

Land Ownership and Inheritance Rights under Common Law and Islamic Law: A Comparative Analysis

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ABSTRACT: In every society, land remains a topical and paramount value, due to its uncommon usages for agricultural purposes, industrialisation, infrastructure, residential usages, for social, economic and political powers as obtainable across different societies. Land disputes relating to ownership and inheritance constantly generates and degenerates legal controversies especially in plural legal systems, where, *pari-passu*, common law and Islamic law and customary law exist as it is in Nigerian society. It is therefore imperative that the objective of this paper is to analyse and compare the principles governing land ownership and inheritance rights under common law and Islamic law, with a particular emphasis on the areas of convergence and divergence, as it explains the conceptual foundations of property ownership, testamentary succession, rights of women's inheritance and legal actions regarding inheritance disputes. Doctrinal and comparative legal methods were used as it evaluates documented statutory provisions, judicial verdicts, juristic scholarly opinions, and the primary sources of Islamic law: Qur'an and Ahadith that are very relevant to land inheritance. The research found out that common law is emphatically on individual's autonomy and testamentary freedom, Islamic law, on the other hand, advocates on divinely revealed Quranic injunctions on distribution of estate, targeting equality, justice, family protection against future rancour. The paper conclusively agitates for integration coalescence between both systems of law for effective land administration, peaceful land dispute resolution in a multi-legal societies and justification in the legal system. Recommendations: The paper makes some plausible suggestions such as: public awareness campaign, seminars on legal reform, integration of judicial system, among others.

KEYWORDS: Land Ownership, Inheritance Rights, Islamic Law, Common Law, Comparative.

INTRODUCTION

In the entire human life, land is of no equal in terms of importance. Ownership of land via: purchase, allocation, compensation for revocation under allodial under indigenous, for individuals' family or community, through trustees etc. In addition to ownership, inheritance contributes significantly as it influences wealth distribution, settlement of disputes, social stability and political authority, as in governorship. Land relating to inheritance as property constitutes to persistent causes of family conflict which resulted to litigation. *Mai-Awaki v Umaru, Damtani v Garba and Ukeje v Ukeje*.

The regulation of land ownership and inheritance vary in different legal traditions. Indeed, inheritances under Common law, rights are regulated by statutes, judicial precedents and the principle of testamentary freedom. On the other hand, Islamic law divinely derives its laws or rules from the first and secondary sources of Islam: Qur'an, Hadith, Qiyas, *ijma'*. *Ilm al-Fara'id* in Arabic is known as Islamic law of inheritance establishes detailed explanations on the portion to be allotted to every eligible heir close or distant heirs. The main concern is that sometimes, there is contradiction among statutory, customary and Islamic law of inheritance. Yoruba culture for example has "Ori-ajari and Idi-igi" where some heirs are left without shares; Islamic law therefore balances the distribution, as it gives heirs male and female children their deserving portions including land inheritance. The paper comparatively explains land ownership and inheritance rights under both common and Islamic laws, including the practical problems or challenges there attached. Notably, the paper proposes methods of synchronising the two systems hence the need for social harmony, legal certainty, removal of injustice and promotion of justice. *Al-'Adlu Asas al Mulk*: Justice is the foundation of governance and in order to right the wrong, the right deed is the only remedy. *Ubi jus ibi Remedium*: Where there is right, there is a remedy!

CONCEPTUAL FRAMEWORK

Land Ownership

Land ownership implies the right to control, possessing, use and transfer of land to others within the limits provided by the law of the land in a given society. Land ownership under common law is the legally recognised bundle of rights vested in a person over land, including the rights of possession, use, enjoyment, exclusion of others, and disposition, subject to statutory limitations and competing propriety interest. Furthermore, in Megarry & Susan land is conceptualised as the most comprehensive interest in land recognised by law encompassing the rights to possess, use, alienate and recover land from unlawful possession.

The researcher, therefore, defines land to be a property possessed under laws of the land whether statutory or otherwise, for the purpose of exclusively excluding others for any form of use, sell, buy, alienate, and judiciously have the total control or right of possession, use for enjoyment, transfer to others, or devised by will and having rights to secure legal remedies against any unlawful occupiers or trespassers based on the laws of the land. The owner of the land incurs either from the local, state, federal or traditional inheritors of such land(s).

