

THE STRUCTURE OF SUCCESSION LAW IN CAMEROON: FINDING A
BALANCE BETWEEN THE NEEDS AND INTERESTS OF DIFFERENT
FAMILY MEMBERS.

By

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DEDICATION

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A. C.	Appeal Cases
All E.R.	All England Law Reports
ALL N.L.R.	All Nigeria Law Reports
A.L.R.	Argus Law Reports (Australia)
App. Cas.	Appeal Cases
BCA/...	Unreported Judgments of the Bamenda Court of Appeal
Beav.	Beavan
Bing.	Bingham
Burr.	Burrow
CASWP/...	Unreported Judgments of the South West Court of Appeal
C/S.	Civil Suit
CAJ-CCL	Court of Appeal Judgments-Common Law Cameroon
C.C.L.R	Cameroon Common Law Reports
Ch.	Chancery
Ch. D	Chancery Division
C.S.C.O	Cour Suprême Cameroun Orientale
F.S.C.	Judgments of the Nigerian Federal Supreme Court
G.L.R	Gender Law Reports
HCB/...	Unreported Judgments of the High Court of Bamenda
HCF/...	Unreported Judgments of the High Court of Fako Division
HCK/...	Unreported Judgments of the High Court of Kumba
I & CLQ	International and Comparative Law Quarterly
J.A.L.	Journal of African Law
L.Q.R.	Law Quarterly Review
L. R. Eq.	Equity Cases
L.R. P. & D.	Probate and Divorce Cases
L.T.	Times Law Reports
M.L.R.	Modern Law Review
M. & W.	Meeson & Welsby
N.L.R.	Nigeria Law Reports
N.L.J:	Nigerian Law Journal
P. Wms.	Peere Williams

Phil.	Phillips
RADIC.	Revue Africaine de droit international et compare
Rev. Jur. Pol. Ind. Coop.	Revue Juridique Indépendance et Coopération.
Rev. Jur. Pol. O-M.	Revue Juridique et Politique d’Outre-Mer
S.J.	Solicitors’ Journal
Sar. F.C.L.	Sarbah, Fanti Customary Laws
S.R.L.R.	Southern Rhodesia Law Reports
T.L.R	Tanganyika Law Reports
W.C.L.R.	West Cameroon Law Reports
W.A.C.A.	West African Court of Appeal
W.A.L.R.	West African Law Reports
W.L.R.	Weekly Law Reports
Y.U.L.R.	Yaoundé University Law Reports

CHAPTER ONE: INTRODUCTION

1.1: THE STATEMENT OF THE PROBLEM

Succession on death, the subject matter of this study signifies the devolution of property to a living person upon the death of its owner. The law of succession could thus be criticised for rendering possible the acquisition of wealth by persons who did not work for it and for constituting a principal source of economic inequality in society. We think, however, that if the law of succession is an evil, then it is a necessary evil. It enables the continuity of the estate of the deceased and most importantly, provides the only opportunity for the reallocation and continuation of the obligations of the deceased towards persons for whose maintenance he was responsible in his lifetime. If the rules of succession are a reflection of the deceased's intention, then nothing would have been dearer to him than to have his name perpetuated and his family well provided for.

The criterion for deciding who the beneficiaries of an estate are ought to be whether the deceased in his lifetime owed them a legal duty of maintenance. The customary and modern laws applicable in Cameroon recognise that a man has the obligation to maintain certain members of his family and maintenance here includes the provision of necessities including food, shelter, clothing and medical care. The primary obligation is towards the nuclear family which consists of the spouses and issue. This obligation is exemplified in English law by the powers given to the wife to pledge the husband's credit for necessities,¹ and since the duty to maintain the issue is placed the spouses, the issue could also take necessary goods on credit and the parents would be obliged to pay a reasonable price for them.² The French position as

¹ See generally, Nwogugu, *Family Law in Nigeria*, Heinemann Educational Books (Nigeria) Plc. 1996, 283 et seq.

² See *Nash v. Inman* [1908] 2 KB 1 (CA). Normally infant contracts are void in law but an exception is made in the case of necessities.

contained in article 214 of the Civil Code reads: “*Les charges du mariage incombent au mari, à titre principal. Il est obligé de fournir à la femme tout ce qui est nécessaire pour les besoins de la vie selon ses facultés et son état*”³, and as is the case in English law the responsibility to maintain the issue is shared by both spouses.⁴

In customary law the husband has the duty to maintain his wife or wives and children and failure in this respect could result in the woman divorcing the man.⁵ This is also a rule of the Muslim Maliki law through the principle of *nafqah* which requires the man to provide the woman with necessaries suitable to their station in life.⁶

The duty of maintenance extends to the needy members of the immediate and extended families. It is immaterial in every case that they might have some means of their own, as might be the case in England and France where government social security schemes provide some form of benefit to all categories of their needy citizens.

These are the persons who in our estimation should qualify as beneficiaries given that the duty of maintenance does not cease on the death of a breadwinner and that the death instead aggravates their situations. When the intestacy rules fail therefore to make a proper inventory of the beneficiaries and leave out some of the persons with a legitimate claim to maintenance, it must only be expected that there would be feelings of bitterness giving rise to social problems of different sorts. This, we submit, is what Cameroon’s succession law seems to be suffering from today.

The number of persons claiming succession rights will generally exceed those to whom the deceased owed the duty of maintenance, as is reflected in the long list of

³ As amended by articles 6 and 25 of Law No. 75-617 of 11 July 1975

⁴ See article 203 of the Civil Code.

⁵ See Ollennu The Law of Testate and Intestate Succession in Ghana, London, Sweet & Maxwell, 1966, 224.

⁶ See Ajjola A. D. Introduction to Islamic Law, New Delhi, International Islamic Publishers, 1989, 191.

possible intestate beneficiaries observed in the received systems. The reason is that rules of maintenance are always subject to the personal needs of a person and these could be substantial, depending on his station of life and lifestyle. His duty of maintenance towards his immediate and extended families is therefore generally limited, an indication of which is found in article 205 of the French Civil Code, according to which, “*Les enfants doivent des aliments à leurs père et mère ou autres ascendants qui sont dans le besoin.*” A dead person has no personal needs and so the extra income could be applied to other things, such for example, as allowing claims to succession by persons claiming by the proxy of those to whom the duty was owed.⁷ The purpose of the extension is however defeated by the institution of a system of precedence which favours succession by the persons closest to the deceased to the exclusion of all others. Hence in most cases, other persons, even those to whom the duty was personally owed are left destitute and at the mercy of the spouse and issue.

While only members of the immediate or extended families⁸ might be excluded under the received laws, the situation in customary law, with the exception, perhaps of Muslim law is even more preoccupying. The patrilineal system of succession excludes women generally from the list of beneficiaries. Widows are excluded for not being family members. Matrilineal systems on the other hand profess the equality of sexes but are just, to borrow from John Anthony Howard, “patrilineal systems with matrilineal emphasis”.⁹ With few exceptions, women are excluded and these include widows. Matrilineal systems further exclude the nuclear family of

⁷ The inheritance tax is another way of tapping into the extra income.

⁸ The terms immediate, extended and nuclear families will be adequately defined in the work, but for the present purpose, an immediate family is that generated by the parents of the deceased and consist of them, the deceased, the brothers and sisters of the deceased and their descendants; the extended family is generated by the grand parents and consists of the grand parents, their brothers and sisters and descendants; the nuclear family or the sub-family is that generated by the deceased and consists of him, and descendants.

⁹ John Anthony Howard on “The Customary Law of Marriage and Succession among the Kom Of Cameroon”, Ph. D. Thesis, University of London, 1972, 16.

deceased completely, except in the case of a deceased female.¹⁰ Now, the duty of maintenance in the lifetime of the deceased did not distinguish between the sexes and went primarily to his nuclear family. And as if enough is not enough the customary law under the apparent influence of the received laws has also adopted the system of succession going primarily to persons closest to the deceased.

The problems confronting succession in Cameroon are not limited to the inappropriate identification of the beneficiaries. Problems are current among the beneficiaries themselves; due mainly to the discretionary nature of distribution which makes administration almost indefinite and gives room to abuse by the persons in charge. The rules of distribution themselves are not always very clear, when for example in French law the rules give spouses the right of use after distribution, male beneficiaries often see no difference between this and customary law and advocate the application of the latter instead.

It is not uncommon that upon the deceased's death members of his or her family go on the rampage to grab the property or dispossess persons considered not to be entitled to succession,¹¹ of any lands occupied by them. Where the deceased was married this is against his widow and the issue¹² and generally any attempts to resist results in violence being perpetrated against them. In a good number of cases female relatives of the deceased receive similar treatment from their male counterparts who believe that women should be in their husbands' homes and not be around upon their father's death to lay claims to property.¹³

¹⁰ This study will be concerned more with the estate of males for the reason that women generally have very little or no property at all to give rise to serious dispute.

¹¹ See Owen, Margaret, *A World of Widows*, London, Zed Books, 1996, 59-62.

¹² See Galega v. Galega, Appeal No. BCA/19/93 (unreported) where the brother of the deceased took hold of money and many other items of movable property and threatened to sell off one of the houses of the deceased.

