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TABLE OF CONTENTS

1.	ADMISSIBILITY OF CONFESSIONAL STATEMENTS UNDER NIGERIAN LAW: A CONTEMPORARY PERSPECTIVE <i>*A.O. ALUBO, (Ph.D) UBALE, C. Esq.</i>	1-14
2.	THE UNITED NATIONS AND THE CHALLENGES OF A CHANGING ENVIRONMENT <i>*OWOLABIE F.</i>	15-28
3.	NOISE POLLUTION: REGULATORY MEASURES FOR PROTECTION OF ECOSYSTEM <i>*HAMZAH ADESOLA DAWOOD</i>	29-43
4.	OWNERSHIP OF CRUDE OIL UNDER NIGERIAN LEGISLATIONS - WHICH WAY FORWARD <i>*BOSE LAWAL</i>	44-56
5.	DETERMINING THE JURISDICTION OF THE ARBITRAL TRIBUNAL AND THE ISSUE OF PARALLEL JUDICIAL PROCEEDINGS IN INTERNATIONAL COMMERCIAL ARBITRATION <i>*A.B. ABDULKADIR & A.O. SAMBO</i>	57-72
6.	ELECTION PETITIONS UNDER THE ELECTORAL ACT 2006: AN APPRAISAL <i>*JESU OROBO E. I. Esq.</i>	73-82
7.	AN APPRAISAL OF THE SUPREME COURT DECISION IN INAKOJU VS ADELEKE AND ITS IMPACT ON POLITICAL STABILITY IN NIGERIA <i>*M.T. ADEKILEKUN</i>	83-93
8.	EXTENDING INTERNATIONAL CORPORATE PERSONALITY TO TRANSNATIONAL COMPANIES. <i>*KHAIRAT OLUWAKEMI AKANBI</i>	94-103
9.	THE DELIMITATION OF CRIMINAL RESPONSIBILITY IN CULTURE BASED CRIMES IN NIGERIA: EVOLVING A NEW THEORY OF BLAME <i>*MUHTARA A. ETUDAIYE</i>	104-123
10.	CONSTRAINTS IN THE APPLICATION OF ISLAMIC LAW OF INHERITANCE IN NIGERIA <i>*RAZAQ JUSTICE ADEBIMPE</i>	124-130
11.	DELEGATION OF POWERS TO GRANT CONSENT BY GOVERNOR UNDER THE LAND USE ACT: AN OVERVIEW <i>*OLUGBENGA Esq.</i>	131-152
12.	CUSTODY OF CHILDREN IN NIGERIA: A COMPARATIVE ANALYSIS OF THE RELEVANT LAWS <i>*F.F. ABDULRAZAQ</i>	153-163
13.	CONSTITUTIONALITY OF THE TAX APPEAL TRIBUNAL IN NIGERIA <i>*GRACE ABOSEDE OLADELE (Mrs)</i>	164-178
14.	THE ROLE OF STATE ENTERPRISES IN MINERAL DEVELOPMENT <i>*G.M OLATOKUN (Mrs)</i>	179-187
15.	PROTECTION OF THE RIGHTS OF THE CHILD UNDER THE AFRICAN HUMAN RIGHTS SYSTEM <i>*TIMOTHY F. YERIMA</i>	188-198
16.	CONTRACT OF <i>KAFALAH</i> (GUARANTEE): A VERITABLE PRODUCT OF ISLAMIC FINANCING? <i>*ABDULQADIR IBRAHIM ABIKAN, (Ph.D)</i>	199-216
17.	WRONG PLACEMENT OF THE MODIFIER " <i>ONLY</i> ": A SOURCE OF AMBIGUITY IN LEGAL DOCUMENTATIONS <i>*OYEDOKUN-ALLI, W. ADEMOLA & OLOKOOPA S.M</i>	217-224

CONSTRAINTS IN THE APPLICATION OF ISLAMIC LAW OF INHERITANCE IN NIGERIA

* RAZAQ JUSTICE ADEBIMPE

INTRODUCTION

The principles of inheritance in Islamic Law are laid down in broad outline in the Qur'an,¹ while the precise details have been worked out on the basis of the prophet's practice and by interpretation and analogy. Thus, a testator can not be partial to one heir at the expense of another, or it will amount to upsetting the shares and undue preference of one heir to another.

