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Probate Practice and the Limitations to Testamentary Freedom: A Comparative Approach between Cameroon and Nigeria

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Abstract: In the Common law jurisdictions of Cameroon as is the case in Nigeria, all persons have the testamentary freedom to dispose of their properties to whoever they choose. Despite the statutory recognition of testamentary freedom, at death, the testator's /testatrix's wishes expressed in his/her Will may be challenged on cultural, religious, moral as well as social grounds. This paper appraises the concept of testamentary freedom in the English-Speaking Regions of Cameroon, while differentiating it with the position in Nigeria as they share the same colonial past with the former British Cameroon. The paper questions whether the limitations to testamentary freedom are justified. In answering the above question, the paper reveals that some limitations placed on testamentary freedom can bring about unworkable and impracticable results while some are aimed at violating the essence of leaving behind a will which is aimed at expressing the desire and wishes of the testator at death. The paper recommends that apart from the claim under the Inheritance (Provisions for Family and Dependents) Act 1975 which permits relatives or descendants who considers that the operation of the rule of intestacy or the will of their deceased relatives does not make reasonable financial provision for them to make a claim, under no circumstance should the testamentary freedom be taking away in view of distorting the wishes expressed by the testator/testatrix in his/her will.

Keywords: Succession, Will, Probate, Testamentary Freedom, Testator,

I. INTRODUCTION

Black's Law Dictionary[1] defines succession to mean the order in which or the conditions under which one person after another succeeds to a property, dignity, title, or throne. Succession in essence is a succinct term covering three different aspects to wit: the question of wills, the question of probate and succession properly speaking. A Will has been defined as "a declaration in a prescribed manner of the intention of the person making it with regards to matters which he wishes to take effect after his death"[2]. A will may also be described as a testamentary document executed according to law and voluntarily made by a person with a sound disposing mind by which he gives direction to persons called executors concerning the disposition or distribution of his real and personal properties after his death.[3] The word will either refers in a metaphorical sense to all that a person wishes to happen on their death or much more commonly, it refers to the documents in which a person expresses their wishes on death. The person making the will is called the "testator" if he is male or a "testatrix" if she is female. The person to whom gifts are given

[1] *Bryan A. Garner, Black's Law Dictionary 9th Edition at 1569.*
[2] *Halsbury's law of England (4th edition) vol. 50, para 301, page 203*
[3] *Re Barnett, Dawes v. Ixer [1908] 1 Ch.402*

under the will is called "beneficiary". The person who administers the will is called "executor" who may also be given power of trustees.

The following salient points should be noted from the definition of a will:

i. A will is not necessarily confined to the distribution of property because in the first place, a will can also appoint executors.
ii. A will may also appoint a trustee[4] where a trust may arise under the will. And usually, the trustees are the same persons as the executors.
iii. Also in a Will, a guardian for an infant may be appointed just as you can revoke previous Wills.
iv. In a will, a testator may also give directives as to his burial or the cremation of his body.[5]
v. By making a will, a testator will not interfere in any way with his power of disposition *inter-vivos.* Thus, if a testator makes a will leaving his house to Anthony, he may nevertheless sell the house during his lifetime, and even if he so does, Anthony will generally receive nothing under the will even though this provision is not formally evoked (see the doctrine of Ademption)[6]
vi. The executor has a supervening authority to sell property during the administration of the estate even if it is subject to a specific gift in the Will to any of the beneficiaries.[7]

Probate is a Latin word which relates to the question of the proof of the Will. Black's Law Dictionary has defined Probate Practice as the judicial procedure by which a testamentary document is established to be a valid will.[8] Probate is equally defined as the judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court. Unless set aside, the probate of a will is conclusive upon the parties to the proceedings (and others who had notice of them) on all questions of testamentary capacity, the absence of fraud or undue influence, and due execution of the will.[9] In probate, the main question is- is this the last Will and Testament of the deceased? In the Anglophone Regions of Cameroon, one of the most influential pieces of legislation enacted by the British was the Southern Cameroon High Court Laws 1955. It governed the administration of justice by the Colonial High Court of Southern Cameroon. The legislation establishes the competence of the High Court and legitimizes the reception and continuous application of the received English laws in the territory- the provisions of sections 10, 11, 15 and 27 of the above cited law provides an important source of law in Cameroon. Section 11 of the Southern Cameroons High Court Law of 1955 justifies the importation of laws in the following words:

Subject to the provisions of any written law and in particular of this section and of sections 10, 15 and 22 of this law:

a) The common law.
b) The doctrines of Equity, and

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[4] Bryan A. Garner., "Black's Law Dictionary Ninth Edition" on page 1656 defines Trustee as one who stands in a fiduciary or confidential relation to another; one who, having legal titled to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.

[5] Some people are concerned about the precise method by which their body is disposed of or they may wish that their body or a part of it be donated to medical education, research or treatment of patients. Directions concerning such matters can be included in the will. However, provisions concerning the disposal of one's body do not have binding legal effect. This is because the law recognizes no property in the dead body of a human being, so a testator cannot by will dispose of their dead body. Directions to the executors are therefore not legally enforceable but only to have the status of a request to the executors of the will to comply with the testator's wishes. Under the Human Tissue Act 1961(as amended in 2004), if a person either in writing at any time or orally in the presence of two witnesses during their last illness requests that their body or some part of it be used for therapeutic purposes or for medical research or education, the person in lawful possession of their body after death (for example executors) may authorize this, but is not bound to so authorize.

[6] Ademption occurs where the gift to the beneficiary ceases to exist at the death of the testator and the gift by operation of law fails (Oliver v. Oliver (1871) LR Eq. 506; Re Vickers, Vickers v. Mellor (1899) L.T. 719). Here are some situations when Ademption will occur: (a) by subsequent disposition by the testator of the subject matter of the gift, (b) by a change in the ownership or nature of the gift, (c) by the presumption that the testator does not intend to provide double portions for his children or other persons to whom he stands in loco perentis.

[7] As one of the main functions of the personal representatives is to pay the decease's debts and other liabilities, it may be necessary for the personal representatives to realize some or all the assets of the estate to carry out this function. In addition, legacies may be payable to beneficiaries under the terms of the deceased's will. For these reasons, section 39(1) of the Administration of Estate Act 1925 gives personal representatives some wide powers of sale, mortgage and leasing as are conferred on trustees for sale by virtue of section 28(1) of the Law of Property Act 1925. Where the decease dies intestate, a statutory trust for sale will of course arise under section 33 of the Administration of Estate Act 1925. This will impose upon the personal representatives a duty to sell, but the statute also implies a power to postpone the sale. The effect of the power to postpone sale is that the assets of the estate may be sold or retained at the discretion of the personal representatives. In many cases where the deceased dies testate (leaving behind a valid will), there will be an express trust for sale of the residuary estate, as this is useful in providing a fund for the payment of the deceased debts and other liabilities, as well as any legacies given under the will.

