The Legal Rules of a Will or Wasiyyah under the Shar'iah

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Abstract

This paper examines the legal rules of a will or wasiyyah under the shar'iah or Islamic law. The paper addresses this issue by digressing to the jahiliyyah period[1] when Arabs used to dispose of their property as they liked as no law concerning bequest or inheritance existed then. The paper then discusses the meaning and place of will under the shar'iah, the conditions or principles of will under the shar'iah, will and marriages contracted by muslims under the Marriage Act, the rule of law on wasiyyah in the Holy Quran and the hadith or tradition of the Prophet, executors of wasiyyah, revocation of will or wasiyyah as well as the summary opinions of the jurists on will or wasiyyah. The study concluded by asserting that the Islamic law in respect of will has been handed down by the Almighty Allah Himself in the Holy Quran. This has been clarified by the Holy Prophet in his hadith or sunnah .

Introduction

Will can simply be defined as a legal declaration in which a person states how his or her property is to be disposed of after his or her death.[2] It is a testamentary and revocable document voluntarily made, executed and witnessed according to law by a testator with sound disposing mind wherein he disposes of his property subject to any limitation imposed by law and wherein he gives such other directives as he may deem fit to his personal representatives otherwise known as his executors, who administer his estate in accordance with thewishes manifested in the will.[3] In the *Jahiliyyah* period[4], Arabs used to dispose of their property as they liked as no law concerning bequest or inheritance existed. They could make bequest in favour of any one, depriving their own parents, children and wives.[5] At times, the bequest was made in favour of the rich and influential members of the clan[6]. *Wasiyyah* or will in pre-Islamic days was as contained in the English Wills Act, 1837, where all property could be disposed of by will. However, to remove the injustice of a man to himself and to his heirs as represented by *Timothy Tanloju Adesubokun v. Rasaki Yunusa*[7] Islamic law gives each heir specific fraction of the estate and pegs the right of the testator to make a will to one-third of the estate.[8] In *Timothy Tanloju Adesubokan v. Razaki Yunusa*, the plaintiff sued the defendant in the High Court of the then North-central state holden at Kaduna. The plaintiff`s claim against the Defendant was for " a declaration that the probate dated 29/6/66 granted to the Defendant in the matter of Yunusa Atanda Saibu (deceased) be revoked as the said Yunusa Atanda Saidu was a Moslem, died as a Moslem and left heirs and wives who are all Moslems". The defendant was the sole executor of the said Yunusa Atanda Saidu.

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[1] This was the period before Islam
[2] Websiters New Encyclopedic Dictionary p. 1192
[3] Kole Abayomi: Wills: Law and Practice, Lagos, 2004, Mbeyi & Associates (Nig) Ltd. P.6
[4] This was the period before Islam
[5] Abdur Rahaman I, Doi*Shari`ah*the Islamic Law, London. Ta-Ha Publishers, 1984, p328
[6] Ibid
[7] (1971) 1 ALL N.L.R. 225.
[8] M.A. Ambali, The Practice of Muslim Family Law in Nigeria, 2nd Edition, Zaria, Tamaza Publishing Compay Limited, 2003, p298

The plaintiff further urged the Court to allow the estate of the deceased to be distributed according to Muslim Law. This would be in contradistinction to the will (exhibit 1 in the case) in which the testator made some bequests to one of his sons and devised his property to two others. This the testator was entitled to do under section 3 of the Wills Act 1837. The trial judge felt that the distribution to his sons should be under *Maliki* Moslem Law which favours equal distribution. This clearly violated the provisions of the Wills Act 1837, particularly section 3 under which a testator can dispose of his properties, real and personal, as he pleases. The learned trial judge, Bello J. (as he then was) in his considered judgment held that:

a. a Moslem of Northern State of Nigeria is entitled to make a will under the Wills Act, 1837 but he has no right to deprive by that will any of his heirs, who are entitled to share his estate under the Moslem law, of any of their respective shares granted to them by Moslem law.
b. in case of a will of moveable, the testator must comply with his personal law, that is the native law and custom of his particular locality, unless such personal law is repugnant to natural justice, equity and good conscience or incompatible with any law for the time being in force which does not deprive any person of the benefit of the personal law of the testator; and
c. where the testator is a native within the meaning of the Land Tenure Law and the will concerns immovable situated in the Northern States of Nigeria, the testator must comply with the native law and custom, relating to devolution, of the place where the land is situated."

The Defendant /Respondent appealed against this judgment to the Supreme Court. The Supreme Court, Pa Ademola C.J.N. (delivering the lead judgment) allowed the appeal, and set aside the judgment of the learned trial judge. The Court then ordered that the Plaintiff/Respondent`s caim be dismissed. Before the distribution of the estate of the deceased among the heirs it is required by Qur`anic injunctions first to settle the claims of debts and other rights of Allah, and His Servants on the deceased as well as the will that he has left behind. Against this background the Holy Qur`an provides and emphasizes. The distribution in all cases is after the payment of legacies and debt.[9] Although the Qur`an mentions Wasiyyah before the claims, all the companions and Muslim jurists agree on the view that the debts attached to the specific or to a specific part of the estate like mortgage (rahn), Zakat of crops and the Zakat on animals should be settled first. The Maliki School also shares the same view. Other jurists are not concerned with the Zakat until after the other claim on the dead person is settled[10].

