THE ELIGIBILITY CODE OF SPECIAL HEIRS TO INHERIT IN ISLAMIC LAW OF INHERITANCE: THE CHALLENGE OF MODERN SCIENCE TECHNOLOGY AND THE 1999 NIGERIAN CONSTITUTION

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ABSTRACT

Heirs' eligibility to inherit is based on set-out grounds and conditions by Islamic law. The law is categorical on the unacceptability of the use of modern science and technology in establishing the conditions. Among the set-out impediments or constraints to inheritance, four appear to be in conflict with Sections 38 (1) and 42 (2) of the 1999 Nigerian Constitution. Therefore, there is need to refashion them to allow for proper and free application of the constraints, including trial for homicide cases to establish the guilt of heirs in the issues of inheritance in the Sharia Court of Appeal rather than English Courts. This can be achieved by expanding the jurisdiction of Sharia Court of Appeal to cover criminal cases in inheritance matters or to terminate all Islamic personal law in the Sharia Court of Appeal.

INTRODUCTION

In Islamic law, heirs will qualify to inherit the estate of their deceased relative only, on attaining to some set out grounds and conditions. The same law equally set out reasons that disqualify heirs from inheriting. In order to establish the eligibility of these special heirs more stringent measures have to be taken on board unlike the normal heirs. Among the conditions to be attained is that the heirs must have survived the deceased, which include the determination of whether or not the wife of the deceased is pregnant, and whether or not the child in the womb is alive at the time of the decease, the sex of the child in the womb as prospective heir, and the actual sex of a hermaphrodite heir. Presently,

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there is modern scientific methods or technology through which these issues can be determined. But can such methods be resorted to, rather than the procedure provided by Islamic law? There is also the problem of pre-emptive danger posed by some of the provisions of the 1999 Nigerian Constitution (As amended) which conflicts with the provision of Islamic law that disinherit eligible heirs, and also the provision divesting the Sharia Courts of powers to try criminal matters even those bordering on inheritance matters. These issues were dealt with, and suggestions were made for free and proper application of Islamic law of inheritance in Nigeria.

GROUNDS AND CONDITIONS OF INHERITANCE

Islamic law of inheritance is the process of transfer of ownership of the property/estate or right which include that of pre-emption, retribution etc of the deceased person to his/her surviving heirs in line with the dictate of Islamic law. Special heirs, are heirs other than the normal heirs; and they include, inheritance of pregnant wife, child in the womb and a hermaphrodite.[2] Devolution of the deceased estate to his legal heirs through inheritance depends on the below set grounds and conditions:

On the grounds of inheritance, the prospective heir must be related to the deceased through any of the followings;

(i) Blood relation (nasab), i.e. he/she must be the deceased person's descendant or ascendant;
(ii) Affinity or Marriage (al-zawaj), i.e. the marriage must be valid and existing either actually or constructively;
(iii) Wala al-itq: this ground is through emancipation of a slave. This is where a master freed his or her slave, he/she can inherit the freed slave when deceased in the absence of a male son.

The following conditions must also be established:

(i) death of the person to be inherited (muwarrith). The death must be established either by real death (haqiqatan) of the

2. Holy Quran chapter 4: 7,11,12 and 176, see also Al-Subuni M.A,(1993), Al-Muwarith fi al- sharia A-islamiyyati fidau'I, Al-kitab wal Sunna, 2nd ed. Darul al kamalli,Beirut P. 34

decease or by a decree of a Court of competent jurisdiction (hukman).[3]

(ii) survival of the heir, for any prospective heir to inherit, it must be established that the he/she has survived the deceased.[4] This condition is imperative as it may be uncertain whether the deceased is dead, or whether the prospective heir is alive, or whether an alleged heir was alive or not at the time of the decease. These uncertainties arise in the following cases; (i) a child in the womb is or are eligible to inherit if it can be established that he/she/they was/were conceived when the deceased died. Therefore, for such child to inherit the following have to be determined:

