

# UNFETTERED RIGHT OF MUSLIMS TO MAKE WASIYYAH (WILL) IN A PLURAL LEGAL SYSTEM LIKE NIGERIA

By

Ismael Saka Ismael\* & Abdullahi Salihu Abdulrauf\*\*

## Introduction

The religion of Islam produced Islamic Law just as Christianity produced 'Common Law'.<sup>1</sup> Islamic Law otherwise called *Shari'ah* and at times denoted by the term *Fiqh* takes care of all the aspects of life of man from cradle to his grave<sup>2</sup> and even beyond.<sup>3</sup> This explains why the religion and its laws are often described as a way of life.<sup>4</sup> Muslims therefore hold tenaciously that Islam and indeed Islamic Law have made provisions for all that may confront them or be encountered in life by them.<sup>5</sup> Since Nigeria operates a tripartite legal system<sup>6</sup> (Common, Customary and Islamic Laws) and its Constitution guarantees freedom of religion,<sup>7</sup> this paper therefore examines the concept of Wasiyyah in Islamic Law *vis-à-vis* the secular law with a view to differentiate them as well as bring to the fore the unfettered right of Muslims to make Wasiyyah (Will) in Nigeria.

## Wasiyyah: The Islamic Will

*Wasiyyah* is the term used in Islamic Law for Will. The term is derived from the Arabic word *wassa* which literally means "to convey", "to order", "to advise", "to promise" or "to give away property after death".<sup>8</sup> In Islamic legal parlance, it could be defined as an order or instruction handed down by a person directing that certain commitments in respect of certain unperfected or unaccomplished duties<sup>9</sup> against him, which he did not carry out before he died is perfected or accomplished.<sup>10</sup> This order or instruction may also take the form of directing that a property in custody be returned to the rightful owner(s) or that a particular quantum<sup>11</sup> of the estate be surrendered and dedicated to charity to benefit specified individual(s) or category of persons or organization.

\* LL.B (HONS.) B.L. LL.M (HONS.) LL.D. LL.S. Lecturer, Department of Islamic Law, Faculty of Law, University of Lagos, Lagos, Nigeria. E-mails: [isaka@unilag.edu.ng](mailto:isaka@unilag.edu.ng) and [isaka@unilag.edu.ng](mailto:isaka@unilag.edu.ng). Mobile Phone No. +234 818 281 0671.

\*\* LL.B (HONS.) B.L. LL.M (HONS.) LL.D. LL.S. Lecturer, Department of Islamic Law, Faculty of Law, University of Lagos, Lagos, Nigeria. E-mails: [asaliu@unilag.edu.ng](mailto:asaliu@unilag.edu.ng) and [asaliu@unilag.edu.ng](mailto:asaliu@unilag.edu.ng). Mobile Phone No. +234 818 281 0671 and +234 818 773 42 3316.

<sup>1</sup> Hassan, Z. "An Introduction to Islamic Law of Property in Malaysia".

Amman, M. A. *The Evolution of Muslim Family Law in Nigeria*. 3rd Edition. Lagos: Princeton &

Associates Publishing Co. Ltd. 2004, p. 142.

<sup>2</sup> *Al-Fiqh al-Islami* "Brief of Islammentology" (retrieved and accessed at

<http://www.whyislam.org/submit/submit.asp?articleid=10&articleid=10&articleid=10&articleid=10> retrieved on 7th May, 2015.

<sup>3</sup> Ibid., p. 2.

<sup>4</sup> *Quran* Al-Quran, Chapter 38 where Allah states that "We have created man from the best of clay" and "We have created man from the best of clay".

<sup>5</sup> See Sec. 247 (1) (a) & (b) S. 275 (1) and Sec. 275 (2) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

<sup>6</sup> Sec. 38 (1) Constitution of the Federal Republic of Nigeria, 1999, as amended.

<sup>7</sup> Hassan, Z. "An Introduction to Islamic Law of Property in Malaysia".

<http://www.zakiahassan.files.wordpress.com/2014/06/an-introduction-to-islamic-law-of-property-in-malaysia.pdf> p. 5.

<sup>8</sup> Such as performance of Hajj, payment of debt, wedding of sons and/or payment of outstanding loans against wealth to mention but a few.

<sup>9</sup> Ogawa, A. S. *Fiqh al-Sunnah*. 1st Edition. Lagos: Al-Qur'an Centre, 1st Edition. Lagos: May, 2000, p. 142.

