (Reading: Garnet Publishing, 1996), 222 and 232-234.

¹⁰⁶ J. N. D. Anderson, *Islamic Law in Africa* (London: Frank Cass, 2nd edition, 1978), 360.

¹⁰⁷ Quran 9:103, 2:267 and 73:20. Payment of *Zakat* is one of the five pillars of Islam: Siddiqi, *Imam Muslim, Sahih Muslim*, Vol. 1, 1-2 (Hadith No. 1). *Zakat* is due only on those who possess up to or more than a prescribed limit (*nisab*) of any type of wealth upon which *Zakat* is payable, see the chapters on *Zakat* in Al-Azharī, *Jawāhir al-‘Ikhlīl*, 1:208-216 and Ibn Ghunaym, *Al-Fawākih al-Dawani*, 1:326-346.

¹⁰⁸ Ibraheem Sulaiman, *The Islamic State and the Challenge of History* (London and New York: Mansell Publishing, 1987), 53-55.

¹⁰⁹ The list of such beneficiaries in Quran 9:60.

¹¹⁰ *Ibid.*, 53-54 and Doi, *Shari’ah*, 610

¹¹¹ Salih Abd al-Sami al-Azharī al-Abi, Al-Thammar al-Dani Sharh Risalat Ibn Abi Zayd al-Qayrawani, (Beirut: Dar al-Fikr, n.d.), 587-589 and 648, and Nyazee, *The Distinguished Jurist’s Primer* (Ibn Rushd, *Bidayat al-Mujtahid*), 2:429. This is one of the many sources of revenue for the *Bait ul-Mal*. On this and other sources of revenues, see Doi, *Shari’ah*, 391.

or wives of the deceased) *pro rata*, Imams Malik and Shafi‘i say that the residue should go to the *Bait ul-Mal*.¹¹² Imam Shafi‘i adds the proviso that this is applicable where the *Bait ul-Mal* is run by a government that upholds justice (*‘adl*) in the Islamic sense. Some Maliki jurists that lived after the time of Imam Malik too have adopted this qualification.¹¹³

In the pre-colonial era, the leaders of the Sokoto caliphate established a *Bait ul-Mal* in the emirates.¹¹⁴ The *Bait ul-Mal* was in operation in northern Nigeria during the colonial era and jurists often ordered that the *Bait ul-Mal* is the heir or beneficiary in cases of *radd* of legal heirs.¹¹⁵ However, the changes brought by the colonial authorities had considerably transformed the *Bait ul-Mal*, which they merged with the Native Authorities treasury that had nothing to do with the concept of *Bait ul-Mal*.¹¹⁶ Eventually, the idea of *Bait ul-Mal* as an institution faded away from the political and economic system of northern Nigeria and it is now completely irrelevant in the local government system that succeeded the Native Authorities.¹¹⁷

The government treasury in contemporary Nigeria does not qualify as *Bait ul-Mal*. This is because (i) the treasury does not belong to Muslims exclusively; (ii) the treasury does not cater for what the *Bait ul-Mal* caters for such as building of mosques and schools that

¹¹² Ibn Rushd, *Bidayat al-Mujtahid*, Nyazee, *The Distinguished Jurist’s Primer* (Ibn Rushd, *Bidayat al-Mujtahid*), 2:426, Al-Jaza’iry, *Minhaj*, 443-449, Orire, *Shari’a*, 280-294, Ambali, *Family Law*, 362-367 and A. M. Gurin, *An Introduction to Islamic Law of Succession* (Zaria: Jodda Comm. Press, 1998), 126-130.

¹¹³ Ambali, *Family Law*, 367 citing Abdul Azim Ad-Dib, *Faridatu Allah fil Mirath wal Wasyyah* (Cairo: Darul Ansar, 1978), 119 and Gurin, *Succession*, 129 citing “[Shams al-Din Muhammad ibn Ahmad ibn Arafah al-Dasuqi, *Hashiyat al-Dasuqi ala Sharh al-Kabir* (Cairo: Dar al-Fikr, n.d.), 4:268]”.