¹³ See for Peter Chi Charles v. Chonkwo Nde Fidelis & Caroline Chi (2006) Appeal No. BCA/62/ 2003 (unreported) in which a brother refused to attend a family meeting because he thought that his sisters ought to be in their husbands' houses and not be attending family meetings.

Many victims of succession-based violence abstain on their own volition from going to court. Women would not want to take their husbands' relatives or brothers to court, as they think that they will need their support in rainy days.¹⁴ There is also illiteracy and ignorance among the rural populations which make them oblivious of the fact that law at least provides some measure of protection for their interests. The conception here is that the successor of the deceased, who manages the property on behalf of the family, is already known and what is needed is for the new "father" and "husband" to continue providing for their subsistence. The fear and threat of witchcraft has also been identified as deterring many a meritorious beneficiary from seeking legal redress in a court of law. Witchcraft as defined by the Penguin English Dictionary consists in "the use of sorcery or magic" and the practitioner of witchcraft is said to be "a person who is credited with supernatural powers."

Furthermore the High Courts with the competence to administer the more favourable received laws are inaccessible to many who would have sought legal redress. These courts are said to be located at divisional levels, but the divisions are generally large and most of the countryside is without motorable roads, and this makes access to them difficult, if not impossible. The rural populations which constitute the majority are therefore governed mostly by customary law.¹⁵ It is not uncommon also for matters arising in the urban areas where the courts are located to be governed by customary law as the cost involved in suing in the modern jurisdiction

¹⁴ Owen, *supra*. 66.

¹⁵ It will be shown in the work that even though jurisdiction is shared between the customary and the received laws, in Francophone Cameroon for example the parties have the option of jurisdiction and in Anglophone Cameroon the high courts have monopoly over letters of administration and on the basis of which they entertain matters normally subject to the jurisdiction of the customary courts.

often scares people away, and succession is not one of the areas for which legal aid is available.¹⁶

The law of succession thus creates a substantial class of destitute persons condemned to a life of poverty and want. Poverty means that a person does not have the resources to sustain himself and those dependent on him. This is exactly what the law of succession does, since by excluding certain persons from succession, they are made to depend on others and in this case the male successor. As will be shown later the successor generally ignores his responsibilities and concentrates on his direct family and those family members who agree to be subservient and recognise his authority;¹⁷ and for widows this might mean accepting to become the wife of the successor.¹⁸

Apparently the choice of customary law beneficiaries is influenced more by the land tenure system according to which land belongs to the group, which could be the tribe, the village or the family, and not the individual member thereof.¹⁹ This is because a group has a perpetual existence and so at no time would its property be a subject of succession. Since the main bone of contention in succession is land, the tendency is to assume that customary law believes more in keeping land in the family than to continue with the obligations of the deceased towards his family. This is largely a misconception of the problem, because it is an accepted rule of the law that succession to property cannot occur unless it is regarded as belonging to individuals rather than to groups.²⁰ That being the case, denying a person succession rights over

¹⁶ Legal aid in Cameroon is available to (1) injured employees; (2) unemployed deserted wives; and (3) appellants against a death sentence. In Anyangwe, C., The Cameroonian Judicial System, Yaoundé, CEPER, 1987, 197.

¹⁷ See Daniel Njike & 3 Others v. Zachuis Ehang (1978) Y.U.L.R. 92

¹⁸ See Asane Florence v. Ndeh Thomas Mbonjoh (2006) Suit no.HCK/AE/K.28/98 (unreported)

¹⁹ See Anyangwe, Carlson, "Land Tenure and Interests in Land in Cameroonian Indigenous Law" (1984) Cameroon Law Review, 29-41, 33.

²⁰ See Miller, Gareth, The Machinery of Succession, Portsmouth, Professional Books Limited, 1977, 2.

land must not be understood as the desire not to continue with the obligations of the deceased.

Group ownership of land is more of a rule than an exception in customary law. The basic reasons for this will be seen in the chapter on intestacy in customary law where the different categories of group ownership of land will be given ample attention. This is the philosophy which guides the courts in their attitude towards widows as far as succession to land is concerned, and not necessarily the desire to deprive them their right to maintenance, because as will be seen later, the maintenance of widows has always been one of the main preoccupations of customary law.

It does not mean that land is never the subject of succession in customary law. The fact is that a number of interests exist over land in customary law and some of them are capable of succession. We begin with the premise that ownership of land is in the family. Ownership describes a “bundle” of rights which might exist over a thing, the amplitude of which is measured in respect of the rights of other persons over the same thing. The precise content of “ownership” is unclear and is liable to vary from one legal system to the other.²¹ The rights commonly ascribed to the term include use, enjoyment, alteration, disposal and destruction. The last set of powers brings the term “ownership” into play, given that it is greatest right that a person might have over a thing. The unchecked exercise of this is of course rare because legal systems impose different types of limitations to the right of disposal to curb any excesses of the “owner” which could result in the disappearance of the thing owned or work against the interest of the community.

²¹ See Dennis Lloyd, The Idea of Law, London, Penguin Books, 1973, 323.

It is recognised in English law for example that a person might not put his land to such a use as would impair other persons from peacefully enjoying their own lands in the vicinity. This is the basis of the law of nuisance, and it is almost axiomatic for the use of land to be made subject to the needs of public policy. In customary law any contracts purporting to dispose of the land must receive the consent of the family through its branches.²²

It is perhaps necessary to qualify the ownership of the family as absolute ownership to distinguish it from the rights of the members of the family over the same land. The absolute ownership of the family exists concurrently with the lesser interests of its members, which derive from their membership of the family. These exist over parcels of land allocated²³ to them for such purposes as habitation and farming. Apart from the right of disposal which is in the family the members have the rights of possession which include use, enjoyment. Possession is part of the “bundle of rights” of which ownership is said to consist, meaning that it is a right of ownership, though limited in scope.²⁴

Hence a grant of family land to a member does not give rise to an interest equivalent to the English fee simple in possession which is actually a right of ownership in the sense that it can be alienated to whomever in the lifetime of the person and upon his intestacy, devolves to his general heirs²⁵ including collaterals.²⁶ It nevertheless gives rise to an interest greater than the usufructuary right in Roman

²² Anyangwe, *supra*, 39.

²³ In the terminology of customary land tenure the words allocation and allotment signify different things. The grant of land by the family head is called an allocation because it does not transfer and an absolute title to the grantee whereas a grant by the chief is called an allotment because the title transferred to the family is absolute.

²⁴ See Allott, A. N. “Towards a definition of ‘absolute ownership’”, [1961] J.A.L. 99-102, 100; Simpson, M. R. “Towards a definition of ‘absolute ownership’: II” [1961] J.A.L.145-150, 146.

²⁵ This distinguishes the fee simple from the fee tail which descends at intestacy on special heirs, namely, the lineal descendants of the deceased

²⁶ See Charles Harpum et al. Megarry & Wade: The Law of Real Property, London, Sweet & Maxwell, 39.

law. The usufructuary right consists actually of a species of adverse possession in which a person has the right to possess and enjoy the fruits of property belonging to another; it is thus a burden on the title of the owner. The customary grantee is a member of the family and so the grant is not a burden on the family's title, and while the usufructuary right ends in the life time of the person, a customary title is virtually perpetual.²⁷

It is this perpetuity which gives rise to questions of succession as to whether the interest of the member could upon his death descend in the same way as a fee simple. The position is that such interests last for the life time of the grantee and could continue in his lineage as long as there are heirs to succeed him, subject, of course to good behaviour.²⁸ Such lands cannot be disposed of by will or gift *inter vivos* and in the absence of descendants, revert to the family as the contingent title-holder, to be reallocated among the other members. A non-family member is therefore not qualified to succeed to such lands; hence the exclusion of widows, but the rationale for excluding female relatives remains elusive.

The next premise is that land could be absolutely owned by an individual, because acquired with his personal resources. Not even the customary law prevents a person, whether male or female from acquiring land through purchase and gifts and these, as we will see could be held under customary or registered titles and are the subject matter of succession by the persons identified by the law as beneficiaries. The problem, however, is in the tendency to presume that even these lands belong to the family subject to the same limitation; hence the non-beneficiaries are held not to be entitled to their succession.

²⁷ "Virtually," because in certain cases a family member might be lawfully dispossessed of his interest in land, as for example where he is guilty of some gross misconduct entailing the forfeiture thereof.

²⁸ Anyangwe, *supra*. 34. This has hardly been used to deprive a member or his beneficiaries of land, except in the case of manslaughter, which we could not find any evidence.

The weaknesses of the law of succession inhibit harmony in the family. Rather than a divisive factor the law of succession should be promoting family stability by balancing the conflicting interests of its members, for where there is stability in the family as the smallest unit of the community there would be stability in the community at large.

The resultant poverty or destitution of the affected persons breeds ill-feeling against the society at large, when such persons are unable to find something honourable to do in order to maintain themselves and their dependants, crime becomes the final option. The women are exposed to trafficking and take to such hazardous sexual practices as prostitution. Like levirate marriages to which widows are constrained, prostitution exposes women more than men to the deadly HIV/AIDS epidemic²⁹ and other sexually transmitted diseases. When they are contaminated the disease is spread to other men, ensuring the continuity of the spiral of destitute women and children. Hence not only does the customary law of succession subject the woman to a life of abject poverty, it might also prove fatal.

