IMPLICATIONS OF STATUTORY AND CULTURAL RESTRICTIONS OF TESTAMENTARY FREEDOM ON VALIDITY OF WILLS*

Abstract

Adult persons had right and absolute freedom to bequeath or devise their properties to persons or institutions of their choice as they wished in Wills without let or hindrance. They could go to the extent of disinheriting family members and dependants. That was the position under the common law of England and the Wills Act of 1837. The hardship occasioned on family members and dependants of testators and testatrixes led to enacting local Wills Laws in Nigeria with provisos qualifying the absolute testamentary freedom of section 3 of the Wills Act 1837. This paper seeks to examine the effects of testamentary restrictions on validity of Wills. In other words, it examines the legal consequences failure to compliance with the restrictions placed on the freedom of individuals to make devises or legacies in Wills. In doing this, both doctrinal and empirical methods of research were used in collating materials, principally, statutes, judicial authorities, learned textbooks and journals; interviews and practical experiences based on cultural practices. These were critically analysed, compared and contrasted where appropriate. The paper concludes that statutes, customs, and religion restrict testamentary freedom of individuals to give out their properties in Wills as they choose. The aim is to ensure that the family members and other dependants of testators or testatrixes are not denied provisions in their Wills and to ensure that the Wills do not offend customary and religious rules of succession. Wherever these statutory, cultural and Islamic restrictions on testamentary freedom are violated, the net effect is not to impugn the whole Will but the devises or legacies offending the rules are affected, and therefore, made null. However, the paper observes that the restrictions are not generally adequate or non-existent in some States. The study proffers some key recommendations.

Keywords*: Implication, Statutory, Cultural, Islamic, Restriction, Testamentary freedom, Wills.*

1. Introduction

Any person who has attained the age of majority, that is, 18 or 21 years depending on the jurisdiction could make a Will in which he makes gifts of personal or real properties to persons or institutions of his choice[1]. Besides attaining majority, the testator must have sound disposing mind[2]. The Will must be in writing, signed by the testator in the presence of at the least two witnesses who themselves are to attest the Will in his presence[3]. These requirements do not apply strictly to Wills made by sea men or mariners (not being members of Nigeria the Navy) or crew of commercial airline being on the sea or in the air provided that the court is satisfied that the instrument expresses the testamentary intention of the testator[4]. The foregoing requirements apply strictly to formal Wills made under the Wills Act or Wills Laws of various States in Nigeria. In England, it was always possible to devise leaseholds and other forms of personal properties in Wills, but the feudal law would not permit Wills of freeholds. A partial power of testamentary disposition of real property was obtained in 1540 when the Statute of Wills permitted tenants to devise all their socage lands and two-thirds of their lands held in knight service. This testamentary power was completed by the enactment of the Tenures Abolition Act of 1660, which converted knight service tenure into free and common socage[5]. A nuncupative or customary Will is oral and takes effect under the incidents of native law and custom. The requirements of writing and due execution of English type Wills are alien to our native law and custom[6]. However, the oral declaration must be made in the presence of witnesses. Hence, disposition of properties could be made under native law and custom by a gift followed by a transfer of the property or a declaration by a person on his or her death-bed in the presence of witnesses[7]. The oral directives of a deceased person on how his or her estate is to be distributed have binding force on members of the family. The directives are carried out by the elders of the family, kindred, community or by persons specifically named by the deceased as executors or trustees in conformity with the prevailing native law and custom of a place. Any disposition or act done contrary to the oral declaration of the deceased will be set aside. In *Nwosu v Okeke*[8], the

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[2] *Banks v Goodfellow* [1870] QB 544.

[3] *Amadi v Amadi* [2017] 7 NWLR (Pt. 1563) 108 S.C. ; *Ayinke v Ibidunni* [1959] 4 FSC 280; see, however, s 257 of the Armed Forces Act which requires only one witness who must be a member of the Force or a medical practitioner in government employment.

[4] Wills Law Lagos, s 6 (1), (2); Wills Act 1837, s 9; High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018, Order 64 Rule 13.

[5] E. H. Burn & J. Cartwright, *Cheshire and Burns's Modern Law of Real Property*, (17th edn, Oxford: Oxford University Press 2006), 87.

[6] I. Sagay, *Nigerian Law of Succesion,* (Lagos: Malthouse Press Ltd 2006), 158.

[7] *Ayinke v Ibidunni supra* per Ademola, C.J.N.

