A DIGEST ON ISLAMIC LAW AND JURISPRUDENCE IN NIGERIA

Essays In Honour Of

Hon. Justice Umaru Faruk Abdullahi (PCA)

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CHAPTER SEVEN
INHERITANCE IN A MUSLIM FAMILY: THE NIGERIAN EXPERIENCE

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Introduction

Inheritance can be defined as an estate in land which descends from a man to his heirs[1]. In its broad sense the expression inheritance comprises the devolution of property on death whether real property or personal property, whether affected by will or by operation of law upon intestacy. In its technical sense it is derived from Latin "heres", an heir.[2]

Inheritance to the estate of a deceased may be either testate, where the deceased left a valid will by which his estate is to be distributed or intestate where he left no will. Under Islamic Law, WILL (Wasiyyah) and intestacy are recognized aspects of law of inheritance[3].

Islamic Law which is one of the three legal systems applicable in Nigeria [4], restricts the power of the testator to dispose of his property by WILL to only 1/3 (one third)of the estate. The remaining two-third portion of the testator's estate devolves (on intestacy) by law on the Legal heirs as laid down under the Islamic Legal System.

Historically, Islamic Law of inheritance has been part of Nigeria Legal System with the entrenchment of Islam in the part of the geographical zone now called Nigeria as far back as 11th Century. In fact, in the various constitutions hitherto promulgated in Nigeria, jurisdiction is conferred on the Sharî'ah Court of Appeal to determine, inter alia, matters concerning inheritance of a deceased Muslim.

Due to the legally pluralistic nature of Nigeria, the problem of conflict of laws as well as the choice of law to govern the devolution of the estate of a praepositus has always generated some controversies. Nonetheless, the courts of law have always resolved the knotty issue by the application of the trite theories of inherent incident theory' and 'manner of life theory. Islamic Law of inheritance has been given showers of accolades by modern jurists and scholars who have admired it for its utility and formal excellence. In fact Macnaughten had this to say about Islamic Law of inheritance:

> In these provisions we find ample attention paid to intestates of all those whom nature places, in the first rank of our affections and indeed it is difficult to conceive any system containing rules more strictly

just and equitable[5].

However, much as the benefits inherent in Islamic Law of inheritance may be for the Muslims in Nigeria and in spite of the fact that the entire legal system in Nigeria affords a Muslims of the right of choice of the law to govern his estate, majority of the Muslims in the country are still reluctant to utilize the opportunity. Most of such Muslims prefer not only to write their Wills (which attitude is not contrary to the dictate of Islamic Law but also to exceed the limit of 1/3 prescribed by Islamic Law thereby donning their Wills in the garment of the English Will. Such actions are in most cases born out of ignorance on the part of such praepositus.

This essay seeks to give the historical background to the application of Islamic Law of inheritance in Nigeria. It also seeks to highlight the basic principles of Islamic Law of inheritance, while the rights of a Nigerian Muslim to opt for Islamic Law of inheritance and the attitude of Nigerian Muslim families thereof shall also be critically analyzed. In the end, valuable suggestions to improve the Lukewarm attitude of the Muslims to Islamic Law of inheritance shall be proffered.

Historical Background To The Application Of Islamic Law In Nigeria

Islamic Law is as old as Islam in Nigeria. This is because the advent of Islam, in some of the areas constituting Nigeria, brought along with it Islamic Laws. The machinery for the administration of Islamic Law was, however, first established in the Borno Empire and later in the Hausa states such as Kano and Kastina. Historically, long before the 19th century, the principal law administered by the courts in most parts of the territory now constituting the Northern part of Nigeria was Islamic Law of the Maliki school, the main sources of which were and are still in writing[6].

Richardson confirmed that by 1914 when Northern and Southern Nigeria were amalgamated, a native court system had been established in the North which (in the Moslem Areas at least) worked satisfactorily and handled most of the litigations to general satisfaction[7]. Lord Lugard found this system of Islamic Law operating in the North when the protectorate government was imposed in Northern Nigeria[8]. After colonization, the British introduced the English Law which, however, did not completely abrogate the existing legal system. Islamic Law continued to operate subject only to certain limitations imposed by the colonialists.