[8] Bryan A. Garner (ed.) Black's Law Dictionary, 8th Edition, USA.: 2004.p. 1239

[9] Bryan A. Garner (ed.) Black's Law Dictionary, 9th Edition, 2004 at P. 1321

c) The Statutes of general application which were in force in England on the 1st day of January 1900, shall in so far as they relate to any matter with respect to which the legislature of the Southern Cameroon is for the time being competent to make laws, be in force within the jurisdiction of the courts.

From the above, the following can be observed:

i. That only pre-1900 and not post 1900 English laws apply in Anglophone Cameroon.
ii. That English law shall be applicable in Cameroon only in areas where the parliament is yet to legislate upon.
iii. It is argued that the use of the words "for the time being" in section 11 has the effect without more.

Indeed, section 15 of the Southern Cameroons High Court Law 1955 provides that:

> "The jurisdiction of the High Court in Probate and Matrimonial causes and proceedings may, subject to the provisions of this law and in particular of Section 27, and the rules of court, be exercised by the court, in conformity with the law and practice for the time being in force in England."

This means that in probate, divorce and matrimonial causes, the law in former British Cameroon changes with that in England. This justifies the application of the Matrimonial Causes Act of 1973 in the English Courts in Cameroon. Now, it is accepted that courts should apply current English law (because they have no local legislation governing Wills) but this practice has been criticized as an undesirable device because it involves perpetrating cultural imperialism because of the use of a legislation made in and for non-African conditions. In the case of *John Enujeko Elumeze v. Fanny Ezenwa Elumeze*[10], Tailor CJ emphasized that the practice of applying current English law was subject to any local legislation modifying English law; and in any case, the application of English law turns on the word "May" and not "Shall" which make Section 15 of the Southern Cameroon High Court Law (SCHCL) 1955 "permissive" and not "mandatory."

The phrase 'for the time being' also occurs in section 10 of the SCHCL Law1955. It stipulates thus:

> "The jurisdiction vested in the High Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this law or any other written law, and or by such rules and orders in the absence thereof, in substantial conformity with the practice and procedure for the time being of her Majesty's High Court of Justice in England."

Testamentary freedom is an important principle in the Anglophone Regions of Cameroon. It provides people with the freedom to leave their estate to whomever they choose in the will, and without any legal obligation to provide for any family member or other individual.[11] It is the idea that a person has the right to choose who will succeed him or her to properties left behind by the testator. Apart from the characteristics of a will which are interpreted to give testamentary freedom to testators, there is in the Anglophone Regions of Cameroon as is the case with Nigeria a statutory limit to such testamentary freedom. Various reasons are given for this restriction which has been addressed below.

II. METHODOLOGY

This research, which is qualitative, it adopts the content analysis method of both primary and secondary data on the subject. Here resort is made to primary sources like legislation, case law, statutes, treaties and secondary sources like textbooks, journals (content and analysis), internet and manuals. Analyses are made from findings and recommendations follows. The qualitative methodology, particularly the content analysis method is best suited for this research as it gives a deeper understanding of probate practice and the limitations to testamentary freedom. Intensive desk top research was done to collect relevant case law. The content analysis research method was used to make replicable and valid inferences by interpreting and coding textual materials. There was a systematic evaluation of texts for example, documents, judgments and oral communication.

The data is analysed using inductive and deductive processes of qualitative content analysis. Through this method, documents, case law, peer review, journals and articles on probate practice were reviewed, compared, analysed and condensed into various sections in this research. The inductive reasoning was used in

[10] *(1969) LLJR-SC*

[11] *Oratto.co.uk, 'What is Testamentary Freedom » https://oratto.co.uk/will-and-probate -disputes/contested-probate. Accessed on the 2nd day of September 2023*

order to understand the general principles underlining the concept of probate practice and the limitations to testamentary freedom in order to arrive at the specific conclusion.

The deductive reasoning gives a better understanding of the concept of limitations to testamentary freedom and how it is applied. The use of secondary data helped guide the research as it gives different sources of information to support the arguments made and to infer and compare. The qualitative and interpretative epistemology is fundamental in this research study. It is used in order to determine and investigate social ills associated with probate practice and the limitations to testamentary freedom. This work also deals with critical analysis of primary data in the form of decided cases from the courts of record in the common law jurisdiction of Cameroon and Nigeria to strengthen the conclusions in Cameroon.

III. THE POSITION OF THE LAW ON TESTAMENTARY FREEDOM

In the Anglophone Regions of Cameroon, there is a longstanding acceptance of the principle of testamentary freedom. From the customary law background, testators could distribute their estate without the courts' interference. The main issue regarding the acceptance of custom is to determine the appropriate methodology to know what practices and norms constitutes customary law. One of the most notorious values of customary law that influenced the testators mind in distributing properties is gender discrimination. The Cameroonian customary law regards women as legal minors who can neither freely contract nor dispose of property.[12] This attitude towards women is reinforced by the notion of dowry,[13] which has denied them succession and inheritance rights. Cameroon has embarked on the use of legislation to reform some customary laws[14] Specific discriminatory values have been outlawed. It has been argued[15]that such gender discriminations are based on four fallacies namely, the marriage fallacy, the family name, women as chattel fallacy and the levirate marriage fallacy.

The arguments presented[16]after interviews and focus group discussions particularly in matrilineal societies like Kum and Wum is that, only the permanent members of the family can inherit land. This school of thought argues that the girl child's identity is 'elsewhere' because as put: 'she is a pilgrim', 'she does not belong', 'she will have land where she will get married', or "why does she need to own land in her name when she can use the land for the rest of her life?" Married women as argued should not have a say in land ownership and management in the family of her birth. Since she no longer belongs to the family, the needs of her male siblings who have wives in need of these lands occupy prime position. Also, the main thrust of the family name fallacy is that women are unreliable and unstable in marriage and cannot be trusted with such family assets like land. it is believed that if a wife is given ownership rights over her husband's land upon death of a husband or divorce, she will go with the land thereby depleting the patrimony of her husband's lineage.

Regarding the chattel fallacy, women for long have been considered as part of man's wealth and property. For this reason, property cannot inherit or beget property. It was argued[17] that, a man's status in the society was defined by the number of wives he had and credit worthiness by the number of potential daughters he can give into marriage. Customary marriages thus make women to look like additional property for their husbands and respective families. This puts women at a weaker position in the bid for land and other properties. On levirate marriage fallacy, the Western concept of marriage or marriage as it is today goes slightly contrary to the traditional view. Survey carried[18]hold the traditional view in which marriage is a union between families and not between two individuals. The Fon of Kum and other traditional rulers have argued[19] that the notion of widowhood is foreign and did not initially exist in their communities since the so-called widow is 'normally' expected to be inherited by a brother, or close family member who also inherits the property of the deceased husband. It thus creates no room to think about women.

