Can a person subject to Islamic law make a will in Nigeria?: Ajibaiye v Ajibaiye and Mr. Dadem’s wild goose chase

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ABSTRACT

Subsequent to the controversial case of Yunusa v Adesubokan (1971) where Supreme Court which held that a Muslim can make will under the Wills Act even if the terms of the will are inconsistent with inheritance laws under Islamic law, the Wills Act and the various State Wills Laws were amended by making them subject to Islamic law and customary law. While the amendments have been upheld severally by the Supreme Court in relation to customary law, the Court of Appeal case of Ajibaiye v Ajibaiye (2007) is the first reported case in relation to Islamic law. Mr. Dadem in a recently published article criticizes the case on the ground that it absolutely precluded Muslims from making wills. He wants the wills law be amended to allow Muslims to make wills under that law to the extent permitted by Islamic law. This paper argues that the case is rightly decided and that the current position is alright. The amended Wills Law merely precluded Muslims from making wills under the Wills law and this is consistent with Islamic law. Dadem overlooked the fact that it is always open to Muslims to Islamic law wills (wasiyyah).

I. INTRODUCTION

The question whether or not a Muslim can make a will has been very controversial in Nigeria. The controversy came to the fore in the case of Yunusa v Adesubokan. In this case, a Yoruba Muslim from Omu-Aran in Kwara State in the southern part of the Northern Nigeria made a will under the Wills Act 1837 which applied there at that time as a statute of general application. Under the Will, the testator bequeathed only £5 to his son (the plaintiff) while he shared his three houses between his two other sons from another marriage with each taking a house worth £350 each and sharing a joint and equal interest in the third. These bequeaths are inconsistent to the laws of inheritance under Islamic law. The trial court Bello J (as he then was) set aside the will on the ground that since Islamic law was the personal law of the testator, the testator had no power to dispose of his estate in a manner inconsistent with Islamic law. However, this decision was

2 (1968) NNLR 97. See also Mahmood, as above pp. 15 – 23.
upturned by the Supreme Court which held that any person can make will under the Wills Act and that in any case of inconsistent between a customary law (in this case Islamic law) and a statute, the statute prevails.³

The case attracted a barrage of comments⁴ and sent ripples that went beyond estates of Muslims. Persons subject to customary law became apprehensive of the implications of the case on them. As a result, there were amendments of the Wills Act at the Federal level and various Wills laws operating at State levels. All the amendments, though differently worded made the Wills Act and Wills laws subject to customary and Islamic law.⁵ The implications of the amendments have been considered by the Supreme Court in many cases in relation to customary law and in particular with regard to the Bini custom by which a person’s principal place (Igiogbe) automatically devolves on the eldest surviving son. The Supreme Court upheld the amendments in all the appeals brought before it;⁶ even where the testator expressly declared thus:

I DECLARE that .... It is my will that nobody shall modify or vary this Will. It is my will that the native law and custom of Benin shall not apply to alter or modify this my will.⁷

The case of Ajibaiye v Ajibaiye⁸ which forms the focus of this paper is the first reported case on the effect of the amended Wills Law on Islamic law. The facts of the case are that one Alhaji Disu Ajibaiye made a will under the Wills Law of Kwara State. Only the third and youngest wife of the deceased (the defendant/appellant in the case) had any knowledge of the Will.⁹ In the Will, he gave this direction:

I also direct and want my estate to be shared in accordance with the English Law and as contained in this Will having chosen English Law to guide my transactions and affairs in my life time notwithstanding the fact that I am a Muslim.¹⁰

The Testator also directed as follows:

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³ (1971) NNLR 77.
⁷ Lawal-Osula and ors v Lawal-Osula and ors (1995) 10 SCNJ 84, 89.
⁸ (2007) ALL FWLR (Pt. 359) 1321.
⁹ As above p. 1329 and Dadem, infra, note 15, 54.
¹⁰ As above, 1330-1331.
My burial should be done in accordance with Muslim rites without drinking of alcohol either on the date of my death, burial or the 8 days prayer.\textsuperscript{11}