This paper considers and analyses the position accorded the Islamic Law of Inheritance in Nigeria corpus juris via the test of repugnancy and incompatibility² with a view to identifying the manifest absurdity therein. The paper further illustrates with decided cases the negative attitude of the Courts towards enforcing Islamic Law of Succession where the deceased is a Muslim. The paper also condemns not only the fallacy of classifying Islamic Law as native law and custom but also called for reconsideration of the status of Islamic Law in Nigeria with a view to drawing a clear distinction between the two so as to reflect the life of Muslims whose life it seeks to regulate.

Islamic Law of Succession

The details of the provisions regarding the manner in which the estates of deceased Muslims should be distributed are not the concern of this paper. It suffices however to state that Islamic Law recognized certain heirs who must inherit a deceased Muslim and who can not be disinherited by a Will or otherwise as well as their portions. For instance, there are three principal Heirs; namely, the Qur'anic Heirs, the Agnatic Heirs and the Uterine Heirs.

The Qur'anic heirs consist of the husband, the wife, the father, the true grand father, i.e., the deceased paternal grand father and mother, the Agnatic heirs are (i) the agnatic by his own right, i.e. male agnates like the

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1. See Quran chapter 4: 11-12. The Quran was revealed in Arabic language. Several translations are however available. Abdullah Yusuf Ali, *The Holy Quran: English Translation of the Meaning and Commentary* (The Presidency of Islamic Researches Ifta Call and Guidance, Al-Medinah Al-Munawarah 1984) is used throughout in this paper.
2. The tests may also be referred to as principles, doctrines, rules or clauses.

son, the father, brother paternal uncle etc. (ii) the agnates by another, i.e. female agnatics who are in fact Qur'anic heirs but who become agnates because there is present a male agnate of equal degree and strength of blood tie and thus inherit on the basis of double share to the male, e.g. son and daughter or brother and sister full or consanguine and (iii) the agnates with another, that is, the full sister and the consanguine sister when they inherit with daughter's or son's daughters.³

However, a Muslim is entitled to devise by Will up to one-third of his property on collateral relatives who are otherwise excluded from the list of these heirs⁴ or outsiders for whom he may wish to provide. The remaining two-thirds are distributed among heirs as laid down.⁵ Legacies can not be left to any of the heirs included in the scheme of distribution, or it will amount to under preference of one heir⁶ unless all the heirs give their consent to the disposition after the death of the testator; and their consent previous to his death will have no effect.

Validity Tests and its Effect on Islamic Law

The application of Islamic Law in Nigeria is determined by the combined or general tests of repugnancy and incompatibility with statutes. The various High Courts Law states thus:

...High Court shall observe, and enforce the observance of every customary law which is applicable and not repugnant to natural justice, equity and good conscience, not incompatible either directly or by implication with any law for the time being in force....⁷

However, while till today no clear or exact meaning of the repugnancy test has been offered in any Court decision, it is noteworthy that no repugnancy test is fixed with the application of the received English

3. See H A Olaniyan, 'Personal Law of Succession in South Western Nigeria: The Dilemma of Muslims' (2005) 1 UILJ 2.

4. *ibid*; see also Ali (n1) 74.

5. Ali (n1) 209.

6. *ibid*.

7. High Court Law of Kwara State Cap 67 Laws of Kwara State 1994 s.34(1). There are similar provisions with minor differences in the wording of the High Court Laws of various States. for instance, High Court Law of Lagos State Cap 60 Laws of Lagos 1994 s.26; High Court Law of Kano State Cap 57 Laws of Kano State 1991 s.34(1).