(a) The child was born alive: according to the majority of sunni jurists including the Malikis, the child must be born alive for however brief a period after delivery.[5] Hanafis, on the other hand, are of the view that the child becomes eligible to inherit if the greater part of its body is protruded with vitality, or the head is presented and the breast is protruded then it dies. All jurists agree that the determining factor for a child to be said to have been born alive is when it makes the first cry, or some other noise, or move its limbs, or sneezes.[6]

(b) The child must be born within the minimum period of gestation which is six lunar months. Similarly, the maxim period of gestation within which a child must be born is five years according to Maliki, two years according to Hanafi and four years according to Shafii and Hambali jurists. Jurists have peg limit on the minimum and maximum periods of human gestation allowed by Islamic law in order to determine the legitimacy of a child, and

3. Salah-Uddin B. H.A. L, (2011), 5th ed.,Al-maktabah AlMuhammedia Ghulah mandi Renala Khurd-okara, Pakistan, P. 23

[4] Gurin A. M, An Introduction to Islamic Law of Succession (testate and intestate), Jodda comm. press ltd, Zaria, P.14

[5] ibid P.18

[6.] Keffi S. U. D (nd) Some Aspect of Islamic law of succession, Rukhsa publications Kano P.70

> therefore becomes eligible to inherit.[7] According to the majority, the minimum period of gestation for legal presumption of legitimacy starts after the consummation of the marriage, whether acknowledged by the parties or presumed by law when there is no hindrance to sexual intercourse.[8] It is only the Hanafi jurists that hold a different view, that the presumption of legitimacy begins from the time of marriage contract and not consummation. Therefore, any child born after six months and within the maximum period of gestation depending on the years pegged by jurists, the child belonged to the deceased and shall inherit him. But any child born after maximum period or below the minimum period of gestation shall not inherit.

Having seen how the legitimacy of a child in the womb could be established, it is now important to illustrate how the inheritance of the child in the womb, his mother and other heirs of the deceased is done. Where, for instance, the deceased left as his heir a pregnant wife, his brothers / or sisters, it is only the pregnant wife that will be given her minimum share (1/8), and the distribution of the remaining estate will be suspended. The remaining heirs have to wait till the pregnant wife delivers, and the sex of the child determined, or if it is established that there is no pregnancy at all. This is the view of the majority of the sunni jurists i.e. the Hambali, Shafi'i and the Hanafi. However, Maliki jurists have opined that the whole distribution shall be suspended until the delivery of the child, or after the termination of the iddah period. In the above given case, assuming a male child is born, the brothers and/or sisters become excluded completely from the inheritance. If the child delivered is a female however, the wife's share still remain 1/8, the child takes 1/2 and the residue which is 3/8 goes to the brothers and/or sisters to be shared in accordance with the provision of Quran chapter 4 : 12 and 176.

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7. The opinion of the jurists on minimum period gestation has been confirmed by Quran chapter 46 :15 and 2:223 and for the maximum period of gestation see Gurin A. M op cit P.19.

8. Hussein A. The Islamic Law of Succession (2005), Maktaba Dar-us-salam Riyadh Jiddah P.252

The next special heir to be considered is the Hermaphrodite (khuntha al-mushkil). A hermaphrodite is a person born with both male and female reproductive organs, or with none of the organs naturally.[9] A hermaphrodite like the rest of the special heirs discussed above must attained to the same set out grounds and conditions of inheritance before becoming eligible to inherit. In addition, a hermaphrodite must be subjected to some investigations to establish his/her actual sex, and to determine his/her share of inheritance. Hermaphrodite are of two kinds, they are khunsa and khunsa mushkil. The former is a child whose sex could be established in future when distinguishing features of either male or female appears. Therefore, if such a child is among the heirs, then the distribution of the estate should be suspended until the sex identity is confirmed after reaching the age of puberty. Hermaphrodite are of two types (i) Khunsa not mushkil i.e whose sex can be determined after some investigations or after the hermaphrodite child reaches the age of maturity. The other type is, Khunsa mushkil, that is a hermaphrodite child whose sex is problematic to determine.[10]

