

A COMPARATIVE STUDY OF SHARIA AND SECULAR LAW OF INHERITANCE RIGHTS OF CHILDREN BORN OUT OF WEDLOCK

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Abstract

Inheritance by children born outside marriage is a fairly complex challenge. Against the above backdrop. The paper examines the inheritance rights of children born out of wedlock by comparing secular laws of Uganda and Sharia on succession, bearing in mind the best interests of a child together with the principles of equality and non-discrimination. The major problem investigated in this paper is the existence of the gap in the law of inheritance in Sharia and the lack of clear regulations in the secular laws of Uganda concerning the inheritance of children born out of wedlock. The study revealed that under Sharia, the children born out of wedlock inherit from their mothers but not their fathers, which is totally different from the secular laws of Uganda. The doctrinal legal research methodology was used by analyzing both primary and secondary sources of both Sharia and Secular laws. The study discovers that the secular law also sacrifices and restores normalcy in the society by way of allowing Walad Zina to inherit part of the estate of the deceased father.

Keywords: Sharia law, Secular Law, inheritance, right of children

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1. Introduction

Sharia is understood by a lot of commentators to mean the understanding of the oneness of Allah². This means that Allah has not only used this term Sharia in respect to the legal rulings alone but also to mean the core of the religion, which is oneness of Allah³. This is according to the interpretation of the Quran⁴ which states:

“The same religion has He enacted/established for you (shar’a lakum min al-den) as that which He enjoined on Noah”.

The scope of Sharia is thus wider than what an ordinary person can think.⁵ This is because Sharia embraces a number of things which include morals, acts of worship and further imposes obligations on people to respects the rights of Allah, rights of itself and the rights of other men⁶. Sharia emphasizes that fact that it calls all the Muslims to do righteous acts as the almighty Allah commanded and further emphasized by the Prophet (SAW). This is premised on the holy Quran which says;⁷

Whosoever acts righteously whether a man or a woman- and embraces belief, we will surely grant him a good life; and will surely grant such persons their reward according to the best of their deeds

Allah has commanded every human being to be obedient and practice the Sharia without any hesitation for the betterment of their wellbeing on earth and hereafter and thus the only available option is for them to obey. Allah says;⁸

It is not for a believing man or woman when Allah and His Messenger decree a matter-to have any other choice in that matter. Indeed, whoever disobeys Allah and His Messenger has clearly gone ‘far’ astray

Therefore, Sharia law is basically religious and it is accompanied by the moral obligations and it’s universal to all human beings without any discrimination nor segregation.

However, the statutory law of Uganda never be denied that religion and law have a close bondage in between them in Uganda as both normally move together when

² Muneer and Mumtaz A, ‘*The Sharia and Law: An Analysis*’ (2017) 2(5) *International Journal of Law, Government and Communication*, pp.48-64] eISSN: 0128-1763, available at: <http://www.ijlgc.com/PDF/IJLGC-2017-05-09-06.pdf> (accessed on 28th November, 2023).

³ Ibid.

⁴ Quran 42:13.

⁵ Orire, A, “Human and other Rights taken from Shariah: The Misunderstood Legal System” (2000), *Paper Delivered at the NIREC Meeting* on 21-23 June, pages 8-10 available at: <https://www.socialtheology.com/docs/app27.pdf> (accessed on November 28, 2023).

⁶ Ibid.

⁷ Quran 16:97.

⁸ See Quran 33:36.

adjudicating cases in the Courts of Law⁹. Despite that, the Ugandan statutory law is not religious in any way as there is no adoption of state religion thus making the laws of Uganda purely secular¹⁰. In fact, the Constitution of Republic of Uganda categorically states that there shall not be state religion¹¹.

“Uganda shall not adopt a state religion.”

The Constitution further provides for freedom of religion of all individuals as it states:¹²

Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media; freedom of thought, conscience and belief which shall include academic freedom in institutions of learning, freedom of practice of religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organization in a manner consistent with the Constitution.

Therefore, the secular laws of Uganda do not in any way regulate the belief and religious practices of people. This means that these laws are not based on religion unlike the Sharia law which is basically religious. The inheritance rights of children born out of wedlock in Uganda are protected by the state which totally differs on Sharia as it a religious obligation.