[8] [2002] FWLR (Pt. 95) 366.

deceased made an oral Will called *Ike Ekpe* in Ndiakunwanta/Arondizuogu of Imo State and appointed an administrator to administer his estate for the benefit of his wife and children. The sale of the deceased's property by the administrator to his former wife was set aside as being contrary to native law and custom of the place and the wishes of the deceased since the administrator could not prove that there was any need to sell the property in question in order to carter for the needs of the dependants of the testator. It is not in dispute that once a person whose estate is governed by customary law dies intestate, his estate, (especially his real properties) devolves on his heirs in perpetuity as family property. The conditions are that the landowner died intestate and the estate during his life time was governed by customary law. The rule, therefore, takes no account of whether he has one child or many children, nor, indeed, the existence of children[9]. This is usually the case where the deceased was subject to customary or Islamic law, and had properties without registered title documents and had no money in bank. His properties will be distributed in accordance with the dictates of his customary or Islamic law of succession[10]. If he had properties with registered title documents or money in bank, his personal representatives will apply for Letters of Administration to enable them administer his estate[11]. They could apply for a Certificate to Administer Small Estate under the seal of the Probate Registrar if the estate is worth N100, 000.00 (one hundred thousand naira) only or less without any real property[12]. At common law and under the English Wills Act 1837, a testator could freely dispose of his properties and make his will without limitations placed on him by statute, custom or religion[13]. In *Banks v Goodfellow*[14], the court affirmed the testamentary freedom of a person to dispose of his properties in a Will as he wished. It held that a person at all times has the liberty to make a will and give his properties to any person he desires and wishes, and may deprive his blood relatives of his properties without being questioned. With the passage of time, it became clear that the absolute freedom to dispose of one's properties to beneficiaries of his choice occasioned hardship on the relatives of the testator and those who might have depended on the testator for support while he lived. This justified the placing of restrictions on the freedom of an individual to dispose his properties in a Will. The argument against an unfettered right to make a disposition in Nigeria is hinged on the moral, customary and religious grounds. Accordingly, testamentary freedom has been limited by disallowing a person from disposing his properties totally as he wishes on his death or by making it possible for his disposition to be altered after his death. In Nigeria, these limitations will be treated under 3 heads, viz: reasonable financial provisions for family and dependants, customary law restrictions, and Islamic law restrictions.

2. Reasonable Financial Provisions for Family and Dependants

Section 2 of the Lagos State Wills Law empowers the wife or wives or husband of the testator and a child or children of the testator to apply to court for an order on the ground that the disposition of the deceased estate effected by his Will is not such as to make reasonable financial provisions for the applicant[15]. Reasonable financial provision in the case of an application made by the husband or wife or wives or child or children of the deceased means such financial provision as it would be reasonable in all circumstances of the case for a husband or wife or wives or child or children to receive, whether or not that provision is required for their maintenance. The application should be made within six months from the grant of probate, that is, from the date on which representation with respect to the deceased's estate was first taken out[16]. Similar provisions exist in Wills Laws of various states in Nigeria which have enacted their Wills Laws. However, there are differences in the tenor of the laws. In Abia, Bayelsa, Kaduna and Oyo States etc, persons who can apply for reasonable financial assistance apart from the husband, wife or wives, child or children of the testator or testatrix include the parents, brothers or sisters of the deceased who immediately before his or her death were being maintained either wholly or partly by the deceased. In the case of parents, brothers or sisters reasonable financial provisions mean such financial provisions as would be reasonable in all circumstances of the case for the applicant to receive for his or her maintenance[17]. In the case of a child or children or spouse of the deceased in Lagos State, reasonable financial provisions may or may not be for their maintenance; in the case of other relatives in other States, it must be for their maintenance. Those persons in Abia, Bayelsa, Kaduna and Oyo States etc, would be qualified for reasonable financial provisions if the testator or testatrix made substantial contributions in cash or kind for their maintenance either wholly or partly while he lived. In other words, the deceased was solving their reasonable needs up till the time of death. Despite the statutory rights of a husband, wife or wives, child or children or other dependants to reasonable provision from

[9] *Abeje v Ogundaro* (1967) LLR 9.
[10] *Onowokae v Onewokae* [2007] All FWLR (Pt. 356) 788; *Jiddun v Abuna* [2000] All FWLR (Pt. 24) 1405 at 1416.
[11] Administration of Estates Law, Lagos State, ss 26, 49.
[12] Administration of Small Estates (Small Estates Payments Exemption) Law, Lagos State, ss 4, 5.
[13] Wills Act 1837, s 3; *Adesubokun v Yunusa* [971] 1 All NLR 225.
[14] [1870] QB 544.
[15] *In the Estate of Hall* [1943] 2 All E.R. 159.
[16] Wills Law Cap W2 Laws of Lagos State 2003, s 2 (3); Inheritance (Provision for Family and Dependants) Act 1975, s 1, United Kingdom; *In Re Dennis* [1982] 2 All E.R. 140.
[17] Abia State Wills Law, s 4; Bayelsa State Wills Law, s 2; Kaduna State Wills Law, s 27 and Oyo State Wills Law, s 4.

the estate of the deceased, the testator may disinherit any of them and state the reason(s) for so doing. The reason could be that he had sufficiently provided for the applicant in his lifetime. Only good reasons supported with cogent facts should be sufficient and acceptable to displace the statutory right of a disappointed dependant from benefiting from the estate of the testator. Erroneous and frivolous reasons should be rejected by the courts. The reasons advanced for denying family members or dependants provision in the estate of the testator may not necessarily be in the Will especially where facts supporting such reasons are scandalous or against public policy. In such cases, the testator may write the reasons in a separate document which must be incorporated in the Will by reference, and keep with a trusted family member, friend or solicitor just as he would do in the case of burial directions. Besides documentary evidence for the reasons, court may admit oral evidence of those reasons[18].