In addition to the relevant provisions of the 1996 constitution (as amended), the Civil Status Registration Ordinance (as amended) is one of the most authoritative instruments used for the eradication of archaic customary practices. However, the use of legislation has failed to reform discriminatory customary

[12] *F. Lotsmart, I Sama-Lang, L. Fombe and T. Ramata., "Land Tenue Practices and w\Women's Rights to Land in Anglophone Cameroon". International Development Research Centre (IDRC), 2013 P. 23-27*

[13] *A dowry includes money, goods or property that the bridegroom – to be provides to the family of the bride –to be before the solemnization of a customary marriage. In traditional Cameroonian societies, it is sarcastically referred to as the money the husband uses to "purchase' his wife and is considered to be one of the root causes of the problem affecting the statutes of women in Cameroon.*

[14] *Sections, 70 -72 of Law No 81/2 of 29 June 1981 (as amended) to organize Civil Statutes Registration*

[15] *F. Lotsmart, I. Sama-Lang, L. Fombe and T. Ramata., "Land Tenue Practices and Women's Rights to Land in Anglophone Cameroon". International Development Research Centre (IDRC), 2013 p 25-27*

[16] *Ibid*

[17] *Ibid*

[18] *F. Lotsmart, I. Sama-Lang, L. Fombe and T. Ramata., "Land Tenue Practices and Women's Rights to Land in Anglophone Cameroon". International Development Research Centre (IDRC), 2013 p 26*

[19] *Ibid*

values. Because of weak enforcement mechanisms, outlawed discriminatory practices are still being observed in society, in total disregard of the law. Consequently, the courts have assumed the role of combating discriminatory practices through the adoption of an egalitarian jurisprudence in the enforcement of customary law.

The Wills Act 1837 places an unrestricted testamentary freedom. As per Section 3 (1) of the Wills Act 1837, testators are free to dispose of their properties to whoever they wish, even if they choose to disregard their family members and dependents to give all to complete strangers.[20] Section 3(1) of the Wills Act 1837 reads:

> "It shall be lawful for every person to demise, bequeath or dispose of, by will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to either at law or in equity at the time of his death."

Despite the provision of Section 3(1) of the Wills Act 1837, the absolute testamentary freedom was criticized on moral, customary and religious grounds. It has been argued that it could lead to testators disinheriting his dependents in favour of strangers, which would cause hardship to those dependents.[21] Also, according to Sagay, Muslims are particularly critical of the fact that this freedom would enable a Muslim dispose of his property by will, in a manner contrary to Islamic Law.[22] All these have an influence on the attitude of the court towards testamentary freedom of testators. However, one of the guiding principles of testamentary freedom is that the testator may be the best arbiter of appropriate provision for their family and dependents.

IV. LIMITATIONS TO TESTAMENTARY FREEDOM IN THE ANGLOPHONE REGIONS OF CAMEROON

Over time, some constraints have been placed on testamentary freedom under the British legislation which by Section 11 and 15 of the Southern Cameroons High Court Law 1955 is applicable in the Anglophone Regions of Cameroon. For instance, testamentary freedom only extends to persons who have testamentary capacity. An eligible beneficiary can bring an action to attack the validity of a will if he or she conceives that the will was made in violation of the essential or formal requirements for the creation of a will. An action can be brought to challenge a will if there are doubts about the mental fitness or testamentary capacity of the testator to make decisions about their estate at the time, they wrote the will. The evidence adduced of a testator's incapacity must be compelling enough to override the court's respect of testamentary freedom. This is so because the courts are always called upon while entertaining an application for a will to be admitted to probate to presume that the testator had sound disposing mind at the time the will was made.

The courts are eager to admit the Will of a deceased person to probate unless some irregularity is established against it. If the formal requirements for the creation of a will are observed, there is a rebuttable presumption that the testator had a sound disposing mind at the time the will was made. The rationale for this presumption is that a state of thing shown to exist continues to exist, unless the contrary is proved. If it is proved that the testator was insane immediately before making a will, the presumption is that his insanity continues unless the contrary is proved.

Kole Abayeomi, SAN[23] in favour of the presumption of sound mind submits that:

[20] The gift to a stranger in this case can be challenged on grounds of suspicion and undue influence. Suspicious circumstances involve situations where there is a fiduciary relationship between the testator and the beneficiary, for example, the relationship of solicitor and client, teacher and student, doctor and patient, pastor and parishioner, etc. In all situations, where there are fiduciary relationships, the court is very careful in admitting the will to probate. For example, if the solicitor who prepared the Will is a beneficiary of substantial party of the testator's property, this could raise suspicion. The onus of proof to clear the suspicion is on the profounder of the Will. The rule applied in such cases is that if the party writes or prepares a will, under which he takes benefit as beneficiary, that ought to generally excited the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the Will, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the Will propounded does express the Will of the deceased.

In Barry v. Butlin,[20]a testator made a will at the home of his Attorney, in the Attorney's handwriting and left approximately ¼ of his estate to the Attorney, giving the rest to friends. The testator's son challenged the Will on grounds of (amongst other things) suspicious circumstances. The court held that the evidence that the Will was executed before two independents `witnesses coupled with the fact that the testator's son had been excluded from the Will because of criminal conduct was sufficient to dispel the suspicion.

[21] I Sagay., "Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries", (Lagos: Malthouse, 2006), P. 127

[22] Ibid

[23]Kole Abayomi., Testamentary Capacity: The importance of sound Disposing Mind in the Law and practice relating to Wills published in Nigeria Law and Practice journal, Vol. 3 No. 1, March 1999 page 42 at 52.

> "That court's attitude in this respect is fair and logical otherwise the propounder of a Will will always and as a matter of course have to prove to the court that the testator was of sound mind and not insane when he made the Will and only then the court grants probate."

In *Okelola v. Boyle*[24], the Supreme Court of Nigeria explained the application of the presumption as follows:

> "Where a document is *ex facie* duly executed the court may pronounce for it on the maxim *omnia preasuntur rite esse acta*. The maxim only applies with force where the document is entirely regular in form and no suspicion attaches to the will. But where suspicion attaches or the document cannot be said to be *ex facie* regular or where the testator suffers from some disability such as deafness, blindness or illiteracy the maxim does not apply with the same force."

If the state of mind of the testator is contested, the onus *probandi* is on the propounder of the Will to establish, usually by showing that the Will is rational on its face, and that the Will is duly executed. This raises a *prima facie* proof of sanity in favour of the testator, or he may decide to advance positive affirmative evidence in support of the testator's state of mind. After this the onus shifts to the challenger who must adduce evidence to show that even though the Will is rational on its face and duly executed, the testator was insane at the time the Will was made.

In *Johnson v. Maja*[25], the executor as plaintiff asked the court to declare solemn form for the Will and Codicil of the testator. The window as defendant challenged the Will on grounds that it was not properly executed, that the testator was not of sound mind and undue influenced by a woman named Jokotade, the testator's mistress. It was held that:

> "The onus of proof shifts. In the first stage, when a will is contested, the burden is on those who propound the Will, to show by evidence that *prime face*, all is in order. Therefore, the burden shift to those who attacked the Will, and they are required to substantiate by evidence the allegations they have made. The decision must ultimately depend upon a consideration. (having regards to the shifting burden of proof), of the value of all the evidence given by both sides."