The meaning and the place of will under the Islamic law

Will or *Wasiyyah* under the Islamic law is the right of a person or individual to give away or bequest not more than one-third (1/3) of his property to another person or group of people or for the use of the general public[11]. In *Mrs. Adamo ajibaiye vs. Risikat Ajibaiye* & 6ORS[12], the 1st to 5th Respondents were the children of one late Alhaji Disu Ajibaiye who died on 29th January, 2004. He had 3 wives and 21 children and lived and died as a Muslim. The appellant was the youngest wife of the deceased. Upon the death of the deceased, a will purportedly made by the deceased surfaced. The will dated 30th September, 2002 was made under the English Wills Act of 1837. The appellant alone had information of the will as at the time of deceased's death. The 1st to 5th respondents challenged the validity of the will when they found that it was not made in accordance with Islamic injunction under which their father was obliged to make a will. The trial Court held that the will was null and void especially in the light of the existence of the Kwara State Wills Law Cap. 168 which abolished the English Will Act of 1837. Dissatisfied with the judgment of the trial Court, the appellant appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal, Ilorin inter alia held that the properties of a deceased Muslim after his death shall be subjected to the dictates of Islamic Law of inheritance which does not allow a Moslem to dispose of his properties anyhow. A Moslem is allowed only to give out, in a will, not more than one-third (1/3) of the whole property. The properties must be distributed strictly in accordance with Islamic law after the lawful heirs are identified. The judgment of the Court of Appeal in Ajibaiye`s case has been criticized by Y.Y.D.Dadem[13]. According to him the Court of Appeal failed to distinguish between "a muslim" and "a person subject to Islamic Law".

[9] *Qur`an* 4:11
[10] Abdur Rahman I.Doi, op cit p390
[11] Isa Adeniyi and Muhammad Jamiu, Inheritance and Will in Islam,p12
[12] (2007) All FWLR (part 359) p.1321 at 1324
[13] See Y.Y.D. Dadem, "Can a Person Subject to Islamic Law Make a Will in Nigeria" 2008, Review of Nigerian Law and Practice Volume 2(i) pp56-57.

The Court had held that: It is Muslims, as opposed to the adherents of other religion that are subject to Islamic Law.[14] Dadem cited the Zamfara State Shari`ah Courts Establishment Law, N0. 5 of 1999 particularly section 5(ii) and the Zamfara state Shari`ah Penal Code Law no. 10 of 2000 particularly section 3. Section 5(ii) of the Zamfara State Shari`ah Courts Establishment Law No5 of 1999 provides that: The Shari`ah Courts shall . . . . have jurisdiction and power over the following-

(a) All persons professing the Islamic faith and
(b) Any other persons who do not profess the Islamic faith, but who voluntarily consents to the exercise of the jurisdiction of the Shari`ah Courts under this Law.

Section 3 of Zamfara State Shari`ah Penal Code Law No10 of 2000 also applies Sharia Law to "persons who profess the Islamic faith and every other person who voluntarily consent to the exercise of jurisdiction of any of the Shari`ah Courts". Dadem then concluded that the Court of Appeal was wrong by failing to distinguish between a Muslim and a person subject to Islamic law.[15] However, with due regard to the learned scholar, it must be emphasized that the judgment of the Court of Appeal did not go against the scale of justice as there were cogent, compellable and valuable evidence that the testator in that case lived and died as a Muslim. He also subjected himself to Islamic Law to the extent that he directed that his burial should be done "in accordance with Muslim rites without drinking of alcohol either on the date of my death, burial or the 8 day prayer."To reiterate, a will is bequest made by a person for part of his wealth to be given, after his death to a person or institution. Wasiyyah or will is a gift which may be in form of cash, claim of debt or any other benefit in which the transfer of the right from the benefactor to the beneficiary becomes effective only after the death of benefactor[16]. Wasiyyah comes from the Arabic word "wasa" which means "he conveyed". Wasiyyah or will therefore means a gift of property by its owner to another contingent on the giver's death[17]. Will or Wasiyyah covers any instructions by a person that certain obligations in respect of certain outstanding duties against him, which he did not carry out before he died be fulfilled. It may be an order that a debt he owned be paid to his creditors or the Zakat outstanding against his wealth be deduced from his estate. It may be that a property entrusted to him be handed over to the rightful owner or a portion of the property he left behind be utilized for charitable deeds in favour of an individual or organization[18] The place of Wasiyyah or will under the Islamic law cannot be over-emphasized. Will is distinguished from hibah, that is, gift, in that the transfer or the control as well as the benefit of hibah takes place during the lifetime of the benefactor while that of Wasiyyah or will takes effect only after his death[19]. The Wasiyyah or will is from the divine book of Allah (Holy Qur`an) and the sunnah. The legal Qur`anic injunction in respect of bequest or will was revealed in Surah al-Baqarah[20] where the Almighty God declares: It is prescribed for you when death comes to any of you, if he leaves abundant wealth that he makes a will.[21] The implication of these verses is that it is the responsibility of the pious and God fearing persons to leave Wasiyyah behind. However, these verses were revealed when no law was yet fixed in the matter of inheritance. Later, in Surah al-Nisa a complete guidance was given to Muslims concerning inheritance and fixed portions for each heir[22] The Islamic law in respect of inheritance and will is further classified by the Holy Prophet in his many hadith. It therefore has references in the Sunnah of the prophet. Ibn Umar reported that the messenger of God[23], peace and blessings of Allah be on him, said that: It is not right for a Muslim who has property regarding which he must be make a will that he should sleep say, for two nights but that his will should be written down with him. In the same vein, the prophetic hadith, reported on the authority of Sa'd bin Ali Waqqas says: I fell ill in the year of victory (that is, the Conquest of Makkah) and was at the point of death.