The principles of reasonable financial provisions may be summarised as follows:

1. An application may be made to the high court on the estate of the deceased person who failed to make reasonable financial provisions to the applicant.
2. The application is made by persons recognised as dependants of the deceased by the relevant Wills Laws of various states. Such persons are the children, spouses, parents, brothers and sisters of the deceased.
3. The deceased helped in solving the reasonable needs of the applicants.
4. The application must be made six months after grant of probate and not necessarily six months after the death of the testator.

The application comes handy where the testator did not provide for the applicant at all or his legacy is inadequate when compared to those of other beneficiaries. It takes care of situations where the testator failed to provide for the applicant either due to a failure of the legacy under the general law or where he miscalculated the size of the estate in making the dispositions. There is need to define who a child, brother or sister is, to either include or exclude those who are not direct biological child, brother or sister of the deceased, that is, those who do not bear any blood relationship with the deceased. Again, it is equally important to describe what reasonable financial provisions is, which should be a matter of facts in every situation. It should be an objective test from the point of view of the court and not subjectively to the point of view of the deceased, and it is irrelevant to consider whether the deceased acted unreasonably in making no provision or no larger provision for the applicant[19]. This may not be the case where testator gave good reasons for making little or no provision for the applicant. In *Re Coventry*[20], the court held that the provision is not meant to keep the applicant above the 'breadline' but must be one that is reasonable in all circumstances of the case to enable the applicant maintain himself in a manner suitable to those circumstances. *In Re Dennis*[21], the son applied for between forty-five and fifty thousand pounds shilling to settle his tax liabilities from the estate of his late father. The court held that the provision was only intended to discharge the cost of daily living and the payment of the tax would not directly or indirectly contribute to the son's living expenses. The use of the word, 'shall', seems on the literal interpretation of the section, to mean that failure to apply for reasonable financial provisions after six months of the grant of probate, the window is closed against any intending applicant. However, it may be argued that rules of courts allow judicial officers to extend time within which to do certain things upon show of good reasons and payment of additional fees to the court by applicants in their applications with supporting affidavits[22]. In England, the court can extend the time within which to make the application under the following circumstances if the applicant advances good reasons- The discretion is exercised judicially; The applicant establishes good reasons for the success of the application; The promptness of submitting the application, whether there is delay in bringing the application; Whether a negotiation to settle the problem was held within the time; Whether the estate had been distributed before the application was made; Whether not extending the time will leave the applicant without any option[23].

3. Effect of Grant of Reasonable Financial Provisions on Will

Application for reasonable financial provisions may succeed, and a court makes an order granting some money to the applicant. What then is the effect of such order on the Will or estate of the testator to which the application for

[18] S. O. Imhanobe, *Legal Drafting and Conveyancing: With Precedents*, (Abuja: Temple Legal Consult 2002), 668-669. *Re Smallwood v Martins Bank Ltd* [1951] 1 All E.R. 372; *Re Searle v Searle* [1948] 2 All E.R. 426.

[19] Y. Y. Dadem, *Property Law Practice in Nigeria*, (3rd edn, Jos: University of Jos Press 2018), 295-306.

[20] [1980] Ch. 46.

[21] [1981] 2 All E.R. 140.

[22] High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018, Order 49 Rule 4; Ebonyi State High Court (Civil Procedure) Rules 2009, Order 44 Rule 4; Edo State High Court (Civil Procedure) Rules, Order 22 Rules 3 and 4; Bayelsa State High Court (Civil Procedure) Rules 2010, Order 44 Rule 4; Federal High Court (Civil Procedure) Rules 2009, Order 48; Court of Appeal Rules 2011, Order 7, Rule 10 (1), (2).

[23] *In Re Dennis supra, per* Wilkinson-Browne, J at143, relying on the principles laid down by Sir Robert Megarry, Vice-Chancellor, in *Re Salmond (deceased)* [1980] 3 All E.R.

reasonable financial provision and the order providing the finance relate? The application and the court order making reasonable financial provisions for the application do not operate to annul the Will to which they relate. If there is a residuary clause in the Will, the executor(s) of the Will will satisfy the court order from the remainder of the estate of the testator after distributing the legacies or devises given in the Will to the beneficiaries or successors. Where, however, the Will does not provide for residuary clause, or the estate of the deceased is not sufficient to pay all the legacies or devises in full, the general legacies or devises could be sold to realise the court order. In this case, the general gifts will fail either partially or totally due to abatement of those gifts. The beneficiaries of the general gifts and the applicant may share the proceeds of the sale in equal proportion[24]. The effect is that the order operates to affect manner of distribution of the estate as some gifts will fail either partially or totally due to insufficiency of the estate and the financial provisions made to the applicant by the court which the Will of the testator did not capture.

