Peculiarities of Islamic Law of Inheritance

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Abstract

Islamic Law is a component of Islam in the Islamic system of importance as a sub-set of Islamic Law. Generally, the law is meant to regulate the affairs of Muslims and how they may find themselves while Islamic law of inheritance in particular is meant to regulate and distribute the deceased Muslim's estate to the beneficiaries. Muslims do not live in isolation, they are found in both Muslim and non-Muslim communities, the law can therefore be referred to as international. The internationality of Islamic Law demands that both Muslims and non-Muslims should be educated on its peculiarities because it is a law mostly misunderstood by Muslims and non-Muslims alike. This paper therefore addresses the peculiarities of Islamic Law of Inheritance with the aim of eradicating or ameliorating the misconceptions and apathy arising from its divine nature.

Keywords: Universality, Inheritance, Divine, Law, Islamic.

Introduction

Law is said to be a channel or agency to achieve justice, hence it can be described as a rule of action which controls the general behaviour of man and protects his bodily and property rights.[1] Broadly, Law can be classified into either divine or man-made.[2] A law is said to be divine when it is ordained by God for the guidance of mankind while on the other hand, man-made law is that made by the people which receives the ascent of the government in council. Like divine law, it equally controls the day to day behaviour of the members of the state. This kind of law is however mutable in accordance with the needs of the society and the government in power. The bulk of the legislations today are man-made laws.[3]

Islamic Law, otherwise called *Shari'ah*, is the totality of Allah's Commandment. It is a body of Islamic religious Law. Islamic Law is a complete and total way of life (which consists of both religious and secular matters). It is the sacred law or canon laws of Islam ordained by Allah hence of divine origin. The term literally means "way" or path to the water source" while technically it means the legal framework within which the religious,

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[1] < http://www.unique-design.net/library/word/law.html >accessed on 15th May, 2009

[2] Some Scholars have broadly classified law into three: Natural Law, Man-made Law and Divine Law. See Saleh, M. Ian Educational Consult. *Three Types of Law*

<http://www.muslimeducators.com/newspaper/3-types-of-law.pdf > accessed on 15th March, 2009.

[3] .Majority of Countries of the world are either practicing democracy, socialism, communism and a host of other-isms. In these countries, man-made laws hold sway. Very few countries are governed by divine laws. See Yasir, Q. *God's Law and Man-Made Laws: Muslims Living in Secular Democracies*

<http://muslimmatter.org/2010/03/01/gods-Law-and-man-made-Laws-muslims-living-in-Secular-democracies >accessed on 20th April, 2010.

public and private aspects of life are regulated for those living in a legal system based on Islamic principles of Jurisprudence and for Muslims living outside the domain.[4] It is a genre [5] of divine laws in existence today in the world in general and Nigeria [6] in particular. Islamic Law, as one type of divine law, is now the most widely used religious law and one of the three most common legal systems of the world alongside Common Law and Civil Law. Islamic Law and Islamic Legal system is particularly in operation in Saudi Arabia, Iran, Sudan, Pakistan, Bangladesh and a host of others.[7] In the Vatican City, the legal system is based on Canon or Ecclesiastical Law (another genre of divine law) and where it does not apply, the Laws of the city of Rome apply.[8]

Islamic Law is divine because it is based on the totality of the commands of Allah as embodied in the Glorious *Qur'an* hence it owes its origin from the spiritual commandments of Allah through the Prophet by means of revelation. Like other types of Laws, it has its unique characteristics. It is a complete system of Universal law that is certain, permanent and more universal than any other type of law in the world.[9] It is neither meant for a particular race nor does it belong to any particular tribe or race, rather it is meant for the whole world.[10] Islamic Law is comprehensive and complete code of conduct ideally embracing all the facets of human life relevant for all times, places and

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[4].M. A. Ambali, *The Practice of Muslim Law in Nigeria*, (Zaria: Tamaza Publishing Company Ltd., 2nd Ed., 1998), p 1; see also Wikipedia, *The Freedom Encyclopedia*< http://en.wikipedia.org/wiki/sharia> accessed on 15th July, 2009.

[5] .Apart from Islamic Law, a few other types of religious or divine laws are: Buddhism, Hinduism, Ecclesiastical/Canon Law (Law relating to the principles that govern the organization of Christian Church or clergy and their well-being).