Law,⁸ and of course the Courts have not pause in doubt to use the test to widen the jurisdiction of the received English Law.⁹ In *Eshugbayi Eleko v The Officer Administering the Government of Nigeria*, Lord Atkin said 'A rule which fail to pass this test must be totally rejected without the Court having any power to modify it or to remove the repugnancy elements'.¹⁰

For such rejected rules therefore, comparable provisions of the received English Law have proved to be a convenient substitute. Thus, Islamic Law in Nigeria is adversely affected by colonial legislations in two ways: firstly, by being totally replaced with the comparable provisions of English Law, as happened in the case of the enactment of the Penal Code, which totally annulled the rules of Islamic criminal law, with some minor exceptions. Secondly, by statutorily recognizing the provisions of English Law on a given subject without abolishing the comparable provisions of Islamic Law.

Such legislation nonetheless derogates from the status of Islamic and Customary Law. The Marriage Act, 1914 for instance provides for a monogamous form of Marriage, but does not abolish other forms of Marriage under the Islamic and Customary Laws. Such legislation as noted earlier derogates from the status of Islamic Law and enhances that of the received English Law when it provides that in case of conflict between the two, the provisions of the enacted laws shall prevail.¹¹

Similarly, there is the rule that so long as a provision of Customary Law and of the Islamic Law remains 'incompatible either directly or by necessary implication with any law for the time being in force', it is not to be enforced. The expression written Law as applied from the Courts' decisions include not only Nigerian statutes but also all English statutes of general application which were in force on the 1st day of January, 1900.

8. While Lord Wright in *Laoye v. Oyetunde* (1944) A C 170 says that the phrase is intended to invalidate barbarous customs, a word also used by Lord Atkin in *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] A C 662. The Courts generally have refrained from putting forward any definition. In *Guri v. Hadejia Native Authority* (1959) 4 FSC 44 the (Federal) Supreme Court Declared invalid a rule of Maliki Law which prevented a person accused of highway robbery (*Hiraba*) from calling witnesses in his defence. While in this and other cases the practice of the Courts generally is to declare a rule invalid, a different approach was adopted by Northern Region Court of Appeal in *Mariyama v. Sadiku Ejo* (1961) NRNLR 81. See E A W Parke, *The Sources of Nigerian Law* (Sweet and Maxwell, London 1979) 100-3; M. Tabiu, 'Constraints in the Application of Islamic Law in Nigeria' in S. Khalid Rashid (ed), *Islamic Law in Nigeria: Application and Teaching* (Islamic Publications Bureau, Lagos 1986) 75.

9. Tabiu (n 8) 75.

10. (n 8) 673.

11. Tabiu (n 8) 77.

The only reasonable interpretation of this provision is that, rules of Islamic Laws must not conflict with enactments of the Nigerian Legislature. This is enough to have reversed the normal situation under the Shariah where decrees of a political authority are necessarily subordinate to the dictates of Allah.

Yet our Courts of Law have gone even further by subordinating the Shariah not only to the enactments of the Nigerian legislature, but also to the received English Law,¹² with total disregard to the fact that the English statutes in question could itself be repugnant to nature justice, equity and good conscience in the circumstances especially having regard to Nigeria peculiar situations and circumstances. The case that readily comes to mind in this respect is the West African Court of Appeal decision in the celebrated case of *Mager v Johnson*¹³ where the testator made a Will in which he gave most of his bequest to his mistress, one Aque Jokotade who had a child for him outside the marriage wedlock.

Being an eminent lawyer, he wrote the Will himself though he took it to one of his tenants Mr. Wilson who himself invited another tenant. The Will was subsequently challenged on the ground of undue influence by the mistress and that it was not duly executed. Evidence of its execution was led by the two witnesses.

The court held that though the deceased was actually moved by an immoral consideration to benefit his mistress against his wife and transfer of affection, he (the deceased) had a normal testamentary capacity.

The above factual position with respect to Islamic Law of inheritance was brought to the fore in *Adesubokan v Yunusa*,¹⁴ where the plaintiff/respondent as the eldest son of the deceased testator brought an action against the defendant/appellant who was the executor of the Will of his deceased father and to whom the probate of the Will had been granted. He challenged the validity of the Will on the ground that the testator being a Muslim was not entitled to dispose of his property in accordance with the provisions of the Wills Act 1937 in a manner contrary to Islamic Law.

