APPRAISAL OF THE TESTAMENTARY FREEDOM OF A TESTATOR UNDER ISLAMIC LAW: A COMPARATIVE ANALYSIS

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Abstract

Will (Bequest) is a branch of Islamic inheritance system which deals with the freedom of a testator dispose of his property. This study undertakes a comparative analysis of the testamentary freedom of a testator under Islamic law, wills laws and other jurisdictions of interest, examining the extent to which a testator can as of right dispose of his property upon death. The Islamic inheritance system, offers two major restriction to a testator when making a Will (bequest). A testator under Islamic inheritance law is restricted to dispose of his property to the maximum of 1/3 and he/she is not allowed to write a Will (bequest) in favour of his/her heirs so as to ensure the rights of legal heirs and other beneficiary are protected. The research work reveals a significant differences in the approaches of testamentary freedom. The Nigeria Wills laws, the Act and other administration of estates laws of some states allowed a testator with a testamentary as well as a complete freedom to dispose of all his property to anybody of his own choice. The testator's powers are constructively truncated by certain customary laws and rules in Nigeria. A comparative understanding and examination of the laws of the United Kingdom, India, Ghana and some Arab nations, highlights the diverse ways in which testamentary freedom is regulated and balanced for the purpose of ensuring that a testator, adhered to the Will laws for the purpose of protecting all and sundry in the estate distribution and management. The research also contributes to a deeper understanding of the complexities of testamentary freedom and its implication for Muslim testators who live and die in an environment that the Islamic law of inheritance (Will) does not adhere to.

Keywords *Testamentary freedom, Testator, Islamic law, Comparative, Analysis*

INTRODUCTION

The good aspect of this life is that no one knows how, when and where he is going to die[1]. The oblivious nature of this unwitting position perhaps makes a person(s) to adumbrate working plans of how his property/estate will be managed, distributed or shared when they are dead. Undoubtedly, a person who has property has the unlimited powers to take charge and equally control his property in the manner and ways he so desires or chooses when they are alive. Certainly, a person may decide to give out the entirety of his property as a gift to a stranger, a friend or an enemy irrespective of whether he has brothers, mother, wife, parents, children or relations and nobody has the right to challenge the action of a testator. This is because he is still alive and it is a gift, not inheritance.

The notion of testamentary freedom refers to the ability of a testator(s) under Islamic Law to dispose of their property upon death which is a fundamental feature of Islamic law of inheritance.[2] The Islamic law of inheritance deals with the ways and procedure of how Will are made, and properties of a deceased are manage, shared and distributed .The Qur'an and the Hadith made adequate provisions[3] for how a deceased person's property will be manage, and be distributed in accordance to the guiding principles of Islam. Allah SWT warned against eating the property of orphans unjustly[4] "those who unjustly eat up the property of an orphans, eat up, eat up a fire into their own bodies, they will soon be enduring a blazing fire". This is the myriad reason why properties to be acquired[5] or be made subject of a Will, must come from a lawful[6] source. In Islam, the testamentary freedom of a testator is completely guided and restricted to a large extent that, a

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[1] Death is invisible

[2] B.M. Busari' "Al-Wasiyyah Bequest according to the Four Sunni Schools: A Concise Analysis" *Journal of Humanity and social science* {2018} (vol.23) (2)

[3] Qur;an 4 v 1, 12, 176

[4] Q 4 v 7

[5] In Islam, there are several unlawful sources of acquiring property that are prohibited. These includes: 1. Riba (Usuary Interest) 2. Gharar (uncertainty/ unfairness)3. Gambling, 4 Haram (Unlawful) Activities and 5. Exploitation etc

[66] See the 40 Hadiths number 10 of Imam Al-Nawawi Collection

testator can only dispose of his property to the maximum of 1/3[7] to any person of his own choice,[8] which must not include his legal heirs.[9] In a Hadith Sa'd Abu Waqqas reported that, the Prophet was reported to have said;[10]