¹¹⁴ Sulaiman, *Islamic State*, 53-54.

¹¹⁵ Anderson, *Islamic Law in Africa*, 216. See examples of such instances in Ahmed Beita Yusuf, *Nigerian Legal System: Pluralism and Conflict of Laws in the Northern States* (New Delhi: National Publishing House, 1982), 135, 151 and 153.

¹¹⁶ Chinedo Nwafor Ubah, *Government and Administration of Kano Emirate 1900-1930* (Nsukka: University of Nigeria Press, 1985), 178. See an account of the colonial transformation of the *Bait ul-Mal* in Kano Emirate, 178-183.

¹¹⁷ On the corruption of the *Bait ul-Mal* system the followed colonialism in northern Nigeria, see M. Bello Uthman, “The Legal Position of *Baitul-Mal* in Contemporary Nigeria as It Relates to Succession of a Deceased Person under Islamic Law,” *Ahmadu Bello University Journal of Islamic Law* 4-5 (2007): 37, 41-42.

impact religious knowledge; (iii) the sources of wealth of this treasury are not in conformity with those contemplated by Islamic law; (iv) the treasury does not qualify as ‘well administered’.¹¹⁸

In the civilian regime that came in 1999, some states in northern Nigeria carried out a comprehensive reform of the administration of Islamic law in their respective states. These reforms included the establishment of institutions for administration of *zakat* and endowments that are akin to but not coterminous with the Islamic concept of *Bait ul-Mal*. For example, in Borno State, the Zakat and Endowment Board Law, 2000¹¹⁹ defines “*bait ul-mal*” as “the treasury for the collection and storage of *zakat*; “endowment” as “funds or permanent or temporary pecuniary provisions for the maintenance of public institutions or charities” and “beneficiaries” as “Muslims or public institutions eligible to receive periodic aids whether pecuniary or otherwise from the Board”.¹²⁰ However, the Law does not mention anything about inheritance due to the *Bait ul-Mal*.¹²¹ In Zamfara State, although there was no reference to *Bait ul-Mal*, the state expressly recognised the “inheritance of those who [do not] have heirs” as an “endowment” payable to the state’s Zakat (Collection and Distribution) and Endowment Board Law.¹²² In Kano State, the Zakat and Hubusi Commission’s sources of revenue are “grant[s] from the State Government, *zakat* and *hubusi*.”¹²³ “*Hubusi*” is defined a “endowment or a voluntary gift of wealth more especially property”.¹²⁴ The state did not contemplate incomes from inheritance. The reforms in the administration of *zakat* and endowments are limited only to twelve states in the north. In the other northern states and in southern Nigeria, there are no provisions for the official administration of *zakat* and endowments.

The absence of the *Bait ul-Mal* in contemporary Nigeria presents the problem of what to do with the payments that are required by Islamic law to go to the *Bait ul-Mal*. Many Maliki jurists argued that in *radd* cases, where there is no *Bait ul-Mal* as in many modern

¹¹⁸ Uthman, “*Baitul-Mal*,” 45-46.

¹¹⁹ Borno State Zakat and Endowment Board Law, 2000

¹²⁰ *Ibid.*, s. 2.

¹²¹ See the board’s powers, *ibid.*

¹²² See s. 32(3)(m), Zamfara State Zakat (Collection and Distribution) and Endowment Board Law, 2003.

¹²³ s. 14, Kano State Zakat and Hubusi Commission Law 2003.

¹²⁴ *Ibid.*, s. 2.

nation states or where the *Bait ul-Mal* is not properly organized as required under Islamic law, redistributing the residue among the heirs is more equitable and therefore preferred.¹²⁵ However, this solution is not universally applied. In *the Estate of Yahaya Gold*,¹²⁶ the Kwara State Sharia Court of Appeal directed that the residue of the estate “should be sent to the *Bait ul-Mal* (public treasury) because nobody was entitled to it except for public use”.¹²⁷ The summary of the report on the distribution of the estate later indicated that ‘*Bait ul-Mal*’ means “area mosques” that is, public mosques in the vicinity where the deceased lived.¹²⁸ Substituting mosques for the *Bait ul-Mal* is problematic in that mosques cannot perform the role of *Bait ul-Mal*.