<sup>10</sup> *Al-Fiqh al-Islami* "Brief of Islammentology" (retrieved and accessed at



and kept secret with him.”<sup>1</sup> This *and thum* doubt depicts the lawfulness of the practice of *wasayyah* in Islamic Law. Prior to revelation of the verses on inheritance, making a will was obligatory but after revelation of verses 11-12, “this order was cancelled in the sense that it is no more mandatory to make bequest;

There are others specifying the quantum of estate that can be bequeathed. Most prominent of these *ahadith* is the one reported on the authority of Sa'ad Bin Abi Waggas that:

The Messenger came to see me while I was in Mecca. I said, "O Allah's Apostle! I have much property and no heir except my single daughter. Shall I give two-thirds of my property in charity?" He said, "No." I said, "Half of it." He said, "No." I said, "one third of it." He said, "You may do so though one-third is also too much, for it is better for you to leave your offspring wealthy than to leave them poor, asking others for help."<sup>26</sup>

Analogically, the *hadith* quoted above shows that *wasiyyah* is legitimate in Islamic Law, otherwise, it will not have prescribed the quantum of estate that can be given out by way of bequest. Therefore, the verses of the Qur'an and the *ahadith* identified above amongst others constitute the legal basis for legitimacy of *Wasiyyah* in Islamic Law.

## Status of Wasiyyah in Islamic Law

*Wasiyyah* enjoys multi-dimensional status in Islamic Law. It is *wajib* (imposed) or *jard* (compulsory). It is imposed or compulsory when doing it will discharge the testator from a burden duty owed Allah or another person.<sup>27</sup> An instruction in a *wasiyyah* directing payment of an over due *zakah* or the performance of *Hajj* (Pilgrimage) is to satisfy Allah's right while in satisfying right of another person or people e. g. debt, deposits, borrowed items, a will is prepared to indicate same without which no one else would be aware of such obligations.<sup>28</sup> In all these examples, *wasiyyah* is *wajib*.

At times, it is *Mandub* (praiseworthy) or *Mastub* (desirable).<sup>23</sup> This is when *wasiyyah* is made for the benefit of one's relatives who are poor and are not entitled to inherit from one or other dependants or poor people who are not related to one, either out of charity or in appreciation of some roles played in one's life or merely to seek for Allah's pleasure.<sup>24</sup>

At other times *wasiyyah* is *Makruh* (disapproved) in case of a poor person whose heirs are poor. Therefore for such a person(s) whose property may not ordinarily be enough to raise the financial status of his poor relatives or heirs, it is disapproved for such a person to make *wasiyyah* for disposal of his property to some other persons.<sup>25</sup>

It is *Mubah*, i.e. inconsequential when the testator and his heirs are not poor nor in need and the bequest is made in favour of the rich.<sup>21</sup> Whereas it is *Haram*, forbidden, when it is

1. A. A. Kiselev, *Uchenye Zapiski Kazansk. Univ.*, Ser. Fiz.-Mat. Nauki, **2**, (1960), 2, 4, 6, 10, 11 (The whole issue).

1. *Phragmites australis* (Cav.) Trin. ex Steud.

A. A. G. J. C. H. N. 89 1 11

2. Mohammad Ali Jinnah, *The Last Quisest: The Speeches Given at Testimonial*, Al-Kutub & As-Sunnat Publications (1999), p. 12.

Z. Anal. Chem. 1977, 256, 103. <sup>12</sup> *Becken: Einmalige Nutzung von Flugstrahlungsquellen*, 1977, 103.

[illegible]

7. *Conclusions*

the 1990s, the number of people in the world who are illiterate has increased from 1.2 billion to 1.5 billion. The number of illiterate people in the world is expected to reach 1.7 billion by the year 2015. The number of illiterate people in the world is expected to reach 1.7 billion by the year 2015.

made to affect or harm the heirs of the testator or when it is made in favour of the heirs of one of them.<sup>31</sup> It is equally forbidden if it is made for the doing of an act which is forbidden in Islam<sup>32</sup> or when it is an *ultra vires* bequest.<sup>33</sup>

### Types of *Wasiyyah* (Wills) in Islamic Law

There are about four major types of *Wasiyyah* in Islamic Law, i.e. Absolute, Conditional, General and Specific Wills. As the names imply, it is absolute when it is made freely and is not subject to certain conditions that are not bound by conditions that are imposed on the inheritance that may be included by the testator.<sup>34</sup> While it is conditional when it contains certain conditions (which do not violate Islamic Law) imposed by the testator. The jurists agree that the conditions imposed in a will are valid as long as they do not violate the Islamic law.<sup>35</sup> When *wasiyyah* is made in general such as to the people of a village or a city,<sup>36</sup> it is described as a general bequest whereas one made and intended specifically for a particular party or persons is referred to as specific.