The exclusionary nature of the rules of succession could also be a cause for underdevelopment. There is no doubt that women are the most affected by the exclusion. Customary law expressly excludes them and they could constitute a remote category excluded on the basis of the principle of precedence enshrined by the received systems. Women alone constitute 52 percent of the population of Cameroon and play a very crucial role in the development of society. Yet the law of succession prevents them from gaining equal access to land, being the main factor of production. The custom inhibits sustainable development as a greater majority of the population is denied the possibility of involvement in the production process as will be shown.

²⁹ Statistics show that five hundred thousand people are living with HIV/AIDS in Cameroon, 60% of these are women between 15-49 years. Source: UNAIDS Report on Global Aids Epidemic July 2008, at <http://www.globalhealthreporting.org/countries/cameroon.asp>

Women only have the right of use over land occupied by them under the customary law of succession, meaning that they can only cultivate subsistence seasonal crops, and not cash crops such as cocoa, coffee, rubber and oil palm.³⁰

As a check to all of these, the law, we submit, ought, (1) to ensure the continuity of the obligation of maintenance which the deceased had towards his nuclear family without distinction of gender; (2) to ensure the maintenance of the vulnerable members of the immediate family notably the parents of the deceased and in default the members of the extended family among whom the grandparents and their descendants; (3) to limit the period of administration by making distribution mandatory ; and (4) to lay down clear rules of distribution.

1.2: THE RESEARCH METHODOLOGY

In-so-far as we are concerned with the study of the effectiveness of the current law of succession in Cameroon, we have to rely on primary and textual material, with the latter serving mainly to validate our findings based on the former.

The primary sources consist of material gathered from field work and the interpretation of legislation and precedent. The field work was conducted by the author and some postgraduate students at the University of Dschang in Cameroon on selected tribes known to be representative of the different systems of customary succession in Cameroon. The research was based on a questionnaire agreed upon in class and administered to officials of the customary courts, traditional authorities and elites from the selected tribes. The findings were presented and discussed in classes which always included judges of the high courts, court registrars and sometimes even traditional chiefs, all of whom are abreast with matters of customary succession.

³⁰ See Jude Awuba and Gloria Macassa “HIV/AIDS in Cameroon: Rising gender issues in policy-making matters,” at <http://www.bioline.org.br/pdf?jh07018>

We relied on law reports to find relevant decided cases and statutes. This was easy for English law as the Harding Law Library is stocked with all of these. What we could not find in that rich library had to be sought elsewhere and so we also spent time at the libraries of the School of Oriental and African Studies, and the Institute for Advanced Legal Studies, in the University of London. The near absence of law reporting in Cameroon rendered the task difficult when it came to local decisions and statutes. We had to visit the law chambers and courts and in this way were able to have direct access to case files in the various courts visited. Priority was given to the appellate jurisdictions whose decisions could be said to represent the government's position on the issue of succession.³¹

The confirmation of the findings on customary law was sought from notable publications on the subject and other Ph. D research. Our ambition to work exclusively on Cameroonian material was thwarted by the dearth of local literature. Most of the available local literature proved inadequate because it is by Francophone Cameroonians who nevertheless purport to be writing about the whole country. To make up for the deficiency we had, for Anglophone Cameroon, to resort to relevant literature from other countries with a cultural or colonial affinity with that part of the country. Hence we drew extensively from Nigerian and Ghanaian and English sources. Not only do Ghana and Nigeria have cultural similarities with Cameroon, they also share a common English colonial heritage with Anglophone Cameroon. The enabling laws for the administration of the English and customary laws in Anglophone Cameroon were first enacted for the Gold Coast colony (Ghana) in 1876. Validation was also sought from scholarly works such as the most-quoted Ph. D thesis of John Anthony Howard on "The Customary Law of Marriage and Succession

³¹ This may sound absurd but truly there is no independent judiciary in Cameroon and so on controversial issues such as succession by women, Judges endeavour to toe the government's line.

among the Kom Of Cameroon”,³² and the London University sponsored research by Rubin entitled “Matrimonial Law Among the Bali of West Cameroon: A Restatement.”³³

What is presented in this work as representing the customs in question is therefore the result of a consensus of all of these authorities and not merely the opinion of this researcher.

Validation for the English law as applied in Cameroon was sought through Standard English textbooks on the law of succession and Nigerian and Ghanaian sources as far as the local application of English law is concerned. Our findings turned out to be in conformity with these sources.

Material on French law was drawn from standard text books by French authors but anything that concerns customary law and the application of French law in Francophone Cameroon comes mainly from local sources. These too agree with our findings in the field.

The thesis is divided into eight chapters. Chapter one, the introductory chapter is divided into a number of sections. Section one above discusses the concerns that motivated the research and summarises the role of land tenure in the current law. Section two treats the research methodology. Section three presents Cameroon in terms of the name, location, people and organisation of the customary communities. Section four explores the different sources of the law of succession and the chapter ends with a section on the definition of some important concepts used in the work. Chapter two treats intestacy in English law. It starts by giving the different sources of English intestacy law as applied in Cameroon. It also considers the contemporary application of these sources, noting the controversy over the application of post 1900

³² The University of London, 1972.

³³ (1970) 14 JAL, 69-97.

English statutory laws therein. The substantive provisions of the sources are then examined in order to ascertain the extent to which they strike a balance between the conflicting interests of persons who depended on the deceased. Chapter three considers intestacy in French law, starting with the applicable laws, their contemporary application and an analysis of the substantive rules. Chapter four examines intestacy in customary law. This chapter is the longest because unlike the received laws different systems of succession are applicable. This means providing an account of their respective rules and differences within the systems, their application, and analysing their various substantive rules. Chapter five is given to considering the conflict of laws in succession matters. Cameroon is a mosaic of laws where not only the received laws vie for space with customary law, the different systems of the customary law of succession also vie for space *inter se*. The situation is rendered even more complex by the fact that the laws are applied by parallel systems of modern and customary law courts. The chapter therefore explains how the various jurisdictions grapple with problems where different personal laws are in conflict. Chapters six and seven are a result of the realisation that the existing intestacy rules do not provide the balance necessary to rid the country of the social problems enunciated above. Hence chapter six entitled “Moving forward- Private ordering through the making of wills” is concerned with the extent to which wills could be relied upon to ensure the balance which our current intestacy rules fail to provide. Chapter seven is entitled “Moving forward-Intestacy under the Family Code”. It examines the bill on the family code with respect to its scope and status and the extent to which its provisions on intestacy constitute an improvement on the existing rules. It should enable the making of proposals aimed at preventing the eventual code from falling foul of the matters which have so far rendered the current law of succession ineffective as a means of

ensuring social harmony. It would keep the legislature on guard against adopting a law which merely adopts the position of some existing received laws which are at variance with local realities. The thesis ends with chapter eight which consists of a general conclusion and proposals for reform.

1.3: THE NAME, LOCATION AND PEOPLE OF CAMEROON.

The name Cameroon derives from the Portuguese and Spanish word for prawns. Portuguese explorers were the first Europeans who in 1472 dared to venture out of the Atlantic Ocean, to explore the estuary of the river leading into the territory today called Cameroon. Marvelled by the variety of prawns in the river, they decided to name it *Rio dos Camarões* meaning the River of Prawns. Spanish explorers later called it *Rio Camerones* for the same reason. At the time the territory was composed of autonomous Sultanates, Lamidates and Fondoms or Paramount chiefdoms.

The name therefore signified a river and not the territory. This changed with the advent of colonialism, with the name taken instead to signify the territory. The Germans, the first colonisers of the territory called it Kamerun and the English and French coming after the First World War called it *Cameroon* and *Cameroun* respectively.

Cameroon is located on the West Coast of Africa, with Nigeria to the west, Chad and Central African Republic to the east, and Congo (Brazzaville), Gabon and Equatorial Guinea to the south. It is located slightly north of the equator and occupies a surface area of 475440 square kilometres. Located between two great river basins, namely the Niger and Congo basins the country shares the physical and cultural characteristics of both.³⁴

³⁴ John Mukum Mbaku, Culture and Customs of Cameroon, Westport, Connecticut, Greenwood Press, 2005, p.1

The population is a result of several hundred years of migratory movements into the country³⁵. Because of its geographical position Cameroon embraces several of the cultural groups according to which African peoples have been classed.³⁶ Thus the coastal peoples include units of Guinea Coastal, Western Atlantic or Nigritic groups. There are also peoples allied to those of the Congo, or with the Bantu or Bantoid languages. Those in the north relate to the Chadic Western Sudan or Hamitic blocs. In the center there are Bantu Bantoid or semi-Bantu groups and pigmies,³⁷ hence the thesis of Cameroon as Africa in miniature, advanced by IMBERT:³⁸ “The centre of gravity of the African continent- Cameroon can be considered as an Africa in miniature and its study is beneficial for whoever wishes to be initiated into the problems of Africa.”³⁹

A similar mixture is present within the country itself due to vast movements of population from one part of the country to the other. Much of this migration, especially from the Western Highlands of the country towards the coast is occasioned by population pressure as a result of a high birth rate not matched by land resources. The shortage of land is exacerbated by the inheritance system which favours a single male heir for family land, meaning that the other male children are left with no land resources until they can acquire some from the chief believed to be the “titular owner” of the land.⁴⁰ Large colonies of Ewondos and Bassas from the centre of the country

³⁵ Tambi Eyongetah and Robert Brain, A History of Cameroon, London, Longman, 1974, pp.22-23

³⁶ Ibid, pp. 19-20

³⁷ Neville Rubin, Cameroon. An African Federation, London, Pall Mall Press, 1971, p. 9

³⁸ IMBERT, Jean, Le Cameroun, Que Sais-je?, Presse Universitaires de France, 3rd ed. 1982, p. 3

³⁹ “Centre de gravité du continent noir-, le Cameroon peut être considéré come une Afrique en réduction et son étude est particulièrement bénéfique pour qui veut s’initier aux problèmes Africains.”