4. Customary Law Restriction

Customary law has been employed as a basis for limiting the once unfettered rights of the testator to freely dispose his estate. For instance, section 1 of the Wills Law of Lagos State provides that it shall be lawful for every person to bequeath or dispose by his will executed in accordance with the provisions of the 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 to any property which the testator had no power to dispose of by will or otherwise under customary law to which he was subject. Similar provisions are contained in the Wills Laws of various States of Nigeria[25]. The Abia State Wills Law does not provide for customary law or Islamic law restriction. It may, therefore, be argued that a person who makes a Will pursuant to that Law has unfettered right to dispose his properties in a similar way provided for under section 3 of the Wills Act 1837. The effect of customary limitation is that it qualifies the right of the testator to freely dispose of his property. It acknowledges that the complete freedom to disposition of properties by way of Wills works hardship on many dependants of the testator in many Nigerian Communities, and if not restrained, the custom and order in many communities may be upset.

Import and Extent of Customary Limitation

In *Idehen v Idehen*[26], the question was whether the phrase, 'subject to any Customary Law relating thereto' contained in section 3 (1) of the Wills Law of Bendel State[27] is a qualification of the testamentary capacity of the testator to make a Will or whether it is no more than a qualification of the subject matter of the property disposed of or intended to be disposed of under the Will. The claim was about certain properties of the plaintiff's late father situate at No. 62 Akpakpava Street and No. 1 Oregbeni, Ikpoba Hill all in Benin City. He claimed that the properties being where his late father lived in (*igiogbe)*, devolved on him as the eldest surviving male child of the deceased according to Bini Native Law and Custom. The court held that the phrase was not meant to qualify the testamentary capacity of the testator but to qualify the devise of his property subject to customary law. The phrase renders the devise, bequest or disposition subject to customary law so that such devise, bequest or disposition shall not be inconsistent with the customary law, and it shall be controlled and governed by the customary law[28] The import of the restriction is that it does not prevent a person from making a Will; the limitation in respect of the Will is that it cannot brush aside the custom of the people with regard to disposition of property. It further affirms that under Bini Native Law and Custom, the *Igiogbe* will not under any circumstance be given away as a gift to another person but it must devolve on the eldest surviving son of the deceased. The eldest surviving son must perform the second burial rights of his late father to be able to inherit the *Igiogbe*.

However, it is correct for the deceased to give out the igiogbe in his Will to his eldest surviving son. That was what happened in the case of *Egharevba v Oruonghae*[29]. The Court of Appeal, also, held that the novel question of customary law raised by the appellant to the effect that *Igiogbe* could situate outside Bini Kingdom, in this case, Sapele in Delta State, was not proved. It, therefore, held that *igiogbe* cannot be outside the Bini Kingdom. It may be necessary to examine the decision of the Court of Appeal in this case. My students of Bini origin have always held the view that Igiogbe could situate outside Bini Kingdom provided it is the main dwelling house where the deceased Bini man lived and died. Efe Osamuede supports this position. There is a proverb in Bini: 'Eghele *oei*

[24] *Whitehead v Street* [1913] Ch. D. 56.
[25] Kaduna State Wills Law, s 4 (1) (a); Oyo State Wills Law, s 3 (1) (a) (similar to s 3(1) (a) of the Wills Law of the former Western Region of Nigeria 1958); Will Law of Bendel State 1973, s3 (1) (applicable to Edo and Delta States).
[26] [1991] 7 SCNJ (Pt.II) 196.
[27] Cap 172, Laws of Bendel State 1973.
[28] *Ogbahon v Registered Trustees of CCCG* [2001] FWLR (Pt.80) 1496; *Agidigbi v Agidigbi* [1996] 6 SCNJ 105; *Odjegba v Odjegba* [2003] FWLR (Pt.187) 802 at 817-818.
[29] [2001] 1 NWLR (Pt. 724) 318 C.A.