Equally important is ownership of land in Islamic Law. It is viewed as a trust by Allah put under the custody of a trustee(s) but never absolute owners. The permanent ownership of lands in the whole universe, is Allah, as they are controlled, possessed and are exclusively belonging to Him, including all the entities in the land and all other economic materials therein, or on the lands. Allah says:

To Allah belongs the dominion of the heavens and the earth; and Allah is over all things competent
Considering the meaning or description of ownership of land as embedded in Q3:189, it is deduced that ownership is recognised in Islamic law, but it is not absolute, it rather remains as a trust from Allah to be used or disposed proportionately in accordance with the stipulated rules of Islam.

Mohammad in his own concept of ownership argues that although, individual may own land, the earth ultimately belongs to Allah, and human ownership is exercised as a form of stewardship (Khilafah) aimed at achieving public welfare. Whereas, Mahmud believes that land ownership in Islam confers rights of possession, utilization and transfer, while imposing obligations to use land productively and avoid harm to society.

Concept of Inheritance

Common Law Rights

The continuity in the usage, management, control and propriety functionality of an estate after the demise of a deceased, by the eligible heirs refers to inheritance. Under common law, John et al refers to inheritance as the legal process by which the property, rights and obligations of a deceased person are transferred to his or her heirs or beneficiaries, either through a valid will (testate succession) or according to statutory rules, where no valid will exist (intestate succession); In this system of inheritance, (Common law) emphasises testamentary freedom that allows individuals' discretion in determining the distribution of their estates upon death.

Customary Law

Allott sees concept of inheritance under customary law as the transmission of a deceased person's property according to customs, traditions and usages of a particular community. The rules, most time depend on kinship structures, lineage systems and cultural norms which maybe patrilineal, matrilineal, or combination of both for the purposes of economic and as a way to preserve identity and community. This implies that in African/Nigeria customary way of inheritance, a child can inherit both parents for continuity of economic gains, for identification of the family land and others.

Concept of Inheritance under Islamic Law

Islamic law stipulates and ordains transfer of a deceased Muslim's estate to specified heirs,

in fixed proportions, as prescribed by the Qur'an, Sunnah and juristic principles. Another concept that Islamic inheritance is the system by which the estate of a deceased Muslim devolves upon his lawful heirs in accordance with the shares prescribed by the Shariah. Unlike what is obtainable in Common law where the discretionary right is given to an individual to allot his or her estate according to his or her wish, Islamic form of inheritance has perfected every eligible Muslim member of the family his or her ratio: 2:1, $\frac{1}{2}$, $\frac{1}{4}$, $\frac{1}{8}$, $\frac{2}{3}$, $\frac{1}{6}$ etc., which is applicable also to immovable property like land where in abundance, where not, the property land for example is sold and ratio formulae is applicable according to the divinely. Muhammad states that inheritance is the transfer of the rights and property of a deceased person to his legal heirs by operation of Shariah after the settlement of the funeral expenses, debts and valid bequests.

THEORETICAL FRAMEWORK

Natural Law Theory

Natural law theory depicts that laws derive from universal moral principles as found inherent in human nature. Equally important in this theory is Islamic law of inheritance as it develops naturally from divine wisdom so as to exercise and socio balance ensures equality, justice. Thomas argues that human laws derive their validity from eternal laws. He believed that inheritance laws should promote fairness, justice, social order, family welfare other than arbitrary personal preference. In his assertion, which Islam basically establishes, the foundation of inheritance is on welfare, that is, to cater for the heirs, and to play the role of fairness, meaning not to cheat anyone as justice is the framework of distributing inheritance, including land property. Mohammed affirms the objectives of Islam: welfare, fairness, justice and propounded also by Thomas. Mohammed furthered his stance that Islamic law seeks realisations of benefit and prevention of harm hence inheritance laws actually protect wealth, lineage and family stability as natural law serves objective moral aims. Ibn Ashur opined that the objective of Islamic Legislation is the preservation of social order, and the sound progress of society. It is obvious that when family members inherit property (land inclusive) the society makes progress as well.