The courts in the Common Law Jurisdictions of Cameroon will assess the will's validity and may choose to disregard the testator's wishes. Where the court disregards the will, the courts will subscribe to the rules of intestacy to determine how the estate is to be distributed. This may turn to hand the estate to an undesirable person(s). The Courts can also choose to overlook the instructions of a testator if they were unduly influenced or coerced into making, bequests or devises and where the will is void of proper attestation clause. Undue influenced may be difficult to substantiate, but a will made under duress cannot properly reflect the testator's testamentary intentions and will be found to be invalid.

As noted above, the wishes of a testator may be disregarded where the will was made without a proper attestation clause.[26]In the absence of such a clause, affidavit evidence will generally be required from the person putting forward the will to prove due execution. In *Werner Steidle v. Waters Ayisi Abange & 2 others*,[27]Counsel for the claimant challenged the will from being admitted to Probate on the ground among others that the will was attested in derogation of the provision of Section 9 of the Wills Act 1837 (as amended), Section 9 of the Wills Act 1852 and Section 17 of the Administration of Justice Act 1982. Section 9 of the Wills Act 1837:

> "No Will shall be valid unless it shall be in writing and executed in the manner hereinafter mentioned; it shall be signed at the foot or end thereof by

[24] *[1998] 1 S.C.N.J. 63*
[25] *(1950/51) 13 W.A.C.A. 290.*
[26] *A rebuttable presumption of due execution arises when a will contains an attestation clause stating that all formalities have been properly complied with.*
[27] *Suit No HCF/020/PA/2021- Judgment No HCF/CIV/048/2023 Unreported, delivered on the 31st day of January 2023*

the testator or by some other person in his presence and by his directions; in the presence of two or more witnesses who shall be present at the same time."

Section 9 of the Wills Act 1852 amends the provision in relation to the position of the signature of the testator only, thus essentially extending the position of the signature of the testator to any part of the Will, as opposed to only at the foot or end thereof. Section 17 of the Administration of Justice Act 1982 on its part textually amends Section 9 of the Wills Act 1837 substantially relaxing the manner of attesting a will. Section 17 provides:

"No will shall be valid unless-

a. It is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
b. It appears that the testator intended by his signature to give effect to the will; and
c. The witnesses acknowledge the signature in the presence of the testator (but not necessarily in the presence of the other witnesses, but no form of attestation shall be necessary.

On the strength of the above provisions and pursuant to the objection raised by counsel in *Werner Steidle's case*, the court held that a literal construction of Section 9 of the Wills Act 1837 and all its amendment[28] culminates in the fact that, where the attesting witness did not see the testator actually attest the will or where the latter did not expressly inform them, while requesting the attestation clause that he had signed the will, the will cannot be valid. Both attesting witnesses tendered oral evidence during the trial. It was the evidence of the attesting witnesses that they signed the will on the 28th day of November 2010. Cross examined by counsel, the 2nd witness stated, *"I did not see the testator signed the will*". Relying on the *ratio legis* of Section 9 (c) of the Wills Act 1837 (as amended) which is to ensure that the testator did actually signed the will, by witnessing the latter in the physical process of signing (which was not the case in the present case) the court noted that with no *iota* of evidence that the attesting witnesses actually saw the testator signing, no court in the world can admit the will in issue to probate. Consequently, the last Will or Testament of William Abange Ange (deceased) was declared incompetent for grant of probate for want of execution of the attestation clause. The court further gave an order that the estate be administered and subsequently distributed in consonance with the Rule of Intestacy.

From the above, it must be noted that the will must be signed in the presence of at least two witnesses present at the same time. There is no statutory provision that prohibits any person from witnessing a will, so a minor who, if required, can testify on the due execution of a will can witness a will.[29] The mere fact that the witness to the will is incompetent witnesses under the Evidence Ordinance does not invalidate the will. So, executors, beneficiaries and their husbands or wives, can witness a will and their evidence is admissible to prove due execution of the will.

On whether the *de cujus* can through a will disinherit a spouse with whom he jointly acquired all the assets of the estate; and whether the court can enforce such a will, the Court of Appeal Bamenda held in *Tantoh Agnes Besong Etaka v. Tantoh Nee Achunche Vivian (Administrator of the Estate of Tantoh Asamba Peter*[30]that all the beneficiaries are entitled to the estate and some of the beneficiaries cannot be deprived of their inheritance even by an act of the deceased except the deceased person justifies the disinheritance with reasons. In the instant case the respondent and her counsel alleged that it was the deceased's intention to exclude the 1st and 2nd wives and their children from inheriting his property. The court stated that even if the deceased had left a valid will, such an evil intention could not be upheld by the court because the disinheritance was not justified. The court maintained that this is so because the vesting of property on the beneficiaries is not left to the whims and caprices of the testator and even though he has absolute freedom to devise his property as he pleases; statutes like the Inheritance (provision for Family and Dependants) Act 1975 are intended to check the abuse of the freedom. In the light of the foregoing, the court held that the deceased's intention to disinherit the wife cannot be taken into consideration because it is repugnant to natural justice, equity and good conscience and against the Rules of Intestacy, the Administration of Estate Act 1925 and Inheritance (Provision for Family and Dependants) Act 1975. It was further maintained in the case under review that by law all the beneficiaries are entitled to inherit a share of the estate, but just in case this law is not

[28] Wills Act 1852 and Section 17 of the Administration of Justice Act 1982

[29] Ideally, the witness should be 18 and above with capacity and if possible, not related to the testator or have any personal interest in the will. However as per the provision of section 154 of the Evidence Ordinance Cap 62 every person including a child who has the requisite mental capacity to understand the questions put to him and gives intelligible answers thereto is a competent witness. Competency is not a matter of age but of understanding. Equally, Section 14 of the Wills Act 1837 provides that a will should not be voided on account of the incompetence of attesting witness.

[30] Supra

respected, the beneficiaries who are dissatisfied have the right to apply under the Inheritance (provision for Family and Dependents) Act 1975 to the court for an order adjusting the distribution of the deceased's estate if it can be shown that the deceased's will or the rules of intestacy failed to make reasonable financial provision for the claimants. As per the court, whether a beneficiary does not show interest in the estate or is not made a party in the proceeding is of no moment regarding their qualification as beneficiary.