[14] See Sankey JCA in Ajibaiye v. Ajibaiye (Supra) Note 2 at p. 1354.
[15] Y.Y.D.Dadem, op. cit.
[16] M.A Ambali. Op cit, page 295
[17] See Durr al-Mukhtar Vol. 4p397
[18] Ibidi at page 295
[19] Ibid
[20] *Qur`an* Chapter 2
[21] *Qur`an* 2:180-182
[22] Abur Raham I.Doi op. cit. p.328 v'
[23] Prophet Muhammed is also referred to as the Messenger of God

The Holy Prophet visited me and I asked, "O Messenger of Allah, I have got an abundant property and there is nobody to inherit me expect my daughter, shall I dispose of my entire property? He (the prophet) replied No; I asked again, may I do so in respect of two-third (2/3) of my property? The prophet replied, No; then I enquired about half of my property. He (prophet) said, no; the I enquired of one-third (1/3) of my property and he said yes, make a will disposing of one-third in that manner because one-third is quite enough of the wealth that you possess. Verity, if you die and leave your heirs rich is better than leaving them poor or begging, verily, the money that you spend for the pleasure of Allah will be rewarded even a morsel that you lifted up to your wife's mouth. Mus'iab Ibn Sa'd narrates from his father – He said, I fell sick and sent someone to the prophet. When he came I said "permit me to divide my entire wealth as I wish" He did not agree. I said, "half of it". He again did not agree then I said, "one third of it". The prophet remained silent while on hearing of the one-third, then said: After one-third (less than one third) is permissible[24] Shurabbil ibn Muslim narrates from Abu Umamah: I heared the prophet saying "Allah has given the right to all deserving persons so there is no legacy for an heir"[25] Will is therefore a right prescribed by Allah on the God-fearing people and if this right is exercised properly, many problems relating to inheritance will be solved tampering with the Islamic code of inheritance. Muadh bin Jabal narrated that the Prophet (peace be upon him) said that: Allah gave charity (permission) to you, one-third (1/3) of your property when you are about to die as an addition to your good deeds.[26] On the basis of the injunction of Qur`an and the Hadith, the hukm, that is the stand of Islamic law on the making of Wasiyyah changes with circumstances. It is wajib that is an obligation that must be performed when it is in respect of certain duties. It is obligatory for a person to make a Wasiyyah if he has liabilities to discharge. He should declare his liabilities verbally to witnesses or reduce them into writing so that rights of others are not plundered or lost after his death[27].

An instance is to return amanah, a trust, to its rightful owner because Qur`anic injunction says: Certainly, Allah orders you to give over the trusts to those entitled to them.[28] The same judgment goes for an outstanding Zakat from the wealth of a person which was not deducted and distributed before he died. It is also obligatory for a person to make a Wasiyyah in regard to fardh salat, fardh saum, kaffarah etc. which he had not discharged before he died. It is a grave sin to refrain from a wajib Wasiyyah[29]. Will is Mustahab that is desirable, in respect of a person with abundance of wealth to make a Wasiyyah for the poor, relations or other charitable deeds[30]. If one's assets are considerable, it will then be mustahab to bequeath any sum up to one-third the value of the estate to charitable works such as musjid, madrah, etc. Will is makruh, that is, not approved when the wealth is not much. It is however ja-iz, that is, permissible to make a will of all things, which are permissible. For example, a person can make a will that certain person should conduct his janazah salat[31].Will is haram (unlawful) when the aim of making Wasiyyah is to harm the heirs or it is capable of causing harm to any of the heirs although inadvertently[32]. It is haram to make a will of anything which is not possible in Islam. For example to bury one's body in another city, to bequeath wealth to such a person or institution which will utilize the fund in haram activities or making a Wasiyyah which interferes in any way whatsoever with the shares of the heirs. Against this background, Prophet Muhammed was reported to have said that: It is possible for a man to do good for seventy years and at the end he makes an unjust will which could make him end up in hell. As it is possible for a man to do evil for seventy years and at the end, he will be just in his will and that will be his last work and earns him paradise[33]. Similarly, a Wasiyyah in favour of a person who has committed murder of the benefactor[34] is haram.