CONCLUSION

Islamic law of succession is applicable as the personal law of Muslims in Nigeria. However, there are some challenges to beneficiaries of Muslim estates in the country. These challenges come mainly from the state and Muslims. Of importance is the absence of a clear legal framework for voluntary submission of estates of deceased Muslims to area courts and sharia court for distribution among their heirs. As it is, the litigation procedure is the only option recognized by law. Thus, there is the need to provide a legal framework for non-contentious submission of estates for distribution in these courts. For this, an amendment of the constitutive laws of the area courts and sharia courts will be necessary.

Another challenge is the inability of the state or Muslims to establish for the country a *Bait ul-Mal* needed in Islamic law of inheritance under the Maliki school, which is Nigeria’s official *madhhab*. The emphasis here should be substance rather than form. It is not necessary for Muslims to depend on the government in this matter, as there is nothing stopping Muslims in Nigeria from establishing an independent organization to perform some of the welfare roles of a *Bait ul-Mal*. The Companies and Allied Matters

¹²⁵ Gurin, *Succession*, 129.

¹²⁶ *Distribution of the Estate of Gold* (2006), Annual Report of the Sharia Court of Appeal (Kwara State), 308.

¹²⁷ *Ibid.*, 314 and 315.

¹²⁸ *Ibid.*, 319.

Act¹²⁹ provides the legal framework for the establishment of charitable Non-governmental organisations that could perform some of these roles.¹³⁰ The Supreme Council for Islamic Affairs¹³¹ should take a lead in this matter.

In addition, state law offers potential challenges to Islamic law provisions barring non-Muslims, illegitimate children and adopted children from inheritance and the provisions that give to some female heirs half of what the male heirs receive. These challenges, which flow essentially from human rights, reflect the global tension between Islam and the western-oriented human rights that have emerged as contemporary international human rights. This tension could be resolved if we understand that Islamic values are not always co-terminous with western values. There is no valid argument in favour of the opposition to the Islamic positions on the inheritance of non-Muslims, illegitimate children and adopted children as the arguments are based only on value judgments which every civilization, culture and community is entitled to make for itself. In the case of Islamic law of inheritance, Muslims have no choice but to keep within the limits prescribed by Allah (SWT). The state should therefore not interfere in matters relating to Islamic family law generally and Islamic law of inheritance in particular.

Muslims should be aware of circumstances when non-Muslim relatives, illegitimate children and orphaned grandchildren are not entitled to inherit and the options available to make provisions for them by way of gifts and bequests and the limitations thereto. It is also imperative for Muslims to note that the distribution of inheritance should not be delayed unduly as delay can lead to numerous difficulties for the heirs. Islamic preachers and Imams in the mosques should enlighten Muslims about these issues. Lastly, Muslims who have wives and children living in different countries should note the imperativeness of joining ties of filial bond. This will prevent a Muslim's children and wives being strangers to one another

¹²⁹ Cap. C20, Laws of Federation of Nigeria, 2004.

¹³⁰ *Ibid.*, Part C especially, ss. 673(1) and 674(1)(b).

¹³¹ Although the government recognises the Supreme Council for Islamic Affairs, the council does not have an official status or any legal powers to compel Muslims in the country to obey its directives, Nonetheless, it is quite influential as many Muslims in the country respect the council. *Constitution of the Nigerian Supreme Council for Islamic Affairs*, accessed 18 November 2016, http://nscia.com.ng/docs/CONSTITUTION_of_the_Nigerian_Supreme_Council.pdf.

and facilitate, in the event of his death, a smooth distribution of his estate in a manner consistent with the limits set by Allah (SWT). In the past, visiting, letters and sending messengers were the main means of joining ties of kinship. In the contemporary world, with the developments in information and communication technology, distance is no longer a reason to sever ties of kinship. Telephone calls, e-mails and the social media provide easy, quick, and affordable means of communication between persons living in different places across the world.