Igiogbe oee', meaning that any place that favours a man in terms of prosperity is his main dwelling place[30]. A distinction is made where the man has buildings both in Benin and elsewhere but lived and died in the one within the Bini Kingdom. His *Igiogbe* will be taken to be the house in Bini Kingdom. Nevertheless, the Court of Appeal was right in holding that the question of extra-territorial application of *Igiogbe* was novel and not proved in the case. After all, a custom is applied if it is judicially noticed or its existence proved by a party who alleges it[31]. *In Asika v Atuanya*[32], the plaintiffs, most of whom were married women, claimed against the defendant, their brother's son for a declaration that under the Will of their father, they were entitled to equal shares to the property known as No. 25 New American Road Onitsha. The Will of their late father read in part: 'I give and bequeath in equal shares unto my children namely, Paulina, Michael, Fidelis, Catherine, Cordelia, and Felicia, all my possessions. The plaintiffs prayed the court to partition the property in dispute into six parts to be shared equally among them and the estate of their late brothers. The defendant denied the claim. He contended that all the plaintiffs but one, were married women and they had children in their respective homes, and that by the native law and custom of Onitsha people which applied to the parties, the plaintiffs were entitled to inherit the properties of their husbands and not of their father. He contended further that the third plaintiff who was not married and stable, could not inherit the estate of her father, except she became a person of good behaviour and only during her life time. The claim of the plaintiffs was partly dismissed. On appeal to the Court of Appeal, one issue that tasked the wit of the court was whether women were not entitled to inherit the estate of their parents as a result of disqualification by native law and custom in respective of the provisions to that effect in a Will? The Court of Appeal held that the Constitution of the Federal Republic of Nigeria (CFRN) 1999 grants women as citizens, the right not to be discriminated against as a result of their gender and the circumstances of their birth and also the right to acquire and own immovable properties in any part of Nigeria[33]. The CA held further that while the testator of the Will did not discriminate against his children in the division of the property, the defendant has introduced native law and custom which discriminates against the female children with respect to the succession to the property, and such custom being repugnant to natural justice, equity and good conscience contravenes the Constitution, the CEDAW[34] and the African Charter on Human and People's Rights[35]. The Court of Appeal concluded that the proposition by the respondent relating to the sharing of the estate in accordance with the Onitsha customary law cannot prevail over the provisions of the Will.

It should be noted that whereas the respondent in *Asika v Atuanya* wanted to absolutely exclude the female children from sharing in their late father's estate on grounds of Onitsha native law and custom, the decisions in *Idehen v Idehen, Lawal-Osula v Lawal-Osula*[36] were on partial exclusion of both the female and male children from sharing in a particular building, '*Igiogbe*' in which the testators lived and died on grounds of native law and custom which have become subject of statutory provision in the Wills Law. It is unlikely that the courts will question the latter 'discrimination' in the nearest future. Among the Nembe people of Bayelsa State, women take larger share than men in issues of succession. It is different strokes for different folks. The position of the eldest surviving son of a Bini man could even be likened to the position of the priests and Levites in the Holy Bible. They have no part nor inheritance with Israel and their brethren. The Lord is their inheritance, and they have to make do with parts of things sacrificed to God.[37] In the same vein, almost always, once the eldest surviving son of a deceased Bini man takes the *igiogbe*, he does not share in the other parts of his late father's estate. These days, he is made to choose between taking the *igiogbe* with the Cultural advantages or significance as the head of the family or take other property in its stead and lose the accompanying rights.[38] In *Ogiamen v Ogamien*[39] the Supreme Court held that the practice of *Igiogbe* was not repugnant to natural justice, equity and good conscience. Ademola, CJN holds, *inter alia*. *Bini customary law of inheritance cannot be said to be repugnant to equity, good conscience and natural justice. Inheritance under English law as relevant to the seat and estate of hereditary person like the Duke of Earl is not far different from Bini customary la. It is designed to keep family tradition and maintain orderly continuity; the eldest son to inherit igiogbe is not incompactible with natural justice, equity and good conscience*[40]. On the

[30] E. S. Osamuede, Benin Customary Succession: A Brief History of the Advent of *Igiogbe* Succession, www.edoworld.net/Benin-customary-law-of-succession.html, accessed on 27 March 2019.
[31] Evidence Act Cap E14 Laws of the Federation of Nigeria 2011, 16 (1), (2); *Esuwoye v Bosere supra; Husseini v Mohammed* [2015] 13NWLR (Pt. 1445) 100 S.C.
[32] [2008]All FWLR (Pt.433) 1293.
[33] CFRN 1999, ss 42, 43.
[34] Convention on Elimination of All Forms of Discrimination Against Women.
[35] 1981, Article 2.
[36] [1995] 9 NWLR (Pt.419) 259.
[37] New King James Version of the Holy Bible ,Deuteronomy 18:1-10.
[38] Handbook on Some Benin Customs and Usages, p. 14 paragraph (h), issued by the Benin Traditional Council on the authority of Omo N'Oba N'Edo Uku Akpolokpolo Erediauwa Oba of Benin, cited in E. S. Osamuede, *op. cit.*
[39] [1967] NMLR 245.
[40] *Ibid*, at 276 paras. B-C.

other hand, the courts may continue to strike down those cultural practices which tend to deprive female children or women or widows who do not have male children from inheriting from their fathers or husbands as being repugnant to natural justice, equity and good conscience[41]. The daughters of Zelophehad demanded from Moses and Eleazar the priest before the princes and the whole congregation of Israelites the portion of their father's land from their family. Their father had died without leaving a son. Moses took their case to God. God told Moses that the daughters of Zelopphehad had spoken right and He commanded Moses to give them a possession of an inheritance among their father's brethren, and to cause their father's inheritance to pass to them. He commands the children of Israel that if a man dies without a son, then, they shall cause his inheritance to pass to his daughter[42].