The will was contested at the High Court on the ground that the testator being a Muslim to whom Islamic personal law applies cannot make a will under the Wills law. The plaintiffs relied on section 4 (1) of the Wills Law of Kwara State which states thus:

\begin{quote}
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.\textsuperscript{12}
\end{quote}

The plaintiffs argued that the proviso stated in the sub-section prohibited Muslims from making wills under the Wills law. The trial High Court agreed with this contention and held that the will is invalid null and void having regard to section 4 (1) of the Wills Law of Kwara State. This decision was upheld on appeal to the Court of Appeal.\textsuperscript{13}

It is these judgments that provoked the reaction of Y.Y.D. Dadem\textsuperscript{14} in a well-written article titled \textquotedblleft Can a Person subject To Islamic Law on Make a Will in Nigeria? Ajibaiye v Ajibaiye Reviewed\textquotedblright.\textsuperscript{15} Dadem finds three major problems with the judgment. Firstly, he thinks that there is a difference between a Moslem\textsuperscript{15} and a person subject to Islamic law\textsuperscript{15} and that a Muslim should have an option in the application of Islamic law as a his or her personal law. Secondly, he thinks that a non-Muslim should if he so wishes, be able to adopt Islamic law as his personal law. Thirdly, he believes that the judgement prohibited persons subject to Islamic law from making a will. This no doubt is a frightening scenario. Fortunately, Dadem\textsuperscript{15}'s conclusions are not incorrect because his arguments are based on premises which as we shall demonstrate below have no basis in reality. This paper looks at these three issues raised by Dadem and clarifies the place of wills under Islamic law.

\begin{footnotes}
11 Clause 6 of the Will as above at p. 1341.
12 Section 4 (1) (b) of the Kwara State Wills Law, Cap. 168 Laws of Kwara State 1991.
14 Y.Y.D. Dadem, Senior Lecturer, Nigerian Law School, Kano Campus Email: yusufdadem@yahoo.com
\end{footnotes}
II. CAN A MUSLIM OPT OUT OF ISLAMIC LAW?: THE SPURIOUS DISTINCTION BETWEEN A ‘MUSLIM’ AND ‘A PERSON SUBJECT TO ISLAMIC LAW’

Dadem sees a distinction between a Muslim and the expression used in the Wills Law that is a person subject to Islamic law. He argued thus:

Even though the Court of Appeal held that it is Muslims, as opposed to the adherents of other religions that are subject to Islamic Law that is begging the issue; since it seems that the word subject to implies some form of active observance and subservience to Islamic law, rather than Muslim which is automatic by implication.16

The problem here is that Dadem did not take into account a fundamental principle relating to jurisdiction of Islamic law and Islamic law courts, that is, Islamic law is essentially a religion-based law which is applicable only to Muslims. Even, in the Nigerian context where only an emasculated Islamic law is applied, Islamic law is still the personal law of all Muslims. No Muslim can opt out of Islamic law so long as he or she professes Islam. According to Oredola:

Islamic law of inheritance is intrinsically conjoined to the basic values and ideals of Islam. It forms an inalienable aspect of Islam to which all Muslims must abide and comply with in a steadfast manner. Doing otherwise is to run the risk of ceasing to be a Muslim. It behoves Muslims not to engage in pointless exercise which transgresses the stipulated bounds of Allah. It is also incumbent on Muslims not to treat Allah’s injunctions with disdain and to regulate all aspects of their lives in accordance with the dictates of Islam. The Qur’an demands that: O ye who believe, enter into Islam wholehearted (completely).17

Dadem did not avert his mind to the imperative nature of Islamic law in the lives of Muslims and that was why he asked:

Again, isn’t it possible for a person to say he is Muslim, but refuse to subject himself to Islamic law? What if a person had actively subjected himself to Islamic, Customary, and even Christian practices while he lived as in the case of Lawal Osula v Lawal Osula, which would apply?18