LITERATURE REVIEW

Inheritance, in conjunction with land acquisition or ownership under Islamic law has been undergoing legal litigations due to the absence of equity and justice. Sometimes, conflict erupts between same family members especially where succession becomes a bottle-neck; or entails partially or elements of favouritism.

Islamic law of inheritance constitutes Mathematical precision, equitable distribution and consideration for the heirs. According to Fyzee, Islamic succession reduces arbitrary disinheritance. In the opinion of Common Law, Anderson admitted that succession evolved gradually from feudal property systems and increasingly recognised testamentary freedom as a component of private property rights.

Observably, Islamic laws of inheritance are divinely coded in the first primary sources of law, permanent and without room for deliberate biased inflection, not subject to arbitrary alteration by the society, scholars, individuals or government. This paper's expository therefore, shows that, inheritance under common law is exposed to changes, inflection and bias, while Islamic system of inheritance has fixed share for male, female, wife, husband, parents, consanguine and distant family members. In addition, to the above gap, Islamic system of inheritance stipulates that debts, bequests, promises and wills must be taken care of, first, before sharing, death must proceed removal of will, bequest and debts and no family member is among entitled to will, so long such members are included in the heirs. The literature reviewed did not include the forementioned salient points; particularly, as they are all absent in the rules guiding inheritance under common law of succession. Another spectacular that this paper fills that could not be found in those reviewed is specifically on land ownership and inheritance's right. Park critically observed that Common law

**Maisuna Mustapha Yahya PhD - Land Ownership and Inheritance Rights under Common Law and Islamic Law:
A Comparative Analysis**

discriminates against women. In *Ukeje v Ukeje* In that case:

Lazarus Ogbonnaya Ukeje, an Igbo man from Umuahia died intestate in 1981. He owned landed property in Lagos State. After his death, his wife, Mrs Lois Ukeje and his son, Enyinnaya Ukeje obtained Letters of Administration over his estate. Miss Gladys Ada Ukeje claimed that she was a biological daughter of the deceased and challenged her exclusion from the administration and distribution of the estate. She (Gladys) instituted an action case against before the Lagos High State High Court seeking recognition as a child of the deceased and the right to participate in the administration and inheritance of his estate.

The defendant, on the other hand denied her claim as she relied on Igbo customary law, which traditionally excluded female children from inheriting their father's estate. Fundamentally, In that case, Customary law, as practiced in Eastern Nigeria, exempts female children from inheriting their fathers.

Islam, on the other hand recognises female children when it comes to inheritance without being gender partial; as the denial of having a share from her father's estate was repugnant to natural justice, equity and good conscience – repugnancy doctrine. Constitutionally, Section 42(1) of the Federal Republic of Nigeria 1999 (as amended) freedom from discrimination.

It can conclusively said therefore be concluded that over 1447 years ago, Islam, under the laws of inheritance had started given recognition to female children's inheritance which as well passed through natural justice, equity and good conscience. In Northern Nigeria, inheritance is administered based on Islamic principles of inheritance while in the western state, conflicts do emanate between statutory land administration and Islamic law.

LAND OWNERSHIP AND INHERITANCE UNDER COMMON LAW

Land Ownership

Landownership under Common law is a process where interest is shown on a particular land, especially the physical, touchable part of the soil as a propriety trustee and systematically exercise others from use with the evidence from the state, local or Federal government or via customary or inheritance. Kevin restricted that: At common law, ownership of land refers to hold in land, particularly the fee simple estate, which consists of legally recognised rights to = possess, use, enjoy, alienate and exclude others from the land.

John Salmond briefly defines land law thus: Ownership in its most comprehensive signification denotes the relation between a person and any right that is vested in him. By implication; if a land is granted to a person by the local government, in a rural area for agricultural, residential and other purposes, such as grazing and other purposes ancillary to agricultural purposes, according S 6(1); the grant of customary right of occupancy makes gives the right to claim ownership. Therefore, s 36(2) of the Land Use Act 1978 preserves the possessory rights of person occupying non-urban agricultural land.