> The Prophet came visiting me while I was (sick) in Mecca, ('Amir the sub-narrator said, and he disliked to die in the land, whence he had already migrated). He (i.e. the Prophet) said, "May Allah bestow His Mercy on Ibn Afra (Sa`d bin Khaula)." I said, "O Allah's Messenger (ﷺ)! May I will all my property (in charity)?" He said, "No." I said, "Then may I will half of it?" He said, "No". I said, "One third?" He said: "Yes, one third, yet even one third is too much. It is better for you to leave your inheritors wealthy than to leave them poor begging others, and whatever you spend for Allah's sake will be considered as a charitable deed even the handful of food you put in your wife's mouth. Allah may lengthen your age so that some people may benefit by you, and some others be harmed by you." At that time Sa`d had only one daughter.

It is also important to know that rules governing testamentary freedom of a testator under Islamic law are unique to other Wills laws, administration of estate laws, Wills Act and in other Jurisdictions of interest. While Islamic law of Inheritance reiterated on the need to restrict the testamentary powers of a testator to protect the rights of individual heirs and other beneficiaries, the Act and other Wills laws seem to empower the testator with unrestricted freedom to dispose of their property.[11]

TESTAMENTARY FREEDOM OF A TESTATOR UNDER ISLAMIC LAW

Al-wasiyyah (bequest)is an integral part of Islamic inheritance Law.[12] It is a voluntary act of charity made by a Muslim during their lifetime or through their testamentary will after death. Will

[7] 1/3
[8] Q 2 v 180-189
[9] Where it is above 1/3 or that the Will is for an heir, consent must be given by all heirs.
[10] Sahih Buhari Book 55, Hadith Number 55
[11] Section 3 of the Wills Act 1837
[12] I. Hussain, *The Islamic law of succession* (Riyadh Darussalam global leaders in Islamic books. 2005)

is a branch of the inheritance system ordained by Allah[13] and it is a divine instruction of how properties of a deceased Muslim can be judiciously distributed, or be given out either as a gift (Bequest) to any person of his own choice. It is also important to know that the Islamic law of Inheritance does not emanate from the Prophet of Allah[14] and his companions but from Allah's clear instructions and directives.[15] Undoubtedly Islamic inheritance is more elucidated in clearer and unambiguous ways than any other knowledge or aspect of Islam.

Therefore, when a man dies as a Muslim, three basic succession rules must be complied with before we can commence the distribution of his property.[16] These three basic conditions are 1. Burial expenses, 2. Settlement of debts and 3. Execution of Will (Wasiyyah) before actual distribution. Where the deceased is buried successfully, the debts are clear, we will talk about Will's question. The question of whether the Will comply with the Shariah or the Islamic standard is important in ascertaining the validity of the Will. In Mariya & Anor v Adamu & Anor[17] where the court stated certain preconditions to inheritance that are necessary cum paramount in the and implementation of Will and distribution of estate of a deceased person.. These preconditions are thus: 1. The maker must have died 2. He must have left property and 3. The existence of an heir. Where there is no property there will be no Will.[18] likewise, no heir exist the whole property goes to Islamic treasury (Baytul-mal)[19]

> Will[20] (Wasiyyah) making is undoubtedly the instruction of the maker[21] of a Will which is to be enforced or implemented after the demise of the maker[22] and is enforceable only to the extent[23] of its compliance with Islamic law. The Islamic

[13] Qur'an 4 v7, 11,12 and 176
[14] Prophet Mohammad (SAW)
[15] Q 4 v 12-13.
[16] A.Gurin, *An Introduction to Islamic Law of Succession: tested and Intestate*(Malthouse Prints Lagos) At. P 10.
[17] (2016) LPELR 45470(CA)
[18] *Tijjani v& Ors v Yabi & Ors (2017) LPELR 44606(CA)*
[19] *Mariya & Anor v Adamu (2016) LPELR 45470 (CA)*
[20] Islamic Will differs with Will under the Act.
[21] *Obianwu Ors v Obianwu & Ors (2017) LPELR 42678*
[22] Q 4 v 11 and 12. Also it will be read at a designated time or day as may be determined by the Probate Registrar. The Will must be read in the Probate Registry or any place the Probate Registrar determines and he shall be the supervising officer
[23] *Sources of law of succession in Nigeria are 1, the received English Law introduced to Nigeria 2, Relevant Nigeria Legislation 3. The Judicial Precedent 4. Customary law 5 Islamic Law 6 international Law.*