2. Analysis of the Sharia and Secular law in Relating to the Inheritance Rights of Children Born Out of Wedlock

While comparing the two legal systems that relates to the inheritance of children born outside wedlock, Sharia carries two main features of being a religious law as well as being universal law which guides the Muslims to the best for them both on earth and hereafter.

This is emphasized in the Quran:¹³

“And now have we set thee (O Muhammad) on a clear road of (Our) commandment; so follow it, and follow not the whims of those who know not.”

Therefore, it is an obligation of all Muslims to follow the guidance of Allah without special treatment to a few as the Sharia laws are universal to all of them and these laws must be adopted by people in all fields including the inheritance rights of individuals.

⁹ Lubogo, C, “When Courts Do Religion “the Disambiguation of Religion and State’, available at:

<https://pub.nkumbauniversity.ac.ug/bitstream/handle/123456789/913/1st%20JAN%2023%20.pdf> (accessed on 30th November 2023).

¹⁰ Ibid.

¹¹ See: article 7 of the 1995 Constitution of Uganda as amended.

¹² See: article 29 (1) (a) (b) (c) Supra.

¹³ See Quran 45:18.

For the Ugandan statutory law, this legal system is national and does not bind any other person outside the boundaries of the state and also does not carry any religious obligation undertones. The Ugandan law is totally independent from the religion and that explains why Uganda has no state religion¹⁴.

The secular laws of Uganda provide for the equality in relation to the inheritance rights of children born out of wedlock with others which means that all children are equal before the law and this explains why the phrase illegitimate was removed in the laws of Uganda specifically the Succession laws¹⁵. Therefore, there is no difference whatsoever between these children as the principle of equality encompasses all human beings, which includes children both within or born outside wedlock¹⁶.

The Constitution of the Republic of Uganda provides for the Qadhi courts to handle matters which include marriage, divorce, inheritance of the property and guardianship.

The Constitution states:¹⁷

The Judicial power of Uganda shall be exercised by the Courts of judicature which shall consist of ... Such subordinate courts as parliament by law establish, including Qadhi's courts for marriage, divorce, inheritance of the property and guardianship, as may be prescribed by parliament

Sharia laws categorically provide that the children born out of wedlock inherit from their mothers not their fathers so this would rise questions on the applicability of Qadhi Courts bearing in mind that the Constitution is the Supreme law, which can never be contravened as per the Supremacy Clause, which states:¹⁸

This constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout, if any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom, shall, to the extent of the inconsistency, be void.

3. 1 The Secular laws of Uganda and the Inheritance of Children Born Out of Wedlock

Globally, the 1995 Constitution of the Republic of Uganda as amended is one of the most progressive documents in relation to the protection and safeguard of human rights today¹⁹.

¹⁴ See Article 7 of the 1995 Constitution of Uganda supra.

¹⁵ See Section 2 of the Succession (Amendment) Act 2022.

¹⁶ See Article 21 of the 1995 Constitution of Uganda as amended.

¹⁷ See Article 129 (1) (d) of the 1995 Constitution of the republic of Uganda (as amended).

¹⁸ Article 2 of the 1995 Constitution of the republic of Uganda (as amended).

¹⁹Byamukama, K, 'Effectiveness of Legislation Enacted to Address Harmful Practices against Women in Uganda, Including Maltreatment of Widows and Female Genital

It is clearly stated in the constitution of Uganda that all human beings are equal before the law and therefore no form of discrimination should be evidenced in all matters that touch human beings.²⁰ The children are all on the same footing of equality in the Ugandan secular law regardless of their status whether born out of wedlock. It is pertinent to note that even the terms that had been used such as illegitimate children were abolished by the court²¹ and declared discriminatory, which means that all children are entitled to receive the estate of the deceased without any special treatment as to his or her legitimacy.²²

The equal distribution of the estate among these children does not look at whether the deceased died testate or intestate as the law clearly guides on the distribution.

Testate occurs where a person leaves a will after his or her death and intestate is where no will is left by the deceased.²³ Therefore, the secular law principle of equality as enshrined in the 1995 Constitution of the Republic of Uganda as amended is respected in relation to the inheritance of children born outside legal marriages to inherit from their fathers irrespective of their status.

3.2 Sharia Law and the Inheritance of the Children Born Out of Wedlock

The position of Sharia is totally contrarily to that of the secular law in relation to the inheritance of children born outside legal marriages as it doesn't recognize their inheritance from their fathers²⁴. This therefore means that the children born out of wedlock will be able to inherit from their mothers²⁵.