Islamic Law was enforced in Nigeria up to 1956 under the comprehensive umbrella of "native law and custom". Referring to this position of Islamic Law then, Ames J. in a dissenting judgement in the West Africa Court of Appeal, observed that Islamic Law "prevails where it does prevail because it is there the local law and custom"[9]. The Northern Region Native Courts Law 1956[10] also provides that native law and custom includes Moslem Law. In 1956 the Moslem Court of Appeal was established to hear and determine appeals in respect of regional mat-

ters involving questions regarding Muslim personal law from any native court in the region. Other traces of the recognition and application of Islamic Law in Nigeria can be found in the Northern Nigeria Penal Code[11] passed into law on 1st October, 1960 and the constitution of Northern Nigeria 1963[12].

The Sharî'ah Court of Appeal was established under the Sharî'ah Court of Appeal 1960 to repeal and replace the Moslem Court of Appeal with jurisdiction :to hear and determine appeals in respect of regional matters in cases involving questions regarding Muslim personal Law from any decision of : (a) A Grade A Native Court (b) A Grade A Limited Native Court and (c) A Provincial Court [13]. Section 11 of the Sharî'ah Court of Appeal Law 1963 also provides that the Court shall be competent to decide:

(a) Any question of Moslem Law [14] regarding a marriage conducted in accordance with that law, including a question relating to the dissolution of such a marriage or a question that depends on such a marriage relating to family relationship or the guardianship of an infant.

(b) Where all the parties to the proceedings are Moslem, any question of Moslem Law regarding a marriage, including the dissolution of that marriage or regarding family relationship, a foundling or the guardianship of an infant.

(c) Any question of Moslem Law regarding a Wakf, gift, will or succession where the endower, donor, testator or deceased person is a Moslem.

(d) Any question of Moslem regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or

(e) Where all the parties to the proceeding (Whether or not they are Moslems) have by writing under their hand requested the courts that hears the case in the first instances to determine that case in accordance with Moslem law.

The Constitution of the Federal Republic of Nigeria 1979 also recognizes the application of Islamic Law in Nigeria. The 1979 constitution specifically distinguishes between Customary Law and Islamic Law[15].

Section 240 (1) provides also that "there shall be for any State that requires it a Sharî'ah Court of Appeal for that State", the jurisdiction of which is similar to that provided under section 11 of the Sharî'ah Court of Appeal Law 1963[16]. The 1989 Federal Constitution also recognizes the establishment of a Sharî'ah Court of Appeal for any State that requires it[17] and the application of Islamic Law[18].

Also under 1999 Constitution there is ample provision for the application of Islamic Law by the Sharî'ah Court of Appeal of any State. Section 277 of the Law provides thus:

(1) The Sharî'ah Court of Appeal of a State shall, in addition to such other ju diction as may be conferred upon it by the law of the State, exercise appellate and supervisory jurisdiction in civil proceedings involving ques of Islamic personal law which the court is competent to decide in accord with the provisions of subsection (2) of this section.

(2) For the purpose of subsection (1) of this section, the Sharî'ah Court of peal shall be competent to decide —

(c) any question of Islamic personal law regarding a wakf, gift, will or succes where the endower, donor, testator- or deceased person is a Muslim.

As earlier enunciated, Islamic Law was considered as native law and custo Nigeria before 1956 and its application was therefore made subject to the re nancy test. It is, however, clear under the present arrangement that Islamic L can be applied as a distinct system of law. The provisions for the applicati Islamic Law as a separate system of law in the Sharî'ah Court of Appeal La well as in the 1979, 1989 and 1999 Federal Constitutions make no mention the application of the repugnancy clause.