¹² *ibid.*

¹³ (1951) 13 WACA 290.

¹⁴ (1971) NNLR 77; (1961-89) 1 ShLRN 15-30. The case was the first important case in post independent Nigeria that brought the implication of the classification Islamic Law to the fore. It was also the case where a direct attack was launched on the consequences of classifying Islamic Law as customary law. See general A.A Oba, 'Islamic Law as Customary Law: the Changing Perspective in Nigeria' (2002) 51 (4) ICLO.

The deceased was succeeded by three heirs (all males). The Will in question purported to bequest £5 to the plaintiff/respondent, plot H15 worth £350 and plot 18 also worth £350 to the two other sons of the testator respectively. In addition, the Will purported to give the same other sons jointly and in equal share the house situated at No. 19 Daunegoro Street, Mushin (the Western, now Lagos State), together with all the residual estates of the testator.

The evidence of the plaintiff/respondent shows that he did not give his consent to his being discriminated against. And it was not in dispute that the surviving children and wife of the testator were Muslims. There was therefore, no equality of treatment of the male children of the testator as required by Islamic Law of Inheritance and in so far as the Islamic Law of inheritance was concerned the Will was void and of no effect.

Since it was not in dispute that the testator lived and died as a Muslim and that all his surviving children and wife were also Muslims, there was therefore, no equality of treatment of the male children of the testator as required by the Islamic Law of Inheritance and therefore, in so far as the Islamic Law was concerned the Will was void and of no effect.

The issue therefore turned on whether or not a Muslim could make Will under the Act, on terms contrary to the rule of distribution of estates under the applicable native law and custom, in this case, Islamic Law.¹⁵

It was held on appeal by the Supreme Court setting aside the decision of trial Court which had earlier invalidate the Will for lack of equality of treatment of the male children of the testator (as required by Islamic Law) on the ground that the said Islamic Law of Inheritance was undoubtedly incompatible with Section 3 of the Wills Act 1837, under which a testator can dispose of his property real or personal as he pleases.

Thus, the Islamic Law of Inheritance which is in consonance with the principle of natural justice, equity and good conscience was not merely dismissed and relegated into a subordinate position but invalidate on the faulty reasoning of being incompatible with Section 3 of the Will Act 1837 (a statute of general application) which in essence permits unscrupulous testators to pervert the cause of justice, equity and good conscience.

15. *The relevant law was embodied in the High Court Law Cap 42 Laws of Northern Nigeria 1963 s.34(1) which provides that the High Court 'Shall observe, and enforce the observance of every customary law which is applicable and is not... incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of Customary Law'*

The provisions of the Section 3 of the Wills Act is that, it shall be lawful for every person to devise, bequeath or dispose of, by his Will all real estate and all personal estate which he is entitled to, either at law or in equity, at the time of his death and which if not so devised, bequeathed or disposed of would devolve upon the heir at law of him.

This absurd position is due to the erroneous classification of Islamic Law as specie of native law and custom under the Nigerian legal system. And despite our peculiar social circumstances, the status quo is still recognized in our legal system till date so that in the event of re-occurrence of cases of similar facts the doctrine of judicial precedent will be applied in accordance with relevant English or local statutes¹⁶ even when such law is in the particular circumstance so manifestly unjust and so repugnant to natural justice, equity and good conscience thereby leading to perpetuation of an absurd verdict.

The implication of this so called freedom of distribution of the deceased testator's property as established by the Court in Adesubokan's Case is that a person is at liberty to dispose of his property in any manner he pleases. He may even decide to bequeath his entire property upon death to any inanimate object or to another woman who is not his legal wife, thereby denying the rightful heirs of any or all of the share of the estates, they being needy or destitute notwithstanding.

It is rather mischievous and unfortunate that Islamic Law has been classified as a specie of native law and custom¹⁷ which is only allowed to be applied if not found repugnant to natural justice, equity and good conscience as conceived in the western world or incompatible with any written law for the time being in force in Nigeria.