V. CLAIMS FOR PROVISION FOR FAMILY AND DEPENDENTS AS A LIMITATION ON TESTAMENTARY FREEDOM

This is one of the statutory limitations to testamentary freedom applicable in the Anglophone Regions of Cameroon. This Limitation arose in line with the developments in England, to provide for family or dependents who have been cut out of a will or to whom adequate provision was not made. On the strength of the provision for family and dependents, certain eligible persons such as spouses and children can contest a will and claim provision from the deceased estate. The limitation is contained in Chapter 63 of the Inheritance (Provision for Family and Dependents) Act 1975. Section 1 of the act provides:

(1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons: —
   a) the spouse or civil partner of the deceased;
   b) a former spouse or former civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership;] (ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) ... below applies;]
   c) a child of the deceased;
   d) any person (not being a child of the deceased) who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family;]
   e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

that person may apply to the court for an order under Section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant. The be competent, an application for an order for financial resources shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with regards to the estate of the deceased was first taken out (but nothing prevents the making of an application before such representation is first taken out).[31]

This financial provisions in the case of an application made by a spouse save when the marriage was subject to a decree of judicial separation as expressed in Section 1(b) of the 1975 Inheritance Act, means such financial provision as would be reasonable in all the circumstances of the case for the spouse to receive, whether such is required for his or her maintenance or not. The courts often express the difficulties in balancing the need for testamentary freedom against the moral responsibility of a testator to provide for their family and dependents. The High Court of Fako Division has recently illustrated the tension at the heart of these claims. In *Kum & 1 other v. Sende Melvis*[32] the court held while interpreting the provisions of Section 46 of the Administration of Estate Act 1925 that the spouse is entitled to half of the estate while the other half is distributed amongst all the children. The court maintained that the law of succession has been codified and same law makes no provision for the parents of a deceased where the latter is survived by a spouse and children.[33] The parents as per the court can only benefit from the estate when there are no children (worthy of mention is the fact that subsequent succession law reforms have totally excluded parents from inheriting where there is a surviving spouse *albeit* children).[34] Thus parents may only benefit as opposed to inheriting where the latter apply for reasonable financial provision within the tenets of the inheritance Act for family and Dependents UK 1975.

In the suit under review, the plaintiffs are the mother and brother of the deceased while the defendant is the widow of the deceased. The plaintiffs sought for the revocation of the letters of administration granted to the defendant, in favour of the 1st plaintiff the mother of the deceased. They further seek an order

[31] *Section 2 of the Inheritance (Provisions for Family and Dependents) Act 1975*
[32] *Suit No HCF/AE124/2020/PA/2021 (Unreported) Delivered on the 31st day of August 2021*
[33] *Mary Kum & 1 other v. Sende Melvis, Suit No HCF/AE124/2020/PA/2021 (Unreported) Delivered on the 31st day of August 2021*
[34] *Ibid*

requiring the defendant to account for all the rents collected from the four apartments owned by the deceased prior to his death and an order refraining the deceased from collecting rents from the four-apartment building.

The narrative upon which the action was predicated flows; thus, that the defendant who obtained letters of administration over her deceased's husband's estate in the year 2020 has been administering same in the lone interest of her and her lone child to the exclusion of the other beneficiaries. Curiously counsel for the plaintiffs did not list the other alleged beneficiaries of the estate in issue. However, the statement of defence revealed that the deceased was survived by the defendant the surviving spouse, her lone issue and three other issues born out of wedlock. The deceased was equally survived by his mother and other siblings. The defendant posited that pursuant to his husband's death, the property was distributed by the sister of the deceased, who apportioned two apartments to her; one to the mother of the deceased for the latter's personal benefit and the last one was allocated to the three children of the deceased under the auspices of his mother for the upkeep. It was further adumbrated that the siblings of the deceased have appropriated the two plots and are attempting to sell same.

On the above facts and pursuant to the provisions of the Civil Procedure Rules 1998 UK, the overriding objective in all probate actions is for the court to identify the issues in litigation at an early stage. The court in adjudicating the issues raised, observed that though the plaintiffs seek the revocation of the letters of administration in their favour, the contention spans far beyond the administration of the estate in issue. It is evident in the statement of facts filed by both the plaintiffs and defendant, that the real issue is the proper parties entitled to the estate of the deceased. To resolve the issue in contention, the court held that the purpose of administration of an estate, is to gather the property of the estate, pay the expenses, that is the debt of the estate and proceed to distribute same according to law.[35] By Section 44 of the Administration of Estate Act 1925 (as amended), the administrator is expected/obliged to distribute the estate within a year upon the grant. In this case, the defendant posited that the sisters of the deceased had distributed the estate upon the demise of her husband, an act which they are not legally entitled to so proceed, thus the action to obtain letters of administration by the surviving spouse and the resultant cacophony born of the surreptitious distribution of the estate in issue.

The court went ahead to identify the beneficiaries of the deceased estate within the realms of the law on intestate succession. Citing section 46 of the Administration of Estate Act 1925, the court maintained that the spouse is entitled to half of the estate and the other half is distributed amongst all the children. As per the court, the law of succession makes no provision for the parents of a deceased where the latter is survived by a spouse and children.[36] This is however subject to the fact that the deceased parents or any other person be it a spouse or child may apply for financial maintenance in cases where the will or intestate succession failed to so provide for them.[37] Applying the rules afore cited to the present case and following the inventory of the estate which comprises a built up four apartment houses, two plots at down beach Tiko and a plot in Muea, the court awarded to the surviving spouse half of the estate. The defendant (deceased spouse) was awarded two of the four apartments, as well as one of the plots situate at down beach Tiko. The deceased birthed four children, three out of wedlock and one with the defendant (deceased spouse) during their marriage. Since English law does not draw the dichotomy between children born in or out of wedlock, the other two apartments and the plot was shared equally amongst the four children. Half of the plot in Muea was given to the wife and the other half was shared amongst the children.

VI. ISLAMIC LAW LIMITATION TO TESTAMENTARY FREEDOM

Islamic Law is a religious law based on the Quran and the traditions of the prophet Muhammad.[38] It is often said and seen that Islamic law is complicated and non-uniform.[39] The key elements of Islamic law are usually the same;[40] however, the sources of jurisprudence can be different. Islamic law sets out strict and rigid inheritance rules that determine how a Muslim's estate is to be divided between his or her heirs on death. Under this law, testamentary freedom is restricted to just one third of the deceased's net estate, after deduction of all debts and funeral expenses. The remaining two thirds is divided in accordance with Shari's.[41] The two third share of the deceased's estate that is subject to Shari'a inheritance rules will differ depending on which Islamic sect the deceased belonged

[35] *Section 25 of the Administration of Estate Act 1925 (as amended)*
[36] *The parents of the deceased can however apply under the Inheritance (Provision for family and Dependents) Act 1975 for reasonable financial provisions within the meaning of section 1 and 2 of the above cited law.*
[37] *Inheritance (Provision for Family and Dependents) Act 1975.*
[38]
[39] *Munazza Hollinsworth., « Islamic Succession » found at www.rhjdevonshire.co, last visited 14/09/2023.*
[40] *Ibid*
[41] *Ibid*

to. Most commonly, it will be distributed in accordance with a hierarchy of three classes of heirs.

i. First class often referred to as the Quranic Heirs or shares; and
ii. The remaining two classes are the residuary Heirs.