However, it is pertinent to mention that since the establishment of the Shari Court of Appeal up to the present time Islamic Court System presently has b with the Northern states in Nigeria. Nevertheless, even though there is no Shari Court established in the Southern states so far there is enough evidence to sh that there had been tremendous influence of Sharî'ah (Islamic Law) in the life and religious activities of most South-Western Nigeria Muslims and the Musl of Afenmai in Edo State. Research has shown for instance, that in 1913 th was a Sharî'ah Court officially established in Ede now in Osun State. The Qadi (judge) of the Court was one Sindiqu who was said to be very verse Arabic language and even recorded the court proceedings in Arabic[19].

On the application of Islamic Law in Southern Nigeria, the Supreme Court in case of **Adesubokan V Yinusa**[20] observed, Pericuriam, that:

> There is no provision to our knowledge, of any law which makes Moslem law whether the Maliki sect or any other sect , as part of any customary law, in any of the courts of the Southern states[21].

This observation, however, should be received with caution. It tends to sugge that Islamic Law is not applicable at all in the southern states. This is far from truth. Islamic Law was recognized as personal law in **Asiata V Goncallo**[22] wh the full court held that Islamic Law should govern the distribution of the estate deceased resident of Lagos, who had lived all his life as a devout Muslim and h with full acquittance of his two wives plainly considered himself subject to Islam Law. The court never doubted that if English Law was not applicable Islamic L

was the only alternative[23]. Deducible from the foregoing is that the application of Islamic Law was as a separate system of law has been put into practice in many parts of Northern Nigeria. In the southern parts, the establishment of Islamic Law as a separate law is yet to materialize despite the constitutional provision of the establishment of a Sharia Court of Appeal for any state that requires it. No doubt however, that Islamic Law can be applied as the personal law of individual in the southern states depending on the conduct and attitude of the individual parties. It has however been held that it is not enough that the individual or parties are nominal Muslims, Islamic Law will only apply if the individuals or parties regarded themselves as subject to Islamic Law and acted accordingly[24].

The fact is, therefore, established that Islamic Law is recognized and applicable in Nigeria. It is applicable in the Northern states as a separate system of law and not subject to the repugnancy doctrine while the courts in the Southern states may apply Islamic Law as personal law depending on the conduct of the parties.

Inheritance Under Islamic Law

The Basic sources of Islamic jurisprudence are the Qur'ãn (Divine revelation) Hadith (saying & deeds of the Prophet of Islam) *Ijma* (Consensus of Jurists' opinion) and *Qiyas* (Analogical deductions of the Jurists). The Qur'ãnic and Hadith legislation as regards intestate succession in Islam did not emerge at once. It was rather introduced through a gradual process, until it finally acquired its present structure, form and substance, and further achieves its development, beauty, excellence, legal and spiritual perfections over any succession laws known to and claimed by any system in this globe. Little wonder then, therefore, about the recommendation of a learned author in his book, Basic Jurisprudence in Nigeria,

> ...principles of Islamic family law of succession could be adapted into the common law of Nigeria by reason of their fairness, equity and progressiveness[25].

Prior to the advent of Islam which indubitably transformed the benighted world, there existed in the Arabian Peninsula four grounds of intestate succession viz: Blood relationship (Nasab); Adoption (Tabanni) Defence pact (Hilf) and marriage (Nikah)[26]. Under the early Arabian Succession Law (prior to Islam) minors and female heirs were not eligible to inherit their deceased relatives. Similarly, marriage as a ground of intestate succession only favoured a husband as a widower. He had the sole right to take the whole estate of his wife by intestate succession to the exclusion of her blood relatives. The law accorded no legal status to the widow. She had no legal capacity to inherit her husband. As a matter of fact, the widow formed part of the chattels inherited by a personal representative of the deceased[27].

Upon the advent of Islam a temporary system of intestate succession, based on *Muakhah* (Islamic fraternity) was initiated by the Prophet Muhammad (S.A.W.).

This new ground of intestacy temporarily initiated for the Muslims could rightly be referred to as brotherhood in pairs between the Makkan immigrants and their Madinan hosts. By this system, when a Makkan immigrant died having no blood relatives in Madinah to inherit, his Madinan brother in faith would inherit him.