> will and Western ways of making wills are distinct in nature, In the case of ***Babba v Ganjarma***.[24] The court held that,
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> Fundamentally, the Islamic Law of inheritance is predicated upon the command of Almighty Allah (SWT) in the Holy Quran and prophetic traditions. In every situation, where the distribution of a deceased's estate comes up in a Court of law, there are some hurdles or conditions which a plaintiff must satisfy.

Will (Wasiyyah) must be Shariah compliant in that a testator can only give out up to 1/3 of the total estate,[25] and also the person who is to receive the gift as legatee must not be an heir, likewise, the testator must be free,[26](not one suffering from slave trade) sound and sane to dispose of his property which he legally owns. An insane testator under Islamic law is barred from making a will. It is important to stress a point here that an infant who lacks the legal capacity to make a valid Will cannot be a testator.[27]

Galore folks and others alike in our contemporary world of today, both within and outside Islam so much believe that making a Will (Wasiyyah) is connected or associated with death.[28]. Can this in any way translate to mean that any person who starts to think towards making his/her Will (Wasiyyah) is about to die? Certainly, this is fallacious and it can never be so. It is not for you to know when Allah will call on you. None of the prophets, companions and all peoples from generation to generation had ever predicted or ascertained the exact time of his/her death. This is for Allah and only the Almighty who knows when you will die. Allah[29] In Quran says "When their times come, they cannot delay it for a single hour or can they prolong it by a single hour" This is the myriad reasons why many people dislike making Wills because of the disturbing belief and fear of a human being cum selfish shallow thinking. Who will die will die. We should prepare one

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[24] *(2022) LPELR 57575 (CA)See also the cases of YARI v. MIKAILA in (1986) 5 NWLR (PT. 46) 106; HAMZA v. LAWAN & ANOR. (2006) LPELR 7657; SHEHU & ANOR. v. SHEHU (2017) LPELR 44596; TIJJANI & ORS v. YABI (2017) LPELR 44606 and IBRAHIM v. GIRKO (2021) LPELR 54953*

[25] Except where consent is given by other heirs.

[26] Not a slave

[27] Under the Maliki school, children and young person who are able to distinguish between good deed and bad deed or have attained the stage of discretion are allowed to make a valid will.

[28] *IQBAL SAUJAN' "*Islamic Law of Inheritance and Its Implication amongst Muslim Society: An Empirical Analysis"*'Journal of Contemporary IslamiT Law*, (2022) Vol. 7(1)

[29] Q 16 v 61

and keep it for tomorrow. The Prophet (SAW) stated this in a Hadith[30] reported by Ibn Umar (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying:" It is the duty of a Muslim who has something which is to be given as a bequest not to have it for two nights without having his will written down regarding it". Therefore, the importance of Will making can never be over emphasizes, we just have ensure that today or tomorrow we write one.

Islam offers a universal inheritance system that is applicable globally to all Muslims[31] when it comes to Wasiyyah (bequest). The system of distribution you see within the Muslims in Ghana is what you will see in Burkina Faso, Mali, Senegal, India, China etc. Unlike the Christian inheritance system which is never universal and can never be so, as stated by Emeka Chianu in his book, Law of Succession[32]

Will and debt[33] are like twins[34] siblings that are considered obligatory[35]or a prerequisite that must be cleared or settled before the actual distribution of deceased wealth. No distribution will commence when the debt has not been settled.[36] This is why the Noble Prophet of Islam often ask whenever he is called upon to perform a burial prayer (Janaza) for a deceased person, whether the deceased owns any debt and if the answer is in affirmative, sometimes he pays, in another time he asked the ummah to pay and sometimes, the Prophet declined praying for the corpse. This shows how important the settlement of the debt of a Muslim is.