The conditions of wasiyyah/will under the Islamic law

A valid *Wasiyyah* or will under the Islamic law has four major principles or conditions. These principles or conditions are:

[24] Sahih Muslim , 3077CD
[25] Sunan al-Tirmidhi, 204CD.
[26] Isa Adeniyi and Muhammad Jamiu. Op cit. p13
[27] The book of injertance, parts 1& 2, Complied by the Majilisul Ulama of South Africa p-44
[28] *Qur`an* 4:58
[29] M.A. Ambali, op.cit. p296
[30] Ibid
[31] Majlisul Ulama of South Africa, op. cit p45
[32] Ibid
[33] As-sayyid Sabiq (1403H/1983) Fiqhus Sunnah, Darul Fikr Lebanon, 4th Edition, Vol. III p.417
[34] Benefactor here refers to the Musi or the maker of the will

(a) The Musi or the testator
(b) Al-musa-lahu or the beneficiary
(c) Quality of the item of property
(d) The format of the will Al-musa-lahu or the beneficiary.

(a) The Musi or the Testator

The first of these principles is the *Musi*. This is the testator, that is, the person who makes the will. One of the major attributes of *Musi* or testator is adulthood. He must also be independent and sane. There must be no coercion in the decision to make a will and he must have full right in law to dispose of the property in question. He is free to rescind his decision any time before his death[35]. The *Wasiyyah* takes effect only after the death of *al-Musi*. The Musi must be a *Mumayyiz*, that is, a person who will be able to differentiate between what is good or bad[36]. He should be able to realize that he is really doing good and not depriving anyone of his due rights and that he is not disobeying Allah. The above last condition has been specified by the *Maliki* School. The *Hanafi* School on the contrary rejected the *Wasiyyah* made by *Mummayyiz*. Hanafi School equates this to a gratuitous contract. Imam *Maliki* says that we prevent the *Mumayyiz* from making the gratuitous contracts only to protect his property upon which he will depend since the *Wasiyyah* will only take place after his death there is no need of preventing him. The same rule will apply in the case of a person who is insane[37].

(b) Al-musa-lahu or the beneficiary

The second principle of *Wasiyyah* is the *Al-musa-lahu*, the beneficiary of *Wasiyyah*. The person in whose favour the *Wasiyyah* is made must be capable of ownership whether he exists or is capable of existing, whether insane or sane, adult or minor. If he is incapable of receiving it like the minors or insane persons, it can be accepted by his guardian on his behalf[38]. The only essential condition is that he must not be among the heirs unless with the agreement of the other heirs.As said above, if the other co-heirs who have attained adulthood approve it, an heir can enjoy *Wasiyyah* in his or her favour. However, if the co-heirs are divided the enforcement of such will shall affect only the share of the heirs who approve it. For instance, a man dies and leaves behind three sons as heirs. His estate is valued at N30,000. He willed N6,000 out in favour of child A. Child B disapproves of it while Child C does not. Without the implication of the *Wasiyyah* each child is entitled to N10,000. In the circumstance of disagreement between B and C over the *Wasiyyah* in favour of A, Child B, who disapproves takes his due share of N10,000 as if there was no *Wasiyyah* while Child C who approves it will take N8,000. The child in favour of whom it was make takes N12,000[39].Similar principles apply to a *Wasiyyah* in favour of non heir but which violates the maximum of one third of the whole estate. Its implementation is at the mercy of the heirs. Where they disagree its implementation is restricted only to the heirs who approve it.The *Maliki* School allows the *Wasiyyah* in favour of a dead person knowing that the person is actually dead. This type of *Wasiyyah* in fact, is intended to go to his heirs[40]. *Wasiyyah* can be made in favour of a mosque for its maintenance. In such a case, it will be the waqf for the mosque for all time to come. The *Wasiyyah* can be made in favour of an animal although the animal is not capable of having anything. It will really mean that the *Wasiyyah* is made to the person taking care of the animal to feed and look after it. *Wasiyyah* can also be made to the heir to give out *Zakat* if it is due out of the estate. If the *Wasiyyah* for the payment of *Zakat* is for the past years it will be to the proportion of the one-third of the *Wasiyyah*.