According to Sharia, the only way these children can have a right to inherit is normally when a person dies testate and inserts a compulsory share in a will or a gift by his biological father.²⁶

Mutilation' 2009, *United Nations*, available at: https://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGM (Accessed on December 1, 2023).

²⁰ See Article 21 of the 1995 constitution of the republic of Uganda (as amended).

²¹ See section 2 of the Succession (Amendment) Act 2022.

²² Ibid.

²³ LAND Net, "The Succession Fact Sheet". Available at:

<http://www.landnet.ug/landwatch/wp-content/uploads/2018/01/The-Succession-Fact-Sheet-Serial-No-LNSF001.pdf?shem=ssusxt> (accessed on December, 1 2023).

²⁴ Akbar, U, & Hidayatullah, 'The Lineage of Children out of Wedlock According to Islamic Law' (2020) *Proceeding of International Conference on Islamic and Interdisciplinary Studies*, available at:

<https://jurnal.uindatokarama.ac.id/index.php/iciis/article/download/1240/774> (accessed on 4th December, 2023).

²⁵ Ibid.

²⁶ Hangdartika, E, 'The Comparison of Inheritance Legal Position of Illegitimate Children Based on Islamic & Civil Law' (2023) 1(3), *Tabellius Journal of Law*, pp.223, ISSN 2988-6201, available at

<https://jurnal.unissula.ac.id/index.php/tabelius/article/download/33166/pdf> (accessed on 4th November 2023).

Sharia encourages every Muslim to have his or her will before death approaches them. This is premised on the tradition of the Prophet (SAW) which states:²⁷

It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it.

From the above tradition therefore, Muslims are advised to always make wills which means that a parent (father) of the child born out of wedlock can dispose of some of his estate to that child in a will.

Before distribution of the estate, the will must be cleared under the legacies as emphasized by the Quran which says:²⁸

Allah thus commands you concerning your children: the share of the male is like that of two females¹⁵. If (the heirs of the deceased are) more than two daughters, they shall have two-thirds of the inheritance; and if there is only one daughter, then she shall have half the inheritance. If the deceased has any offspring, each of his parents shall have a sixth of the inheritance; and if the deceased has no child and his parents alone inherit him, then one-third shall go to his mother; and if the deceased has brothers and sisters, then one-sixth shall go to his mother. All these shares are to be given after payment of the bequest he might have made or any debts outstanding against him.

Therefore, the chance for the child born out of wedlock to inherit in Sharia is dependent on the will by the father, which is not the case in secular laws of Uganda because it gives express rights to these children.

4. The Position of Illegitimacy Children under Sharia and Secular laws of Uganda

According to the Sharia, the definition of child is a person who has not reached puberty or maturity which is wet dreams for the boys and menses for the girls²⁹. It means that Sharia does put specific age for the person to be called a child. Furthermore, the Sharia recognizes children born out of wedlock as illegitimate (Walad Zina) which means that these children are born out of legal marriages for the parents who are not married to each other³⁰.

²⁷Kumar, A, 'The Concept of Will under Muslim Law: A Study' 4(3) *International Journal of Law and Legal Jurisprudence Studies*, Raksha Shakti University, available at: <https://lc2.du.ac.in/DATA/Will.pdf> (accessed on 4th December, 2023).

²⁸ See Quran 4:11-12.

²⁹ Islam relief, 'An Islamic Human Rights Perspective on Early and Forced Marriages' available at: <https://www.girlsnotbrides.org/documents/867/IRW-Islamic-perspective-on-CM.pdf> (accessed on 4th December, 2023).

³⁰Sikho, L, 'Illegitimate Children under Muslim Law' available at: <https://blog.ipleaders.in/illegitimate-children-muslim-law/> (accessed on 4th December, 2023).

In Ugandan statutory law, a child is any person who has not attained the age of 18 years³¹. The 1995 Constitution of Republic of Uganda clearly provides for the majority age as it states:³²

“Men and women of the age of eighteen years and above have the right to marry and found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.”

The Statutory laws of Uganda also repealed the use of ‘illegitimate’ children in the laws of Uganda as it was declared discriminatory³³. This was followed by the subsequent amendments in the Succession laws where the distinction between the legitimate and illegitimate children was removed³⁴.