⁴⁰ Tambi Eyongetah and Robert Brain, A History of Cameroon, London, Longman, 1974, pp.44-45; Neville Rubin, Cameroon. An African Federation, London, Pall Mall Press, 1971, pp. 16-17.

who escaped from the system of forced labour pursued by the French colonial administration⁴¹ can be found in the Anglophone coast.

The result is extensive group mixing that has rendered all attempts to classify and demarcate the ethnic groups geographically quite difficult. And above all it has provided a fertile ground for conflict of laws in Cameroon.

1.4: THE SOCIAL AND POLITICAL ORGANISATION OF THE TRADITIONAL SOCIETIES.

The organizational structure of an African society affects status of the members therein. Men make the laws and thus women are the most affected, because the structure at all the levels is dominated by men. But the strength of the laws depends very much on the degree of attachment of the community to them, hence the absence of a uniform pattern in the custom depriving women of succession rights for instance.

Although Cameroonian communities hardly possess the standard characteristics of highly centralized and acephalous⁴² communities advanced by some authorities,⁴³ they could be classified under either on the basis of research showing that the identified types of communities could take a variety of forms.⁴⁴

In highly centralised societies, found in the Western Highlands of Cameroon and in the North, there is a government in the nature of a centralised authority, administrative machinery and judicial institutions. They are organised into Sultanates, Lamidates and Fondoms or Paramount chiefdoms.⁴⁵ The leader wields executive,

⁴¹ See Carlson Anyangwe, *The Cameroonian judicial System*, Yaoundé, CEPER, 1987. pp. 51-52.

⁴² Anyangwe, Carlson, "Land Tenure and Interests in Land in Cameroonian Indigenous Law" (1984) *Cameroon Law Review*, 29-41 32.

⁴³ Fortes (M) and Evans-Pritchard (E.E.) *African Political Systems*, London, Oxford University Press, 1955, p.5.

⁴⁴ See Elias, T.O. *The Nature of African Customary Law*, Manchester University Press, 1956, p. 14.

⁴⁵ These could consist of towns that were never subjugated or could cover more villages headed by sub-chiefs who depend on, and pay allegiance to some paramount chief, for example, as a result of

legislative and judicial power.⁴⁶ He designates the officials of these organs and his subordinates.⁴⁷

He is not only a temporal leader; but also the spiritual leader, chief priest; a representative of the ancestors who ensures the liaison between the living and the dead believed to be masters of the land.⁴⁸ The chief's authority is global covering persons, goods and land. Land is sacred; it is the medium of communicating with the dead,⁴⁹ one reason why custom frowns on alienation thereof to strangers. Members desirous of land must ask for and obtain it from the paramount chief.⁵⁰ This chief's control over all the land is sometimes erroneously described as a right of ownership.⁵¹

The coastal communities possess characteristics of acephalous societies. They have no leaders with an all-embracing authority over persons and property. Nor do they have strong centralized authorities, administrative machineries, and constituted judicial institutions.⁵² What obtains is a segmentary pattern of traditional political organisation based upon a loose-knit and non-hierarchical clan structure.⁵³

Political power is exercised by the local chief priest or council of elders, with specific roles assigned to each member of the council. Authority is in the person of a

conquest or protection provided in time of danger. Tambi Eyongetah and Robert Brain, A History of Cameroon, p.44.

⁴⁶ See Fisiy, Cyprian F., Power and Privilege in Administration of Law: Land Reforms and Social Differentiation in Cameroon, Leiden, African Studies Centre, 1992, pp. 212-213.

⁴⁷ C.G. Weeramanting, Justice Without Frontiers: Furthering human Rights, London, Kluwer Law International, 1997, p. 14.

⁴⁸ Gluckman, Max, "The kingdom of the Zulu of South Africa," Fortes, African Political Systems, pp. 30-31; Bentsi-Enchill, Kwamena, Ghana Land Law, London, Sweet and Maxwell, 1964, p.46, note 5.

⁴⁹ Fisiy, Cyprian F., Power and Privilege in Administration of Law: Land Reforms and Social Differentiation in Cameroon, Leiden, African Studies Centre, 1992, p.221.

⁵⁰ See Fisiy, Cyprian F., Power and Privilege in Administration of Law: Land Reforms and Social Differentiation in Cameroon, Leiden, African Studies Centre, 1992, p.208; Anyangwe, Carlson, "Land Tenure and interests in land in Cameroonian indigenous law," (1984) Cameroon Law Review, pp. 29-41, 38; Max Gluckman's account of land holding in one highly centralised society and one acephalous society in, The Ideas in Barotse Jurisprudence, Yale University Press, 1965, pp.78-81.

⁵¹ Presbyterian Church Moderator v. D.C. Johnny (1974) BCA/27/74 (unreported).

⁵² See Fortes (M) and Evans-Pritchard (E.E.) African Political Systems, London, Oxford University Press, 1955, p.5.

⁵³ Neville Rubin, Cameroon: An African Federation, p. 18.

ritual functionary and not in the chief who is a political leader.⁵⁴ Thus governance is shared between the spiritual leaders and political heads of the group drawn from different categories of the population. None of these alone can exercise absolute authority over the population. They have distinct but complementary functions which require sanction of the community.⁵⁵

Political power does not involve rights over a given territory and its inhabitants. Membership of these communities and the rights and duties that go with it are acquired as a rule through genealogical ties as against political allegiance to the sovereign. The chief only has control over un-appropriated lands which he manages in-council. Each minor segment (family) holds and enjoys land in its individual name. Chief Endeley of the coastal tribe of Bakweri said as expert witness in *Wokoko v. Molyko*⁵⁶ that members of the tribe could without prior authorisation appropriate parcels of the communal lands.

It is the responsibility of the family head in acephalous communities and that of the chief in highly centralised communities acting through the family heads to keep property in the family by preventing its alienation to strangers.⁵⁷ Even the Western legal systems in their nascent stages prohibited such alienation, said to diminish the family patrimony, at a time when land was the principal source of wealth.

Here lies the root of the restrictions which customary law places on access to land, and not only have the customary law courts made it a vocation to ensure this, the spill-over effect is equally felt in the English and French laws applicable in

⁵⁴ T.O Elias, The nature of African Customary Law, p.14.

⁵⁵ There will, of course be persons assuming the title of paramount chiefs because of their political influence or wealth, or because as a result of government policy they are classified as first class chiefs, which to them means taking the title, even though lacking in the actual traditional attributes of the office.

⁵⁶ (1938) 14 N.L.R. 41, 43

⁵⁷ See Fisiy, Cyprian F., Power and Privilege in Administration of Law: Land Reforms and Social Differentiation in Cameroon, Leiden, African Studies Centre, 1992, pp.128-129

Cameroon. This is true of both the rural and urban communities. However the rural population is generally indifferent to these restrictions. Ignorance is one of the reasons but the fact is that members of the rural populations, notably the women view land more as means of subsistence than economic empowerment. The attitude is different in the urban areas where land is viewed more in terms of economic development than subsistence. Most changes in the law therefore occur in the urban than in the rural areas, be it in the customary or modern law courts.

Modernism has also reduced the powers of chiefs over land through government legislation. As will be shown later most of the land which used to be the common property of the community and placed under the authority of the chief is today either national lands or state lands. The powers of chiefs to restrict access to such lands are thus limited as the restrictions can only operate effectively within the domain of family land. Any person with sufficient resources could acquire land from these new pools of land which are placed under the authority of administrative officials rather than the chiefs. Even if the long arms of family land have eventually to stretch to lands thus acquired, what is clear is that they constitute private property and could be disposed of by their acquirers, subject only the conditions under which they are acquired.

1.5: AN OVERVIEW OF THE DIFFERENT SOURCES OF SUCCESSION LAW IN CAMEROON.

A study of the sources of law generally is necessitated by the understanding that rules of law do not exist in a vacuum and must originate from somewhere. Cameroon's law of succession is variegated due to the multifarious nature of its sources, which are the English, French and customary laws.

1.5.1: ENGLISH LAW

The reception of English law in Anglophone Cameroon is a result of the First World War, when a combined British and French military force defeated Germany, the country's colonial master in 1916, and partitioned the territory between them. This was confirmed by the League of Nations in 1922, when the territory was formally handed to them under the mandate system.