(c) Quality of the item of property

The third *rukn* or principle of *Wasiyyah* is the quality of the item of property upon which *Wasiyyah* is made. The property should be valuable at the time of the death of the testator and should be what Islamic law allows Muslims to posses or what Islamic law permits Muslims to invest in.

[35] As-Sayyid Sabiq, op cit, p418
[36] Abdur Rahman I. Doi, op.cit p330
[37] M. A. Ambali, op cit, p.296
[38] Ibid
[39] Ibid, p296
[40]Muhammad Ali (ND), A Manual of Hadith, The Ahmadiyya Anjuman Ishaat Islam, Lahore

For example, money or property which is acquired through unfair means is unclean, unlawful and indeed cannot be the subject of a will. Anyone who makes use of it or spends it on his needs does himself a great harm. His prayer will not find acceptance with Allah[41].

(d) The Seegah or the Format of the Will

The last condition of *Wasiyyah* is the *seegah*, that is the format in which *Wasiyyah* is made. It varies from person to person but Islamic ethics demand that it be introduced with the following preamble as it used to be the practice of the companions of the Prophet (peace be upon him).*In the name of Allah the Most Gracious the Most Merciful. This is the instruction of X, the son of Y. That he testified that nobody deserved worship but Allah, He is alone and He has no associate. He also testified that Muhammad was His worshipper and Apostle. He testified that the appointed time shall no doubt come to pass and that God will cause the dead to resurrect. The testator instructed his people who survived him to fear God and keep alive the bonds of brotherhood among themselves. They should obey God and follow the footsteps of His Apostle, it they are faithful. The words he left behind for them are the same as those left behind by Ibrahim for his children as well as what Yakub let behind for his children, God has chosen religion for you and ensure that death overtakes you only as Muslums.*[42] He then states his will.The position of a potential beneficiary to a *Wasiyyah* on the date of the death of the testator determines the entitlement of the beneficiary. For instance, A, a testator was a brother to B, a beneficiary. A had no child by the time he wrote a will in favour of his brother B. However, before A dies he begot a male child and B becomes qualified to benefit from the *Wasiyyah* because by the time of the death of A, the status of B has changed from an heir to non heir. Conversely, if A had a child and made a will in favour of B but the child pre-deceased his father, the testator and as such the brother becomes heir, the will in his favour becomes invalid because it is a will in favour of an heirs.[43]For example, if the deceased left behind N5,000 and at the time of implementing the testament, he had only N3,000 probably after payment of legacies and debts the beneficiary would only get one-third of N3,000 and not one-third of N5,000 Again, it must be noted that a testator is entitled to make a will on one-third of his property. The one-third allowed is assessed on the amount of the property (estate) at the time of the implementation of the will after his death and not on what he left behind after[44]. For example, if the testament, and debts the beneficiary would only get one-third of N3,000 and not one-third of N5,000.

Will and marriages contracted by muslims under the marriage act

Nigeria is a meeting or even a melting point for the three legal systems, namely, Islamic, English and Customary law practices. One of the areas of conflics that arise in the course of their interactions is the problem of will and succession. For example, Muslims who contract their marriage under the Marriage Act have unconsciously created some complications[45]. Islamic law, by virtue of Qur`an 4:3 recognises monogamous marriage which is the essence of the Marriage Act. Unfortunately, the Act ousted the jurisdiction of Islamic law on the succession of such Muslims by providing that: Where any person who is subject to native law and custom contracts a marriage in accordance with the provisions of the this Ordinance, and such person dies intestate……..the personal property of such intestate and also any real property of which the said intestate might have disposed of by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates.[46] It therefore follows from the above that for a Muslim to contract marriage under the Act it is to reject the Qur`anic injunction[47] as well as the Islamic ordinance of succession. The truth of the matter is that a Muslim does not die intestate because Islamic law had stipulated how to handle his estate. The law of England however says that he has died intestate. If the law is an ass, the Muslims are not. In India, such conflict has been resolved in their own law which says that: "A Muslim whose marriage is solemnized or registered under the special Marriage Act, 1954 is governed by the exception made by Section 213 (2) of the Indian Succession Act 1925 and therefore Sections 213 (1) of the said Act does not apply.

[41] Isa Adeniyi and Muhammad Jamiu, op.cit p.14
[42] As-Sayyid Sabiq (1403H/1983) Fihqus Sunnah, Darul Fikr, Lebanon, 4th Edition, Vol. III P417
[43] As-Sayyid Sabiq (403H/1983) 3. Fiqhus Sunnah, Darul Fikr, Lebanon, op. cit p.298
[44] Isa Adeniyi and Muhammad Jamiu, Op cit p13
[45] M.A. Ambali at p.299
[46] Section 36(1) of the Marriage Ordinance (Cap 115), Laws of the Federation of Nigeria and Lagos, 1956
[47] The injunctions here are contained in *Qur`an* 4:11-13 and 176

Accordingly, a probate is unnecessary and a Succession Certificate can be granted under Section 370 of Indian succession Act"[48] Like their Indian counterparts, the Nigerian Muslims should resist swallowing the concept of English Marriage Act hook, line and sinker. They should demonstrate maturity of taking the best from western civilization without throwing into the winds the good sides of their own culture[49].