Dadem was unhappy that the court did not consider as decisive the various evidences the allegations that the testator contrary to Islamic injunctions drank

16 As above, 56 ï 57.
17 Oredola, note 1, 19 ï 20.
18 Note 15, 57.
alcohol and had children out of wedlock - that ‘showed’ that the testator (because of his lifestyle), couldn’t have been subject to Islamic law. It is likely that Dadem is haunted by the ghosts of colonial decisions such as Mariyama v Sadiku Ejo, where the court in refusing to apply Islamic law to the parties even though they are all Muslims and the matter is one within the ambit of personal law, applied the ‘intention’ or ‘manner of life’ test thus:

From their conduct throughout and from the way parties both speak now it is clear that they consider themselves bound by Igbirra native law and custom in this matter, and not by Muslim law.

What the court was saying in essence is that Islamic law would only apply to ‘strict’ Muslims. This decision was widely criticized by Muslim scholars who see it as part of the colonial subterfuge against Islamic law. Another such decision is Apatira v Akanke where the court refused to apply Islamic law to the estate of a Yoruba Muslim who had made a will couched in the common law form. In the will, the testator devised part of his estate in a manner consistent with Islamic law. The court after setting aside the will for lack of compliance with the formalities of will-making declined to apply Islamic law but opted for English law. The court reasoned as follows:

The Will reads as if it was intended to be a will made in accordance with English law. Moreover, the fact that it makes legacies to his heirs (as they would be in Mohammed law) and disposes of all his property, contrary to Mohammedan law, also suggests that it was intended to be made according to English law to enable him to do so.

The colonial courts tried all they could to ensure that Islamic law was not applied to the estates of Muslims. Yoruba Muslims were particularly victims in this regard. The result is that some scholars think that customary law and not Islamic

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19 As above, 54 ff 55.
20 (1959) NNLR 81.
21 As above 82.
23 (1944) 8 WACA 39.
law apply as the personal law of Yoruba Muslims. Of course, the days of colonialism have passed. The law in Nigeria today is that a Muslim is subject to Islamic personal law so long as he or she professes Islam even if he or she is not diligent in following some of the injunctions of the religion.

The Kwara State Sharia Court of Appeal while holding that Islamic law is the personal law of the Muslims parties from Offa remarked thus:

The point needs to be made that a Muslim and as long as he or she professes Islam, has no option or choice regarding the application of Islamic law – personal or otherwise onto his person. Having voluntarily assumed the status of a Muslim, he or she is disentitled from accepting or rejecting according to his whims and caprices. He cannot back out therefrom and he must not allow anybody to either encourage or discourage him therefrom. There cannot be a superimposition or juxtaposition of customary law over Islamic law. It cannot be done. It is never done.

The point needs to be made here too that Islam does not allow a Muslim to opt out of Islam once he or she have voluntarily made the decision to be a Muslim. However, this may not be applicable in Nigeria now that the fundamental rights provisions of the constitution include the right to change religion as part of the right to freedom of religion.

Non-Muslims in Nigeria are too frequently guilty of interfering in matters regarding Islamic law which neither affect them nor should concern them. The worst of this attitude is their concern to force Muslims from Islamic law. This attitude was more apparent during the 1976, 1988 and 1995 constitutional debates in relation to the jurisdiction of the Sharia Court of Appeal. The attitude was also repeated during the post 1999 revival of Islamic law in some parts of northern Nigeria. A classic example of this is the Guardian newspaper editorial which expressed the anxiety that given the "nebulous" and "wide scope" of the jurisdiction of the Sharia