The *status quo* was maintained after the Second World War in 1945. The preamble of the Nigeria (Protectorate and Cameroons) Order in Council 1946, replacing the Cameroons under British Mandate Order in Council 1923, as amended by the Cameroons under British Mandate Order 1932, provided:

“And whereas the intention has been expressed that, notwithstanding the termination of the existence of the League of Nations, the Cameroons shall continue to be administered in accordance with the obligations of the said Mandate until other arrangements have been agreed between the Mandatory Power and the United Nations...”

The “obligations of the said Mandate” were set out in article 9 of the League of Nations Mandate Agreement drawn up for Cameroon by Great Britain and France and approved by the League of Nations in 1922:

“The Mandatory shall have full powers of Administration and Legislation in the area subject to the mandate. The area shall be administered in accordance with the laws of the Mandatory as an integral part of His territory... *The Mandatory shall therefore be at liberty to apply His laws to the territory under the Mandate subject to the modifications required by local conditions...*, and to constitute the territory into customs, fiscal or administrative union or federation with adjacent territories under his sovereignty or control...”⁵⁸

⁵⁸ My emphasis. Source, Neville Rubin, *Cameroon. An African Federation*, London, Pall Mall Press, 1971, p. 202-203. This was adopted by the United Nations, as embodied in article 5 and 4 of the 1945 British and French Trusteeship Agreements, respectively (same source). Article 5 of the British

In application of the second arm of that article British Cameroons⁵⁹ was attached to, and administered as an integral part of Nigeria. The laws in force in Nigeria were thus extended thereto by Proclamation No.1 of 1916,⁶⁰ pursuant to the Foreign Jurisdiction Act of 1890 rendering English laws applicable in foreign territories. Until the independence of Nigeria in 1961, the name “Nigeria” included Cameroons under British mandate and trusteeship. Section 1(1) of the Nigeria Letters Patent 1946, amending the Letters Patent of 1922 and 1935 defined “Nigeria” as “the colony [Lagos], the protectorate [the rest of Nigeria] and the Cameroons [under British mandate]”.⁶¹

The English law extended to Anglophone Cameroon included laws enacted in Nigeria. The two territories shared the same court system and laws until independence in 1961, and to this day pre-1961 Nigerian statutes⁶² continue to be received.⁶³ Prior to independence the Nigerian constitutional reforms of 1954 had resulted in the establishment of a High Court for Southern Cameroon, through the Southern Cameroon High Court Law 1955. This marked the beginning of the autonomous reception of English law in that part of the country and this is pursuant to section 11 which stipulates:

Trusteeship Agreement read: “For the above-mentioned purposes of this agreement, as may be necessary the administering authority: (a) Shall have full powers of administration and jurisdiction in the territory and shall administer it in accordance with the Authority’s own laws as an integral part of his territory with such modification as may be require by local conditions...” Ibid, 211.

⁵⁹ The plural form is explained by the fact that Cameroon under British mandate and trusteeship was divided into Southern and Northern Cameroon, with Southern Cameroon attached to Southern Nigeria and Northern Cameroon attached to Northern Nigeria.

⁶⁰ The Proclamation was made after the partition of the territory on March 4, 1916, but came into force retrospectively on January 24th 1916.

⁶¹ See also section 1(1) of the Nigeria (Protectorate and Cameroon) Order in Council, 1946, and section 3B of the Interpretation Ordinance, cap. 94 of the 1948 Laws

⁶² So far the only Nigerian statute that has been repealed by local legislation is the Land and Native Rights Ordinance of 1 January 1948, repealed by art. 22 of Ordinance No. 74/1 of 6 July 1974, on Land Tenure.

⁶³ See section 6(1) of the Nigeria (Protectorate and Cameroons) Order in Council, 1946.

“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
- c) the statutes of general application which were in force in England on the 1st day of January, 1900⁶⁴, shall in so far as they relate to any matter with respect to which the legislature of the Southern Cameroons is for the time being competent to make laws, be in force within the jurisdiction of the court”.

The expression “common law” stands for the English rules of law developed from time immemorial⁶⁵ by the courts of law,⁶⁶ as against common law as a system of law, the distinguishing feature of which is the doctrine of binding precedent. If it stood for the legal system the inclusion of the “doctrines of equity” would have been superfluous, and it would have meant that the laws of any common law jurisdiction could be applicable. The “doctrines of equity” mean the technical equity composed of equitable maxims, equitable interests, and equitable remedies evolved in the Court of Chancery to cure the injustices and shortcomings of the common law.

What constitutes “statutes of general application” has not been equally easy to establish. Much seems to depend on the merits of the particular statute which is sought to be enforced, and the acceptance of a statute as being of general application in one territory does not necessarily mean that it will be accepted as such in another.⁶⁷

⁶⁴ The limitation will be considered in detail under intestacy in English law.

⁶⁵ The reckoning of the common law starts from the year 1189, being the year when the earliest rolls of the King’s Bench became available.

⁶⁶ Until the Judicature Acts, the rules were evolved exclusively by the Court of King’s Bench, Court of Common Pleas, and the Court of Exchequer.

⁶⁷ See Daniels, W.C. Ekow, The Common Law in West Africa, London, Butterworths, 1964, 319.

The generality of a statute is viewed in terms of the subject matter and the geographical area of its application. A statute would not be of general application if its application is limited to certain persons or categories of persons. In *Young v. Abina*,⁶⁸ the test for the generality of application to all persons in England was established. The current test as established by Osborne C.J. in *Att.-Gen. v. John Holt & Co*⁶⁹ is:

- (i) By what courts is the statute applied in England?
- (ii) To what classes of the community in England does the Act apply?

A statute is thus not of general application if its application is limited to a certain category of persons, or its administration is exclusively by specific courts.

It is clear from the foregoing that the English law applicable in Anglophone Cameroon includes the three components of English law, to wit the common law, doctrines of equity and statutes of general application and pre-independence Nigerian statutes.

1.5.2: FRENCH LAW

The explanation on the historical background to reception of English law in Anglophone Cameroon is equally relevant for the reception of French law in Francophone Cameroon.

The French laws received in Francophone Cameroon are French derived and French laws. By French laws is meant laws imported directly from France, and by French-derived laws is meant laws made by French colonial administrators for the former French Cameroon and those brought in from other French possessions.

⁶⁸ (1940) 6 W A.C.A.

⁶⁹ (1910) 2 N.L.R. 1.

The enabling instruments for the introduction of French and French derived laws in Francophone Cameroon were the Decrees, signed on 16th April, and 22nd May 1924 respectively, made pursuant to authority given under article 9 of the League of Nations Mandate Agreement of 1922 quoted above.⁷⁰ The Decree of 16 April enacted as follows:

“The Commissioner of the Republic shall promulgate statutes, decrees, orders and regulations made by the Government of the mandatory state, as well as orders and regulations made by the Government of the mandated territory.

Statutes, Decrees and regulations in force in France shall not be rendered executory in Cameroon except by Decrees of the French Head of State”⁷¹

A second Decree enacted on May 22 elaborated on the previous and rendered executory in Cameroon all the statutes and Decrees promulgated in French Equatorial Africa before the first day of January 1924. The Decree provided:

“1. Statutes and decrees promulgated in French Equatorial Africa before the 1st day of January 1924 are hereby rendered executory in the territory of Cameroon placed under French mandate. The powers conferred on the Governor-General and on Lieutenant-Governors by those instruments shall devolve on the Commissioner of the Republic.

2. However, the provisions of the above-mentioned instruments that shall apply are those that are not contrary to decrees specifically

⁷⁰ Like Great Britain, French colonial policy in the territory did not change after the Second World War.

⁷¹ “Le Commissaire de la République promulgue les lois, décrets, arrêtés et règlements émanant du Gouvernement de l’Etat mandataire, ainsi que les arrêtés et règlements émanant du Gouvernement local. Les lois, décrets et règlements en vigueur en France ne peuvent être rendu exécutoire au Cameroun que par décret.”

passed for Cameroon and to the French mandate of 20th July 1922 for Cameroon”⁷²

On the basis of these decrees therefore, French laws promulgated in French Equatorial Africa before the 1st day of January 1924 became applicable in Francophone Cameroon. Two French decrees of 28th September 1897 and 17th March 1903 had extended French Laws already in existence in the colony of Senegal to French Equatorial Africa. Thus all the French laws that were in force in the colony of Senegal on the 17th of March 1903 were extended to French Cameroon by the combined effect of the decree of 17th March 1903 and 22nd May 1924.

The content of the received French law therefore consists of:

- All French laws in force in the colony of Senegal as of 17 March 1903. This includes any amendment, in French Equatorial Africa up to January 1924, and in French Cameroon since January 1924. The French Civil Code governing most succession matters in Francophone Cameroon was promulgated in the colony of Senegal by an order of 5th November 1830.
- All statutes and decrees promulgated in French Equatorial Africa before 1st January 1924.
- All statutes, decrees, orders, and regulations passed by the French Government after 1st January 1924 and promulgated in French Cameroon by the local colonial administration.
- Any statute, decree, and regulation in force in France and directly exported to French Cameroon by a decree of the French Head of State.⁷³

⁷² “Art. 1er – Sont rendus exécutoires dans le territoire du Cameroun placé sous le mandat de la France les lois décrets promulgués en Afrique Equatoriale Française entièrement au 1er Janvier 1924. Les attributions conférées par ces actes au gouverneur-général et lieutenants-gouverneurs seront dévolues au Commissaire de la République.