### Differences between *Wasiyyah* and Will

It is of essence to state at this juncture that the concept and purpose of *Wasiyyah* varies from the concept and purpose of Will under Common Law. Unlike the conventional Will that allows and enables a testator to determine how to dispose of his or her estate the way he or she wants, in Islamic Law, it is determined by divine injunctions of Allah, i.e. everything is predetermined in terms of what quantum can be given out as *wasiyyah* and what share goes to who and who gets what quantum of share in *Mirata*.

It is therefore pertinent to note that Wills in accordance with the secular law is greatly different in many respects from *Wasiyyah* in Islamic Law. First and foremost, *Wasiyyah* has its rules and injunctions sourced from the *Qur'an*, *Sunnah*, *Ijma'* and other sources of Islamic Law<sup>37</sup> while the conventional Will has its origin from the common law practice and is regulated by man-made laws. In the Nigerian experience, it all started with the Wills Act of 1837.<sup>38</sup> Today, the Act has become domesticated and almost all the States of the federation have passed into law Wills Law which caters for Will making under the secular law.<sup>39</sup> The legal impediments such as restriction on the quantum from the entire estate that is "willable" and exemption of some categories of people from capable of being legatees are also remarkable marked differences between the two legal concepts.

The intent of will making by or expected of a testator in the two laws is also at variance. While a testator under the secular law intends to make will ordinarily to fulfill his personal wish and interest in respect of the distribution of his estate after him and nothing more.<sup>40</sup>

<sup>31</sup> Al-Asqarani, *Op. Cit.* *Hadith* No. 82, p. 34, see also, *ibid.*, p. 35, pp. 36-37.

<sup>32</sup> Zaid, *Op. Cit.*, p. 4.

<sup>33</sup> A bequest is described as *ultra vires* in Islamic Law when it is either on more quantum allowed or made in favour of one or some of the heirs of the Testator. In this case, it is a bequest contrary to the legal heirs or the principle of abatement of legacy is applied to bring it within the limit prescribed in the *Shari'ah*. This is, because *wasiyyah* is a favour to man to utilize or dispose of one's wealth as *sadaqa*.

<sup>34</sup> Hassan Z., *Op. Cit.*, p. 7.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, p. 8.

<sup>37</sup> Zaid, *Op. Cit.*, p. 9.

<sup>38</sup> Aderibigbe, S., "Wills in Contemporary Nigeria", *An. Afric. Soc.*, 21, no. 7, (2006), pp. 214-212.

<sup>39</sup> Ahmadu S. M., "An Examination of the Nature and Operation of the Statutory Successory Laws of Testate Succession in Kaduna State, Nigeria", Vol. 5, No. 1, (2012), *Journal of Law, Economics and Finance*, pp. 21-38.

<sup>40</sup> *Aderibigbe*, (1977), 7 N.S.C.C. 236.

whereas the intention under Islamic Law is more of fulfilling obligations, spirituality and charity.<sup>37</sup> The rules affecting the position of the legatees in terms of status, interest and eligibility as provided in the Islamic Law is different from that of the secular law.

### **The Legal Framework of Wills in Nigeria**

The nation called Nigeria came into existence through the imperial activities of the colonialists in the early part of the 20th Century when the different empires and kingdoms with different history, cultural values and beliefs earlier existing were amalgamated in to a country and named Nigeria. The colonialists then brought with them two sets of laws to compete with the existing and well established indigenous law known as the customary law.<sup>38</sup> The first of the laws so brought is the Common Law and the second, the Statutes.<sup>39</sup> Therefore, in Nigeria, three diverse systems of law operate alongside one another. The result of this "legal pluralism" is the complicated interplay among Customary Law, Common Law and Statutes, which in many occasions had culminated into fierce internal conflict of law issues.<sup>40</sup> While the effect of this legal pluralism is noticeable in different aspects of our law, it is however more obviously noticeable with regard to personal law of which succession (inheritance) is one.<sup>41</sup> To this end, often times it is hard to figure out which of the three laws is to be applied in a certain situation. This problem can largely be traced to the history of Nigerian State and its legal system. Like in most parts of Africa, the present legal system applied in the adjudication and disputes resolution is a product of colonial imperialism.<sup>42</sup> This evidences the reason for the observable application and effects of the English Common Law on our laws in date in Nigeria, with pockets of consequential and substantial amendments by statutes.<sup>43</sup>

Expectedly, when the English Statutes were introduced to Nigeria, they were made to apply to some strategic coastal areas to facilitate trade and commercial activities with the local people of Africa. Later, they were made to apply generally to the entire Nigeria and became the adjudicatory rallying point in the Nigerian Legal system. By way of delimitation, the laws introduced into Nigeria to co-exist with the customary law are Common law and doctrines of equity, the English Statutes all of which are termed the Received English Law.<sup>44</sup> The English Statutes are different from the enactments by British Authorities meant to apply directly to Nigeria.<sup>45</sup> The qualifying point for the Received English Statute is its being in force in England before 1900.<sup>46</sup>

Now, the Wills Act, 1837 and the Wills Act (Amendment) Act of 1852, being Statutes

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<sup>37</sup> D.O. A. I. *Statutory Islamic Law: The Revised Edition* (London: "Asha Publishers Ltd", 439AH 2008CE), p. 502.