The wisdom of this temporarily initiated intestate system which was affirmed by a famous Quran's exegetist (Ibn Kathir) to have been based on a divine legislation[28] is not far fetched. It was meant to encourage Muslims to undertake Hijrah with a view to foster and inject in them a sense of unity, love, compassion and to transform them into one solid force and a distinct society of committed God-fearing and justice-loving fellow.

Upon the achievement of the purpose for which Makkah was initiated and upon the liberation of Makkan, Islamic fraternity was abolished by Sunnah of the Prophet which says "There shall be no immigration (to Madinah) after the liberation (of Makkah). Adoption as a ground of intestacy was also abolished by a divine legislation[29] while the military compact which in fact ratified at the early days of Islamic era (according to the Muslim Jurists Malik, Shafii and Ahmad) as a ground of intestate succession, was later abolished and superseded by *Ayatul Fara'id* i.e. Qur'ãnic verses on succession) where Allah (SWT) says[30]:

> Allah directs you in the matter of your children's (succession) the male will have as much as the portion of two females, but if they have two thirds of that which he had left and if only one, she will have a half...

The above verse is corroborated by the Hadith of the Prophet which was unanimously accepted by the founder of schools of Islamic Jurisprudence as having abolished military compact as a ground of intestate succession. The Prophet was reported to have said:

> There is no more (intestate succession) based on Hilf (contract of military defence) any such contract entered into in pre-Islamic Arabia is opposed to by Islam. I (similarly) nullify the agreement in the Baytun Nadwah (the assembly hall at the pre-Islamic Arabia)[31].

Now under Islamic Law, there are three grounds of intestate succession on which inheritors may lay claims on the estate of their dead relatives. They are: Blood relationship (Nasab) as approved by Qur'ãn, marriage (Nikah) and clientage (Wila'ul itaq).

The final changes introduced by Islam as regards heirs by blood is that it gave the inheritors, rights to inherit subject to the rules of Hajb (exclusion). Under Islamic Law of succession, the fact that the inheritors are male or female, major or minor does not give any additional advantage or disadvantage to the heirs. Similarly the

widow is now at par with her husband in matters of succession. She now has acquired a legal status and personality distinct from her husband, unknown to the women of the old Arab days. She is no longer an inheritable chattel as she used to be in those days. Like heirs by blood each of the couples has his/her own fixed shares which was not the case before [32]. Another ground of succession not known to the Arabs of the days but newly introduced by Islam, is the relationship, that existed at one time between a master and his freed slave.

First, the freed slave dies having been survived only by his one-time master who set him free, the latter would inherit the former (even in preference to the Muslim public treasury) [33]. Although according to **Coulson** reference to the institution of slavery, which is no longer relevant to present Muslim society, but which is the subject of a massive corpus of law in the traditional authorities, is partially or almost completely committed in the day discussion of Islamic intestacy[34]. I need to mention here that in discussing the nature of Islamic inheritance, attention must be called to the fact that there are different schools or versions of the Sharî'ah, each of which possessed its own authoritative legal manuals on inheritance and each of which is represented, for its true interpretation of the Sharî'ah even though they agree on basic issues.

The vast majority of Muslims known from their basically common religious adherence as Sunnis are divided among the four schools of the Hanafis, Maliki, Shafis and Hanbalis, while their minorities who stand apart from the Sunnis on fundamental theological issues are the Ibadis and the numerically larger group of the Shîah which is itself split into the three distinct branches of Ithna-Asharis, Ismailis and Zaidis. It is the duty of the court to apply the school of law to which individual litigants concerned have personally chosen to give allegiance.

Resolution of conflicts between the different schools is by certain rules and in matters of succession, such conflict will generally be resolved by application of the rules of the school of the praepositus. Due to factors not unconnected with the historical spread of Islam and political developments the populations in fairly well-defined geographical areas of the Muslim world have embraced a particular school and the country in that area have become wedded to the application of the doctrine of that school[35]. For example in some parts of the Middle East, the Hanafis school applies. In West Africa, the Maliki law school applies. The Shaffii law obtains in South Yemen while the court of Saudi Arabia apply Hambali doctrine. In the present essay, reference shall be had to Maliki school in the Sunni group which is applicable in Nigeria.