As a liberal and a universal system, Islamic law permits Muslims to contract marriage with Christian women of monotheistic faith. By virtue of the woman being a non-Muslim, she is not qualified as heir of the Muslim husband. The husband too does not share out of her estate. However, the Islamic law takes good care of the first problem when it allows a legatee to be a Muslim or person of different religious persuasion. The husband testator is free to take care of his Christian wife through his right of will.[50]Islamic doctrine of succession constitutes part of Muslim faith of total submission to the will of God. Muslims and what they possess belong to Allah and He decides what to do with their possession after their death. There is no place for favour or hatred for any bonafide heir to make any of them suffer injustice or undue favour. However, any person who has special love for any relative or potential heir, is free to do so through the process of *hibah*, that is, gift, where the beneficiary will take the possession of the property during his life time.[51]

The rule of law on wasiyyah in the holy qur`an and the hadith of the prophet.

Imam Muhammad idris al-Shafii has discussed the following two verses of the Holy *Qur`an* to show the example of abrogating[52] and abrograted[53]verses and the role of *Sunnah* and *Ijma* in deciding the rule of law on *Wasiyyah*[54]. The first verse says: *It is prescribed for you, when death draws near to one of you, and he leaves behind some property, that he makes a bequest in favour of his parents and relatives according to reasonable usage, an obligation on the God-fearing*[55]The second verse says: *And those of you who die, leaving widows, let them make bequest for their widows, provision for a year without expulsion (that is residence),but if they leave, there is no fault in you what they may do with themselves honourably Allah is All-mighty, All-wise"*[56]From the above two verses, it can be said that Allah provided (legislation) for the inheritance of parents as well as for near relatives whether together with them or as successors, and for the inheritance of the husband from his wife, and wife from her husband[57]The two foregoing verses may be interpreted either to confirm bequest for the parents and the near relatives, bequest for the wife, and inheritance together with bequests, so that inheritance and bequests are lawful; or that the legislation concerning inheritance abrogates that concerning bequests [58] Since the above two interpretations are possible, it is obligatory upon the learned *Ulama* to find an evidence in the Book of Allah as to which of the two is valid. If the *Ulama* are unable to find a clue from the text of the Book of Allah, they should try the *Sunah* of the Prophet. If such evidence is found, it should be accepted. Those who are learned in legal interpretation and close companions of the Holy Prophet had said that in the year of the conquest of Mecca[59]the prophet said: *No bequest to a successor (is valid) nor shall a believer be slain for (the blood of) an unbeliever.*[60] This *hadth* has been transmitted from those who have heard it from the prophet. It is therefore of greater authority. Therefore, the Holy Prophet's ruling that there should be no bequest for an heir is valid. According to Imam Shafii, it means that legislation on inheritance has abrogated that on bequests for parents and the wife based on the authority of the above *hadith* and the agreement of the jurists.[61]

[48] Asaf A.A. Fyzee (1981) Outlines of Muhammadan Law, Oxford University Press, Delhi, pp 364-365
[49] Abubakar Jabir Al-Jazairiy (1396H/1976), Minhajul, Muslim, 8th Edition, Darul Fikr, Lebanon, p230
[50] Asaf A.A. Fyzee, op. cit p.366
[51] M.A. Ambali, op. cot. P.300
[52] This is called Nasikh
[53] This is called Mansukh
[54] Al-Shafi, Risalah translated by Majid Khadduri, Baltimore 1961, pp288-293
[55] *Qur`an* 2:180
[56]*Qur`an* 2:240
[57]Abdur Rahmon I. Doi, op.cit. p331
[58] Tabari, Tafsir Vol. III, pp384-396, Vol. v, pp.250-262
[59] Mecca was conquered in 8.A.H/630AD
[60] Abu Daud, Vol. III, p113, Shafii Kitab al-umm, Vol. iv. Pp27,36 and 40
[61] Abdur Rahmon I.Doi op.cit p332

A great number of jurists also have held that the legislation concerning bequests for relatives was abrogate and is no longer obligatory, for whenever they are entitled to inherit they are so by virtue of the law of inheritance but when they are not entitled to inherit, it is not obligatory that they should inherit by a bequests[62]. *Tawus bin Kaysan* and a few other authorities however, held that the legislation concerning bequests for parents has been abrogated, though it was confirmed for relatives not entitled to inherit. Therefore, it is permissible to make a bequest for persons other man relatives. Also, the bequest of the deceased cannot exceed one-third of his estate. Bequests to parents are no longer valid since their right to inheritance as successors is confirmed. A bequest made by a deceased to anyone, if he is not a successor is valid.