5. Islamic Law Limitations

Religion restricts the freedom of individuals in freely disposing their properties by Will. The background to this restriction may be traced to the decision of the SC in the case of *Adesubokun v Yunusa*[43]. The facts of the case were that the testator hailed from Lagos State, and was subject to the Islamic law of the Maliki School. He made his Will according to the Wills Act. The Will was challenged for not making certain dispositions to the heirs of the testator. The trial court held that the testator in accordance with Islamic law could not dispose more than one-third of his properties to persons who are not his heirs, and that the Wills Act could not override the Islamic law of inheritance. The Federal Supreme Court reversed the judgment, and held that since the testator intended to distribute his estate according to the Wills Act, the Act prevailed over any native law and custom (which Islamic law was equated with) that applied to the testator. It is perhaps in response to the above case that the current Islamic law restriction came into being to curtail the freedom of Muslim or persons subject to Islamic law to freely dispose of their estates as they wish. Section 2 of the Wills Law Cap 163 Laws of Kaduna State 1991 provides 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 the provisions of this Law shall not apply to the will of any person who immediately before his death was subject to Islamic Law.'* Similar provision are found in sections 3 (1, b) of Oyo State Wills Law and the Wills Laws of the States in Northern Nigeria. The limitation may be summarised as follows: Every person is guaranteed to dispose his property by Will but this right does not apply to the Will of the person who immediately before his death was subject to Islamic Law. The restriction does not apply only to the property, but applies to persons who are subject to Islamic Law.

In other words, a person subject to Islamic Law is prevented from disposing his property by Will executed in accordance with the provisions of the law. Islamic law restriction is to the effect that Wills of persons who are subject to Islamic law derogate from the concept of testamentary freedom. Such persons immediately before their deaths must be subject to Islamic law. It, therefore, means that if a person lived and practised Islam most of his life but immediately before his death, he renounced Islam, his Will shall not be affected by Islamic law. The law does not define what immediately is but each case will be determined on its facts. Again, the law raises the question of whether or not there is any difference between 'persons subject to Islamic Law' and 'Muslim'. Can a person be a Muslim and still choose not to subject his affairs to Islamic Law? This problem fell for determination in *Ajibaiye v Ajibaiye*[44]. The testator Alhaji Disu Ajibaiye was a Muslim from Ilorin Kwara State. He made his Will under the Wills Act and disposed of his properties as he wished without complying with the principles of Islamic law. He gave much of his estate to his late wife. He provided as follows: *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 lifetime notwithstanding the fact that I am a Muslim'.* The Will was challenged on the ground that being a Muslim from Ilorin Kwara State, the Wills Law Cap 168 Laws of Kwara State 1991 applies to his Will and by the provisions of the law which contains the Islamic law restriction, he could not make the Will as he did and dispose of his estate as he wished. The last wife of the deceased, however, claimed that her husband could not have been subject to Islamic law since he did not comply with its principles by his lifestyle. He sold and drank alcoholic drinks although in his Will, he wished that alcoholic drinks should not be served on the day of his 8-day prayer after his interment. The Court of Appeal affirmed the decision of the trial court which voided the Will and held *inter alia*:

a. The Will in dispute is ab initio void for being contrary to the Wills Law of Kwara State; and with this local legislation in place, 'the Testator could not have validly made a Will under the Wills Act 1837, a statute of general application which is no longer applicable in Kwara State.

[41] *Ukeje vUkeje* [2014] 11 NWLR (Pt. 1418) 384 S.C.*; Anekwe v Anekwe* [2014] 9 NWLR (Pt. 1412) 393 S.C.; *Mojekwu v Mojekwu* [1997] 7 NWLR (Pt. 512) 283.

[42] New King James Version of the Holy Bible, Numbers 27: 1-8; 36:2.

[43] [1971] 1 All NLR 225.

[44] [2007] All FWLR (Pt. 359) 1321.

b. The properties of a Nigerian Muslim in Kwara State after his death are subject to the dictates of Islamic law of inheritance which does not allow a Muslim to dispose his properties anyhow. Accordingly, a Muslim is allowed to give out in a Will not more than one-third of the whole property. The properties must be distributed strictly in accordance with Islamic Law after the lawful heirs were identified.
c. Having loudly declared that he was a Muslim, the testator had subjected himself to the application of the Wills Law of Kwara State, 'notwithstanding his erroneous belief, that he could still, while being a Muslim, elect to be governed by English Law in this regard.