There will be no execution of will (Wasiyyah) when debt of the deceased is unsettled.[37] Settlement of debt is a prerequisite to the will execution and the distribution of estate. Nothing will be given to any heir or person mentioned in the will without the debt of the deceased being cleared. This position implies that the wording of the Qur'anic provisions on Wasiyyah was mentioned.[38] before

[30] Sahih Muslim *Book 13, Number 3987:*
[31] Iqbal,S, Sayed.M.,' *Islamic Law of Inheritance and Its Implication amongst Muslim Society: An Empirical Analysis'* 2022 (2)(10) URL: http://www.ukm.my/jcil accessed on 13/03/2024
[32] At page 397
[33] See Badaji v Kuwara & Anor (2018) LPELR 4660 (CA*), Adams & Ors v Karami & Ors*
[34] 4 v 11 and 12
[35] Q4 11,12 and 176
[36] S.U. Keffi 'Practice and Procedure on Settlement of Claims before Sharing of Estate in Maliki School' (A paper delivered at Kongo conference Hotel, Zaria,2005) P.133
[37] *Hamza v Lawal* (2006) LPELR 7657 (CA)
[38] Quran 4 v 11 and 12

debt, however all the schools[39] of thoughts[40] Unanimously agreed that debt should be settled before the will is executed.

The conceptual understanding of Will (bequest) in Islam is different from the concept of Will under the Will laws and Acts. The laws of the will allowed a testator to devise their property by way of distribution in the Will to those they like or to their immediate family or relation. Under the Muslim law of succession, it is not[41] allowed for one to share his inheritance while still alive. The best of what they can do is not to share the estate by their Wasiyyah, (Allah has done the distribution)[42] but rather to make it in the form of a gift to the person who will not inherit from him as of right. For his children he can give them a gift while alive. Every child is allowed to collect gifts provided other children also receive the same. It is important to know that the distribution of estate only comes up when you're no more and that has been taken care of by Allah.[43] Islam does not expressly allow one to share his inheritance (when you are alive) through a Will. This is because a testator, cannot write a Will in favour of those that will inherit from him by right, and also a testator is restricted to 1/3 of the estate as his limitation when making will.[44]

TESTAMENTARY FREEDOM UNDER THE WILLS LAWS IN NIGERIA

Testamentary freedom refers to the right of a testator to dispose of their property as they wish after death. Under the Nigeria wills laws, a testator's power to make a will or dispose of their property is limited depending on where the testator dies. The power of the testator cannot be truncated nor reduced by anyone. He is at liberty to decide how to or not to dispose of his property. It is not for any person to question whether a testator is at liberty to dispose of his property in any manner he deems fit.[45] In the case of ***Igboidu v Igboidu & Ors***[46], the Court held that " …The law is clear that in the absence of any ambiguity, the testator's wishes must prevail.."

[39] Hussain. A *The Islamic law of Succession* (Darussalam Publication,2005)
[40] Maliki, Hanafi,Shafi'I, and Hambalis
[41] It is advised that as a Muslim who leaves outside Nigeria particularly where Islam is not popular, should endeavor to write his will in line with Islam otherwise, your property will be distributed according to their state law.
[42] See Q 4 11,12 and 176
[43] Q4 v11,12 and 176
[44] A. Yusuf and E.E Sheriff, Succession Under Islamic Law (Malthouse Press LTD, 2011) At P.163.
[45] *Adewunmi & Ors v. Okunade & Ors. (*2012) LPELR 56212 (CA) (Pp. 37-38
[46] (*1998) LPELR 6414 (CA)*

The freedom of a testator under the Wills and various administration of estate laws in Nigeria differs from one place to another. In ***Adewunmi & Ors v Okunade & Ors,***[47] the court reiterated the powers of the testator to bequeath his property to anybody of his own choice. "In any case, no law prevents a Testator, in the exercise of his freedom of choice, to bequeath his property to anybody he wishes, whether related by blood or not." It is imperative to pose and ask this question whether a testator's capacity to dispose of his property by will is subject to native law and custom.[48] For example in Anambra State the court in ***Okafor v Okafor***[49] "The Administration and Succession (Estate of Deceased Persons) Law of Anambra State, as it is now, is that the capacity or the right of a testator to dispose of any property which he may be entitled to at death by will is not restricted or subject to any native or law and custom.". Also in the case of ***Asika & Ors V Atuanya***[50] the court held that a testator has the liberty to dispose[51] of his property in the way and manner he likes and no one can modify the Will. This was equally confirmed in the case of ***John & Ors v. Akhuamhenkhun & Ors***.[52]