[6] .Before 1998, limited Islamic Law was applicable in Northern Nigeria but within the first tenure of General Olusegun Obasanjo (rtd) as civilian president, some states, such as Zamfara, Sokoto, Katsina, Kano, Niger, in the Northern part of Nigeria, introduced full application of Islamic Legal system which covered both the Civil and Criminal aspects of Islamic Law in their states. See Sokoto, Kebbi and Zamfara States Sharia Penal Codes and Sharia Criminal Procedure Codes respectively.

[7] .See Muslimedia: January 1-15, 2000< .http://www.muslimedia.com/archives/features00/shariah 2.html >accessed on 16th August, 2015.

[8] .See <http://www.sheppardsoftware.com/Europeweb/factfile/Unique-facts-Europe19.html>accessed on 13th June, 2016.

[9] .*Alkamawa v. Bello* (1998) 6 S C.N.J. 129 at 136 where the Supreme Court held inter alia that: *"Islamic Law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English Common Law."* See A. A. Oba, "Islamic Law as Customary Law: The Changing Perspective in Nigeria" *International & Comparative Law Quarterly*, October 2002, Vol. 51, Pt. 4, 826, see also A. A. Oba, "An Ideological Discourse And A Literature Review on Islamic Law in the Nigerian Legal System" in Osen, Z. I. (Ed.) *A Digest on Islamic Law and Jurisprudence in Nigeria* (Essays in Honour of Hon. Justice Umar Faruk Abdullahi, PCA), (Auchi: Darun-Nur, 2003), 110.

[10] .The Prophets before Prophet Muhammad were each given Scripture and each of them sent to their people. For instance, Prophets Noah, Hud, Salih, Shu'aib, Musa were each sent to their people while Prophet Issa was sent to the children of Israel. See *Qur'an* 7:59, *Qur'an* 7:1:1, *Qur'an* 7:65, *Qur'an* 7:73, *Qur'an* 7: 85, *Qur'an* 14:5 and *Qur'an* 3:48. However, Prophet Muhammad, the seal of all the Prophets was given the Glorious *Qur'an* which unequivocally states that *"We have not sent thee but to all men as a bearer of good news and as a warner"*. See *Qur'an* 34:28. The universality of the mission of Prophet Muhammad is stressed in *Qur'an* 7:158 where it provides thus: *"Say, O people! I am the Apostle of Allah to you all, of Him whose is the kingdom of the heavens and the earth."*

purposes.[11] In Islamic Law moral evaluation is supreme. There is hardly any distinguishing factor between the rules of law and rules of morality. Islamic law tends to preserve morality unlike in some other types or genre of law.[12]

Features of Islamic Law of Inheritance

Islamic law of inheritance is a segment[13] of Islamic Law. Like other branches of the law, it is based on the religion of Islam. The religion of Islam being a divine [14] religion, presupposes that Islamic Law of Inheritance is also divine. Therefore, the first and fundamental feature of Islamic Law of Inheritance is that it is divine. It is so because the manner in which it is made is prescribed by Allah who provides that:

لِّلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ ٱلْوَٰلِدَانِ وَٱلْأَقْرَبُونَ وَلِلنِّسَآءِ نَصِيبٌ

مِّمَّا تَرَكَ ٱلْوَٰلِدَانِ وَٱلْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ ۚ نَصِيبًا مَّفْرُوضًا

From what is left by parents and those nearest related-there is a share for men and a share for women. Whether the property be large or small. A share made compulsory [15]

By being described as divine, it is meant that the law and rules guiding distribution of inheritance in Islam is ordained by Allah and not man-made. The shares assigned or given to each heir as the case may be, is prescribed by Allah. The *Qur'an* in this case, is the main subject of its laws. The *Sunnah* of the Prophet and the consensus opinion of the Companions added very little to what is in the *Qur'an*. Hence there is no law that opposes the Qur'anic detailed explanation of inheritance.

It is also divine because it is inextricably intertwined with the belief system and the moral values of Islam. A close study or analysis of the laws and rules of Islamic Law

[11] It traverses all the aspects of human life such as marriage, naming, divorce, inheritance, contract, purity, religious rites, commerce, science, education, history, morality and a host of other things/areas too numerous to mention here.