<sup>38</sup> Idris P. O. "Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as Amended on the Rights of Inheritance," Vol. 4, No. 3, 2012, *Journal of Law, Politics, Religion, Economics*, pp. 31-44, accessed at <http://www.zealonline.com/jlpe/CR/04032015>.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

<sup>41</sup> Amosun, J. O. O. and Oyeleye, A. B. (2010), *Legal System of Nigeria* (Lagos: MII Publishers), 2<sup>nd</sup> Ed., pp. 4-5.

<sup>42</sup> *Ibid*, Op. Cit.

<sup>43</sup> Oluwalade, A. O. *The Nigerian Legal System* (London: Sweet and Maxwell), 4<sup>th</sup> Ed., pp. 55-56.

<sup>44</sup> *Ibid*, pp. 69, 81.

<sup>45</sup> Amosun, J. O. O. and Oyeleye, A. B. (2010), *Op. Cit*.

enacted and in force in England before 1900 were received pursuant to the reception laws the first of which was Ordinance No. 6 of 1863 as Statutes of General Application received from England.<sup>47</sup> With the introduction and entrenchment of these Statutes and the principles of Common Law of England and doctrine of Equity, fierce and unhealthy competition sets in between the customary law and the Received English laws. There then arose the need to put a halt to this conflict. Characteristically, the colonial master had to find a ground for the need for imposition of the English laws over the rules of the customs of the indigenous people. Then the validity test emerged from the blues. It is said that the emergence of repugnancy test in Nigeria was from the case of *Eshugbaye Eleko vs. Government of Nigeria*<sup>48</sup> wherein Lord Atkin held thus: "*The court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience.*"

With this test the colonialists were able to push away most of the rules of customary law and get them give way to the alien common law of England under the guise of natural justice, equity and good conscience. It is on this ground that the provision of the law is that, besides the establishment of customary courts, the High Courts in Nigeria are imbued with the powers to observe and enforce the observance of every customary law of the people in the area of its jurisdiction provided:

- (i) That the customary law is not repugnant to natural justice, equity and good conscience, and
- (ii) That such customary law must not be incompatible either directly or by implication with any law for the time being in force.

The High Court Laws of various States of the federation contained these provisions initially<sup>49</sup> but same has been imported into the provisions of Evidence Act to make it have general and uniform application to all courts in Nigeria.<sup>50</sup> The Evidence Act provides clearly that: "*In any judicial proceedings where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.*"<sup>51</sup>

With these provisions of the law, the customary law and Islamic law suffered great setback having regard to the need to satisfy the repugnancy and compatibility tests. Then, it is observed here that the interpretation and the application of these rather vague and evasive terms in determining the validity of a customary or Islamic law has no standard than the personal conception of the judge before whom the custom has been alleged.<sup>52</sup> There were

<sup>47</sup> Ibid.

<sup>48</sup> (1931) AC 262 at 273

<sup>49</sup> Adule, B. N., *The Validity of Customary Law as a Source of Nigerian Law*

<http://www.nigerianlawclass.wordpress.com/2014/07/26/the-validity-of-customary-law-as-a-source-of-nigerian-law-by-burabari-adule-nko/#respond> accessed on 10/6/2015

<sup>50</sup> Ibid.

<sup>51</sup> See Section 18(3) of the Evidence Act, 2011

<sup>52</sup> See for instance the decisions in *Marinawa vs. Seriki* (1984) 1 N.R.N. 183 and *Okagbue vs. Okagbue* (1984) 5 NCLR 78 wherein the customs were held to be repugnant to natural justice, equity and good conscience without having any regard for whatever wisdom was behind the custom or whether there is any mischief sought to be corrected. In *Marinawa's* case, the custom was that a child delivered by a woman to her new husband within 10 months of divorce with another man belongs to that other man. This may sound unreasonable to an average white man or someone who has imbibed the culture of the whites but an average cultural Nigerian should appreciate some wisdom behind that customary rule.

equally other tests like that of contrariness to public policy<sup>53</sup> and inconsistency with the provisions of the Constitution<sup>54</sup> to which customary and Islamic laws are subjected by the courts.