5 Similarities between the Sharia and the Secular Legal Regimes on the Inheritance of Children Born Out of Wedlock

Sharia treats children as vulnerable people who deserve massive protection from any exploitation and discrimination, which means that all children deserve fair and just protection from their parents³⁵. The Holy Quran provides for the protection of children and it terms them weak, which clearly signifies their need for special care regardless of their status and it states:³⁶

And let them fear, those who, if they would themselves leave behind helpless offspring, they would surely have been fearful on their account. Let them, then fear Allah and make the right statement.

This is emphasized in one of the Traditions of the Prophet where he said:³⁷

Each of you is a responsible and each is responsible for his flock. Each man is a responsible for the members of his family, and is responsible to the community (ummah). A man’s wife is responsible for her husband’s house and her children. A man’s servant is responsible for his master’s property. Beware, each one of you then, is a responsible and each one of you will be questioned about his flock.

³¹ See Section 2 of the Children Act cap 59.

³² See Article 31(1) of the 1995 Constitution supra.

³³ See the Constitutional Court in Law Advocacy for Women in Uganda v Attorney General, Const. Petition No.13/2005 &05/2006.

³⁴ See section 1(a) of the Succession (Amendment) Act, 2022.

³⁵ Islamic Relief Worldwide, ‘The Islamic Approach to Keeping Children Safe’ 2014 available at: <https://islamic-relief.org/news/the-islamic-approach-to-keeping-children-safe/> (accessed on 4th December, 2023).

³⁶ See Quran 4:9.

³⁷ United Nations Assistance Mission in Afghanistan, ‘Protecting Afghanistan’s Children in Armed Conflict’ available at: https://unama.unmissions.org/sites/default/files/caac_islam_booklet_english_with_corrections... (accessed on 4th December, 2023).

However, Sharia protects the children as they are regarded as weak and vulnerable and their rights are protected despite that fact that children born out of wedlock are not attributed to their fathers and cannot inherit from them.

In the same way, statutory laws of Uganda play a big role in protecting children's interests and this is seen in a way that in all circumstances the welfare of children should be considered.³⁸

Therefore, both legal systems give special care to the children though statutory laws of Uganda seem to give more protection to illegitimate children than Sharia law.

6. Recommendation

The study also revealed that Islamic law is clear that the children born outside marriages do not inherit from their biological fathers whether they died testate except where they are given in a will or given gift or intestate but the only way for these children to inherit is from their mothers or mother's family. Therefore, if their fathers indicate in a will or give in form of a gift which should not exceed 1/3 of the deceased's estate, then these children can get a chance to inherit.

It recommends that much as Uganda clearly save guards the inheritance rights of children born out of wedlock, the parliament should try to enact specific regulations that govern and guide qadhi's courts in the distribution of the estate of the deceased because the constitution only provides for them under subordinate courts but does not at all provide for the regulations to that effect. So this calls for the operationalization of article 129 (d) of the 1995 constitution of Uganda (as amended) to effectively regulate the Muslim personal family law in relation to inheritance.

The researcher recommends that where the Quran and Sunna are silent on certain matters, the Muslim scholars should acknowledge the use of technology (DNA) and should always give verdicts basing *Ijtihad* (reasoned decision) and also make ruling basing on the change of time and circumstances. This is because DNA is allowed in Islamic so that it is used to ascertain paternity of a child then that child born out of wedlock should inherit from the father after DNA proof.

It is recommended that there is need to amend the Succession Act to give an option to parties who would wish their property to be distributed according to Sharia without any complain because this has been evidenced in countries like Tanzania where the courts have been deciding inheritance cases based on the will of the parties. This is because if the Act is not amended it would mean that the Muslims who would wish their property distributed in Sharia will feel their right to religion violated.

7. Conclusion

There is a sharp difference between Sharia and secular laws of Uganda as relates to the inheritance of children born outside legal marriages as both considers the

³⁸ See section 3(1) of the Children Act.

principles of equality and welfare of children but they differ in the practicability. For example, in Sharia the children born out of wedlock do not inherit from their fathers yet they do in secular law, the father has to make a will including the child born out wedlock as a beneficiary in Sharia, this not the case in secular law. Therefore, there is need to harmonize the co-existence of the two legal regimes to avoid contradiction of the two.