Furthermore, another feature of Islamic Law of succession which must command attention is the process of modern reform of the law which has taken root in many Muslim countries and communities in the field of family law in general and succession law in particular. In the Indian sub-continent for example, statute law has in

many respects directly superseded the traditional Hanafis doctrine and formed an integral part of the body of succession law applied by the courts. Similarly the Muslim family ordinance 1961 introduced into Pakistan law has been said[36] to play a significant role in the domestic and political life of that country. Islamic Law of succession by its nature, its supreme purpose is material provision for surviving dependents and relative, for the family group bound to the deceased by the mutual ties and responsibilities which stem from blood relationship.

The manner in which this provision is to be made is prescribed by the law in rigid and uncompromising terms. Relatives are marshalled into strict and comprehensive order of priorities and the amount or quantum of their entitlement is meticulously defined[37]. "Legal her" in the Islamic context is a term which is properly applied only to those relatives upon whom property devolves, after the decease of its owner, by operation of law, and it is the rights of the Legal heirs which are the key notes of the whole system of succession, for they are fundamentally indefeasible.

The power of the deceased to dispose of his property by Will is recognised[38] in Islamic Law but it is restricted to one-third of his net asset. The only situation where testamentary disposition is allowed to be in excess of this one-third is where the legal heirs, for those whose material benefit the compulsory rules of inheritance are designed and commanded, are prepared voluntarily to forgo their rights.

In Islamic Law of inheritance particularly intestacy, there are laid down steps to be followed . The first step is to ascertain the gross estate, upon which funeral expenses and debts are a first charge and this involves the application of the ultra vires[39] rule to the deceased's acts and transaction during his death sickness. The next step is to give such effect out of the net estate to bequest as the ultra vires doctrine and the rules relating to the validity of bequest allow them to ascertain who are potentially the heirs of the praepositus taking into consideration the circumstances upon which the rights of the heirs depend i.e. applying the rules regarding conditions of and impediments to inheritance. And finally to distribute the inheritance among the entitled claimants.

Rights Of A Nigeria Muslim To Opt For Islamic Law Of Inheritance

As regards the Islamic Law of succession, modern jurists and authors have admired it for its utility and formal excellence. Tyabji had this to say on the subject:

> The Muslim law of inheritance has always been admired for its completeness as well as the success with which it has achieved the ambitious aim of providing not merely for the selection of a single individual or homogenous group of individuals, on whom the estate of the deceased should devolve by universal succession but for adjusting the competitive claims of all the nearest relations.

As to the excellence of the system in a formal sense Williams Jones said:

> I am strongly disposed to believe that no possible question could occur on the Muhammadan law of succession which might not be rapidly and correctly answered.

This was emphatically corroborated by Macnaughten in his words thus:

> In these provisions we find ample attention paid to interests of all those whom nature places in the first rank of our affections and indeed it is difficult to conceive any systems containing rules more strictly just and equitable.

Deducible from the above are some inherent benefit in Islamic Law of succession which every given Muslim will want to benefit. Nevertheless, the situation in Nigeria presents itself for complexity. The co-existence in Nigeria of English and Customary Law[40] naturally gives rise to conflict of laws problem. Consequent upon this, a Muslim in Nigeria much as he may desire the benefit of Islamic Law may be deprived of same either unwittingly or out of ignorance. Regarding the rules governing the choice of law in Nigeria , there are many situations that may present themselves for solution. For instance, which of the laws would govern the intestate succession of the Muslims (Islamic Law or the received English Law) in the following situations?