[12] The English Criminal Law for instance, inherited from the past has undoubtedly been influenced by Christian beliefs, but at the present day, these beliefs are not the only basis of the morals of the society hence the spheres of social morals and criminal law are co-extensive up to a point as many of the rules enforced by the criminal law have nothing to do with social morality, and many rules of social morality are not enforced by the criminal law. There is therefore a clear cut demarcation between morality and the rule of law. See Cross and Jones, *Introduction To Criminal Law*, (England: Butterworth & Co. Publishers Ltd, 10th Edition, 1984), 14.

[13] Other segments of Islamic Law are: Islamic Law of Contract (*Mu'amalat*), Islamic Family Law, Islamic Law of Crimes and Torts, Islamic International Law (War & Peace), Islamic Law of Evidence (*Murafat*) and a host of others too numerous to list.

[14] This is because it is based on the totality of the Commands of Allah as embodied in the Glorious *Qur'an* and the *Sunnah*. See N. Gabru, (2005), "The Applicability of The Islamic Law of Succession in South Africa", Obiter_V26_n2_a9, 34 accessed on 15th March 2008, see also Coggins, W. A. (July-August 2004), "Succession in Traditional Islamic Law", *Journal of the Missouri Bar*, MOBAR Publication for MOBAR members,< http://isskc.org/will >accessed on 20th February, 2008.

[15] *Qur'an* 4:7, see also *Qur'an* 4:11-12. There are several other verses that relate indirectly to inheritance such as *Qur'an* 5:106 -108.

of Inheritance would reveal that the moral values and belief system of Islam is reflected in them. For instance, a *waladun zina* (illegitimate child) is precluded from inheriting his (biological) father to protect the sanctity of the institution of marriage, but can inherit from his mother and vice versa. Similarly, a non-Muslim cannot inherit a Muslim (and vice versa) no matter the closeness of the relationship between the two as a reflection of the belief system of Islam in the laws and rules of Islamic system of inheritance.[16] All these are a reflection of the divine characteristics of Islamic Law of Inheritance.

Universality of Islamic Law of Inheritance

There is no doubt that Islamic Law is a by-product of Islam while Islamic Law of Inheritance is a sub-set of Islamic Law. Before the advent of Islam and Islamic Law, there had been other religion-based laws. These religion-based laws had limited scope in terms of application because they were directed to specific race(s).[17] But unlike these other religions, Islam and indeed Islamic Law (of Inheritance) are directed at the world at large and not to specific tribe or race.[18] Therefore, since Islam is a religion for the whole of humanity, this implies that wherever a Muslim may be in any part of the universe, upon his or her demise, rules of Islamic Law of Inheritance applies to his or her estate [19] notwithstanding the differences in *Madhab* (School of Law).

Rigidity of Rules of Islamic Law of Inheritance

In legal parlance, when a law is written, especially man-made law, it is described as rigid because it will require certain stringent steps or procedures to have it amended or altered. In the case of Islamic Law of Inheritance, the law is principally contained in the revealed Book of Allah (*Al-Qur'an*); and *Hadith* of the Prophet. Since the Qur'an is the last and final of all revealed Books and it is not susceptible to correction, addition or amendment as in the case of man-made law, then it is the most appropriate master piece of legislation that can be described as rigid. It is rigid in the sense that it is not subject to amendment, correction and or addition. The bearer of the religion of Islam is the final and seal of all the Prophets and since there will never be any other Prophet again, it is obvious that the rules of Islamic Law of Inheritance are not susceptible to amendments, addition or changes.

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[16] The Prophet (saw) said: *"A Muslim does not inherit from an infidel and an infidel from a Muslim"* see Al- A. H. Asqalani,, *Bulugh Al-Maram Min Adillat Al-Ahkam*, (Pt. 2), (Riyadh-Saudi Arabia, Dar-us-Salam Publications, 1996/1416), Hadith No. 806, .334. See also I. S. Ismael and A. 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* organized by the African Consortium of Law and Religion Studies (ACLARS) and hosted by the University of Addis Ababa. Addis Ababa, Ethiopia May 22-25, 2016).