It is therefore the reception of the English type of laws and the consequent imposition of the validity tests against the customary and Islamic law that inform the various controversies over various aspects of our law. As it is now, the issue of testate succession in Nigeria is guided by various laws. Earlier on, especially during the pre-Independence era, the Northern and Eastern regions adopted the received English Law, comprising the Common Law of England, Doctrines of Equity and the Statute of General Application, as part of their applicable law.<sup>55</sup> The situation was different in the Western Region where only the common law of England and doctrines of equity were adopted into the law.<sup>56</sup> The Western legislature then enacted and domesticated the English statutes considered relevant to their region with modifications where necessary provided that same was within their legislative Competence.

By virtue of the above, then the Wills Act, 1837 and the amendment thereto of 1952 became applicable in the Northern and Eastern Regions and the situation continues after Independence. Even after States were carved out of the regions, the States so carved out from the two regions still incorporated the regional Laws into their laws.<sup>57</sup> In the Western region however, the applicable laws were Wills Law of the Western Region, 1958<sup>58</sup> and the Administration of Estate Law of the Western Region, 1959.<sup>59</sup> Beyond this, the various High Court Laws of the States contained the provisions which empowered the High Court to have recourse to the practice and procedure for the time being in force in the High Court of Justice in England.<sup>60</sup> Later, each State of the Federation saw the need to domesticate the laws on wills as a result of which most States enacted their own Will laws and excluded completely the English Wills Act hitherto applied.<sup>61</sup> Therefore the Wills Laws of the various States, the Case law, Armed Force Act, Islamic Law and customary Law are the major sources of law on testate succession in Nigeria.

### **Wasiyyah and the State of Wills Laws in Nigeria**

It is important to briefly and quickly clarify the point that Islamic law by its nature and tenets is not the same as or part of customary law. This position has received judicial blessing of the Supreme Court in the case of *A. Abubakar vs. Ballo*.<sup>62</sup> The Supreme Court in

<sup>53</sup> See Section 8(3) of the Evidence Act, Cap. 121, Laws of Nigeria.

<sup>54</sup> See Section 1(1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended and Section 42(2) thereof.

<sup>55</sup> See Section 14 of the High Court Laws of the Eastern Nigeria, No. 27 of 1955 and Section 28 of the High Court Laws of the Northern Nigeria, No. 8 of 1955. These provisions are similar to the provisions of Section 32 of the Interpretation Act, 1954.

<sup>56</sup> See Section 3 of the Law of England (Application) Law of Western Region, Cap. 60, Laws of the Western Region of Nigeria, 1959.

<sup>57</sup> Law of Succession, Wills and other Laws of Nigeria, 1997.

<sup>58</sup> Cap. 175, Laws of the Western Region of Nigeria, 1958.

<sup>59</sup> Cap. 60, Laws of the Western Region of Nigeria, 1959.

<sup>60</sup> See Section 14 of the High Court Laws of the Eastern Nigeria, No. 27 of 1955 and Section 28 of the High Court Laws of the Northern Nigeria, No. 8 of 1955. Only the Eastern States have adopted this provision.

<sup>61</sup> See for instance, the Kwara State Wills Law, Cap. 28, Laws of Kwara State, 1997. See also the Kaduna State Wills Law, Laws of Kaduna State, 1997.

<sup>62</sup> (1998) 8 NWLR (Pt. 561), 773-798, AN 18323.

that case per Wall, JSC (as he then was) stated that: *“Islamic law is not same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English common law.”*

But to achieve their target at imposing the English type of law, the colonialists fused the Islamic law with the customary law under the pretext that they were both indigenous to the local people and thus form their customs. They claimed that while various customary rules were indigenous to the Western and Eastern Nigeria, the Islamic law was indigenous to the North. The thinking was in that line of thought and frame of mind until decisions like the one in *Alkamawa's* case were made.

The issue of *wasiyyah* has been subject of serious controversy not only in the Nigerian legal circle, but world over. Many writers have tried to view it from the angle of human right and others including the courts have taken the English conception of wills espoused by the provisions of the Wills Act of 1837 as the yardstick. The main issues centre around the fairness of the restrictions placed on the Muslims in making wills and the rather unguided rights afforded by the English type of law to bequeath property as one pleases regardless of whether doing so may spell serious doom on some people or the society at large. Another serious issue that catches attention on wills is whether a Muslim or “a person subject to Islamic Law” should be given freedom of choice between the *Wasiyyah* under the Islamic law or in accordance with the Wills Act.