Opinions differ whether the provision of a year maintenance with residence, for a widow is abrogated by the share which the widow gets (that is one-eight or one-fourth) as a successor[63]. Yusuf Ali does not think it is abrogated.[64] The bequest, where made, takes effect as a charge on the property, but the widow can leave the house before the year runs out, and presumably the maintenance then ceases. *Wasiyyah* therefore, offers to the testator a complementary means of enabling some of the poor relatives who are excluded from inheritance to obtain a share in his property according to the law of succession. The will or bequest also offers an opportunity to the testator to recognize the service rendered to him by a total stranger whom he wants to reward although such power given to the testator is not exercised to the injury of the lawful heirs. Hence, the testator cannot exceed, while making his will, the limit of 1/3 of his property. It is unfortunate that some western scholars as well as Muslim scholars influenced by these western scholars have been trying to explain the *Qur`anic* restriction about the limit of one-third. They made a conjecture that probably the restriction was influenced by Roman law as mentioned by "Fyzee" and Ameer Ali[65].

Any Muslim who is sane, a major and has some property can make a will. Any well or bequest made during *Mard al-maut*, that is, death sickness, is not valid. In the same vein, if a person who has tried to commit suicide by some other means makes a will, it will not be considered valid[66]. The will can be made either orally or in writing. It is desirable, however, that it should be rendered in writing. If the will is in writing it may not be signed and if it signed it may not be attested. What is really important is that the intention of the testator must be very clear.[67]. A dump person who cannot speak can make a will through gestures. Will can be made in favour of a male or female, Muslim or non-Muslims as long as they are capable of holding property. An unborn child, who cannot be a legatee as he is in the womb, if he is born within six months from the date of making the will can validly avail the benefit of the bequest made in his favour.[68] A *Wasiyyah* for a non-Muslim is valid although there are no ties of inheritance between Muslims and non-Muslims. The will will be valid only if the testator or *Musi* is sane and an adult. Ii will be discharged only if there are assets after payment of funeral expenses and debts. When a person has neither heirs nor creditors and he makes a *Wasiyyah* for all his wealth or assets to be distributed among various beneficiaries, this will be valid. The will remain valid even if the beneficiary of the will dies before he accepts the benefit of the will. The *Wasiyyah* amount will be paid to the heirs of the beneficiary. The essential condition is that the beneficiary should be alive at the time the *Wasiyyah* is made in his favour. The *Wasiyyah* is not valid for such a person who happens to be heir on the death of the *murith* or testator. Once again, it must be noted that the majority of the jurists of Islamic jurisprudence are of the opinion that the bequest made by Muslims to non-Muslim is valid. The *Shafii* jurists, however, differ in their view on this subject. An apostate cannot be a legatee. It is permissible to make a will in favour of educational, charitable and religious institutions. A will can always be revoked by the testator either by a subsequent will or through express or implied statement made orally or in writing. The implied revocation of a bequest is made when the testator subsequently acts in such a way that the revocation can be inferred.[69] For example, where the testator after having made a will in respect of a parcel of land, subsequently builds a dwelling place on it.

[62]Fyzeee A.A, A, Mohammedan Law,p348
[63] *Qur`an* 4:12
[64] Yusuf Ali A. The Holy *Qur`an*, Text, Translation and Commentary, Beriut, 1968 p. 106 note 273
[65] Fyzee A.A..A op cit. p.248
[66] Ameer Ali Muslim Law,. 1938
[67] Ameeer Ali Muslim Law, 1938
[68] Abu Daud, Vol. III, p.113
[69] Abdur Rahmon I . Doi, Op. cit, p 333

By implication, the testator has revoked the will. If the testator has made a will and then makes another will subsequently on the same property in favor of another person the previous will becomes null and void.[70]

Executor of wasiyyah

The person whom the testator (*mayyit*) had appointed to attend to his estate is called the **was**, that is, the executor or the administrator. A person becomes a *wasi* or executor by his acceptance or by acting in a way implying acceptance. Once he has accepted, the post becomes incumbent on him. However, as long as the testator is alive, the executor or administrator is entitled to resign.[71] If two executors were appointed any one of them cannot act unilaterally.