[17] *"And there is not a nation but a warner has gone among them"*: *Qur'an* 35:24, see also *Qur'an* 3:48, *Qur'an* 25:1 and *Qur'an* 21:107.

[18] *"We have not sent thee but to all men as a bearer of good news and as a Warner"*: *Qur'an* 33:28, see also *Qur'an* 7:158, *Qur'an* 5:3 and *Qur'an* 2:213.

[19] See generally N. J. Coulson, "A Comparison of the Law of Succession in the Islamic and British Legal Systems," *The American Journal of Comparative Law*, 1977, Vol. 26, No. 2, 227-232.

Determinants of an Heir Are Divine

Allah Has used certain adjectives to describe Himself.[20] Amongst others, He is the Creator, the Knower of all knowledge, the Merciful and the Owner of the Universe and everything in it. He alone knows who will die before whom and who will survive who. That is, who will be the heir of who is only known to Him. He determines an heir because it is not every person that survives a decedent that qualifies to be a legal heir.[21] Through Islamic Law of Inheritance, Allah has provided divine criteria for determining the legal heirs in any given situation and their proportionate share (in the estate of a deceased person) which are based on a number of factors such as the rule of proximity of relation to the deceased. This proximity is also determined by Allah and not left in the fallible and subjective discretion of man. In determining the legal heir, the *Qur'an* provides thus: *"...Between your fathers and sons, you do not know which of them is nearer to you in benefit. Allah is undoubtedly most knowledgeable and most wise."* [22] From this *Qur'anic* provision, it is clear that Allah has accordingly specified the shares of heirs based on the law of proximity of relationship and not on the material needs of the heirs. In Islamic Law, the heirs are not of the same rank. They are on grades and some are given priority over others. For instance, in the presence of father, father's father (grandfather) cannot inherit son. Likewise in the presence of son, son's son cannot inherit father's father. But in the absence of father, father's father can inherit son and son's son can inherit father's father in the absence of son. This is based on the principle of total exclusion.[23]

Inheritable Objects Are Divinely Determined

What constitutes estate in Islamic Law of Inheritance is denoted by the term *Mal*, i. e. property. This is divinely determined because it is not everything the deceased person leaves behind that qualifies to be subject matter of inheritance. Only those properties adjudged by the religion of Islam as property can be subject matter of inheritance.[24] Property not known to Islamic Law is not property, hence cannot be inherited. Further, in Islamic Law of Inheritance, property is not limited to real property left behind by the deceased. It includes every piece of item, whether real or moveable as long as the property is legal in the sight of Islam. Unlike under some other systems where disposition of property is limited to real property. For instance, among the *Igbo* people of Eastern Nigeria, the disposition of property by Will is called *Ike Epo* and is mainly applied to real property. Likewise, among the *Yorubas*, the rules of inheritance are *Idi-igi* and *Ori-Ojori* which is mainly applied to real property.

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[20] See the ninety-nine beautiful names of Allah.

[21] See I. S. Ismael and S. O. Rabiu, "Concept of Heir(s) and Status of Gift from Decedent's Estate by Heir(s) in Islamic Law of Inheritance," *Islamic Law Journal*, Al-Hikmah University, Ilorin (forthcoming 2016).

[22] *Qur'an* 4:11.

[23] There are two types of exclusion: Total and partial. Partial exclusion is a situation where a full sister co-exists with a full brother, and the full brother converts her to the residuary class instead of the full sister inheriting as a *Qur'anic* sharer. See A. B. Mahmud, "Succession under the Sharia in Nigeria". *Nigerian Current Law Review*, 1982, 127 – 129.

[24] See *Qur'an* 2:173 and 219; *Qur'an* 5:3, 88 and 90; *Qur'an* 6:118 and 121.