1. Where a Muslim subject to native law and custom contracts a Christian marriage outside the Act and dies domiciled in Lagos or the regions or any part of Nigeria.
2. Where a Muslim subject to native law and custom contracts a marriage under the Act but S.36 of Marriage Act is not applicable because he has his property outside Lagos.
3. Where a Muslim subject to native law and custom contracts a marriage outside the Act.
4. Where a Muslim subject to native law and custom first contracted a Muslim marriage but later contracted a Christian marriage or vice versa.
5. Where a Muslim contracts an Islamic marriage but later gets it registered under the marriage Act.
6. Where a Muslim subject to native and customary law contracts an Islamic marriage.
7. Where a Muslim subject to native and customary law contracts a marriage under the marriage Act.
8. Where a Muslim subject to native and customary law contracts a monogamous marriage other than that provided in the marriage Act.

Further discussion on this would provide answers to these questions? As a guide in resolving such problems the high court laws of the Regions and Lagos provide that no person normally subject to Customary Law[41] shall be deprived of its benefits unless there is an agreement that English Law is to govern or transaction involved is unknown to Customary Law[42]. This position is justified because English Law on some subjects "was developed in response to social and economic conditions peculiar to England. One wonders, therefore, how rational and just it is to apply English Law completely to (a Muslim who contracts) a Christian marriage where the spouses are living a customary way of life[43].

Prior to 1973, the application of pre-1900 statutes of general application dealing with intestacy to the estates of persons subject to Customary Law was determined by Section36 of Marriage Act. The effect of Section 36 (which has limited application to Lagos is to remove from the ambit of Customary Law, the succession rights of persons who have contracted a statutory marriage whether or not they marry under the Act.

In respect of which law actually governs each particular situations earlier painted, two tests have been evolved by courts; "the inherent incident theory" and the "intention or manner of life theory". For instance, where a Muslim marries a new convert (formerly a Christian) whose family requires that marriage be conducted in the church what law will govern the intestate succession of such people? The courts have not been consistent, nor uniform in giving answer to this and many other questions.

Some cases have held that a Christian (church) marriage automatically makes the English Law applicable[44], others have held that whether English or Islamic Law is to govern depends upon the intention or manner of life of the parties[45]. The first group is that based on the inherent incident test which provides that a monogamous or church marriage (by a Muslim) ousts the jurisdiction of Customary Law in matter such as succession. This test found judicial recognition in the case of **Cole V Cole**[46] where Griffith J. stated in the course of his judgement that "In fact, a Christian (church) marriage clothes the parties to such marriage and their offspring with a status unknown to native law".

Successive application of this test which has been criticized as being unresponsive to local conditions and thereof invalid against the context of the extended family system (In fact the application of the test in **Adegbola V Folaranmi**[47] went so far as to bastardize legitimate child of a prior customary marriage) gave rise to the formulation of a more realistic approach. The new approach, which lays a greater emphasis on the manner of life as opposed to the type of marriage contracted, has its genesis in the case of **Smith V Smith**[48] where the court gave judgement for the plaintiffs basing its decision on the fact that the deceased in spite of his Christian

marriage had lived a traditional way of life. Further examination of decided cases on this issue reveals a lack of consistency and uniformity in the rules governing the choice of law. In fact it would appear that the only yardstick for determining which test is to be used is based on the personal bias of the presiding authority[49].

Several cases have rejected the above cited case of **Cole V Cole's** mechanical application of English Law and have held Customary Law to govern the estate of persons who had contracted Christian marriages. The first of these cases was **Asiata V Goncallo**[50] which was decided barely two years after **Cole v Cole**. In the instant case, a Yoruba, had been seized as a slave in his youth and taken to Brazil where he married a woman first according to Islamic rites and then according to Christians rites. During his stay in Brazil, two daughters were born. When he returned to Nigeria with his wife, he married a second woman under Islamic rites.

Upon the deceased's death intestate the plaintiff, the only child of the second marriage, brought an action claiming a share of the Estate. The divisional court rejected his argument and claim on the ground that the plaintiff was illegitimate. The full court however reversed it and held that the second marriage was valid and applied Islamic Law, thereby giving the plaintiff a share in the Estate.

Griffith J. in this case stated that "there can be no doubt that the Christian marriage was legal". He however distinguished Cole from Asiata and held that Islamic Law should apply. But on what basis then was Islamic Law applied?. It is submitted that the court was much concerned with the fact that the deceased had been a "bona fide follower of the Prophet" and both he and his wife "lived and died as Muhammedans" The court was looking toward the deceased's manner of life and expectations. According to J. Griffith.