There are six heirs who will always inherit if they survive the deceased and these are, the husband/wife, son, daughter, father and mother. The first group are entitled to specific shares, but they cannot all inherit at the same time and may exclude others; a husband is entitled to half his deceased wife's estate if she has no children, if she has children, he is entitled to a quarter share.[42] A wife is entitled to a quarter share of her deceased husband's estate if she has no children, if she has children, she is entitled to one eight.[43] Sons usually inherit twice as much as their sisters when one of their parents dies.[44] In the absence of children, the grandchildren or remoter issue would inherit although the daughter's children are unlikely to inherit even if the daughter has died. The second group includes grandparents and siblings. In the absence of siblings, nephews and nieces inherit.[45] The third group includes paternal and maternal aunts and uncles and their descendants. Under Islamic law, adopted children are not considered as belonging to the couple's and therefore are not within the primary heirs but deceased can only leave to them a bequest from the one third of his/her estate over which he has testamentary freedom.[46]

It is understood that one of the advantages of leaving behind a will is generosity towards strangers. Section 3 of the Wills Act 1837 confirms the power of every adult to dispose of the real and personal property, whether they are the outright owner or a beneficiary under a trust, by will on the death. The act extends to all testamentary dispositions or gifts, where a person makes a disposition of his property to take effect after his deceased, and which is in its own nature ambulatory and revocable during his life. From the above provisions, anyone can benefit from a will. A testator reserves the right to give his property to whosoever he wishes after his death. So, a relative, friend, acquaintance or total stranger can benefit from a will if so, properly named by the testator. It is however advisable that a beneficiary should not be an attesting witness in the will.[47]

Despite the express provision of Section 3 of the Wills Act 1837, it is generally accepted that a non-Muslim, even if he is a follower of the Book cannot inherit from a Muslim. The only exception to these generally accepted norms applies to the remaining one third share which the testator has some degree of testamentary freedom.[48]

Whilst we understand the importance of complying with the Wills Act, it is also important to ensure that the will adheres to the principles of Islam. Dying without a Shari's compliant will, or any will, may result in the deceased estate being more complex and difficult to administer. It further suggests that the will may be distributed in accordance with the rule of intestacy which does not include provisions for Shari's compliance.

VII. STATUTORY LIMITATION TO TESTAMENTARY FREEDOM IN NIGERIA.

The law governing Wills in Nigeria is not uniform as is the case in all the English-Speaking Regions of Cameroon. Different laws apply in different states that make up the federation of Nigeria. The laws applicable in probate matters in Nigeria are the Wills Law, Cap 133, Laws of Western Region of Nigeria 1959 (applicable in the states created out of the Old Western Region,[49] the Wills Law of Oyo state 1990, Wills Law, Cap W4, Laws of Delta State 2006, the Wills Law of Lagos State Cap W2 Laws of Lagos State 2004. In some States in the former Northern and Eastern Region of Nigeria, the applicable law remains the English Wills Act 1837.

In the states in which the Wills Act of 1837 is still the applicable law, there is unrestricted testamentary freedom. Testators in those states are free to rely on section 3 of the Wills Act 1837 to dispose of their properties to whomever they wish and can even choose to disregard their family members and dependents to give all their properties to complete strangers. However, this absolute testamentary freedom as in the Wills Act of 1837 has been criticized on moral, customary and religious grounds. As noted by Aloro I. Fenemigho,[50] Muslims are particularly critical of the fact that this freedom would enable a Muslim dispose of his property by will, in a manner contrary to Islamic Law. It was

[42] Nalvedhya Kumar., « Succession of Sharer and Residuary Under Muslim Succession Law" Found at www.legalserviceindia.com last visited on the 14/09/2023.
[43] Ibid
[44] Ibid
[45] Aloro I Fenemigho., 'Statutory Limitations to Testamentary Freedom in Nigeria: A comparative Approach', NAUJILI 2013 at 69 -83
[46] Munazza Hollinsworth., 'Islamic Succession ' found at www.rhjdevonshire.co, last visited 14/09/2023
Ibid
[47] Except for cases covered by the statutory exceptions section 15 of the Wills Act 1837 bars witnesses in a will from benefiting in the will.
[48] Marylou Bilawala., "Muslims May Bequeath a third of the Property by Will" found at www.livemint.com, last visited on the 15/09/2023.
[49] Edo, Delta, Ekiti, Ondo, Osun, Ogun, and Oyo states
[50] Aloro I Fenemigho., 'Statutory Limitations to Testamentary Freedom in Nigeria: A comparative Approach', NAUJILI 2013 at 69 -83

also argued that some properties are sacred by customary law and cannot be disposed of by the testator however he wishes.[51] This lead to the legislative attitude as manifested in the Wills laws enacted by some states in which laws now introduced certain limitations placed on the testamentary freedom of testator with the states. One of such limitations which are statutory is customary law limitation.

VIII. CUSTOMARY LAW LIMITATION IN NIGERIA AS OPPOSED TO WHAT OBTAINS IN THE ENGLISH-SPEAKING REGIONS OF CAMEROON

In the case of Nigeria, this limitation is present in Wills Laws of Lagos, Kaduna, Oyo, Delta and other states of the former Western Region of Nigeria. It is also present in plateau and Kwara States.[52] This restriction serves to restrict the property that can be disposed of by will. Section 3(1) of the Wills Law of the former Western Region provides:

> "Subject to any Customary Law relating thereto, it shall be lawful for every person to demise, bequeath or dispose of, by his will executed in the manner hereafter required, all real and personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so demised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator".

It was held that this statutory limitation recognizes that complete testamentary freedom could upset some established rules in customary law in Nigeria.[53] There was equally confusion as to the effect of Section 3(1) of the Wills Law of Western Nigeria, that is, whether it operated to take away the testamentary capacity of the persons subject to Customary Law or if it merely qualified the property that could be disposed of in a will. This confusion has however been cleared up by the Supreme Court of Nigeria in Lawal-Osula's Case[54]when it held that the customary law restriction is so absolute that a testator cannot seek to exclude it.

The Lagos State limitation is a little different. Section 1(1) of the Wills Law of Lagos States provides:

> "It shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with the provision 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 provision of this 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."

It is submitted that this restriction is more explicit and expansive than that provided for under section 3(1) of the Wills Law of Western Nigeria. The restriction in the Wills Law of Lagos State covers property subject to customary law and would seem to also cover any property which the testator has no power to dispose of such as family or community property.

Unlike in Nigeria where customary law can be relied upon to defeat the concept of testamentary freedom,[55] the same cannot be said to be the case in Cameroon. As a post-independent legislation, the Cameroon Constitution[56] only makes implicit recognition of customs. Article 1(2) of the Constitution provides that "the state shall recognize and protect traditional values that conform to democratic principles, human rights and the law." This constitutional provision is subjected to ambiguity as it failed to define what traditional values are. It is contended in this article that traditional values are the ancestral customary values of the people. The Constitution alludes to the state offering protection of 'traditional values" without stating in précised terms what those values entail and the measures that have been adopted or are to be adopted to protect them. Could it be said that the protections that state is going to provide to traditional values are already those in existence, and contemplated under section 27(1) of the Southern Cameroon High Courts Law 1955? There is no doubt that a discussion of

[51] *Ibid*
[52] *Ibid*
[53] *Belgore JSC in Lawal-Osula v. Lawal-Osula, [1995] 32 LRCN 291*
[54] *Supra*
[55] *See Section 280 of the Constitution of the Federal republic of Nigeria which provides useful reference points when there is need to subject any custom to repugnancy test and Section 3(1) of the Wills Law of the former Western Region provides as well as Section 1(1) of the Wills Law of Lagos State.*
[56] *Law No 96/06 of 18th January 1996 (As amended)*

this nature will serve the immediate and future needs for advancement of Cameroon legal jurisprudence.