However, a testator's freedom under the Wills law is restricted and he cannot dispose of his entire property by way of Will. Lagos and many states enacted Wills law restricting testamentary freedom of testator. For example the Oyo State[53] Limits the testamentary freedom of a testator to dispose of his estate/property if he is restricted by his customary law or Islamic law as the case may be. The Kaduna State[54] Wills law under section 4 restricts the power of a testator. The law, thus; It shall be lawful for every person to bequeath or dispose of, by 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 the law shall not apply-

1. To any property which the testator had no power to dispose of by Will or otherwise under customary law to which he was subject:

[47] *(2021)LPELR 56212 (CA)*
[48] In the East or Anambra in particular
[49] (2014)LPELR 23561 (CA)
[50] (2013) LPELR - 20895 SC:
[51] See Igboidu v. Igboidu (1999) 1 NWLR (Pt.585) p. 27." per NGWUTA, J.S.C (P. 27, PARAS. F - G)."
[52] *John & Ors v. Akhuamhenkhun & Ors* (2021) LPELR 54138 (CA)
[53] Cap 170 Wills Law of Oyo State 2000
[54] Cap 133 Kaduna State 1991.

2. To the Will of a person who immediately before his death was subject to Islamic law

Lagos state also enacted a wills law empowering a testator to make his Will with an enlarged restriction on the testamentary power of a testator to dispose of his property by way of Will. section one. Empowered the testator, thus;

> It shall be lawful to every person to bequeath or dispose of, by Will execute in accordance with the provision of this law, all property to which he is entitled, either by law or equity or at the time of his death Provided the provision of the laws shall not apply to any property which the testator had no power to dispose of by Will or otherwise under customary laws to which he was a subject.

From the above, it is crystal clear that the testamentary freedom of a testator to make a will is only to the extent of satisfying certain conditions and these conditions are what constitute restrictions to the powers of a testator to make a Will under the Will laws. Some of these restrictions are;

Capacity to make a will

The testamentary capacity of a testator means the capacity to make a will and for a testator to make a valid will must have attained the requisite age, possess a sound mental capacity and must not have been influenced or coerced to write the will under any law or customs.[55]

1. **Age.**

In Nigeria, there is no uniformity when it comes to the age capacity of a testator.[56] A testator can make a will if he attains puberty age.[57]. The state that still accommodates the Will Act of 1837 is 21 years while most states in Nigeria are 18 years. The Lagos[58] and Oyo[59] Will law for example stipulated 18 years as the benchmark for will-making. Kaduna State,[60] and Abia[61] Many other states in Nigeria specified 18 years as a valid age for Will making.

[55] Section 3 of Lagos state Will laws. Section of the Will Act of western state 1958.
[56] B. Adetunji, *The law of Succession in Nigeria* (University of Lagos Printing Press, 2019) P 304
[57] For Muslims
[58] Section 3 of the Wills Law of Lagos State
[59] Section 5 Wills edict of Oyo state
[60] Section 6 of the Kaduna state Wills law
[61] Section 4 of Abia state Wills law

However, some of the States[62] make exceptional provision accommodating situations where a Will made by an under 18-year person can be said to be valid. One of the exceptions for example is stated in Section 6 (1) of the Wills Law of Lagos State which provides that any seaman, mariner or crew of a commercial airline being at sea or in the air may dispose of his estate though under the age of eighteen years.