> But it may fairly be argued that assuming the marriage to be legal, still it would be contrary to justice that Selia (the first wife) having impliedly contracted Christian marriage for monogamy, her offspring should suffer by the breach of that contract by their father. But the contract which a Christian marriage would ordinarily imply was clearly not implied in the present case as Selia not only went through a Muhammedan ceremony of marriage first but she does not appear to have raised the slightest objection to her husband's subsequent marriages and wives...[51].

Deducible from this summation of the court is the view that the manner of life approach should be the guide even if the parties had contracted a church marriage for one reason or the other. This matter of life approach was more fully developed several years later in **Smith V Smith**[52] a case much like **Cole V Cole** in that it involved a single Christian marriage. There the deceased contracted a Christian marriage in Sierra Leone in 1876 and later purchased property and took up resi-

dence in Lagos. after his death intestate, his widow and children continued to live on the property. A disagreement arose among the children and the daughters, basing their claim on Customary Law brought about an action or partition. The defendant, the deceased's eldest male child opposed the action on the ground that he was the deceased heir at law and was, therefore, solely entitled to the property. He relied upon **Cole V Cole** and argued that since his parents had contracted a Christian marriage, English Law must govern the intestate succession.

The manner of life theory was also followed in the case of **Ajayi V White**[53] without apology. The deceased in this case had been widow of Reverend James White whom she married according to the provisions of the marriage ordinance. She had several children, one of whom was the defendant in the case. Her other children married under native law and custom, the plaintiffs brought an action for partition of the property in their grandmother's estate, basing their claim upon Customary Law and relying on **Smith V Smith**[54] as authority for its application. The court held that Christian marriage merely creates a rebuttable presumption and not conclusive evidence that succession should be regulated by English Law.

Moreover, what law prevails when a Muslim contracts an Islamic marriage? In this instance there is certainty that the manner of life theory will prevail without conflict and the mosque marriage conducted will also serve as evidence that Islamic Law of intestate succession should apply. However, where a Muslim marries under the Act or contracted an Islamic marriage but registered it under the marriage Act, what law governs it can be found under the Act. Section 36 of the marriage Act provides thus:

> Where any person who is subject to native law or custom contracts a marriage in accordance with the provision of this Act and such person dies intestate, subsequently to the commencement of this Act, leaving widow or husband or any issue of such marriage.

Reading this section in conjunction with paragraph b, it reads thus:

> Provided that (b) The property, the succession to which cannot by native law or custom be affected by testamentary disposition shall descend in accordance with the provisions of such native law or custom anything herein to the contrary notwithstanding [55].

The usual interpretation to the above (and which is position of the law) hitherto is that a marriage contracted under the Act is conclusively an indication that his succession should be governed by English Law. Nevertheless we submit that we think contra-wise.

The tenor of the provision when read conjuctively with paragraph b is that where such devolution contradicts any limitations on testamentary power by any Cus-

tomary Law, then the Customary Law violated shall operate but not the English Law. In Nigeria Legal System as espoused earlier in this work, Islamic Law is considered as a type of Customary Law. It would further be noted that in Islamic Law there is restriction on testamentary capacity as averse to the English Law where there is relative testamentary freedom. Such contradictions would in my view in most cases render it sound logically to conclude that Islamic Law should prevail.

Furthermore, we should not be oblivious of the High Court Laws provision. Section 31 of the High Court Laws explicitly provide thus:- "All imperial laws declared to extend or apply to the jurisdiction of the court shall be in force so as far only as the limits of the local jurisdiction and local circumstances permit and subject to any existing or future legislation"[56].

The laws provide that statutes of general application are to apply in Nigeria if, inter alia "local circumstances" permits, and these are the native and Islamic Laws in force in different parts of Nigeria[57]. In the light of the foregoing, a strong case could be made for the argument that English intestate laws are "Imperial Laws" and, therefore, would need adaptation so as to fit local circumstances and specifically the circumstance that most indigenous customary and religious laws in Nigeria have rules restricting the disposal of property away from the heirs or family.