With the introduction of the Common law in the country, the indigenous/customary law rules were relegated to the background, coming after received foreign law, statutes of general application and other ordinances.[57] The validity of these customary law rules were assessed based on the English principles introduced to assess the validity of customary law. Based on these foreign standards, substantial rules of customary law were found offensive, inconsistent with the English sense of justice and therefore declared invalid. The subjection of customary law to repugnancy and the incompatibility tests in Cameroon Courts during the colonial and post-colonial era has attracted the attention of criticisms of different stakeholders, such as judges and legal analysts depending on your point of view. Notwithstanding the persistence of concern and criticisms of different stakeholders, repugnancy and incompatibility tests on several Cameroon customs have continued and Cameroon courts have been making landmark decisions in that respect. Many writers both in Cameroon and other Common Law jurisdictions[58] have dwelled on this subject matter of Repugnancy tests on several customary laws. When issues of subjection of customary law to repugnancy[59] are brought before the courts, the courts have never failed in condemning barbaric customs. The courts have set aside several Cameroon customs on the ground that such customs failed the Repugnancy tests.[60]In some instances, the courts have made conflicting decisions on the same custom.[61] Notwithstanding the scholarly efforts and judges' contributions in condemning every trace of "barbaric" customs, those barbaric cultural practices have persisted in many Cameroonian societies.[62]After Cameroon

[57] *The Administration of justice in Cameroon suffered a serious dislocation in the interregnum between the outbreak of World War I and the coming into force of the mandate system in 1922. It was not until 1922 that the judicial and legal services in the British Cameroons were put on a systematic footing. In the interval between the outbreak of WWI and 1922 the administration of justice in the territory was haphazard and uncertain. When the British got her own share of Cameroon in March 1916, she decided to administer it along her contiguous territory of Nigeria. The Governor General of Nigeria issued proclamation Nº 1 of 1916 authorizing "All British military officers in command of detachments of troops and all British civil officers appointed to temporarily administer any territory of Cameroons …. as from the date of their appointments to hold courts with full jurisdiction in civil and criminal matters in which natives are concerned in so far as it is known, and, if not known, the laws of that part of Nigeria in which they hold appointments immediately prior to their present appointments". Justice in the British Cameroons was until further notice, to be administered by British administrative and military officers. They hold courts in which they exercise full jurisdiction in Civil and Criminal matters. However, they could only try cases in which all parties were natives. Each court applied the law which obtained in the place of its location. If there were doubt as to which law to apply, the law of the place in Nigeria where the presiding officer previously held appointment applied. It was however unclear whether this referred to imported English law or customary law. This was clearly a chaotic way of dispensing justice. It was also unsafe because everything was virtually left to the individual whims and caprices of the officers concerned. However, this was only a stopgap as the British had not by then established a durable administrative structure in the territory. See C. Anyangwe., The Cameroonian Judicial System (Yaoundé: Publishing and Production center for Teaching and Research, 1987) p.69*

[58] *K. E. MIKANO., "The Repugnancy and Incompatibility test and customary law in Anglophone Cameroon" African Studies Quarterly, Volume 15, issue 2 March 2015, P. 90-94. H. Nwaechefu., "The subjection of Customary laws to repugnancy tests by Nigerian Courts; the need to broaden the Horizon" International Journal of Law, Volume 3; Issue 6; November 2017; P. 70-74*

[59] *Ibid*

[60] *Elive Njie Francis V. Hanna Efeti Manga, Suit No CASWP/CC/12/98 Unreported, the applicant claimed that, in accordance with the Bakweri custom, he had provided a sack cloth for the widow of his uncle, thus rendering him the next of kin of the deceased, to the exclusion of the widow. His claim was rejected by the Bwenga customary court when it declared the widow next of kin. The decision was upheld on appeal, with Nana J stating that it was repugnant to natural justice, equity and good conscience for the appellant to be made next-of- kin over the widow. This decision also show that the courts used the repugnancy test to enforce human rights in practice.*

[61] *See the contrasting decisions reached in the cases of The Estate of Agboruja, Yakuba 2002 a Nigerian case, and David Tchakokam v. KeouMagdaleine, Suit No HCK/AE/K.38/97 unreported, a Cameroonian case. In both instances, the courts were called upon to determine whether the system of levirate marriage under customary law (by which the wife of a deceased member of the family could be given to or married by another member of the family) offended natural justice, equity, or good conscience. In the Estate of Agboruja, the court approved the system of levirate marriage by holding that there can be nothing intrinsically unfair or inequitable even in the inheritance of widows, where those who follow the custom are pagans and not Mohammedans or Christians. The custom is based on what might be called the economics of one kind of African social system, in which the family is regarded as a composite unit. On the contrary, the court arrived at a different conclusion in David Tchakokam'scase and rejected the practice as not only being repugnant but also contrary to written law. Although the cases are derived from two different jurisdictions, it is important to note that the applicable rules are similar as Anglophone Cameroon and Nigeria share similar legal traditions and legal systems. Nonetheless, the judges arrived at different conclusions. Whereas the Nigerian judge saw the practice as not being repugnant because of the benefits it confers to the family, his Cameroonian counterpart disapproved of it as repugnant based on human right.*

[62] *InTeuto Victor C/ Mme Teuto ne/e Njounkwa Philomene, Bafousam Court of Appeal Arret No. 43 Court of 25th July 1996, the husband assaulted his wife when she was pregnant causing a miscarriage. Her medical certificate of 10th May 1996 showed that the miscarriage was due to trauma. The court of Appeal Bafousam upheld the Bamilike Custom which forbids a man to beat wife when she is pregnant and granted divorce holding the husband in constructive desertion. This case shows that assault of woman was rampant in the Bamilike Culture, reason why the culture only forbids a man to beat the wife when pregnant. Despite the principle of equality enshrined in both international and domestic instruments, there are still customs which are completely at variance with such*

political independence,[63] Cameroon Courts continued subjecting several indigenous customs to repugnancy tests. In the light of these tests, it is contended that the repugnancy test has restricted the scope of the application of customary law, the test has brought about reforms in customary law and there is uncertainty in the application of Customary Law due to the absence of clear standards. Any customary law provision that conflicts with statute must be held to be inconsistent and in applicable.