2. Mental Capacity.

Every testator is deemed mentally fit and capable at the time he/she signs the Will. However, if the testator becomes[63] Unsound after signing the Will, the Will remains valid and effective. It is therefore clear that where the testator is unable to meet the essential.[64] Requirements, the will is tantamount to being declared invalid as the testator lacks testamentary capacity and the will not be able to dispose of his property and where the testator had already written one, that might not be admitted in the probate or court. [65]

Testamentary capacity means the legal capacity to make a Will. The law requires that a testator must have a sound disposing mind both at the time of giving instructions and execution. See the case of ***Nola & Ors v Graham-Douglas & anor***[66] where the question before the court was on what constitutes the sound disposing mind of a testator; instance(s) in which a testator will be held to lack it. The court held that "Relying on the evidence before the Court, the learned trial Judge found and held that; "A Will though formally executed may be held to be invalid where the testator does not have sound mind memory and understanding or simply put lacks a sound disposing mind."

In addition, it is important to know that, for a will to become valid and enforceable under the wills laws in Nigeria, the will must be written among other things. Section 4 (1) of the Wills Law of Lagos State states the conditions for the validity of a Will as follows: No Will shall be valid unless-

[62] Section 5 of the Will laws of the western region 1959, applicable in the States that are created out of old western region such as Ondo, Ekiti, Oshun, Delta and Edo. The Oyo State has its own Will law. The applicable in these states is the Will Act of 1837
[63] Non Compos mentis
[64] Ogianien v Ogianien (1967) 1 All NLR. 191
[65] (2014) *Okolonwamu & anor v Okolonwamu & ors* LPELR 22631 (CA)
[66] (20190 LPELR 48285

(a) it is in writing; (b) it is signed by the testator or signed in the testator's name by some other person in the presence and by the direction of the testator, on such place in the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testators will; (c) the testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time; (d) the witnesses attest and subscribe the will in the presence of the testator but no form of attestation or publication shall be necessary.

TESTAMENTARY FREEDOM OF A TESTATOR IN GHANA

Ghana[67] is another country of interest when it comes to testate and intestate law of succession because of its patrilineal and matrilineal intrigues. In Ghana maternal side is sometimes more favoured and considered as per the right to inherit from a deceased person is concerned. Unlike in most countries in Africa where the male line solely inherits almost everything[68] when it comes to the distribution, and management of a deceased property. In matrilineal, the man is more connected to his mother than his father[69]. Everything passes from the mother to the children[70] among some tribes in Southern Ghana. While in most of the States in the Northern Part of Ghana are patrilineal where the properties of a deceased person pass through the father. This status to a very large extent affects Will making in Ghana.

Ghana just like any other country has rules and basic requirements for a valid will. The Wills Act of 1971(Act 360) provides for the essential requirements of a valid Will in Ghana. The law also deals with other related matters. In Ghana,[71] to make a Will the testator must not be less than 18 years of age and be of sound mind as at the time of making the Will. The Will must be executed in accordance with the law of where it was made. It must be signed in the presence of two witnesses. A witness to a will cannot be a beneficiary according to Ghana's law except if there are at least two other witnesses. To avoid doubt, it is strongly advised that the beneficiary should not witness a Will.

[67] A. N. Liman, *Islamic Law of Inheritance: A Comparative Perspective*, (Malthouse Lagos, 2018) At P.90
[68] Ibid at P. 74
[69] This is a common practice among the tribes of Ashanti, Bunu, and Akan etc. from the southern Part of Ghana
[70] Ibid
[71] O.B. Gloria, *The Wills Making in Ghana*(Oagelinks LTD, 2016)

The Ghana Wills Act makes provisions similar to that of Lagos and Oyo wills laws giving enormous powers to spouses, children and parents (their dependents) whose Will did not favour approaching the court to express how badly the Will affected them. Section 13 of the Ghana wills of 1971 carried the same provisions.

In Ghana, the testator has the freedom to dispose of all his property by will to anybody of his own choice. No law in Ghana prevents or compels the testator or testatrix to devise his or her properties in a particular manner. By virtue of section one of the Wills Law of Ghana which reads as follows; "Any person of or above the age of eighteen years may in writing and accordance with this Act make a will disposing of any property which is his or to which he will be entitled at the time of his death or to which he may be entitled" this section by implementation and implication connotes to means that the testator is guaranteed to the extent of excluding his spouse, children and parents by disposing of all his property to anybody of his choice.