Effect of Islamic Law Restriction on Validity of Wills

In States such as Lagos and Abia whose Wills Laws do not provide for Islamic law restriction, it may be argued on the face of it that Muslim who hailed from, lived and owned properties there cannot be subjected to such limitation. However, since Islamic law is equated to native law and customs being questions of facts to be proved, Muslim in those states may lead evidence to prove the existence of that Islamic rule of succession[45]. It should be pointed out that Islamic scholars and the courts have held the view that customary law does not include Islamic law[46]. In *Alkamawa v Bello*[47]and *Usmanu v Umaru*[48], the Supreme Court held that Islamic law is written in the Holy Qu'ran and numerous books of Hadith, a complete system of universal law, more certain, permanent and even more the English common law whereas customary law is unwritten law recognized as a law by the members of an ethnic group. However, the mode of proving the both systems of laws may be same, that is, proof as facts. The effect is that upon successful proof of such law, the part of the Will contrary to the Islamic rule of succession will be struck down by the court. It does not invalidate the whole Will. Again in a State like Lagos where there are plenty of Muslim, the fact of one-third rule may be notorious to enjoy notoriety or judicial notice. In that case, the burden of proof of the custom is lifted off the shoulders of the heirs challenging Wills made contrary to the Islamic law of succession[49]. The courts should adopt liberal interpretation to meet the purpose of the customary law and the Islamic law restrictions[50].It is to be noted that Bayelsa State which little or no Muslim as indigenes provides for Islamic law restriction in section 1(1) (a) of the Bayelsa State Wills Law. The presence of Islamic communities from the North and South West of Nigeria might have influenced the legislators in this regard.

The practice of *Igiogbe* in Bini Kingdom is so notorious and judicially noticed that we tend to ignore similar practices among nations in Nigeria. Among the Igbos, the eldest surviving son also takes his father's house or structure usually in the centre of his compound where he stayed and welcomed visitors while alive. This house is called *Obi* in Igbo land. Among the Abakaliki people of Ebonyi State, the eldest surviving son inherits his late father's compound called *mbarezhi* with adjoining land called *Ihe* in Ngbo Dialect. He could share it, including the economic trees, with his sibling but he is traditionally the owner as long as he lives. At his death, the compound devolves on the next eldest surviving son. Therefore, it will not be valid for a testator to devise the *obi*, *mbarezhi* or *ihe* to another person other than his eldest surviving son in a Will. For a Will to validly pass a property to a beneficiary whether under the general customary or Islamic law of inheritance, it must comply with all the requirements of formal validity of the general law. A testator cannot for instance, devise by Will his undivided share of family property. Neither can he devise a family property or property jointly owned in a Will[51]. Any clause in a Will tending to devise such an undivided share is void. In *Taylor v Williams*[52], a devise by a testatrix in her Will of her undivided share in a family property was held to be null. It is not a defence that the devise is to the testator's child or children as the latter would naturally take the deceased's share of the family property[53]. To that extent Professor Smith argues that the decision of the Federal Supreme Court in *Adesubokun v Yunusa*[54] that the rule of Islamic law of succession where only one-third[55] of a testator's estate could be given out in a Will and the rest distributed equally among his heirs is incompatible with the statute for the time being in force, that is, section 3

[45] *Esuwoye v Bosere* [2017] 1 NWLR (Pt. 1546) 256 S.C.
[46] M. A. Lateef, 'Is Islamic Law Customary Law?' (2012) (1) *The Silk*, University of Abuja, 120-123.
[47] [1998] 8 NWLR (Pt. 561) 182 S.C.
[48] [1992] 7 NwLR (Pt. 254) 401 S.C.
[49] *Adesubokun v Yunusa supra; Esuwoye v Bosere supra;* Evidence Act 2011, s 16 (1), (2).
[50] O. Onyema, 'Questions of Customary Law: The Interpretative Jurisdiction of the Court of Appeal and the Supreme Court under the Constitution' (2015) (7) *The Justice Journal*, 64-87.
[51] F. J. Oniekoro, Property Law Practice: Key Points, MCQ and Model Answers, (2nd edn, Enugu: Chenglo Ltd 2016), 132, 144; *Okelola v Adeleke* [2004] All FWLR (Pt. 224) 1980; *Okeloloa v Boyle* [998] 1 SCNJ 63; *Oke v Oke* [1974] All NLR 401.
[52] (1935) 12 NLR 67.
[53] *Ogunmefun v Ogunmefun* (1931) 10 NLR 82, cited in I. O. Smith, *Practical Approach to Law of Real Property in Nigeria*, (2nd edn, Lagos: Ecowatch Publications Ltd 2007), 570-571.
[54] [1971] All NLR 227; Adubi C. O., Legal Drafting, Conveyances & Wills,(Lagos: The Light House Publishing Co. Ltd 1995), 173-187; C. O. Adubi, *Legal Drafting, Conveyancing Law, Wills & Practice*, rev edn by A. M. Adebayo, (Lagos: The Light House Publishing Co. Ltd 2012), 310-339, particularly 313-315.
[55] Wills Law Cap 152 Laws of Sokoto State 1996, s 3 (2), Smith I. O., *op.cit*, 572.