Succession is a regional and personal matter, an individual thereof has the right to choose any law that governs his intestate succession. This is best expressed in a deduction from intention of the praepositus which can best be detected by the "intention or manner of life test" explained above.

Conclusion

In the foregoing research work we have given an exposition of the Islamic Law of inheritance, the historical background of its application in Nigeria and the right of Muslim families to opt for the Islamic Law of inheritance in the devolution of the estate of a praepositus.

With Islamic Law, it is observed that the concept of succession as a whole under that legal system is that the wishes of the deceased must be respected. This is his right to make a Will but this testamentary power is limited to 1/3 of his estate. The core of the law is the material provision for the surviving dependants and relatives bound to the deceased by the mutual ties and responsibilities which stem from blood to marital relationship. The Islamic system of inheritance is generally characterized by justice and precision.

Be that as it may, research has shown that even though the Nigerian Constitution accords an individual Muslim the right to choose the law that would govern him in respect of personal matters like succession, the attitude of some Nigeria Muslims has been unsatisfactory. Many fickled Nigerian Muslims today who led their lives in Islamic way would prefer their properties to pass under their hands through a Will rather than leave it to be governed by Islamic intestacy. Their testamentary powers they exercise in excess of 1/3 prescription by Islamic Law. This non-challant attitude of the Muslims is one of the problems against Islamic Law of inheritance despite its justness and equitableness.

Consequently, it is recommended that since adherence to this law in Islam is at present more of moral per suasion than compulsion,[58] the Muslim preachers should emphasize this area in their sermons (Khutab) to make the Muslims realize the need for them to allow the laws of God to govern their affairs, especially in the area of inheritance, rather than their personal whims. The Muslim couples should also be enlightened that it is not a compulsion for them to register their marriage under the English Act after it had been conducted in Islamic way. And where it is so registered under the marriage Act, for formality sake, they should avoid filling the form that will automatically subject them to succession rules under the English Law.

Another attendant problem militating against Islamic Law of succession is the dearth of scholars with sound knowledge of the law. In Islamic Law, a great deal of importance is attached to the laws of inheritance (faraid). Consequently, the jurists keep repeating the saying of the Prophet (S.A.W.) that the laws of inheritance should be learnt and taught to the people for they are one half of useful knowledge.

But where are those to learn and teach this aspect of the law today? Many scholars deliberately avoid this aspect of the law. Although it must be acknowledged that the law of succession is a relatively difficult aspect. It takes a sound mind, both health and spirit to be able to meet the requirement of accuracy and justice in the intestate distribution of a praepositus' properties. Nevertheless, scholars should realize that this succession law is worth knowing as the act of learning and teaching it would invariably be acts of Ibadah (worship) on the authority of the Prophet's saying mentioned above.

The Prophet Muhammad (S.A.W.) is reported to have said that the first knowledge to be forgotten on earth would be law of inheritance. This is clearly evident in what obtains today. In order to halt this trend it is suggested that efforts should be made by the Muslim Ummah to breed more scholars versed in laws of inheritance.

Consequently it is recommended as follows:

1. There should be scholarship awards or sponsorship programme for those who are willing to pursue their education and specialize in this area of the law.
2. There should be prize awards for students in the University who excel in the Islamic Law of inheritance.
3. There should be professional chairs in Nigeria Universities for specialists in the Islamic Law of inheritance.

Apart from the foregoing there should be more public campaign to bring about awareness among the Muslims in respect of this law of inheritance, their rights given them under our laws. When these are done, the Muslims would allow Islamic Law of succession to govern them and regulate their lives and properties, a measure which is part and parcel of Islamic way of life. On the other hand, there would be enough competent hands to handle the distribution of estate accurately and justly as prescribed by Islamic Law of succession. And consequently the Muslims would not be eluded by the universal, just and equitable rules of Islamic intestate succession which is part of their rights entrenched in the Constitution of the Federal Republic of Nigeria.