Under common law, the doctrine of testamentary freedom allows land and property owners to choose or determine who benefits from their estate in their wills, while on the other hand, dependents may be protected through statutory caveat or restrictions, from disinheritance. In a situation where a person dies intestate (without documenting his will), certainly, inheritance is governed by succession statute. Applicable laws in Nigeria include: Wills' Laws of Various States, Administration of Estates Laws; and Land Use Act - 1978.

To a large extent, common law protects women's inheritance rights as both male and female are equal before the Nigerian constitution:

S. 42(1) prohibits discrimination on the bases of sex, and guarantees equal treatment of male and female citizens before the law.

Land Ownership and Inheritance: Islamic Law

Generally, the law of inheritance, according to the doctrine of Qur'an and Islamic law is provided for in Q4: 7, 8, 11, 12, 13, 14 and 176 respectively. Meanwhile, ownership in Qur'an is

Maisuna Mustapha Yahya PhD - Land Ownership and Inheritance Rights under Common Law and Islamic Law: A Comparative Analysis

discussed in various chapters and verses of the Glorious Qur'an, whether directly or indirectly. Such chapters and verses include: Q2:188, 282, Q3:189, Q5:120:

To Allah belongs the dominion of the heavens and the earth and whatever is in them Q5:120, expatiates on the fact that ownership of the heaven, the earth (land) and their entities or properties therein are owned absolutely by Allah, in which negates the assertion of common law's doctrine on ownership of landed property as common law believe that: "Land hath, also in its legal signification, an indefinite extent as well as downwards; even Cujus est solum, eius est usque ad coelum et ad inferos, a French lang imported into common law, meaning:

Whoever owns the soil (land), owns everything up to the heavens and down to the depths (centre of the earth)

The maxim expresses common law principle which connotes that ownership of land extends not only to the surface but also to the airspace above and the subsoil beneath. In *Bernstein of Leigh v Skyviews & General Ltd.*

The court held that the maxim cannot be applied literally in modern law because landowners do not own unlimited airspace above their land. Similarly, the Land Use Act 1978 and laws regulating minerals and petroleum, ownership of land does not automatically confer ownership of mineral resources beneath the land, which are vested in the Federal Government. This act, therefore, confirms the divine doctrine of Islam on property (land) and inheritance that no one owns absolutely land property. This statement is evident in S 44(3) of the Federal Republic of Nigeria, 1999 (as amended) derogates from the principle by vesting the ownership and control of all minerals, mineral oils, and natural gas in the Federal Government. Consequently, ownership or occupation of land in Nigeria does not automatically confer ownership of the minerals or petroleum resources beneath the land. Also, in *A.G. Federation v. A.G. Abia State & 35 Ors.* In that case, the Supreme Court held that:

Ownership and control of petroleum resources are vested exclusively in the Federal Government under S 44(3) of the Constitution.

Comparatively individual or group ownership of land property according to Nigeria Constitution is not absolute because Federal government's land is controlled by the state, those in urban areas, local government is on the other hand controlled by the Federal government, then, from Islamic perspective, God (Allah) controls and well inherent the lands in local, state and Federal governments. The Glorious Qur'an explicates:

And to Allah belongs the inheritance of the heavens and the earth. And Allah is All-Aware of what you do.

Therefore, the verse depicts that ultimate ownership (al-milkiyyah al-haqiqiyah) belongs to Allah absolutely, humans are just mere trustees; and the trusteeship is temporaneous and fiduciary in nature.

Purchase of Land (Property) through Lawful means: (Ownership)

Historical Background

When prophet Muhammad (P.B.U.H.) arrived in Madinah, his camel al Qaswa, was allowed to proceed freely until it knelt at a particular place. The land belonged to two orphan boys from Banu al-Najjar, namely: Sahl & Suhayl who were under the guardianship of As'ad ibn Zurarah. The owners and members of Banu al-Najjar offered to donate the land to the Prophet (P.B.U.H) without payment. However, the prophet (P.B.U.H) refused to accept it as a gift and insisted on purchasing it for a price.