The procedure for determining the sex of *Khunsa* not *muskil* is divided into two: the first is that the sex is determined when the hermaphrodite child is still in his minority stage. Here observation is made as to which of the organs the prospective heir urinates. If it is through the female organ, then the hermaphrodite is said to be a female heir. But if it is through the male organ then it is said to be a male heir. A situation may arise where he urinates from both the male and the female organs urinate. Here the procedure is, observation should be made as to which of the two releases the urine first, if it is the male organ the heir is a male and entitled to a male share, and if it is the female organ that releases first then the heir is a female in which female share should be given to her. A situation may also arise where both the organs release urine at the same time. In such situation, the organ that releases the larger volume should be the sex of the heir. Where both the male and the female organs release urine at the same time and same volume, then the temperature of the urine from each organ should be considered and the one that releases the warmest is considered the sex of the heir,

[9.] Pindiga U. E. Practical Guide to the Islamic Law of Succession (Mirath) in the Sharia (2000), Tamaza publishing co. Ltd. Zaria P. 139.
[10.] Pindiga, U.E.H. op cit p. 130. see also Sala-uddin, H.A. op cit P.169

therefore, entitled to the heir's share. This is the view of the majority of the sunni jurists including the Malik.

The second procedure for determining the sex is when the hermaphrodite child reaches the age of puberty or majority, at which period the distinguishing features may appear for example beard, nocturnal dreams for male, and breast or menstruation for female. This is the view of the Hanafi jurists in all the situations discussed above.

The share of the above *Khunsa* not *mushkil* according to Hanafi, Shafii and the Hambali jurists, is to calculated the shares of the hermaphrodite both as a male and as a female and give the hermaphrodite whichever share is smaller, and the balance to be kept until the gender is determined at its maturity age. But according to Maliki jurists the hermaphrodite inherits half of the combined shares of the male and female.

For the inheritance of the second type of *Khunsa* that is *Khunsa mushkil* whose gender could not be determined both at minority and majority age, then the hermaphrodite should be the average share of the male and female i.e half the share of the male and female combined, for example where the deceased is survived by the following, his son (S), daughter (D) and a hermaphrodite(considered a female) , here son inherits ½ of the estate, the daughter and the hermaphrodite share the remaining half equally each taking ¼. And where the deceased is survived by a son, hermaphrodite (considered a male) and a daughter, here the daughter inherits 1/5, son 2/5 the hermaphrodite gets 2/5. According to the Hanafi law, since the hermaphrodite inherits as a son is entitled to 2/5, but since ¼ is smaller share than 2/5, the hermaphrodite takes the smaller share which is ¼. But according to the Hambali and the Shafii jurists, the hermaphrodite inherits ¼, the daughter 1/5 and the son inherits 2/5. It should be noted that the shares are the minimum shares to be inherited by them, and the residue which is 3/9 would be reserved till the gender is determined.[11]

The questions to be determined are, whether it is accepted to use modern medical science and advanced technology to establish whether a woman is pregnant; or whether the child in the womb is male or female; or whether he/she is alive in the womb. Similarly, whether

[11.] A. Hussain op cit p 264 – 265

Islam accepts the use of technology to change the sex of a hermaphrodite to the one he chooses, rather than reserving the estate pending the delivery of the child or the completion of her *idda* period, and in case of a hermaphrodite, pending the maturity of the child as provided by Maliki law. The answer to the above questions is in the negative. This is because human innovations be it scientific, modern technology or otherwise is fallible; therefore, it cannot take precedence over Allah's injunctions or the saying or approvals of His Prophet (SAW).[12] Regarding hermaphrodite a kind of correction through plastic surgery is been performed on some children in a hospital in Sokoto, Nigeria.

As the foregoing grounds and conditions represent the attributes of qualified heirs. The following constraints disqualify the heirs from inheriting the estate of their deceased relative.