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26 It was argued in Yunusa v Adesobakan, that Lagos Yoruba do not follow Moslem law see Mahmood, op cit, p. 18. Ijaodola too says that: "It is common knowledge that the Yoruba people always look on their tribal laws as their personal law irrespective of their religious beliefs; nothing could be more astonishing to an Offa [Yoruba] man or woman than to be told that by professing the Moslem faith he or she had opted to be bound by Islamic law even in only areas of his or her secular life" J. O. Ijaodola, “The Proper Place of Islamic Law in Nigeria” 1969 Nigerian Law Journal, 129 at 130. See also S E Mosugu, “Moslem Wills and the Courts in Nigeria” 1972 Nigerian Journal of Contemporary Law, 105 at 117 and 121 - 122.
27 Shittu v Shittu (1998) Annual Report Sharia Court of Appeal (Kwara State) 93 at p. 98 (per Oredola, K as he then was).
Court of Appeal as framed in the defunct 1995 Constitution there was a potential of abuse of forum because the jurisdiction was too broad as to rope in a party who though a Moslem, entered into dealing on the basis of common law. This patronizing attitude denies the validity and authenticity of the Islamic faith and treats Islamic law as a sham; an oppressive, barbaric and outmoded law. This attitude is an unwarranted intrusion into the sacred precincts of freedom of religion and an affront to Muslims.

III. CAN A NON-MUSLIM MAKE A WILL TO WHICH ISLAMIC LAW IS APPLICABLE?

Here again, Dadem overlooked the principle of Islamic law which states that Islamic law is for Muslims only. Islamic law is not interested in dragging non-Muslims within its jurisdiction. Non-Muslims in Islamic jurisdictions are entitled to continue to apply their own personal laws. Islamic law even goes beyond this; it allows non-Muslims social, judicial and cultural autonomy. Non-Muslims in pre-colonial Sokoto caliphate enjoyed this right fully. This stance of Islamic law is more superior to that of the common law which drags everyone willy-nilly under its jurisdiction. It is the ignorance of all these that led Dadem to ask:

Is it not possible that one may not be a Muslim, but choose or elect to subject himself to Islamic law or an aspect of Islamic law? The Zamfara State Sharia Courts Establishment Law, No. 5 of 1999, contemplates such possibility. It provides that: The Sharia Courts shall have jurisdiction and power over the following- (a) All persons professing the Islamic faith; and (b) Any other person(s) who do not profess the Islamic faith, but who voluntarily consents to the exercise of the jurisdiction of the Sharia Courts under this law.

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31 See Matters for the New Constitution The Guardian, Thursday January 21, 1999, p. 16. Sections 266 and 281 of the 1995 Constitution complained of merely gave the Sharia Court of Appeal jurisdiction in civil proceedings involving question of Islamic Law where all the parties are Moslems.
32 The Quran says: I worship that which you worship, nor will you worship that which I worship, and I shall not worship that which you are worshipping, nor will you worship that which I worship. To you is your religion, and to me my religion 109: 1 - 6. And say: The truth is from your Lord. Then whosoever wills, let him believe: and whosoever wills, let him disbelieve. 2: 29 and There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path 2: 256.
35 Dadem, note 15, 57.
Here, Dadem confuses Islamic law as personal law with a person subjecting himself to the jurisdiction of an Islamic court. When a non-Muslim subjects himself to the jurisdiction of an Islamic court, Islamic law would not necessarily apply to him unless he so wishes. The normal thing for the Islamic court to do is to note that he is not subject to Islamic law and to proceed to ascertain the law that applies to him. Thus, a person subject to the jurisdiction of Islamic courts is not necessarily subject to Islamic law. The distinction attempted by Dadem is spurious.

IV. DOES THE DECISION CLOSE THE DOOR TO MUSLIMS MAKING WILLS?

Dadem is apprehensive that the decision in Ajibaye may close the door to Muslims making wills. He argues that:

é. These canons of interpretation have been highlighted to adumbrate the view that Islamic law does not totally ban a person subject to it to make a Will. It only permits a Testator to freely dispose of one third of his estate to persons who are not his lawfully prescribed heirs. The two thirds must go to persons which Islamic law had prescribed. This explains the obiter of Coomasie JCA in Ajibaye that a Muslim is allowed to give out, in a Will, not more than one third of the whole property. This predetermined prescription of disposition of the estate of a person subject to Islamic law, is the true legislative purpose of section 4 (1) (b) of the Wills Law of Kwara State. The design and legislative purpose was meant to cure the mischief in the unfettered right to dispose of property which the Wills Act of 1837 granted and was sanctioned in the case of Adesubokun v Yunusa.