The Prophet (P.B.U.H) ordered that the land be cleared and the site was made ready for the construction of al-Masjid, al-Nabawi. Indeed, protection of private property rights and interest of vulnerable owners (the orphans) were meticulously protected as his refusal to take the land as a gratuitous free donation to the new Muslim community in Madinah demonstrated the prophet's commitment to the protection of private property. It is pertinent to know that Islam does not teach

Maisuna Mustapha Yahya PhD - Land Ownership and Inheritance Rights under Common Law and Islamic Law: A Comparative Analysis

its adherents embezzlement or unlawful seizure of others' property (land inclusive) with force and that wealth and property can be transferred to the beneficiaries, inheritors or heirs through lawful means and mutual consent.

Land Inheritance by Community (Maslahah)

Abu Hamid a classical scholar defines Maslahah as the objectives of the law (Maqasid al-Shariah) namely: the protection of religion, life, intellect, lineage and property. Of the five objectives, property is much related to the ongoing discussion on inheritance of land property. Islamic inheritance law therefore, protects preserves and possesses land, under inheritance of property.

Umar ibn al-Khattab (RA) acquired land at Khaybar, he followed the prophet (PBUH)'s guidance and converted it into a perpetual Waqf whose proceeds were dedicated to public welfare, thereby establishing a classical precedent for maslahah-oriented management of property.

Inheritance of Land by Family Members

Land property is a means to financial affluent success to some. Sometimes, its value extends to being inherited for agricultural purposes; grazing, planting and other purposes, such as residential and for commercial purposes as well. Az-Zubayr ibn al-Awwam died in 36 AH / 565 CE, he left behind large landed properties, houses and agricultural estates. His son, Abdullah ibn al-Zubayr distributed the estate among the eligible heirs; in accordance with Islamic law of inheritance. Parts of the properties left by Az-Zubayr included: at Ghabah, two houses in Basra, one house in Kufah, one house in Egypt and eleven houses in Madinah.

The above narration explains that landed property constitutes part of what a Muslim family members can inherit as an estate and without withholding the trust (amanah), the properties, including the houses were distributed proportionately in accordance with Islamic law of inheritance, to the eligible heirs Q4: 7, 12 and 13.

In the classical commentary of Ibn Kathir, Q4:7 where (maa taraka) was mentioned, includes land property apart from cash that can be easily allotted based on the ratio stipulated; in this regard, houses, vehicles, farm produce etc. can be part of what the heirs will inherit; whether moveable or immovable.

Comparative Analysis

Areas of Convergence

Both systems: Common law and Islamic law converge in certain areas of ownership and inheritance of properties or estates, below are the areas of convergence: Both:

Both have elements of heirs or inheritors which include male and female;

advocate on the rights of inheritance;

contain private ownership of land and recognise distributive inheritance.

provide judicial remedies where damages are done, or compensation where necessary.

Dauda Adamu Helende v Sama'ila Musa & Ors.

Facts

The disputes concerned two farmlands belonging to a deceased Muslim father. The claimant sought recovery of the farmlands so that they could be distributed among the lawful heirs according to Islamic law. One party had purportedly dealt with the land without proper distribution of the estate.

Issue

Whether the farmlands formed part of the deceased's estate and whether the Sharia'h Court had jurisdiction to order their recovery and distribution among the heirs under Islamic law.

Decision

The Court of Appeal (CA) held that:

Maisuna Mustapha Yahya PhD - Land Ownership and Inheritance Rights under Common Law and Islamic Law: A Comparative Analysis

The land constituted part of the estate of a deceased Muslim

Questions concerning distribution of the land among heirs were matters of Islamic personal law

The Shari'ah Court had jurisdiction because the dispute involved inheritance and succession to a deceased Muslim's estate

The remedy sought – recovery of the farmland for distribution to lawful heirs was properly cognizable under Islamic law.

Legal Principle

Where land forms part of a deceased Muslim's estate, any heir may seek a judicial remedy for: recovery of the land;

cancellation of unauthorized dealings with the land; and

distribution of the land according to Islamic inheritance rules (mirath). Also, similarly, remedy was given in the case of *Dantani v. Garba & Anor*.