Art. 2- Toutefois, ces textes ne seront applicables que dans celles de leurs dispositions qui ne sont pas contraires aux décrets pris spécialement pour le Cameroun et au mandat Français sur le Cameroun, du 20 Juillet 1922”.

1.5.3: CUSTOMARY LAW

The term customary law as used here includes native laws and customs and Muslim law, which thanks to the colonial policies pursued by Great Britain and France constitute a major source for our law of succession. The English colonial policy of indirect rule encouraged customary law as it deemed it more expedient and beneficial to administer the colonies through the local chiefs making use of traditional institutions.⁷⁴ The French colonial policy of assimilation on the other hand was a complete antithesis of indirect rule. With a bloated conception of the superiority of *la civilisation Française* over all others, the French had nothing but disdain for customary law. Natives had to be purged of their customs through education and nurtured to reason and act in accordance with the superior French civilisation.⁷⁵ This was to culminate in every native becoming a French citizen, technically referred to as *évolué* or *assimilé*. Customary law had however to be condoned when it became clear that French citizenship could not possibly be granted to everyone and that it would be

⁷³ Anyangwe, *the Cameroonian Judicial System*, pp. 224-227.

⁷⁴ In a confidential letter to the Secretary of state for Colonies, Cameron, as Governor of Tanganyika in 1925, a country which like British Cameroon was a former German colony handed to Great Britain after the First World War, extolled the virtues of indirect rule as follow:

“...I believe that by that (indirect administration) we shall secure, as far as it is humanely possible to foresee now, the political and social future of the natives in a manner which will afford them a permanent share in administration of the country on lines which they themselves understand, and can appreciate, building up at the same time a bulwark against political agitation and averting the social chaos of which signs have already manifested themselves in other countries similarly situated. Quoted by H. F. Morris and James S. Read, *Indirect Rule and the Search for Justice*, Oxford, Clarendon Press 1972, p. 3.

⁷⁵ André P. Robert, “Attitude du Législateur Français en Face du Droit Coutumier d’Afrique Noire”, published in *L’Avenir Du Droit Coutumier en Afrique*, Leiden, Universitaire Pers Leiden, 1956, pp.170-185 at 184. In fact even the colonial justice system was designed to achieve this aim. According to Ntarmark, P. Y. “The Indigenat [system of justice for natives] deprived the masses of freedom of speech, association and movement and also rendered them liable to severe punishment for quite minor offences, It was a symbol of French policy designed and superbly calculated to repress the masses in the hope that they would feel the strain and burden of this intrusive ‘code of law’ and accept French culture and institution for all their worth,” in “Constitutional Development of the Cameroons since 1914,” Ph. D. Thesis, London University, 1969, 78-79 (unpublished).

practically impossible to substitute existing customary institutions with French institutions.⁷⁶

1.5.3.1: Native Law and Custom.

During one field study by this researcher and some postgraduate students some judges argued that the custom which denies women succession rights is a mere “practice” and not a rule of law. In other words the custom is a rule of convention and not a rule of law. Such opinions derive from initial postulates that customary law was not law according to the Austinian theory of law.

Austin defined law as “a rule laid down for the guidance of an intelligent being by an intelligent being having power over him,”⁷⁷ among which he identified the laws of God, positive laws, and metaphorical or figurative laws. Positive law consisted of rules of positive morality and rules of positive law proper. The latter constituted the province of jurisprudence, and are laws:

“Set by a sovereign person or sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.”⁷⁸

The notions of sovereignty and independent political society are therefore cardinal in the existence of law.

⁷⁶ Georges Hardy, as director of the Ecole Nationale de la France de L’Outre-Mer admits this impossibility when he writes: “Notre tort principal n’est pas seulement d’avoir perdu de vue que la moindre coutume fait partie d’un corps et qu’une réforme de détail peut ébranler toute la structure; c’est aussi et surtout d’avoir méconnu les ressources mentales et morales des populations dont nous avons la charge; c’est d’avoir, dans notre orgueil de favorisés du destin, refusé d’admettre que leurs institutions, tout comme les nôtres étaient les manifestations extérieures d’une conception de l’univers et de la vie, d’une table de valeurs,... d’une philosophie,” cited by D. Boisdon in “Note sur les conflits entre le statut civil Français et les statuts civils coutumiers dans le pays D’Outre-Mer Dependand de la République Française” published in L’Avenir Du Droit Coutumier en Afrique, Leiden, Universitaire Pers Leiden, 1956, pp. 130-139 at 134.

⁷⁷ Campbell, Robert, Austin on Jurisprudence Vol. I, London, John Murray, 1879, p.88.

⁷⁸ Alternatively “it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author.”

Austin's sovereign is habitually obeyed and habitually obeys no one else. An independent political society is that with a considerable and diversified population in which the inhabitants pay allegiance to no one else but their sovereign.⁷⁹ Inherent in the definition is the assumption that law can exist only in a society possessing the attributes of a modern state, namely, population, territory and government having effective law enforcement machinery. As an emanation of a political superior, law is "a command which obliges a person or persons to a course of conduct."⁸⁰

The other types of societies referred to as "natural societies,"⁸¹ being societies "consisting of persons not in a state of subjection"⁸² do not have laws as such. Law in these societies is nothing but customary law, which according to Austin consists merely of rules of positive morality "set and endorsed by...the opinions or sentiments held or felt by an indeterminate body of men in regard of human conduct,"⁸³ and which only become law proper after legislative or judicial sanction.⁸⁴

Elias⁸⁵ and Gonidec⁸⁶ argue that highly centralised pre-colonial African societies had laws in Austin's sense. This argument falls to pieces, given that, the real question is not whether there existed strong central governments, but whether the rulers were sovereign in the sense that they were answerable to no one else and that the people were completely subjected to him.⁸⁷ Such a situation would hardly exist in traditional African societies. In Cameroon, even the head of a highly centralised society works with a council of elders, which in the Bamileke tribes is known as a

⁷⁹ Ibid. 237.

⁸⁰ Hart, H.L.A., John Austin: The province of Jurisprudence Determined and the uses and study of Jurisprudence, London, Weidenfeld and Nicholson, p. 1968, 24.

⁸¹ Ibid. 237-240.

⁸² Ibid. 237.

⁸³ Ibid. 89.

⁸⁴ Ibid. 204.

⁸⁵ Elias, T.O. The Nature of African Customary Law, Manchester University Press, 1956, p. 13.

⁸⁶ Gonidec, P-F, Les Droits Africains: Evolution et Sources, Paris, Librairie Générale de Droit et de Jurisprudence, 1976, p.7.

⁸⁷ Ibid, 237-238.

“Council of Nine Wiseman”⁸⁸ with a mission to curb any excesses of the chief,⁸⁹ and always the population owes allegiance not to him directly but to their sub-chiefs.

But to conclude that customary law is not law would entail the abrogation of rules that regulated life prior to the advent of the modern state and render null and void all the decisions taken under it. Carter, therefore, writes that “custom, therefore, is the only law we discover at the beginning of society or of society when first exposed to our observation.”⁹⁰ Savigny defends customary law as constituting the external manifestation of the *volksgeist* or the common consciousness of the people.⁹¹ He suggests the independent existence of customary law called the “political element” of law which continues to be shaped and moulded by the common consciousness of the people. And the “technical element” consisting of codified law, which is the final stage in the development of the law or an indication that the common consciousness of the people has attained its ultimate or acceptable stage of evolution on that particular point.⁹² The *volksgeist* is a variant of the description of customary law as “a mirror of accepted usage,”⁹³ both of which consider that customary law must be part of the legal system to allow for the necessary evolution of the law, before legislative intervention.

Gonidec qualifies law in the primitive society as *pré-Droit* and law in the modern state as *Droit proprement dit*,⁹⁴ an indication first, that customary law is law, and second, that with the advent of the modern state customary law has to function

⁸⁸ “Le Conseil de neuf notables.”

⁸⁹ “L’Organisation Sociale chez les Bamilekes” http://www.bamileke.com/newfolder/org_sociale.htm, consulted on 01-04-2007.

⁹⁰ Carter, James Coolidge, *Law: Its Growth and Function*, London, G. P. Putman’s Sons, 1907, 19.

⁹¹ Stone, Julius, *The Province and Function of Law*, Sydney, Associated General Publications, 1946, 431.

⁹² Stone, Julius, *The Province and Function of Law*, 432-434.

⁹³ *Owotoyin v. Onotosho* (1961)1 All N.L.R. 304, 309, per Bairamian F.J.