However, section 13 of the Act allowed dependents of the testator to approach court where the testator did not make reasonable provision for spouses and children under 18 years. Therefore, a testator's freedom to make a will is restricted.[72] to the extent that the testator must not ignore his spouse and children while planning his will, otherwise, the Court will intervene to declare the Will invalid.

TESTAMENTARY FREEDOM OF A TESTATOR IN INDIA.

India is another country of interest because of the zillions of traditional systems and multiple customs and religions that are practised or co-exist in India. The freedom to make a Will in India depends on the State, tribe or religion you believe in. It is important, to know that In India, testamentary disposition is primarily governed by the Indian Succession Act, 1925. The Act[73] provides the legal definition of a will and outlines the requirements for its validity, execution, revocation, and probate

[72] By section 13 of the Ghana's will Act,

[73] https://lawbhoomi.com/testamentary-disposition/#Laws_Governing_Testamentary<accessed 06/01/2024>

Just like, under the Will Act,[74] the will must be in writing, except in cases of privileged wills (e.g., soldiers in actual warfare). The testator must sign or affix their mark on the will in the presence of at least two witnesses, who must attest to the testator's signature or mark. More importantly, the will must not be a product of coercion, fraud, or undue influence.

The India Will Act of 1925 which is still in operation, expressly allowed a testator to dispose of all his property through Will to another person of his own choice, except Muslims[75] and some other specific tribes or communities excluded by specific statutory provisions. For example, a Muslim whose testamentary matters are governed by personal laws. The Muslims are guided by the Quran and Sunnah in India.

However, in India under the 1925 Act, where a Muslim married under the Marriage Act, he has chosen that his inheritance should be governed by the Act, not under the Muslim personal law. Under Muslim law, you cannot write a will above 1/3 of your total estate but under the Indian Succession Act of 1925, the testamentary freedom is one hundred per cent in India.

THE FREEDOM OF A TESTATOR IN ENGLAND

The Will Act of 1837 which was domesticated by many states in Nigeria originated from England. The Will Act gives total freedom to a testator to dispose of his property in a manner and ways he likes, and this is why the English law of succession adheres to the principle of absolute freedom[76] of testation since common law systems have been more reluctant in granting compulsory shares contrary to the will of the testator. Unlike in Italy and other place 'reserved' and 'compulsory' portion for spouse and family has no place. A statutory fixed share does not exist, therefore, under the English common law. The system[77] largely determined by the courts[78] can be described as a discretionary system[79].

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[74] 1837

[75] K. Anand, The Concept of Will under Muslim Law: a Study, International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212:Volume 4 Issue 3

[76] Section 3 of the Will Act 1837

[77] A. Abdulraham 'Testamentary Freedom and its Restrictions in Civil and Common Law Jurisdictions' file:///C:/Users/liman/Desktop/p.hd%20research/testamentary%20freedom%20in%20u.%20s.%20a.pdf <accessed 4/1/2024>

[78] The England Act of 1938 is also relevant. This Act allows surviving spouses, children, and other dependents to claim a reasonable share of the testator's estate if they are not adequately provided for in the will

[79] A range of persons may apply to the court for a share of the estate

However, where the testator disposed of all his property without living any portion for his spouse and his immediate dependents, the Courts[80] in England have the discretional power under Inheritance (Provision for Family and Dependents) Act 1975 to alter the terms of a will where no provision or inadequate provision has been made for certain categories of person, which are not confined to spouses, civil partners or children: the England Amendment Act also stipulates those entitled to apply to the court for a share of the estate under the Inheritance[81]Act 1975[82] to include; (1) A surviving spouse or civil partner; (2) A former spouse who has not remarried; (3) A child of the deceased 942 (4) Any person who was treated by the deceased as a child of the family in relation to a marriage; (5) Any other person who was maintained wholly or partly by the deceased before his or her death; (6) Any person living in the same household as the deceased as husband or wife or as civil partner during the whole of the two years preceding the date on which the deceased died, where the deceased died on or after 1 January 1996.