Pre-Specified Quantum of Shares for Heirs

In Islamic Law of Inheritance the shares of each heir is already pre-determined[25] or prescribed by Allah in uncompromising terms. In any particular case, the quantum of the estate of the deceased that goes to a particular heir is fixed by Allah. The deceased has no power regarding fixing the share of an heir because these cannot be altered or changed by man. The shares of the heirs as determined by the Qur'an are binding on all Muslims. Allah, in His Wisdom, Has allotted shares to heirs using His own criteria.[26] These criteria are divine, rigid and beyond questioning by man.[27] Unlike man-made allotment which is subject to whimsical subjective discretion and changes. Allah Has allotted shares to its beneficiaries probably because inheritance is one of the most important sources of the right of possession of wealth.[28]

Inheritance takes place in Islamic Law only when certain conditions exist. These conditions are also part of the peculiarities of the law. Therefore, since inheritance in Islamic Law does not take place in vacuum, it is necessary at this juncture to examine these conditions that are most often referred to as elements of inheritance. These elements are three: the deceased (*Al-Mwarrith*), the heir (*Al-Warith*) and the estate (*Al-Mourooth*) or the property to be inherited.[29] Inheritance, therefore, does not arise until these three basic elements are present.

The Deceased (*Al-Mwarrith*)

The first of these three elements presupposes that there must be evidence that a Muslim person had died in fact by evidence of actual death or in Law. A person is said to be dead in law when the Law Court declares him so as a result of evidence of his being missing as in the case of a *Mafqud* – A missing person.[30] A person could be missing in any one of the following circumstances such as disappearance during a battle or in calamity as in an earthquake, shipwreck, in a community which has been overcome by plague or epidemics e.t.c. The death of the Muslim person must be actual and real or in law by a judicial decree as when a missing person (*Mafqud*) is declared dead and has left behind some inheritable property and relatives who have right to inherit his property.[31] This is because evidence of death is one of the pre-conditions of inheritance in Islamic Law.[32]

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[25] See *Qur'an* 4:11-12.

[26] See *Qur'an* 3:34

[27] See *Qur'an* 4:13

[28] I. S. Ismael, "Socio-Economic and Religio-Legal Importance of Estate Distribution in Islamic Law", *IIUM Law Journal*, 2011, Vol 19, 69-89.

[29] J. Badamasuiy, "Elements And Impediments of Inheritance," in Zubair, A. (Ed.) *Discourse on Islamic Law of Inheritance And Waqf*, (Kano: Department of Islamic Law, Bayero University, 1998), 15; see also I. Aliyu, *Inheritance in Islamic Law*, (Zaria: Zazzau Ventures, General Printing and Publishing, n. d.), 13.

[30] See *Jatau v. Mailafiya* (1998)1 SCNJ 48 at 55, where Supreme Court held among others that the Respondent must establish that the said Mailafiya is dead or has been missing and his whereabouts are unknown for a period within which a person of his age would be presumed dead. See also A. M. Gurin, *An Introduction To Islamic Law of Succession* (Testate/Intestate), (Zaria: Jodda Press Ltd., 1998), 27-28.

[31] S. H. A. Lakhvi, *Al-Mirath: Justice of Islam in the Rules of Inheritance*, (Renala Khurd-Okara; Pakistan: Al-Makhtabah Al-Muhammedia Ghullah Mandi, 2003/1424 A. H.) 19.

[32] I. Aliyu, *Inheritance in Islamic Law*, (Zaria: Zazzau Ventures, General Printing and Publishing, n.d.), 14; see also *Jatau* v. *Mailafiya*, op. cit.

The general rule, in case of determining the death of a missing person for the sake of inheriting his estate, is that he is presumed to be alive until "it is inconceivable that he should still be alive for until his contemporaries resembling him in health, habits and body are dead"[33] otherwise referred to as recognized life-span. By this general rule, a court is therefore, in decreeing a missing person dead, is guided by the expiry of the recognized life-span of a person, which the Muslim jurists have no consensus opinion on what number of years constitutes recognized life-span. Recognized life-span of a missing person is fixed at ninety years according to the popular view in the Hanafi School of Law while seventy years is recognized in the Maliki School.[34] The Shafi'i, Hanbali and Shiite Schools are of the view that the life-span of a missing person should be determined by the court at its own discretion.[35] Apart from the general rule, the Malikis and Hanbalis have provided an important exception. According to the Malikis, where there is a strong presumption of death arising from the missing person disappearing during battle, earthquake, shipwreck, fatal epidemic, the estate of the missing person should be distributed amongst his heirs after one year while the Hanbalis maintain four years from the date of the disappearance of the missing person after a period of thorough search and enquiry has failed to provide any clue that the missing person is alive.[36]