Areas of Divergence

Most obvious under common law doctrine on the issue of inheritance which are not found or applicable under Islamic law of inheritance are:

Testamentary Freedom

Under common law of inheritance, testamentary freedom is granted extensively as it was derived from two sources, namely: from statutes and precedents. Harlan Stone asserted that testamentary freedom emerged from the common law traditions as an extension of the right to private ownership allowing individuals substantial discretion in selecting beneficiaries. Testamentary freedom reflects the legal recognition of personal dominion over property, extending beyond life through testamentary instruments. Harlan Stone views testamentary freedom as an expanded right of an individual's right he has on personal property while Islamic law does not give room to testamentary freedom and that is to avoid selfishness, partiality and tribalism, but to uphold equity and justice.

State of Ownership

Islamic law lays emphasis on; accountability about one's wealth on the Day of Resurrection while wealth achieved through legal means must be expended with stewardship and humility. Unlike in Common law where emphasis is laid on individual autonomy and total control on one's wealth.

Gender Consciousness

Under Islamic law of inheritance, ratio, figure or number is assigned to every heir's share, proportionately to the heir's financial responsibility. Basically, men tend to spend more for their wives, children, parents, relatives and on themselves Q4:34. Comparatively Common Law generally promotes equal ratio or figure as inheritance's rights, without giving attention to the financial responsibilities of each gender.

Origin of each Law

Common Law emanated from precedents and Statutes. Historically, it was ported into Nigeria from the Country of Origination – England, after Norman Conquest of 1066 when English royal courts began to create a unified body of law, applicable throughout England. English Law consists principally of the Common law, the doctrines of Equity and statutes enacted by Parliament. In 1863, it was first formally introduced into Nigeria through Ordinance No 3 (of 1863) which applied to the Colony of Lagos and Common Law, doctrines of Equity and Statutes of General Application, started operating in Nigeria, on January 1, 1900.

On the other hand, Islamic law is divinely ordained and established by Allah which does not dance to humans' inflection. Primarily, its rulings are encoded in the primary sources of Islamic law: Qur'an and Hadith while other secondary sources: Ijma', Qiyas etc. in conjunction with the primary sources expatiate on the divine Islamic law of inheritance. Indeed, this has been existence more than

1447 A.H.

Finally, Islamic law established some general rules on ownership and inheritance, such as:

The will (Wasiyyah) or bequest of a Muslim should not exceed $\frac{1}{3}$ of his estate Q4:11

All debts, promises and funeral expenses (where applicable) should be deducted first from the deceased's estate before sharing the estate to the heirs Q4:12 in relation to the prophetic Hadith that says:

The soul of the believer remains suspended because of his debt until it is paid on his behalf

All the above conditions stated are neither present or recognised in Common Law.

SUMMARY/CONCLUSION

Inheritance law in both systems shapes economic social and security of every society that practices the system accordingly. Besides, Islamic law covers the syllabus of ownership and law of inheritance, that if practice by all, irrespective of religion, culture or other system of law, it will improve the societies' security, economic buoyancy, justice, equity and welfare of larger number of every family by extension, the general society that adopts the system, due to its divinity.

Common Law spectacularly emphasises personal autonomy and legal flexibility which may introduce partiality and a loophole to creating enmity between and among family members; thereby reducing drastically, conflicts, disputes and enmities generated or associated with land inheritance while social justice is promoted while social justice comes into existence.

RECOMMENDATIONS

All Universities should have cross exchange knowledge about both Common Law and Islamic law and harmonise the two systemic laws where that of Islamic law of inheritance's preponderancy will resolve a lot of issues in Common Law.

Every family should have the knowledge of inheritance's rights particularly, to avoid the discriminatory dealings or practices postulated by customary law of inheritance.

Only knowledgeable judges and lawyers in Islamic law and Scholars of Islamic Jurisprudence be allowed to participate in the sharing of deceased Muslims' estate or property.

Public dissemination of Islamic inheritance's rights be engaged in on Media stations, public lectures, Symposia, Seminars and retreats should also be embarked on for wider dissemination of the rights.

Governments, at all levels, should harmonise law of inheritance therein, in the two systems: statutory inherent and Islamic principles of inheritance for the peaceful co-existence of all families, and by extension, the global human families.

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Maisuna Mustapha Yahya PhD - Land Ownership and Inheritance Rights under Common Law and Islamic Law: A Comparative Analysis

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Maisuna Mustapha Yahya PhD - Land Ownership and Inheritance Rights under Common Law and Islamic Law: A Comparative Analysis

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