Also, apart from the funeral arrangements and the necessary expenses for the testator's dependants, all other acts and decisions regarding the testator's estate must be effected jointly by the two appointed executors.[72] It must be noted that it is not permissible to appoint a Kafir or a Fasiq[73] to be one's executor. A will or bequest under theShari`ahmust be witnessed by two persons. Against this background, the Almighty Allah has declared in the Holy Qur`an that: O you who believe, when death approaches any of you, (take) witnesses among yourselves when making bequests, two just men of your own (brotherhood) or others from outside if you are journeying through the earth, and the chance of death befalls you (thus). If ye doubt (their truth), detain them both after prayer, and let them both swear by Allah. "We wish not in this for any worldly gain, even though the (beneficiary) be our near relation: we shall hide not the evidence before Allah:if we do, then behold! the sin be upon us.[74] It can be seen from the above verse of the Holy Qur`an that a typical Islamic will or bequest must be witnessed by two persons. The two persons must be just men. This implies that a woman cannot stand as a witness to a will or bequest under the Shari`ah. These two just men can be the testator's brothers or relations. They can also be appointed from outside particularly when the testator is on a journey and death is suddenly approaching. The Holy Qur`an has also prescribed the procedure for ascertaining the merit of a witness in case of perjury, if suspected. To this effect, the Holy Qur`an provides that: But if it gets known that these two were guilty of the sin (of perjury), let two others stand forth in their places, nearest in kin from among those who claim a lawful right: let them swear by Allah; "we affirm that our witness is truer than that of those two, and that we have not trespassed (beyond the truth): if we did, behold! the wrong be upon us That is most suitable: that they may give the evidence in its true nature and shape, or else they would fear that other oaths would be taken after their oaths. But fear Allah, and listen (to His counsel) for Allah guides not a rebellious people.[75]

Revocation of will/wasiyyah

While the musi or the testator is alive, he has the right to revoke the will he has made. When revoking the will it is essential that the Musi or testator uses such terms which clearly indicate that the Wasiyyah has been revoked. For example, I am revoking this Wasiyyah or I am canceling this Wasiyyah or I have cancelled or revoked this Wasiyyah! The mere denial of the Wasiyyah will not constitute a cancellation. Thus, if the testator says: "I don't know anything about the Wasiyyah you are talking about", this will not cancel the Wasiyyah which is confirmed by the testimony of witnesses. If the testator has no intention of honouring the Wasiyyah, he should revoke it in clear terms. An operation which indicates that the musi has revoked his Wasiyyah constitutes cancellation of the Wasiyyah. For example, where the testator erects a building on a plot of land or sells it to another person after having bequeathed the plot to somebody. This action of testator constitutes a cancellation of the Wasiyyah.

Summary opinions of the jurists on will under the shari`ah

Based on the *Qur`anic* injunctions and *Hadith*, jurists of all the schools of thought, Imams Maliki, Shafii, Hanafi, and Hambali agreed on the following opinions about the will or *Wasiyyah*. That the *Qur`an* has expressly sanctioned the law of *Wasiyyah* (will) that it should be done. That the rules regarding the inheritance must be followed as well as applied. That *Wasiyyah* or will in Islam is the right of a person to give away one-third (1/3) of his property to an individual or group of people or organization or for meritorious purposes.

[70] Ibid
[71] Al-Shafii Risalaj, op. pp294
[72] Ibid
[73] The Book of Inheritance Complied by Majlisul Ulama of South Africa page52
[74] *Qur`an* 5:106
[75] *Qur`an* 5:107-108

That no *Wasiyyah* should be made in respect of heirs, that is, for those who are really entitled to inherit according to the *Qur`an*. That although *Wasiyyah* is mentioned first before debt in the verse of the Holy *Qur`an* on inheritance, debt should be paid first followed by the will execution then the distribution of inheritance. That will should not exceed one-third (1/3) of the entire property of the deceased[76] According to Imam Maliki, if the will exceeds one-third, it has become a gift and the approval of the other co-sharers must be sought. He is also of the opinion that based on the verse of the *Qur`an*[77] the *Shari`ah* has made bequest (will) *wajib* upon a person who has poor relatives that are not his heirs, that is, that are not entitled to inherit him to use his opinion to bequeath for such relatives out of his property.[78] To reiterate, *Wasiyyah* or will has been enjoined by the *Qur`an* and the *hadith* of the prophet.

If the rules governing will or *Wasiyyah* are duly observed the following are the likely benefits derivable form it. First, will makes it possible for one to leave one's relatives in riches instead of poverty. Secondly, it teaches us that some of our relatives have some rights over our property. Thirdly, it gives room for justice when distributing property.

Conclusion

The Islamic law in respect of will has been handed down by the Almighty Allah Himself in the Holy *Qur`an*. This has been clarified by the Holy Prophet in his *hadith* or tradition. *Wasiyyah* is optional both on the part of the testator as well as the beneficiary. The testator may or may not make the bequest, while the beneficiary is free either to accept it or reject it. Every will or bequest made by a person during his life time is valid and becomes executable only after his death. *Wasiyyah* encourages one to leave one's relative in riches instead of poverty.[79] It teaches Muslims that some of their relatives have some rights over their property and it gives room for justice when distributing same.

[76] Isa Adeniyi and Muhammad Jamiu Adeyemi op. cit. pp 13-14
[77] *Qur`an* 2:180-182.
[78] The Book of Inheritance Complied by Majlisul Ulama of South Africa page52.
[79] Isa Adeyemi and Muhammad Jamiu Adeyemi, op. cit at p15