The time when the estate of a missing person becomes ripe for distribution does not also enjoy consensus opinion of Muslim jurists. There are two major opinions on this. The first is that of Maliki and Hanafi Schools of Law that the distribution becomes due from the date of his missing while according to Hanbali and Shafi'i Schools of Law, the distribution becomes due from the date he is decreed dead by the Court.[37] Closely related to this, is the issue of determination of the heirs of a missing person. According to one School of Law,[38] all those who are entitled to inherit him during the time of his disappearance would qualify to be his heirs, whether they are living or dead. Where the heirs are dead, their heirs take their shares. The other opinion, i. e. the Shafi'i and Hanbali Schools of Law says only those heirs who were living at the time when the missing person was declared dead would be entitled to inherit his estate.[39]

Having discussed the missing person in respect of his property or estate, it is also not out of place to say one or two things on the position of a missing person as an heir of other deceased Muslim person. There are two general rules in this respect. The first is that if at the time of the death of a deceased Muslim, one of his heirs is a missing person, and the whole property shall be reserved until he reappears and claims it or he is proved to be dead.[40] That is a missing person is not to be reckoned as dead in respect of the estate of others until such time has elapsed that it is inconceivable that the missing person should

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[33] .A. M. Gurin, *An Introduction To Islamic Law of Succession* (Testate/Intestate), (Zaria: Jodda Press Ltd., 1998), 28.

[34].Badamasuiy, op. cit, 16, see also Gurin, op. cit.

[35] .Gurin, op. cit. 28-29.

[36] .Gurin, op. cit, see also Aliyu, op. cit, 150.

[37] .Gurin, op. cit, see also Aliyu, op. cit, 149.

[38] .These are the Maliki and Hanafi Schools of Law, see Gurin, op. cit. 29.

[39] .See Gurin, op. cit , see also Aliyu, op. cit, 152.

[40] .Aliyu, op. cit, see also Gurin, op. cit.

still be alive or until his contemporaries are dead after which he would be regarded as dead in respect of the estate of others as if he had died on the day of his missing.[41]

However, where the missing person is a co-heir with others, the second rule applies. That is, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead.[42] In this case, the heirs are to take the smaller share before confirming the death or survival of the missing person. He who is to inherit and whose share does not diminish under all circumstances should be given what he/she deserves completely. But those whose shares vary should take the smaller portion. Whereas, the one who has no share on the assumption of the death or life of the missing person should not be given anything.[43] By way of illustration, supposing a man dies and leaves behind a wife, mother, and half-brother and a missing full brother. The wife should be given her share which is one-quarter and also the mother is to take her one-sixth and other one-sixth is to be kept pending and not to allow the half-brother take anything. The suspended portion should be reserved until the where about of the missing person is known or adjudged dead by the Court.[44]

The Heir (*AL-WARITH*)

This is the second element of inheritance in Islamic Law. By the heir, it is meant those who would take the benefit of the estate left behind by the deceased Muslim. An heir is therefore one qualified to inherit a deceased Muslim person and must be related to the deceased and entitled to get a share from the deceased's estate.[45] An heir must have survived the deceased [46] or be in existence [47] as at the time of the death of the deceased.

In Islamic Law, the heir must also have some nexus with the deceased Muslim in order to qualify as an heir of the deceased. This nexus may be either by way of marriage [48] blood affinity [49] or emancipation (*wala'a*).[50] However, certain circumstances may prevent an heir from inheriting the deceased person. These circumstances are seven in number. They are: a person who died before the person he is to inherit, when two or more persons die at the same time and it is not known who died first out of the two, A child disowned

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[41] .Aliyu, op. cit, 152-153, see also Gurin, op. cit, 15-16.

[42] .Gurin, op. cit, 16.

[43] .Aliyu, op. cit, 153.

[44] .Aliyu, op. cit, 154.

[45] .Lakhvi, op. cit, 20.

[46] .This is in respect of a living person because a dead person does not inherit another dead person in Islamic Law.

[47] .This relates to a foetus in the womb. Its right to inherit is dependent on two factors. These are its existence as at the time of death of the deceased and its being born alive, see Badamasuiy, op. cit, 17.