It is beyond all reasonable argument that those restrictions imposed by Islamic Law are necessary in the interest of the welfare of the legal heirs. The Prophet (P.B.U.H.) was quoted to have admonished a Sahabah, *Sa'ad bn. Abi Waqqas* that “it is better that you leave your heirs better off (financially) than to leave them as burdens begging other people (after you have departed them).”<sup>63</sup> The wisdom here is that if a man is left unguided to make a will and dispose of all his property, he may end up depriving his own heirs worse off or totally deprived. Similarly, if a person is not curtailed in his testamentary capacity, he may bring about endless chaos or strife between the members of his family after his demise.<sup>64</sup> These clearly justify the need for the restrictions on testamentary capacity of a testator as observed by Zulkifli thus: “The rule avoids the enmity which might arise among the heirs as a result of the preferential treatment of one of their member by the deceased in his will.”<sup>65</sup>

In the Nigerian legal sense, the point is not as clear as that because the Nigeria law on will has undergone certain developmental stages in the past and the experience of those past still haunts us up till today and prevents us from appreciating that at least in the area of testate succession the law had changed for better since.”

<sup>63</sup> Al-Asqalani, *Op. Cit.*, Hadeeth No. 519, p. 335.

<sup>64</sup> Doi, *Op. Cit.*, p. 504.

<sup>65</sup> Hassan, *Op. Cit.*, p. 7.

<sup>66</sup> Onu, A. A. “Can a Person Subject to Islamic Law Make a Will in Nigeria?” *Abubayye v. Abubayye and Mr. Daterin's wild goose chase*, CAI S., Vol. 2, No. 2 (2008). [http://www.ijerph.com/abstract.php?paper\\_id=132](http://www.ijerph.com/abstract.php?paper_id=132) accessed at [www.workprogress.com/ijerph/abstract.php?paper\\_id=132](http://www.workprogress.com/ijerph/abstract.php?paper_id=132) on 5 May 2015.

The issue of whether a Muslim or 'person subject to Islamic Law' can or has any right to make will started more prominently with the case of *Yunusa vs. Adesibokan*<sup>67</sup> in which case the High Court of Kwara State set aside the Will of a Muslim which he made in line with the Wills Act being the applicable law in the State then on the ground that the testator was a person subject to Islamic Law. The trial Judge also held that the testator did not have power to dispose of his estate in the way and manner that he did same being incompatible with the Islamic inheritance (*Mirath*) and bequest (*Wasiyyah*).<sup>68</sup>

At the Supreme Court, the judgment setting the will aside was upturned on the ground that same was inconsistent with the applicable law, i.e. the Wills Act of 1937. It was held further at the apex court that a person was entitled to dispose of his property as he liked without any impediment. The testator was therefore held to have rightfully chosen English rather than Islamic Law to govern the disposition of his estate.<sup>69</sup> This decision of the apex court generated a lot of concerns from different quarters beyond the Muslims whose law suffered the attendant set back but those other people whose cultures were likely to be affected by the Supreme Court's position.

Responding to the concerns raised by the state of law at that time and the real and perceived hardship attached thereto, the various States of the federation took the initiative to amend the law in such a way as to accommodate the various customary laws of the people and the Islamic Law of Succession to apply.<sup>70</sup> Like in Section 4(1) of the Wills Law of Kwara State, the application of the law itself is made subject to the Islamic Law on *Mirath* and *Wasiyyah*.<sup>71</sup> The provisions of the Section go thus:

It shall be lawful for every person to bequeath or dispose of by his will executed in accordance with the provisions of this law, all property to which he is entitled, either in law or in equity, at the time of his death. Provided that the provisions of this law shall not apply to the will of a person who immediately before his death was subject to Islamic Law.<sup>72</sup>

It is therefore sound to state that on the strength of the above provision that the Wills Law of Kwara State is meant to apply to all persons in the State except that who just before his death was subject to Islamic law. This provision leaves no doubt in the mind as to its purport and as such needs no external aids to interpret. The main provision makes a general application while the proviso serves to limit the scope of the preceeding general terms. The clarity of this provision aided and strengthened its interpretation in the case of *Ajibaye vs. Ajibaye*<sup>73</sup> right from the trial court up to the Court of Appeal. In that case, the testator, a Muslim, made a will, and stated categorically therein that despite his being a Muslim, he had chosen Wills Law to apply to the distribution of his estate and that it should be shared in accordance with his instructions contained in the will. The courts

<sup>67</sup> (1991) 1 NN 111.

<sup>68</sup> See *M. O. O. S. v. Adesibokan*, *Reported Decisions of the High Court of Kwara State* (1993 Ed.), 1993.