He therefore suggested that section 4 (1) of the Wills Law be redrafted as follows:

It shall be lawful for every person to bequeath or dispose 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 where it is the will of a person who immediately before his death was subject to Islamic Law, he shall comply with the requirements of Islamic law in making his bequest or disposition.

He believes that

Were the restriction redrafted in the manner suggested, the interest of a person subject to Islamic law who wishes to dispose part of his

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36 See note 34.
37 As above.
38 Dadem, note 59.
39 As above 60.
property (let's say one third) in a manner he desires and the demands of Islamic law in that regard would be harmonized.  

The point raised by Dadem here is very important and crucial to Muslim, if such is really the case. Fortunately, Dadem is only partially correct. The Wills Law as the Court of Appeal rightly surmised excluded Muslims from making wills under that law. However, the crucial point which Dadem overlooked is that Islamic law has its own laws relating to Wills. This law is what section 4 (1) of the Wills Law of Kwara State which was in issue in Ajibaye contemplates when it refers to the provisions of this law shall not apply to the will of a person who immediately before his death was subject to Islamic Law and it is on these Wills that the Constitution confers jurisdiction on the Sharia Court of Appeal. Any legally competent Muslim (Mukallaf) can make a will under Islamic law if he or she so wishes. It is obvious that Dadem did not for a moment contemplate this possibility. Dadem had all the materials but was misled here by a lack of understanding of Islamic law relating to wills. Wasiyyah refers to wills under Islamic law but Dadem sees it only as a 'doctrine'. He pointed out correctly and as rightly asserted in Ajibaye that a Muslim can only dispose a third of his estate by will but he was unable to put this in its proper perspective. The correct position as regards making of wills by Muslims in Nigeria is that a Muslim cannot make any will under the Wills Law but can only do so under Islamic law. It is necessary to state here that the law here contemplates the two types of wills namely; statutory wills under the Wills Law and Islamic wills under Islamic law, as two separate and distinct types of wills. What Dadem apparently wants is for Muslims to be able to make statutory wills but the law only contemplates that they make wills under Islamic law. There is no reason to permit a Muslim to make statutory wills in a country where Islamic law is in existence. This is because statutory wills and wasiyyah are premised on different worldviews and value systems and are governed by very different rules. Dadem's anxiety is only applicable to Muslims living in countries where Islamic law of inheritance is not recognized. Islamic scholars advise such Muslims to make wills in the form recognized and bequeath their properties according to Islamic law and/or specify in the will that they want their estate to be distributed according to Islamic law; otherwise non-Islamic laws would apply to their estates. Again, there is no basis for a non-Muslim making wills under Islamic law. A non-Muslim in this context can only make a will under the Wills Law as the want of faith completely deprives him of the legal capacity to make an Islamic law will. Of course, he can as testator under the Wills law adopt Islamic law of inheritance to govern his estate but here,

40 As above.
41 Sections 262 (2) (c) and 277 (2) (c) of the 1999 Constitution provide that the Sharia Court of Appeal shall be competent to decide any question of Islamic personal law regarding a wakf, gift, will, or succession where the endower, donor, testator or deceased is a Muslim.  
42 As above. 59. See also note 35  
43 See more details infra.  
44 Al-Jibaly, infra note 45 99.
the Islamic law of inheritance is applying not as Islamic law *stricto sensu* but as the testator’s choice.