[48] .There must be a valid and subsisting marriage in accordance with Islamic Law between the deceased and the heir (where basis of right of inheritance arises from marriage) See H. 'Abd al'Ati, *The Family Structure in Islam*, (Lagos: Islamic Publications Bureau, 1982), 254.

[49] .Blood affinity (*Al-nasab*) is a situation where the heir has some blood relationship with the deceased, the relationship could be close or distant, see *Qur'an* 4:11-12

[50] .This arises where a master emancipates his slave. In this circumstance, the master can inherit the slave if the emancipated slave does not have any other heir, Lakhvi, op. cit, 22. Closely related to this is another heir in the form of *Baytul-Mal* (Public Treasury), where the deceased Muslim is not survived by anybody that could come under any of the above stated grounds, then the estate goes to *Baytul-Mal*.

through *Li'an* by his or her father, shall not share out of his or her father's estate and vice versa, difference of religion (A Muslim cannot inherit a non-Muslim and vice versa), the status of being a slave because a slave is property of the slave-master or owner, a child born out of legal wed-lock (*Waladun zinaj*, and a person who causes the death of the person he is entitled to inherit. [51]

The Property (*AL-TARIKA*)

This is the third but not the least element of inheritance in Islamic Law. It is the estate which is left behind by the deceased Muslim to be inherited by the heir(s).[52] It could be tangible, movable or immovable as the case may be.[53] Though the subject Matter of inheritance is the estate, Muslim jurists are not unanimous as to what type of property may be regarded as the legacy of a deceased Muslim. According to Maliki School of Law, which is the majority view, *"Tarika" means the property a deceased person leaves behind after his death and this includes all other financial rights and liabilities of the praepositus whether they are in his possession or not."* [54]

In respect of Tangible property, there is no difference of opinion amongst Muslim jurists hence all tangible property is inheritable [55] except the forbidden[56] ones which include items like swine, wine and intoxicants, pork, blood to mention but a few. The position of Muslim jurists however differs[57] as regards usufructs.[58]

Rights are specie of property in the class of usufruct which Muslim jurists have divided into three for the purpose of determining their capability of being subject matter of inheritance in Islamic Law. The first of this category of rights is the one referred to as pecuniary or pure proprietary rights which include unpaid debts from other people, compensations, right of easement and etc. All the Muslim jurists are unanimous that these rights are inheritable.[59] In the second category are rights classified as being partially

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[51] .A. Orire, *Shari'ah: A Misunderstood Legal System*, (Zaria: Sankore Educational Publishers Limited, 2007), 255-256, see also Badamasuiy, op. cit, 19-25.

[52] .Estate or property as used here are those recognized as property in the sight of Islam. So anything that does not fall within the purview of legal property in Islamic Law cannot be subject matter of inheritance, see *Qur'an* 2:173 and *Qur'an* 5:3-4. How such property has been acquired does not matter in this circumstance because it is the deceased that will account for them if acquired illegally by him during his life time. Islam, though, does not encourage acquiring legitimate property through illegitimate means. See *Qur'an* 4:29 and *Qur'an* 2:188.

[53] .These are not the only classification of property in Islamic Law, there are other classifications such as: Fungibles and Infungibles (*Mithli* & *Qaymi*), Measurable and Non-measurable (*Makil* or *Kayli&Mawzun* or *Wazni*), Tangible and Intangible (*al-a'yn wa al-manafi* or *dayn*) Moveable and Immoveable (*al-Manqulat wa ghayr al-Manqulat*) and Valuable and Invaluable (*Mutaqawam wa Ghayr Mutaqawam*), see A. Zubair, *Islamic Legal Doctrines and Interests in Land*, (Lagos: Al-Madinah Heritage Publications, 1996), 16-26.

[54] .Gurin, op. cit, 6.

[55] .Zubair, op. cit, 6, see also Gurin, op. cit, 7.

[56] .*Qur'an* 2:172, 173-175 amongst others.

[57] .According to the Maliki, Hanbali and Shafi'i Schools of Law, usufructs are inheritable property because they are rights that are closely related to property, while the Hanafi School as minority, hold the contrary opinion because usufructs cannot be independently possessed without the corpus, see Zubair, op. cit.

[58] These are the right of using and enjoying all the advantages and profits of the property of another without altering or damaging the substance, Zubair, op. cit.