It is important to also know, that several reforms were made in England to address zillions of issues of abandonment of spouse and children to their God. For example Section 2 of the Law Reform (Succession) Act[83] amended the Inheritance (Provision for Family and Dependents)[84] Act 1975 and inserted a new s.1(1) (b) into the 1975 Act by providing that in addition to the persons already entitled, s.1(1) would be extended to give any person living in the same household as the deceased as husband or wife or civil partner during the whole of the two years preceding the date on which the deceased died.

From the above, it is crystal clear that all the amended Acts expressly allowed Courts to look inward and give its order based on what is adduced or established before the court and the kind of consequential order the court may grant for the support of the spouse, children etc. The above provision reduced and truncated the testamentary freedom of a testator.

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[80] A. Obiora*, Limits of a testator on Freedom of Will testamen*t https://nigerianlawguru.com/wp-content/uploads/2024/10/LIMITS-OF-A-TESTATOR-ON-FREEDOM-OF-WILL-TESTAMENT. accessed 19/02/2025

[81] Section 2 make Provisions for Family and Dependents protection

[82] A Broun, *Testamentary Responsibility* ' Journal of University of Edinburgh https://www.pure.ed.ac.uk/ws/portalfiles/portal/450085831/BraunELR2024TestamentaryResponsibility. accessed 12/12/2024

[83] 1995

[84] 1975

CONCLUSION

Islamic inheritance system deals with how the estate of a deceased person can be managed, distributed and shared among heirs. Will (bequest) is a branch of Islamic inheritance which deals with how a testator is empowered by the Shariah to dispose of their property. The power of testator(s) to dispose of their property both under the Islamic and Wills laws in Nigeria is not absolute. The testamentary freedom of a testator in Islam is restricted in two major ways. One of which is that a testator is restricted to 1/3 of the estate when making a will and is not allowed to write a Will in favour of their heirs. The Will laws also restrict a testator in many ways and a testator without capacity or sound judgment will not be able to make a valid Will.

The court played a key role in ensuring that the testator adhered strictly to the provisions of the Law whether customary or Islamic law. A Will that does not meet the necessary requirements will always be considered as declared as invalid by the court.

BIBLIOGRAPHY

Abubakar Jabir, Albir Al-jazairy,. Minhaj Al-Muslim (volume 1) Darussalam (Global leaders in Islamic books 2001)

A, A, Asaf, The Pillars of Islam(Da'a al-Islam Oxford University Press)Volume 2.

Adetunji Babatunde, The Law of Succession in Nigeria: Principles and Practices (Published by Nilag Press Ltd 2019)

Adewale Taiwo, Basic Concept in Legal Research Methodology (Published Princeton & Associates Company Ltd 2017)

Ahmadu S Malik ' An Examination of the Nature and Operations of Islamic and Statutory Laws of Testate Succession in Kaduna State, Nigeria(Unpublished PhD Thesis) A.B.U Zaria, 2015

Alkali Muhammad Khalil, Askari (2nd edition) Hausa translation: Kano. 2008

ALNAHDAH: A Journal of Islamic Heritage (vol.3 Nos. 1&2) 2001.

Al-kalbiy Jazay , The Canons of Islamic Jurisprudence; a Translation of Al-Qawanin Al-fiqhiyyah by Centre for legal Studies Ahmadu Bello University Zaria

Al-Tamimi & company: inheritance in UAE Citizen advice bureaux: family in England. 2004

Alphousus Okoh, SAN, Contemporary Legal Research Methodology: for Nigeria Universities (Published in Jos 2018)

Dr Hussain, The Islamic law of succession (Riyadh Darussalam global leaders in Islamic books. 2005)

F.J, Wills, Probate practice and Administration of Estates in Nigeria (Chenglo Printing press, 2007)

K. Abayomi, Wills: Law and Practice (Mbeyi print Nig LTD, 2004)

M. Bashir, Marriage and Succession Under Islamic Law: Sharia and Justice, Lectures and Speeches (published by Sakore Educational Publishers Nig Ltd)

Seleiman Nchi and Samaila Mohammed, Islamic Personal Law and Practice in Nigeria (Oracle Publishing Company Ltd 1999)