### V. WASIYYAH: WILLS UNDER ISLAMIC LAW

Under Islamic law, inheritance (*Mirath*) 45 and wills (*Wasiyyah*) are two different legal matters which unlike under the common law do not mean or imply the same thing. A Muslim cannot properly speaking die intestate because there is a law relating to inheritance (and a law that he cannot vary) which becomes automatically applicable to his estate when he dies. 46 This law of inheritance has identified in each circumstance, the heirs and their portions but gives the testator a limited power to dispose of some of his properties by will.

The law relating to Wills (*wasiyyah*) is governed by copious and detailed legal rules. 47 Literally, *wasiyyah* means ṭcommand, instruct, or obligation. It derives from ṭwassā which means ṭcommand ṭor ṭinstruct 48 Technically, in Islamic law, *wasiyyah* is a set of instructions given by a person to individuals whom he expects to survive him. 49

Every Muslim who has properties is encouraged to make a *wasiyyah*. It is a religious obligation. The Quran puts it thus:

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46 Orire, as above, 251.


48 Doi, note 45, p. 328 and Al-Jibaly, note 45, p. 93. Al-Jibaly gives vivid illustrations of the use of the word *wasiyyah* in the *Qur‘ān* which was used by Allah SWT to command mankind to fear and obey Him: 4:131; to instruct us to be kind and dutiful to parents: 29: 8, 46: 15, and 31:14; to convey to us lists of His prohibitions: 6:151; and generally to give other commands see variously 6:151 i 3, 4:12 and 103:1 i 3, as above, 93 i 95.

49 As above, 96.
It is prescribed for you, when death approaches any of you, if he leaves wealth, that he makes a bequest to parents and next of kin, according to reasonable manners. This is a duty upon the pious/God-fearing.\(^{50}\)

A Prophetic saying (hadith) fortifies this thus:

It is not proper for a Muslim who has something to bequeath to sleep two consecutive nights without having his will written with him.\(^{51}\)

There is spiritual reward for making a wasiyyah but there is no punishment if one omits to make one.\(^{52}\) However, it is incumbent on one who owes a debt; one who is entrusted with something by another person; or whom others have a right upon which he has not discharged, to make a wasiyyah. The reason for this is that if he dies without discharging those obligations and they are not discharged by his heirs he runs the risk of accounting for the obligations on the Day of Judgment.\(^{53}\) Wealthy persons whose heirs are also wealthy are encouraged to bequest a third (or less) of their estate to their relatives who are not entitled to inherit from their estates or to any other worthy cause in order to seek the good pleasure of Allah (SWT).\(^{54}\)

It is forbidden for a Muslim to make deliberately a wasiyyah which violates the principles of Islamic law. One reason for this according to al-Jibaly is that inheritance portions have been ordained by Allah (SWT) and a person cannot challenge this by proposing alternative shares that seem more reasonable to him thereby imposing his limited knowledge and experience over the unbounded knowledge and wisdom of Allah (SWT).\(^{55}\) Another reason is that it is prohibited for one to be unjust. The duty to be fair and just is so wide and onerous so much so that one must not allow enmity to a person to prevent one from acting in a just manner with that person.\(^{56}\) Thus, even if one is dissatisfied with a legal heir, one should not deprive him or her of his or her legal share in one’s estate. In any case, there is divine punishment for Muslims who violates the Islamic laws of inheritance. The Qur’an says:

\(^{50}\) Quran 2:180. Scholars are agreed on the fact that bequeaths in favor of parents have been abrogated by the subsequent verses which stated the legal portions of parents in inheritance since there is no bequest in favor of heirs. They also agree that the aspect dealing with next of kin is still in force: Doi, as above, 331 ́ 333.


\(^{52}\) Al-Jazairy, note 45, 596.

\(^{53}\) As above.

\(^{54}\) As above.

\(^{55}\) Al-Jibaly, note 45, 105.