16 For example until recently, Northern States where Islamic Law applies predominantly have not done much in freeing Islamic Law from the shackles of the Common Law as most of them have not domesticated the statute of general application by way of local legislation. However, Kwara State has made progress in this area by the promulgation of the Kwara State Wills Law Cap 168 1994, See s. 4(1)(b).

The situation is quite different in the Southern States where codification and domestication of the statutes of general application has been done, for example, some States have reversed the effect of the decision in *Yunusa v Adesubokan* (n14) by making the application of Wills laws subject to Customary Law. see, O Ajai, 'The New Wills Edict and the Reform of Wills Law in Nigeria: Some Thoughts and Suggestions' (1988-91) NCLR 79,81.

17. For all purposes, Islamic Law became Customary Law: see AG Karibi-Whyte, *The History and Sources of Nigeria Criminal Law*, (Spectrum Law Publishing, Ibadan 1993) 124-5. The classification of Islamic Law as Customary Law was done during the colonial era by legislation, see *Native Courts Ordinance* Cap 142, *Laws of Nigeria*, 1947. see also, E A W Parke (n8) 65. It has continued to be so by succeeding legislations, see *High Court Law* Cap 42, *Laws of Northern Nigeria*, 1963 s.2 (applicable in the Northern States) which says 'Native Law and Custom includes Moslem law'. This Law and other laws to the similar effect are applicable in the States that formed the defunct Northern Region: *District Courts* Cap 33 *Laws of Northern Nigeria* 1963 s.2, see generally Oba (n8) 827.

However, it appears that the process of drawing a clear distinction between the Customary law and Islamic law has started by the Supreme Court decision in *Usman v Umar*¹⁸, where it was held inter alia that in its ordinary meaning, and within the meaning of section 2 of the Customary Court of Appeal Law, Plateau State 'Customary Law' does not include 'Moslem Law.'¹⁹

It is unwise to say that a rule of Islamic Law should be declared invalid simply because it does not correspond to the most advanced notions of what is socially ideal in a particular situation. It is necessary to go much further to show that such rule is by any civilized or reasonable standard quite objectionable. To do otherwise is to shift emphasis from the 'social relevance' and 'public good' of laws which is the hall mark of Islamic jurisprudence to the Western legal values.

Another implication is that a principle of Islamic Law which is an embodiment of substantive and natural justice could still be invalidated on the faulty reasoning of being incompatible with any written law for the being in force.

CONCLUSION

Judging from the importance attached to inheritance in the life of a Muslim testator, and the extent of damage done to him by the relevant provisions of our laws, it appears that in view of such shortcomings, to call such a system of law as progressive or to regard it as an ideal system is to show clearly one's ignorance of functions of law generally. That those embarrassing provisions remain in the statute books for long is a shame and an indictment of the slow pace of law reforms in Nigeria.

The overall status of Islamic Law in Nigeria needs to be reconsidered to reflect the life of Muslim whom the law is to regulate so as to guarantee justice and peace. The false distinction made between Islamic personal Law and other aspects of Islamic law is too restrictive and does not reflect the purpose of Islamic Law. The phrase Islamic personal law (*Al-Ahwaal Ash-Shakhisiya*) is a recent legal term in Arabic, unknown to classical Islamic jurists and non-existent in any classical texts of Islamic jurisprudence.²⁰ The law should therefore be reframed to read Islamic Law or Shariah whereby Muslim personal Law will be a branch of the aforesaid substantive law.

The issue of repugnancy test as it affects Shariah, which as earlier established, represents a comprehensive legal code and the totality of life of a Muslim must be revisited.

18. (1992) 7 NWLR (pt 254) 377.

19. Note also that a clear cut distinction between Islamic Law and Customary law has been made by the Shariah Laws of most States in Northern Nigeria, for e.g. Shariah Law of Zamfara State 1999.

20. J.J. Nasir, *The Islamic Law of Personal Status*, (2nd edn Graham and Trotman, London, 1990), 29.

According to A.A. Oba (n14) it was purely a creation of the British Colonial masters, so as to curb the all-pervading influence of Islamic law in the life of their Muslims subjects.