of the Wills Act 1837 and therefore invalid has ceased to be the law. This position is in agreement with the preceding paragraph of this paper and the decision in *Ajibaiye v Ajibaiye* above. It should be so because the customary law of a people is a mirror of their accepted usage, including religion[56], and it is no less a source of law than the other sources of law. It is a set of rules of conduct applicable to the persons and things including succession to properties in our present case in a particular locality[57]. Under Islamic jurisprudence, the force of custom (*Urf)* or usage is recognized as far as there is no provision on the matter in the basic texts of the *Quran* and other primary sources of Islamic law. There is a legal maxim in Islamic law to the effect that any good custom is a part and parcel of sharia doctrine. With regard to testate succession, the *Quran* does not substantially change anything apart from limiting the quantity of the property to be willed away one-third of the net estate. By the authority of the prophets, legal heirs were not allowed to benefit from Wills but in pre-Islamic Arabia, a person could benefit from a Will irrespective of his legalistic rights of succession.[58]

6. Conclusion and Recommendations

An adult person who has the required mental capacity can make a Will and make gifts of personal and real properties to individuals and institutions of his choice. This freedom to make Will is not absolute. Statute, customs and religion restrict testamentary freedom of persons to give out properties in Wills as they choose. The aim is to ensure that the family members and other dependants of a testator are not denied provisions in the Will. It, also, ensures that the Will does not offend customary and religious rules of succession. Wherever these statutory, cultural and Islamic restrictions on testamentary freedom are violated, the net effect is not to impugn the whole Will. It is the devises or legacies offending the rules that are affected, and therefore, made null. The following recommendations are made to better the lots of extended family members and dependants of testators and testatrixes in Wills in the spirit of African communal and extended family life. Wills Laws that do not provide for restrictions should be amended to incorporate them. The Wills Law of Abia State does not provide for customary nor Islamic Law restriction. The Wills Law of Lagos State does not provide for Islamic law restriction despite the sizeable number of practicing Muslim who are indigenes of the State. The decision of the Federal Supreme Court in *Adesubokun v Yunusa* was to the effect that the Wills Act of 1837 applicable then in Lagos prevailed over the Islamic rule of succession. Today, there is Wills Law of Lagos State which does not provide directly against the effect of the decision in the above case. It is, therefore, recommended that the Legislatures in Abia, Lagos and any other States whose Wills Laws do not currently provide for customary and Islamic Law restrictions amend their Wills Laws to reflect these positions. Wills Laws should be amended to enlarge the class of persons eligible to apply for reasonable financial provisions. In Lagos State, only the husband, wife or wives, child or children of testators or testatrixes can apply for reasonable financial provisions[59]. In other States, the parents, brothers and sisters of the deceased testators or testatrixes can also apply for reasonable financial provisions upon proof that there were maintained by them while they were alive[60]. This is so un-African. In our part of the world, extended family members, and even members of immediate communities may depend on wealthy persons for maintenance.

It is recommended that the Wills Laws be amended to include: uncles, aunts, nephews, nieces, half brothers and sisters, step mothers, grandparents, in-laws and other dependants provided the estate has sufficient resources after the immediate family members have been settled and upon proof that they were maintained by the deceased during his or her lifetime. Child or children should be defined to include the children of the defendants subject to the proviso in the preceding sentence. Where there is no residuary legacy, provision should be made to enlarge the estate over which application for reasonable financial provisions is to be made, such as properties accruing to the estate after making the Will or after the death of the testator. Reasonable financial provisions should go beyond living expenses only in certain circumstances for all those entitled to them. It should cover educational and other training needs of the applicants especially the young ones among them. Reasonable financial provisions should be categorised in terms of percentages and a formular introduced into the Wills Laws for calculating them. For instance, if an estate of a testator is worth N100, 000.00, the application should be entitled to say 5% of it.Laws against discriminatory cultural practices in succession matters should be strictly enforced and enlightenment campaigns should be undertaken periodically to stop discriminatory cultural practices depriving female children and widows from inheriting from testators. This research observes that after making laws and passing judgments by courts against the cultural practices, people continue to indulge in them. Courts should interpret the provisions of Wills Laws touching on cultural and religious restrictions on testamentary freedom liberally and in favour of such restrictions provided they are not repugnant to natural justice, equity and good conscience.

[56] CFRN 1999, s 38.
[57] *Esuwoye v Bosere supra.* CFRN 1999, s 21.
[58] M. T. Ladan, *Introduction to Jurisprudence: Classical and Islamic*, (Lagos: Malthouse Press Ltd 2006), 217-220.
[59] Wills Law of Lagos State, s 2.
[60] Wills Law of Oyo State, s 4.