\(^{56}\) The Qur’an says: "O you who believe, stand out firm for Allah, and be just witnesses. Do not let the enmity and hatred of others prevent you from being just. Be just; that is nearer to piety. And revere Allah: indeed Allah is well-acquainted with what you do." Qur’an 5:8.
And whosoever disobeys Allah (SWT) and His Messenger (SAW) and transgresses His limits [in respect of inheritance], He will cast him into the Fire, to abide therein; and he shall have a disgraceful punishment.\(^\text{57}\)

Orire spoke the minds of practising Muslims when he said after citing this verse,:  

Therefore, when one sees nowadays a Muslim distributing his wealth through ‘will-making’ based on common law without any regards to such [Islamic] regulations; one is taken aback and feels sorry for such people.\(^\text{58}\)

*Wasiyyah* has a very wide scope. It includes Islamic instructions and admonishments, monetary distributions, and assignment of rights.\(^\text{59}\) It can be used to command the discharge of a trust (*amanah*) reposed in one.\(^\text{60}\) *Wasiyyah* is particularly useful or even necessary in the case of a non-Muslim spouse of a Muslim man. Under Islamic law, a Muslim may marry a Christian wife but such wife cannot inherit from his estate because the rule is that a non-Muslim cannot inherit from a Muslim and a Muslim cannot inherit from a non-Muslim.\(^\text{61}\) It is recommended in such instance that a *wasiyyah* is made in her favor.\(^\text{62}\)

Although both statutory wills and *wasiyyah* take effect after death, there are so many differences between both. Under statutory law, a testator can dispose of *all* his property by will but under Islamic law, as pointed out above, he cannot dispose of more than a third of his estate by will. However, he may do so if his heirs consent to it. He cannot also bequeath to any of the persons who are by law his heirs. Again, he may do this subject to the consent of the other heirs. What happens in cases where the consent of heirs is required and some of the heirs consent and others withhold their consent? Islamic law has detailed rules to deal which such situations.\(^\text{63}\)

Under the Wills Law, a testator has unlimited power to bequeath all of his properties in any manner he wants. This can, and often, does give raise to all sorts of manipulations of the testator by potential beneficiaries. It is a rather common scenario among the wealthy in the West for a testator to cut off completely his

\(^{57}\) Qurān 4:14.  
\(^{58}\) Orire, note 45, 253.  
\(^{59}\) As above.  
\(^{60}\) Ambali, note 45, 295.  
\(^{61}\) "Usama b. Zaid reported that Allah’s Messenger (May peace be upon him) as saying: A Muslim is not entitled to inherit from a non-Muslim and a non-Muslim is not entitled to inherit from a Muslim": *Imam Muslim*, note 45, Vol. III, *Kitab al-Faraid*, Hadith No. 3928 852.  
\(^{63}\) See the in-depth examination of this issue in Idris Sani Idris, *Limits to Testamentary Power under Islamic Law* 23 (2000) *Journal of Islamic and Comparative Law* 58 ţ 68.
children and bequeath all his properties to a second, third or fourth wife. A testator can, if he so desire, be partial in his bequests to his children as was done in Adesobukan’s case, the law will give effect to his wishes. It is not so in relation to wasiyyah as Islamic law will not give effect to unjust bequests. Apart from the fact that a wasiyyah cannot be made in favour of a legal heir, the authorities (government), the estate’s administrators, or the deceased relatives can vary the terms of a wasiyyah if they perceive injustice in it. Thus, the situation in Adesobukan’s case would not under any circumstances be permitted under Islamic law. Rather, the three sons will be reconciled and the estate divided among them in the portions to which they are entitled to under the law.

Whilst the morality or otherwise of the contents of wills is largely irrelevant in statutory wills, it is important in wasiyyah. Under Islamic law, a bequest can only be made for legal and legitimate (halal) purposes. Thus, a bequest in favour of a mistress, concubine, or illegitimate child or made for any other forbidden (haram) purposes will be set aside.