⁹⁴ Gonidec, P-F, *Les Droits Africains: Evolution et Sources*, Paris, Librairie Générale de Droit et de Jurisprudence, 1976, p.6.

within the state law enforcement machinery.⁹⁵ This alone would provide it with the necessary binding authority vital for any law⁹⁶ and also bring it in line with the modern conceptions of contemporary jurisprudence,⁹⁷ the essentials of which are the predictability of court decisions whenever a rule of law is in issue⁹⁸ and regularity.⁹⁹

That customary law is recognised as law in Cameroon is evident in the wording of section 27 of the Southern Cameroon High Court Law 1955, authorising the Courts to “observe” and “enforce the observance” of customary law in terms which recognise that customary law has a legal validity independent of judicial or legislative intervention.¹⁰⁰ This same quality was recognised in the customary law by the French colonial administration which in decrees of 1921 and 1927 empowered the courts to apply customary law per se in certain matters between natives.¹⁰¹

Elias defines customary law as “the body of rules which are recognised as obligatory by its members.”¹⁰² Gluckman defines it as: “A set of rules accepted by all normal members of the society as defining right and reasonable ways in which persons ought to behave in relation to each other and to things, including ways of obtaining protection for one’s rights”¹⁰³ Both definitions highlight the element of consent, a point emphasised by the Privy Council in *Eshugbayi Eleko v. Government of Nigeria*:¹⁰⁴ “It is the assent of the assent of the native community that gives a

⁹⁵ See also Allott, Antony, Essays in African Law: With special reference to the law of Ghana, London, Butterworth, 1960, pp.13-14.

⁹⁶ Hoebel, Adamson, The law of Primitive Man, Harvard University Press, 1954, p. 26.

⁹⁷ Hoebel, Adamson, The law of Primitive Man, Harvard University Press, 1954, p.22.

⁹⁸ Cardozo, Benjamin N., The Growth of the Law, London, Humphrey Milford, 1934, 52.

⁹⁹ Hoebel, supra, p. 28.

¹⁰⁰ See Woodman, Gordon R., “Legal Pluralism and the search for Justice” [1996] J.A.L., pp.152-167. 158

¹⁰¹ See Youego, Christine, “Sources et Evolution du Droit des Successions au Cameroon” Doctoral thesis, University of Paris II, 1994.

¹⁰² Elias, T. O., The Nature of African Customary Law, Manchester University Press 1956, p. 55

¹⁰³ The Judicial Process among the Barotse of Northern Rhodesia, Manchester University Press, 1955, p. xv.

¹⁰⁴ [1931] A.C. 662.

custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.” Gluckman sets himself apart by limiting the consent to “normal members,”¹⁰⁵ meaning that consent does not need to be unanimous.

Section 2 of the Customary Courts Ordinance, cap. 142 of the 1948 Laws of Nigeria, as amended by the Adaptation of Existing Laws Order, 1963 defines customary law as:

“ a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.”

This definition complements those advanced by textbook writers by including the phrase “fortified by established usage”. It means that rules of customary law must, in addition to the other factors, be of some antiquity. In English law the reckoning of time is from 1189, based on the existence of royal court rolls dating from that period.¹⁰⁶ Such a limit is inappropriate in customary law, firstly because of the absence of written records from which the immemoriality of a custom could be reckoned, and secondly because customary law has not yet reached a satisfactory state

¹⁰⁵ The term “normal members” cannot be taken as a variant of the “reasonable man” or even the “right-thinking members of the society”, because this might be giving it too wide an interpretation. The “normal members” could only refer to those members with an adequate knowledge of the native law and customs of the community in question. They are those persons whose evidence on particular points of customary law would be admissible in a court of law. This excludes members without such knowledge and strangers, who nevertheless know or are presumed to know the rules and are bound by them. Lord Lugard also employed the term “competent spokesmen”, when he wrote that “[a] custom must be admitted as being such [law] by the community and its *competent spokesmen*” (cited by Anderson, J.N.D., Islamic Law in Africa, and P.4). Competent spokespersons are the mouthpiece of the normal members, in the sense that they simply enunciate what is held to be custom by the normal members, whether or not they believe in the custom themselves. Spokespersons are designated not because of their knowledge of the customs and practices of the community but because of some other quality, such as oratory or the ability to communicate in the English language. It is submitted for these reasons, that the spokesperson cannot be dependable representatives of the customary laws of their communities.

¹⁰⁶ See Lord Blackburn in *Dalton v. Angus* (1880-81) 6 A.C. 740, 811.

in its evolution to impose such a limitation. In *Lewis v Bankole*,¹⁰⁷ Speed, Ag. C.J. said that "...the native law and custom which the court is empowered or directed to observe must...be existing native law or custom and not the native law or custom of ancient times."¹⁰⁸ Hence it is the current state in the evolution of a rule of customary law that must be applied.

The Roman doctrine of *opinio necessitatis* adds another condition to the definition, for it argues that consent alone cannot transform custom into law since the rules of convention also derive legitimacy from the community's consent. For a custom to be law therefore the consent needs to be backed by a general conviction that a rule is observed because it is law.¹⁰⁹ When a custom assumes the force of law and is not repugnant to natural justice, equity and good conscience it is enforced by the courts, as against rules of convention which though supported by consent are inferior and lack the binding force of law. Professor Griffith articulates the distinction between rules of law and rules of convention: "These domains exist in hierarchical relationship to one another, so that the legal rules are not only set apart from social rules, but acquire greater authority than and precedence over them. Law according to this model is removed from the domain of social life and represents an autonomous field with immunity from the kind of considerations that permeate every day existence. Through its autonomy and immunity from ordinary social processes, reinforced by the creation of specialist sources, institutions and personnel, law claims

¹⁰⁷ (1908) 1 N.L.R. 81, 83,

¹⁰⁸ See also *Golightly v. Ashrifi* (1955) 14 W.A.C.A. 676 at 684.

¹⁰⁹ See generally, Alan Watson, "An Approach to Customary Law" in Alison Dundes Renteln and Alan Dundes, *Folk Law: Essays in the theory and practice of lex non-scripta*, Vol. 1, the University of Wisconsin Press, 1995, pp. 141- 156; Park, *The Sources of Nigerian Law*, p. 68.

to invoke neutrality and equality in its dealings with individuals, unlike the ordinary social world from which law studiously maintains its distance.”¹¹⁰

The custom that a woman cannot be successor has been enforced by the courts from time immemorial to qualify as a rule of law rather than a rule of convention as argued by “our” Judge. Rules of convention must however not be confused with rules of law that are rejected by the courts on grounds of repugnancy or public policy. Recognised rules of customary law still retain that quality as far as the population is concerned and this probably leads Woodman to describe them as the customary law of the sociologist,¹¹¹ to distinguish them from the customary law of the courts. Discarded rules of customary law are enforced by non-judicial instances.¹¹²

As an instrument of continuity the law of succession always follows wherever there are human beings. In the Holy Bible the conflict between Esau and Jacob¹¹³ was a result of succession, and in Numbers chapter 27 Moses is shown laying down the rules of inheritance for the children of Israel. Pre-colonial Cameroonian societies had rules of succession, the enforcement of which were ensured by the family council or the chief-in-council, depending on the nature of the dispute.¹¹⁴

¹¹⁰ Griffith, Anne M.O., In the Shadow of Marriage. Gender and Justice in an African Community, University of Chicago Press, Chicago, 1997, 17

¹¹¹ Woodman, G. R., “Some realism about customary Law–The West African Experience”, *Folk Law: Essays in the theory and Practice of Lex Non Scripta*, Wisconsin, University of Wisconsin Press, 1995, 95.

¹¹² See Mikano Emmanuel Kiye, “The Importance of Customary Law in Africa: A Cameroonian case study”, Doctoral Thesis, VRIJE UNIVERSITEIT BRUSSEL, June 2007, 85.

¹¹³ See Genesis chapter 25- 27.

¹¹⁴ Anyangwe, Carlson, The Cameroonian Judicial System, p. 15-16; Roger Cagan, “Contribution à l’Histoire de la Justice au Cameroun,” (1966) 20 Rev. Jur. Pol. Ind. Coop. 3-18, 5.

1.5.3.2: MUSLIM LAW

The Muslim religion was introduced into Northern Cameroon through Northern Nigeria at about 1715,¹¹⁵ as a result of trade contacts and the *Jihads*. From the north it spread down south so that by the time German colonial administrators penetrated the country, Muslim law was already installed in some of the areas and controlled from Sokoto (Nigeria) the headquarters. Muslim law is a consequence of interpreting the Koran not only as embodying religious guides but also rules of law binding on those who profess the faith.

It applies in Anglophone Cameroon as customary law because the Interpretation Section of the Southern Cameroon High Court Law 1955 states that “native law and custom includes Moslem law.” In Francophone Cameroon it maintains its identity as religious law.¹¹⁶ In *Dame Dada Balkissou*¹¹⁷ the Supreme Court emphasised that courts must base their decisions on the customs of the parties rather than on their religious beliefs. In some cases, however, religion and custom are the same.¹¹⁸

Muslim law derives from the Quran, Sunna, Ijma and Qiyas. The Quran and Sunna are the primary sources. The Quran embodies the revelations of God as recited by Prophet Mohammed. The Sunna consists of practices of the Prophet in line with

¹¹⁵ *Dame Dada Balkissou v. Abdoul Karim Mohamed*, Arrêt No. 2/L du 10 Octobre 1985, *Juridis info*, No.8, 1991, p.53.

¹¹⁶ In the codification of some aspects of customary law, the French colonial administration distinguished between Moslem and non-Moslem law.