<sup>69</sup> *Id.* 18-23.

<sup>70</sup> *Id.* pp. 24-38.

<sup>71</sup> *Oba. On. O.*

<sup>72</sup> *Id.* See also the Kwara State Wills Law, Cap. 108 Laws of Kwara State, 1993.

<sup>73</sup> *Id.*

<sup>74</sup> Section 4(1) of the Wills Law of Kwara State.

<sup>75</sup> (2007) 4 F.W.R. (Pt. 35) p. 132.

defied this clear instruction in the will and held that it was only Islamic Law that applied to his estate having regards to the proviso to Section 4(1) of the Wills Law.

This amendment to the law also actually gave the indigenous people some succour and opened the flood gate for a barrage of other customary law cases decided on the provisions of the various States' Wills Law. In fact some of the cases were decided in favour of the Bini kingdom's *Igiogbe* which gives right of inheritance to the eldest male child of the deceased.<sup>82</sup> The Supreme Court also decided all of the appeals brought before it on the interpretation of similar provisions in other States' Laws.<sup>83</sup> Therefore, the present state of our law on bequest, especially in the States where the Law has been accordingly amended, is that the customary law is no longer subservient to the English-type of law on the same, i.e. the Wills Law.

Another real issue to be addressed is a "person subject to Islamic Law" as used in the proviso to the provisions of the Law.<sup>84</sup> The phrase is not in any way ambiguous as used in the Section. The active word that needs to be interpreted is the phrase "subject to" and this has been defined to mean "liable to, open to, exposed to, vulnerable to, prone to, susceptible to, disposed to; bound by, under the control of, accountable to, *constrained by*; dependent on, hanging on, contingent on, controlled by, hanging on, conditional on".<sup>85</sup> It has also been define as "being dependent or conditional upon something"<sup>86</sup> or "being under domination, control or influence of something".<sup>87</sup>

The phrase in italics seems to be more apposite with the intended meaning of the phrase 'subject to' as used in the Law.<sup>88</sup> Therefore, the intendment of the proviso to the provision is to the effect that all wills made shall be valid and or challengeable under the Law except that of a person who remained a Muslim up to the moment of his death without renouncing it.<sup>89</sup> Therefore the distinction between a "Muslim" and a "person subject to Islamic Law"<sup>90</sup> is just splitting hairs or even a distinction without any difference.<sup>91</sup> By the principle of the religion, being a Muslim is subject to choice but after choosing to be a Muslim, one is subject to its laws. A Muslim continues to be subject to Islamic Law even when he indulges in acts contrary to the tenets of Islam.<sup>92</sup> The position of the law in those States of the North<sup>93</sup> where the Wills Law have been amended is that Muslims are exempted from being subject to the Wills Law since they are already subject to the Islamic Law on inheritance (*Mirath*) and bequest (*Wasiyyah*). Therefore, in States where in their

<sup>82</sup> *Lawal Olanrewaju Osofin* (1985) 9 NWLR (Pt. 4) 419-425.

<sup>83</sup> *Ibid.* See also *Isenrenyi Isenrenyi* (1991) 6 NWLR (Pt. 28) 382.

<sup>84</sup> *Ibid.* See also *Ajibapeji Ajibapeji*, *Op. Cit.*

<sup>85</sup> See Section 4(1) of the Wills Law of Kwara State, Cap. 8, Laws of Kwara State, 1999.

<sup>86</sup> Collins English Dictionary, <http://www.collinsdictionary.com/dictionary/english/subject-to> accessed on 13 June, 2015.

<sup>87</sup> [www.dictionary.reference.com/subject-to](http://www.dictionary.reference.com/subject-to) accessed on 13 June, 2015.

<sup>88</sup> [www.businessdictionary.com](http://www.businessdictionary.com) accessed on 13 June, 2015.

<sup>89</sup> The law intended here is section 4(1) of the Wills Law of Kwara State.

<sup>90</sup> Oba, *Op. Cit.* at 134.

<sup>91</sup> Olanrewaju, N.Y., *Class Law in the State of Nigeria*, (Lagos: Nigerian Law Library, 1987) at 127.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> See *Ajibapeji Ajibapeji*, *Op. Cit.*

<sup>95</sup> Not only the Northern States like Kwara, Kaduna, Plateau, Kano, to mention a few but also including some of the South Western States.

Wills Laws, restriction of applicability is not on the ground of Islamic Law, then whatever customary law a testator in that area is subject to serves as the restricting factor.<sup>58</sup> Therefore, a person "subject to Islamic law" means a Muslim regardless of his level of practice.