[59] .Gurin, op. cit, 7, see also Zubair, op. cit.

proprietary and partially personal in nature otherwise called right of mixed nature.[60] They are both pecuniary as well as personal. Jurists are of different opinions as regards whether this type of right can constitute subject matter of inheritance in Islamic Law.[61] The third and last category of rights is those rights which are purely personal in nature. For this category, all the Muslim jurists are unanimous that such rights [62] are not inheritable because they are reserved only to the deceased person.

Attempts to Tamper With Law of Inheritance

Having discussed the peculiarities of Islamic Law of Inheritance, the objective of this paper will not be fully achieved if reference and some comments are not made on the recent and on-going steps taken by the Upper Legislative Chamber of this country to enact some laws targeting to "amend" some aspects of Islamic Law of Inheritance. The first attempt was through one senator Abiodun Olujimi of Ekiti South Constituency of Ekiti State. He sponsored the "Gender Parity and Prohibition of Violence against Women Bill" which was subsequently abandoned half way while the second attempt is the "Bill on Equality in Inheritance between Men and Women." This bill was equally sponsored by the sponsor of the first and it has passed second reading and slated for public hearing as at Friday 16-12-2016. The Bill, briefly, seeks to stop marginalization of women in regard to inheritance in parts of the country amongst others.

Though, details of the Bill in question are not yet available to the author, it is pertinent however to state that Islamic Law of Inheritance is distinct and not the same as and varies from the various customary laws of inheritance in the country. The immutable rules of Islamic Law of Inheritance enjoy the recognition [63] and protection [64] of the Constitution. Therefore, if the Bill infringes on or comes into conflict with the immutable Islamic Law of Inheritance, the Bill becomes null and void to the extent of inconsistencies and becomes an exercise in futility because the religion of Islam begot Islamic Law and Islamic Law of Inheritance is a sub-set of Islamic Law as earlier pointed out above. On the other hand, if the Bill does not affect and or tamper with rules of Islamic Law of Inheritance but affects the various mutable customary laws of inheritance, it is welcome as long as it satisfies the yearnings of the non-Muslim citizens of Nigeria. The Muslims of Nigeria do not have grievances against any rule of Islamic Law of Inheritance because Allah, the

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[60] Zubair, op. cit., see also Gurin, op. cit. Examples of this type of right are the rights of pre-emption, the right of a debtor to defer payment of the debt to a certain time.

[61] The position of the majority of the jurists which include Maliki School is that these rights are inheritable because of the involvement of proprietary rights while the Hanafi jurists, relying on the argument that these rights are more personal than proprietary, hold a contrary opinion. This is because they are more connected with the desire and wishes of the deceased person, see Gurin, op. cit., see also Zubair, op. cit.

[62] These rights include right of custody of a child, right to divorce one's wife and a host of others, see Gurin, op. cit.

[63] See Section 38, Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides for right to freedom of thought, conscience and religion.

[64] See Section 262(1), Section 277(1), Section 262(2)(c), and Section 277(2)(c) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See also I. S. Ismael, "Peripheralisation of Shariatul-Islam (Islamic Law) in Nigeria and its Adverse Effects on Muslims", *UNILORIN Sharia Journal*, 2000, 1, 15-23

Ultimate Law Maker, Has assigned shares to heirs whether male or female on the basis of responsibility He has assigned to them.[65]

Conclusion

This paper has discussed the nature of Islamic Law of Inheritance. In the course of doing this, the paper has been able to elicit the peculiarities of the Law. These peculiarities are: the divine nature of the law, universality of the law, its rigidity, divine nature of determinants of heirs in Islamic Law, divinely pre-determined subject matter of inheritance, pre-specified quantum of estate entitled to each heir; and the three conditions that must exist before inheritance takes place in Islamic Law. All these identified special features make Islamic Law of Inheritance distinct and a perfect piece of legislation by Allah, the Creator and Owner of the Universe and what is in and or on it.[66] The paper also shows that rules of Islamic Law of Inheritance are immutable and do not marginalize the heirs, whether male or female. Rather the law has adequately provided for the heirs hence does not require any man-made amendment in any form whatsoever.

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65 See *Qur'an* 3:34.

66 See *Qur'an* 1.2.