CONSTRAINTS TO INHERITING

There are several reasons disqualifying eligible special heirs from inheriting, notwithstanding they stand to the deceased in the relation of inheriting relatives. The reasons are:

(a) murder or homicide: homicide categorically barred the perpetrator from inheriting his victim.[13] This is because he draws nearer to himself such benefit by killing the deceased. The principle behind this is deterrence, so that people with same mind would be discouraged from killing for the purpose of inheritance. Jurists are however, divided in their opinion as to the type of homicide that constitute a constraint to inheritance. They all agree that intentional killing is a bar to inheritance, but differ as to whether an unintentional homicide would also prevent the killer from inheriting. On this issue, Maliki jurists categorise homicide into two, as unlawful and intentional an example of this type of killing is giving false testimony against another which led to his execution, and the other as lawful and unintentional killing. According to them, in the former the killer will not inherit; and in the latter, it prevents the killer from inheriting the *diyyah* (blood money)

12. Holy Quran 4: 13 – 14

13. This is attributed to the tradition of the Prophet (SAW) that 'a killer does not inherit' as quoted by Gurin A. M op cit P. 21 ,see also Muhammad I,T, 'Principle and Practice of Succession under Islamic Law, a paper presented at all Nigeria judges' conference, held in Abuja between 9th 13th Dec.2008

only. Therefore, in Maliki law which is the law applicable in Nigeria, two elements must be present before a killer is prevented from inheriting which are intention and deliberate. It is because of this principle that minors and lunatics may not be exempted when they commit deliberate homicide, though their liability in this respect is payment of *diyyah* only.[14]

According to Shafi'i School, homicide whether intentional or unintentional, direct or indirect operate as a constraint to inheritance against the perpetrator. By their law, even lawful execution of Court order prevents the executor from inheritance. The same law applies to in case of a killer who is a minor or lunatic.[15] The Hanafi jurists view is that, any killing whatsoever, whether it is the one that attracts *qisas* (retaliation) or expiation by redeeming a slave, or by fasting or by paying *diyyah* operate as a constraint for inheritance against the perpetrator. The only exception according to the school is justifiable homicide, for example death cause by a Court order or in self-defence. According to them where the homicide is caused indirectly, for instance, by throwing someone into fire, river or through hired assassin, the perpetrator must pay *diyyah* but may not be barred from inheriting his victim.[16] In Hanafi law, direct killing by a minor or lunatic do not bar them from inheritance. According to Hambali law, any homicide punishable either by retaliation or payment of *diyyah* operate as constraint against the perpetrator, but any lawful or non- actionable homicide, for instance, killing by execution of Court order or in self-defence will not.[17]

It is worth noting that, the proof of killing that operates as a bar to inheritance in the view of Islamic law is, one established through the legal operations of law provided by Islam. Thus, any other means used to arrive at the guilt of the perpetrator is not acceptable by Islamic law which makes it void. In Nigeria, the Sharia Court of Appeal is vested with powers to adjudicate inheritance cases do not have the powers to try Islamic criminal offences, their powers are limited to only Islamic

14. Coulson, N.J, (1971) Succession in the Muslim Family, Cambridge Press, London P. 179, See also Gurin , A.M, op cit P. 22
15. Magniyyah, M. I, (1995), The Five Schools of Islamic Law, Anssaniya publications, Iran, P. 473
16. Sabiq, S, (1996), Fiqh US Sunna vol.iv, Dar el Fikr, Beirut, P.471
17. Ibn Qudama, M, (nd), Al Mugni, vol.6, MakktabatuL lal-Haditiyyah P.29

personal laws.[18] Therefore, disallowing Sharia Court of Appeal to try criminal offences including those that falls within the provision section 277 of the 1999 Constitution impeded the right of Muslims and good governance in Nigeria.

(b) slavery is another constraint. A slave lacks the right to inherit his free relatives nor can he be inherited as he belonged to his master.[19]

(c) difference of religion is also a constraint to inherit. This Implied that a Muslim cannot inherit a non-Muslim and vice versa.[20]

(d) child out of wedlock. Illegitimacy is also a constraint to inherit, therefore, an illegitimate child is not eligible to inherit the estate of his/her mother's partner in the act of *zina* (illicit intercourse), as the two illicit actors have no basis of inheritance from one another for want of recognition by Islamic law. The child of the union can only inherit from his/her mother only.