### Right of a Muslim to make Will

In the States in Nigeria where Wills Law have been enacted there is a common feature in the laws. This is the observable distaste for the overriding effect of the English type of law over their customary or indigenous laws. This informed that massive inclusions, in the laws, of the proviso which tends to limit the effect of the English type of law on the customary Law.<sup>59</sup>

It should be noted that neither the Wills Act, 1837 nor any of the subsequent Laws fashioned out of it prohibit a Muslim from making a Will. The problems of the decisions which followed the Wills Act during the era of its applicability in Nigeria were the source of the unfounded belief that Muslims are prevented from making wills. It should also be pointed out clearly that the will a Muslim has right to make is that which follows the rules of Islamic Law of *Wasiyyah*. The confusions occasioned by the decisions rendered pursuant to the Wills Act, 1937 still haunt the appreciation of the present position of the law in the Country.<sup>60</sup>

Regardless of the confusions, the right of Muslims to make will in Islamic Law is not impeded but subject to restrictions as to the quantum of estate to be willed and who can benefit from the will.<sup>61</sup> Islamic Law therefore permits a Muslim to make will. The Law, for instance the Wills Law of Kwara State, states "*Provided that the provisions of this law shall not apply to the will of a person who immediately before his death was subject to Islamic Law.*"<sup>62</sup> This clearly settles all the controversies. It is the will of a Muslim that the Law exempts from being subject to its application. There may be some issues on the wills of Muslims in the other States where Islamic Law is not particularly exempted. Even in those States, the closest possibility is that since customary law is exempted in those States, the Muslims can argue that Islamic Law is their own customary law.

The fate of the wills of the non-Muslims in the States where Islamic Law is recognized in their Wills Laws is more unclear. Clearly, they cannot benefit from Islamic Law because they are not subject to it.<sup>63</sup> It is only a Muslim that can be subject to Islamic Law even though a non-Muslim may take advantage of same where there is no legal impediment on him. Therefore, it is the right of the Muslims to make will that is most assured and clearest

<sup>58</sup> This belief is the basis of the decision in *Osun v. Osun* (1965) 6 NWLR (Pt. 4) 151, 159 is comparable to the decision in *Agbor v. Agbor* (1965) 6 NWLR (Pt. 4) 151, 159. *Osun's* case was decided in the High Court of Lagos, Bini and *Agbor's* case was decided in the High Court of Lagos, Lagos. Both cases were decided in the era of the applicability of the Wills Act, 1837. Since the decision in *Osun's* case, the test of applicability of Islamic law has been the subject of law.

<sup>59</sup> See the legal provisions in the various Wills Laws of the various States of the Federation which are radically different from the provisions in the Wills Act, 1837. For example, Section 4 (1) of the Wills Law of Kaduna State, Cap. 10:1, Laws of Kaduna State, 1970.

<sup>60</sup> See Dutton, Y. Y. in *Current Understanding of the Status of Customary Law in Nigeria*.

<sup>61</sup> *Idem*, *Op. Cit.*

<sup>62</sup> Proviso (1) Section 4 (1) of the Wills Law of Kwara State.

<sup>63</sup> *Idem*, *Op. Cit.*, 151, 159.

in any State of the Federation regardless of whether or not the State has specifically recognized Islamic Law in its Wills Laws.

Writers have also engaged in fantastic arguments on the right of a Muslim to make a will under the Wills Act, 1837. It is beyond argument that the said Wills Act, 1837 (as at today) is not an extant law in Nigeria. The States have domesticated the law with substantial amendments to bring it in line with recognition of the indigenous laws (customary and Islamic Laws).<sup>94</sup> All arguments based on this non-existing law cannot stand the present position of the law on testate succession in Nigeria.

### Conclusion

The right of a Muslim to make will is not in any way impeded either during the period when Wills Act, 1837 was the applicable law or after the domestication and amendment of the law by the States of the federation to bring the law into a form that will not run contrary to the customary or Islamic Law or conflict with the realities, wishes and aspirations of the people.

The state of the law on testate succession in Nigeria now does not only recognize the right of the Muslims to make will but also provides that the laws shall not be applied to any will(s) made in accordance with Islamic Law (or customary law) to which the testator(s) may be subject to during his or her life time. The harmony introduced into the Nigerian Wills laws that recognizes and accommodates the customary and Islamic Laws is commendable in the sense that it is in recognition and in consonance with freedom of religion as entrenched in the Constitution.<sup>95</sup>

<sup>94</sup>Itua, Op. Cit.

<sup>95</sup>See Sec. 38(1), Constitution of the Federal Republic of Nigeria, 1999 (As Amended)