The Southern Cameroons High Courts Law 1955[64] mandates the High Court to enforce and observe every native/local custom and shall not deprive any person of the benefit thereof except when any such custom is repugnant to natural justice, equity and good conscience or incompatible either directly or by implication, with any law for the time being enforce. This test (the incompatibility test) generally means that where a subject matter is governed exclusively by a law or statute for the time being in force, any customary law that is inconsistent with such as law or statute cannot be valid. Any law used as such in this section means any local or Cameroonian legislation. It does not cover English law because the two systems are almost always contradictory and if the validity of Customary Law is based on its incompatibility to English Law. It was held in *Salau v. Aderibigbe*[65] that rules of customary law are incompatible with local statute or subsidiary legislation if the local enactment is manifestly intended to govern that subject matter to the exclusion of customary law. This incompatibility rule also facilitates rights enforcement as violations often amount to practices that are prohibited by law.

There is direct incompatibility if the enactment expressly abolishes or modifies the customary law rule by its terms and implicit incompatibility where it is inconsistent with the manifest object of the enactment for both the statute and the customary law to co-exist even though the statute does not expressly abolish or modify the customary law rule. The primary issue the courts have grappled with is the issue of the proper meaning of "law for the time being in force" and whether it refers to local enactments or also includes English law in force. In *Adessubokan v. Yinusa*[66]the court held while interpreting the word "for the time being" that it relates to the laws as applicable in England. The court in *Ratibi v. Savage*[67] gave a conflicting interpretation of the meaning of the word "for the time being enforce" to refer to local enactments. It is contended in this article that the position held in *Ratibi's* case is a better law, because customary law is so inconsistent with English Law, that prescribing an incompatibility test by reference to English law would result in virtual abolition of customary law.

RECOMMENDATIONS

In the case of Customary Law limitations, tt is noted that the repugnancy clause is so controversial; it puts in issue the true nature and basis of authority of customary law as a source of law. This is so because the clause implicitly makes validity of any rule of customary law whether related to property adjustment or not dependent not on the ethos and beliefs of the people but on exotic standards. In other words, the application of customary law is subjected to the basic principle of law accepted by an alien country, or a subjective test by the judge. The question concerning the objective or purpose of the repugnancy clause is therefore an important one. Is customary law (inheritance) rule "law" only when it has passed the repugnancy clause? Better still, is the clause a criterion of validity of customary law? Can on say this given rule of customary law has failed the repugnancy test and so it is not law at all? Better still, has the repugnancy clause only the effect of reducing the quantum of enforceable rules while leaving the source of their authority unimpaired? Can one say this given rule has failed the repugnancy test, but still remains law though not a law that should be observed and enforced because it is morally iniquitous?

If the former hypothesis is the case, then the repugnancy clause is open to serious criticism. Customary law derives its validity from the assent of the local community not from the decision of the court.[68] For, a court of law cannot in itself create customary law. Rules of customary law are enforced by the courts because they are authoritative rules with binding force and not because

instruments, in few extreme cases the courts have had the occasion the check the exercise of such customs. In Ngoe Theresia Ngosong Alemkeng v. Bezakeng Alemkeng John, Suit Nº HCK/8/94/28M/94 the husband abandoned his wife with six children in their matrimonial home for another woman. Later, he got into debt and pledged the house. When he was about to sell it, she got a court order restraining the husband from selling the house. The husband had taken steps to sell the house on the belief of male dominance in the Bangwa culture.

[63] *The French Cameroon achieved independence on 1 January 1960 while British Southern Cameroon got their independence on the 1st of October 1961. See V.J. Ngoh., History of Cameroon since 1800 (Limbe: Presbyterian Printing Press, 2002) pp. 167 and 233.*

[64] *Section 27 of SCHCL*

[65] *[1963] WRNLR 80*

[66] *(1971) ALL NLR 227*

[67] *(1944) 17 NLR 77*

[68] *R.B. Mqeke., Customary Law and the New Millennium (Grahamstown: Lovedale Press, Alice, 2003) p. 7.*

they have passed through the judicial mill. Accordingly, concerning the authority of a rule of customary law the point whether such rules are repugnant to good conscience or not is irrelevant because that is a moral question which does not in any way deprive the customary law of its validity. The rule does not cease to be law because of its moral iniquity. Indeed, when the courts declare a rule of customary law repugnant and refuses to enforce it, the said rule does not thereby cease to exist or be observed by members of the community concerned. Since the rule is generally accepted by the people themselves as binding on them, it continues to regulate the relationships of the community inter se, the court's ruling notwithstanding.

It is conceded that the "repugnancy doctrine" was routinely employed in a legal cleansing mission, and was the engine for the imposition of hegemonic, foreign culture. Nevertheless, it is undisputed that repugnancy doctrine has contributed greatly to the development of Cameroonian customary law. It has refined and modified obnoxious rules of customary law in tune with modern day realities. It is canvassed, however, that the application of repugnancy by the courts for decades should have resulted in a satisfactory obliteration of those customary law rules considered repugnant. This article is not advocating for the return of the obnoxious and barbarous customary law rules into the body of Cameroonian law, it is argued however, that the retention of the colonial clause of repugnancy doctrine in Cameroonian statute books has outlived its purpose. It sends a wrong signal that the country still retains obnoxious customary law.

This article therefore calls for an interpretative approach on customary law that ensures its survival and adaptation to the dictates of equality in an egalitarian society. It is argued that it will serve Cameroon really well if Customary Law is placed on the same pedestal and status as the English Law. It is the further contended in this article that considerable caution should be taken in the uncritical and contemporary use of the repugnancy doctrine and its precedents under Cameroonian law. Throughout Africa, post-colonial governments have paid close attention to customary law.[69]The position in South Africa presents a model for Cameroon to follow. Codification and recognition of customary law as justiciable rights in the constitution (as in the case with South Africa) will help in preserving Cameroonian Customary Law.

With regards to the Islamic Law Limitation, it is recommended that Muslims who do not want their estate to be distributed according to Muslim Law be given the opportunity to do so. The few who do not want to go down that route should not be compelled by Islamic law to do so. There should be equal standards applicable to Muslims and Christians on the application of their Customary Law.

For the limitation dealing with provisions for family members and dependants, the continues application of the rules is recommended. However, the conduct of the applicant under this provision should be decisive factors in derogating from the testator's freedom to dispose of his properties as he pleases. This may be the middle ground where respect for the wishes of the testator and reasonable provisions for his dependants meet.

IX. CONCLUSION

The statutory limitations to testamentary freedom the Anglophone Regions of Cameroon have been discussed and compared with those of Nigeria. The study has found cause to limit the testator's/testatrix's freedom to dispose of his/her property as he/she wishes. The rational behind the limitations present in Cameroon has been discussed and it has been found that while these limitations are not totally justified, yet they have their merits. A review of the Customary Law and Islamic Law limitations has been advocated for and a middle ground approach in the limitation relating to provision for dependents has been recommended. It is hope that these suggestions be taken so as to respect as fully as practicable the wishes of the testator after death.

[69]*South African Law Commission has been forthcoming in this respect. Several aspects of customary law have been received under the auspices of project 90: The harmonization of Common Law and the indigenous Law: Succession in Customary Law. Other African countries such as Ghana, Zimbabwe and Zambia have at one time or other carried out comprehensive review of their customary law. See South African Law Commission 2000:34.*

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