(d) divorce by process of *lian* (imprecation): if a husband and his wife took an oath of *lian* that is, the husband disowned the paternity of a pregnancy or a child through process of *lian*, that child shall not inherit from the husband of the woman carrying the pregnancy if he dies nor will she inherit from him or him from her. However, both the child and the mother can mutually inherit each other.[21]

(e) Apostasy (*riddah*), means anyone who denounce Islam for any religion is barred from inheriting his/her Muslim deceased relative, Jurists differ on the inheritance of a Muslim from an apostate person. According to the majority of the jurists i.e. the Shafii, Hambali and the Maliki jurists share same view that, the whole estate of an apostate escheat to public treasury (*baital mal*). None of his/her Muslim relative including spouse shall inherit. Hanafi jurists are however of the view that an apostate Muslim's relatives

18. Section 277 (1) and (2) (a) –(e) of the 1999 Constitution of the Federal Republic of Nigeria (As amended)

19. Malik, I, (1982) Al Muwatta imam malik, translated by Al Tarjumana et al, Diwan press, England, P. 241

20. Holy Quran 4:114, see also hadith reported by Sahih Al Bukhari and Sunan at Tirmidhi respectively ''no Muslim can inherit from a non-Muslim nor a non Muslim from a Muslim''

21. Q24: 6 and 7, Ambali M.A (1998) The Practice of Muslim Family Law in Nigeria Tamaza Publishing co.Ltd ,Zaria, P.270

> can inherit all the estate acquired by the apostate while a Muslim while wealth acquired after apostatizing goes to Muslim public treasury if the apostate is a male. But if the apostate is a female, the whole of her estate should be inherited by her Muslim relatives.[22]

The above last four constraints appear discriminatory in the eyes of Nigerian 1999 constitution (As amended). These constraints conflict with the provisions on freedom of religion and discrimination under sections 38 and 42 (2) of the Constitution which provide ''No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth'', and that of freedom of religion provides, "Every person shall be entitled to freedom of thought, conscience and religion including freedom to change his religion belief…''. The fact is, Sharia or Islamic law must be seen as a complete way of life of the Muslims. Thus, it did not recognise the illicit union through which an illegitimate child is brought about, and as a way of life the law determines who is not to inherit among its adherents i.e. Muslims. In addition, since Section 277(2) (c) had conferred jurisdiction on Sharia Court of Appeal in civil proceedings involving question of Islamic personal law regarding… succession where the deceased is a Muslim, is enough to assume that it allows the faith of the deceased to govern his/ her estate in toto. The assumption is negated by the mentioned Sections 38 and 42 of the Constitution. Therefore, these Constitutional restraint on the application of the constraints to inheritance leave much to be desired, as the application of the constraints beyond Sharia Court of Appeal may be declared in conflict with the provisions of the Constitution, and may be declared null and void to the extent of the inconsistency. It is therefore, imperative to amend those provisions to allow free application of Islamic rules of inheritance in Nigeria.

CONCLUSION

The eligibility to inherit in Islamic law is based entirely on fulfilment of grounds and conditions set out by Lawgiver. Islamic law is categorical on the use of modern science and advanced technology in establishing the conditions for eligibility to inherit, (for instance to

[22.] Hussain A, op cit P.60

determine whether or not the wife of the deceased is pregnant, or to determine whether or not the child in the womb is alive or to demine his/her sex for the purpose of inheritance) as unacceptable by Islam. Four of the constraints disentitling special heirs to inherit appears to be in conflict with Sections 38(1) and 42 (2) of the Nigerian 1999 Constitution that is subjecting any one to discrimination based on circumstances of his birth or religion. Therefore, there is imperative need that those sections refashioned in such a way to allow for proper and free application of the constraints. In addition, the practice in Nigeria of establishing the guilt of prospective special heirs alleged to have committed homicide in English Courts negates the very concept of full application of Islamic law of inheritance, thereby undermining the purpose and power of Sharia Courts and the mandate of Muslims in issue as sensitive as inheritance, and more so in a democratic set up like Nigeria, where majority are Muslims. The truth is, the outcome of any judgement in the English Court is not acceptable for the establishment of guilt of homicide for the purpose of disinheriting a heir him or verdict of not guilty for him to qualify to inherit. Therefore, there is the need to expand the jurisdiction of the Sharia Court of Appeal to hear and determine homicide cases relating to inheritance or to terminate all Islamic personal law cases in the Sharia Court of Appeal.