Unlike the common law which has strict formal requirements in respect of wills, the requirements of wasiyyah under Islamic law are less cumbersome and technical. Wasiyyah can be in any form. It can be oral or written provided that the intentions of the maker are manifestly clear and reasonably ascertainable. However, the written form is preferable. Some basic elements of what a written wasiyyah should contain have evolved over time but these are not legally compulsory. Whatever the form of the wasiyyah, it requires proof by two witnesses if the wasiyyah is disputed by some of the heirs or if fraud is suspected.

Given these fundamental differences between statutory wills and wasiyyah, it is not desirable to use the word “testator” and its derivatives in connection with wasiyyah, rather the Arabic technical term al-Musi should be used to avoid unnecessary confusion.

65 Al-Jibaly, note 45, 110.
66 The Qur’an says: “If one has the reason to fear that the testator has committed an unjust act or a deliberate wrong, and thereupon brings about a settlement among them (the heirs), he incurs no sin by that. Indeed, Allah is Forgiving and Merciful” Qur’an 2:182.
67 Oredola, note 5, 18 i 19.
69 Jimeta and Mafa, note 24 155.
70 As above.
71 See the various forms in Al-Jibaly, note 45 119 i 136 and Orire, note 45 267 i 274.
73 Doi, note 45 330.
Wasiyyah is frequently used in Nigeria. A more common wasiyyah is the instruction for the preservation of the dwelling place of the al-Musi as family property or as a point of common property of all the heirs. There are several reasons why wasiyyah is not widely known among legal practitioners in the country. The major reason is that legal education in Nigeria is grossly deficient when it comes to Islamic law. Apart from the few who underwent the combined common and Islamic law degree for the rest Islamic law is largely an unknown law. Another reason is that the wasiyyah as we have pointed out above could be in an oral form and even when written, it could be in an informal form, thus, the drafting skills of legal practitioners may not be needed. Another reason for the relative obscurity of wasiyyah in legal circles in the country is that a wasiyyah is not admitted into probate in the manner of statutory wills. Rather, it is administered privately outside the official legal system. The few cases that trickled into the courts rarely proceed beyond the area courts. Apart from the fact that until recently (1986) legal practitioners do not appear in these courts, the judgments of these courts being lower courts are not reported in the law reports.

VI CONCLUSION

The decision in Ajibaiye v Ajibaiye interpreted correctly section 4 (1) of the Wills Law of Kwara State. Dadem’s arguments amount in essence to a call to return to the position before the amendment of the Wills laws. The various Wills Laws in the country are the result of serious deliberations on the incongruous results of Yunusa v Adesobokan (supra). The current position is satisfactory to Muslims in the country. There is no need to take the country back to the pre-Adesobukan situation.

It is very important to understand that the whole law of inheritance in Islamic law is one of the limits prescribed by Allah (SWT) for Muslims. The matter is an integral part of the Islamic faith. Anyone who forces Muslims to act otherwise tampers with the religion in a manner that is unacceptable.

Dadem’s paper illustrates the danger of dabbling into matters relating to Islamic law without some working knowledge of that law. Many have warned of this danger. It is more so in the Nigerian context where religion is a volatile and emotional issue. It is also necessary to point out here again the unnecessarily concern of non-Muslims in matters of Islamic law when that law does not apply to

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74 Although this wasiyyah is commonly made, some have disputed its legality under Islamic law, see U. S. Abbo Jimeta and U. M. Mafa, "The Tradition of Reservation of Property for Heir’s Common Use in Nigeria: The Islamic Perspective" (2004) University of Maiduguru Law Journal 61.
76 Oba, "Lawyers, Legal Education and Shari’ah Courts in Nigeria" as above 127 i 128.
77 See note 57.
78 As above 145 - 146 and 152, and Ambali, note 45 21.
them forcefully or otherwise under any guise. Of course, concern is justified in matters of relating to national co-existence. It is difficult to understand or perceive the *locus standi* of a non-Muslim in the personal law of Muslims. The three dominant religions in Nigeria have fences high enough to shut out non-adherents. It will be much conducive to national unity and peaceful co-existence if these fences are respected by all.\(^79\)