¹¹⁷ *Dame Dada Balkissou v. Abdoul Karim Mohamed* Arrêt No. 2/L du 10 Octobre 1985, in *Juridis info*, No.8, 1991, p.54.

¹¹⁸ In *Baba Iyayi v. Hadja Aminatou and Hadja Bintou*, Arrêt No. 083 of 32 March 2000, the Hausa custom which was that of the parties was not different from Moslem law on the supremacy of males over females in matters of succession. There are major differences too as exemplified in *Ministere Public c/ Pangou Bello* (1996) 26 *Juridis Périodique*, 24, a case involving Muslims decided at first instance by the Tribunal de Premier Degré of Kaele and then the court of Appeal of Maroua, the custom of the deceased provides that when a man dies without an heir his estate devolves to his father even if he left a child *en ventre sa mere*, contrary to Moslem law which recognises succession rights in an embryo if it can be shown to have existed the time of the death.

the Quran and his verbal interpretations of its provisions.¹¹⁹ The Sunna was compiled partly in the lifetime of the Prophet and subsequently by generations of his followers.¹²⁰

The Ijma and Qiyas are secondary sources based on human analysis of the primary sources. The Ijma represents the consensus of scholars and jurists of a given generation on a particular legal principle. It involves the application of human reasoning to the Quran and the Sunna, with a view to filling any lacunae in these principal sources of the law. The Qiyas involves the expansion of the law through analogical reasoning. The Ijma is more important than the Qiyas. An established Ijma must not be revisited by future generations of scholars, due to the principle of the infallibility of the consensus of Muslim scholars.¹²¹ A Qiyas of one generation may be rejected by another generation based on the recognised principle that a judge might err in his judgment.¹²²

Muslim law consists of the Sunni and Shī'a, branches, each of which is crystallised in a number of schools. Cameroonian Muslims are Sunnis of the Maliki School¹²³ and this is the focus of our study. The other Sunni Schools are the Hanafi, Shafi'i and the Hanbali. The most common of the Shī'a Schools are the Imamiyya, Ismailiyya and Zaidiyya.

The general principles of the Muslim law of succession are drawn from surah 4, verses 8, 9, 12, 33, 34 and 170, surah 7 and from the traditions of the Prophet as recorded in the Sunna, and the consensus of Muslim scholars recorded in the Ijma.¹²⁴

¹¹⁹ The divine revelations recognise in him a good example to follow. In this respect Surah 33 (21) of the Holy Quran prescribes "You have indeed in the Messenger of Allah a beautiful pattern (of conduct) for anyone whose hope is in Allah and the Final day, and who engages much in the praise of Allah."

¹²⁰ Ajijola, A.D. *Introduction to Islamic Law*, New Delhi, International Islamic Pictures, 1989, pp. 59-63.

¹²¹ David Pearl, *A Textbook on Muslim Law*, London, Groom helm, 1979, p. 69.

¹²² Ajijola, A.D. *Introduction to Islamic Law*, New Delhi, International Islamic Pictures, 1989, pp. 78.

¹²³ Carlson Anyangwe, *The Cameroonian Judicial System*, p.249.

¹²⁴ Ajijola, A.D. *Introduction to Islamic Law*, New Delhi, International Islamic Pictures, 1989, 228.

1.5.4: LOCAL STATUTORY LAW

Currently Cameroon has no statutory law on succession. A draft bill, to be seen later, in view of a Family Code is however pending in Parliament.

1.6: DEFINITION OF CONCEPTS.

1.6.1: TESTACY AND INTESTACY

Testacy describes the situation when a person dies leaving a will while intestacy is used for situations where there is no will or there is one which has failed. The distinction between the two seems to be a fine one, as the legal systems assume, for different reasons, that intestacy rules reflect the presumed intentions of the intestate.

English law bases the assumption on the studies of the contents of existing wills, said to have formed the basis of the scheme of distribution enacted in Administration of Estates Act 1925.¹²⁵

In French law the assumption is based on a notional presumed affection of the deceased towards members of his family. The law presumes that a person's affection goes in priority to the blood as against marital relations. Chabot aptly describes the French position when he writes:

“The law having no other role than to stand in for the wishes of the *de cuius* must regulate the transmission of his property as it is presumable that he would have disposed of himself. It must give him as successors those who would have been the subject of his choice, and we must

¹²⁵ Law Commission No. 187 1989, at para. 24 stated “There are a number of principles upon which the rules of intestacy may be based and in our working paper we canvassed the respective merits of the presumed wishes of the deceased, the needs or deserts of the survivors and the status of the surviving spouse. The present law is based upon a combination of these, although the underlying object has been to do what the deceased himself or herself might have wished,” culled from Borkowski, Textbook on Succession, London, Blackstone Press Limited, 1997, 7.

suppose naturally that he would have chosen his relatives when he has not manifested a contrary intention, because he must be presumed to have had more affection for his relatives than for strangers.”¹²⁶

Certainly, customary law will also impute its rules on the presumed intention of the deceased intestate. Statements tending to show that rules of customary law cannot be altered because the ancestors intended them to be so are current in the traditional jurisdictions and a person become an ancestor when he dies. Testacy, we will see offers the opportunity to evade hash intestacy rules.

1.6.2: SUCCESSION AND INHERITANCE

The dictionary defines succession as the “the act or process of becoming entitled to a deceased person’s property or title,”¹²⁷ and inheritance as “the act or an instance of inheriting property.”¹²⁸ Both terms are employed interchangeably in textbooks on succession to property, in spite of the differences in their meanings. That “succession” includes title and “inheritance” does not, is of no moment in a work limited to the study of succession to property.

Legally English law conceives succession as a situation whereby “a person became beneficially entitled to or interested in property upon the death of another”.¹²⁹ Succession, therefore, transfers a beneficial interest, being one which could be used

¹²⁶ “La loi n’ayant pas d’autre office que supl er a la volont  du de cujus doit r gler la transmission de ses biens comme il est pr sumable qu’il en e t dispos  lui-meme. Elle doit lui donner pour h ritiers ceux qui auraient  t  les sujets de son proper choix,. et l’on doit supposer naturellement qu’il aurait choisi ses propres parents lorsequ’il n’a pas manifest  une volont  contraire, parce qu’il doit  tre pr sum  avoir eu plus d’affection pour ses parents que pour les  trangers. Rapport au Tribunal, LOCRE. T.V. 107 cited by Youego, Christine, “Sources et Evolution du Droits des Successions aux Cameroun.” Doctorat thesis, university of Paris II, 1994, 225 (unpublished).

¹²⁷ The Penguin English Dictionary, 1402.

¹²⁸ The Penguin English Dictionary also defines inheritance as “the act or an instance of inheriting property”, at 721.

¹²⁹ John Burke, Jowitt’s Dictionary of English Law, 2nd Edition, London, Sweet and Maxwell, p.1715.

freely within the limits of the interest acquired and subject to public policy considerations.

If succession transfers rights over property it is but normal to imagine that some of these could be subject to encumbrances likely to pass with the property. Normally before distribution any encumbrances in the form of debts or other liabilities on the estate must be ascertained and expunged by the personal representative. If this is done the beneficiary obtains unencumbered property. But some encumbrances hold over after distribution because the personal representative was unable to ascertain them or they crystallised after distribution. These generally pass with the property¹³⁰ and the law devises means to protect owners of such encumbrances. Personal representatives could retain property to meet eventual claims, or are indemnified by the beneficiaries or insurance. Generally, the courts take a practical view of the matter and hold that no protection beyond the personal liability of the beneficiaries is needed.¹³¹

In French law succession signifies the transfer of property and liabilities¹³² from the deceased to one or more living persons.¹³³ There is no intermediate period of administration, since pursuant to article 718 of the civil code succession opens immediately upon the death of the *de cuius* and property vests directly in the universal heirs jointly. It is then administered jointly pending partition to be decided upon by the beneficiaries or a court order.¹³⁴ Unlike the English law, therefore the liabilities attach automatically on the beneficiaries.

¹³⁰ Kerridge, Roger, Parry and Clark: *The Law of Succession*, London, Sweet and Maxwell, 11th edition, 2002, 270.

¹³¹ See Halsbury's *Laws of England : Annual Abridgement*, 2007, 495.

¹³² Louis Bach, *Droit Civil*, Paris, Sirey, 1985, p. 133.

¹³³ Hubrecht, G. *Notions Essentiels de Droit Civil*, Paris, Sirey, 1960, 21.

¹³⁴ See article 815 of the civil code, 1804

Customary law, according to Doumbe Moulongo, conceives succession in the same way as in French law stated above.¹³⁵ But succession in customary law, excluding Muslim law¹³⁶ is complicated by the fact that a deceased person often holds property as a family member and as an individual. Family property cannot be a subject of succession because the family, as a corporation has a perpetual existence. Only the management of family property passes from one person to another. And this is where there have been misconceptions, as the successor/manager tends to consider himself as the absolute owner, whereas as a family member he acquires a qualified title in the sense that whatever he does with the property must not negatively affect the interests of the other members. He cannot, for example dispose of the property without the consent of the other members.¹³⁷ He nevertheless enjoys an unlimited right of user which he could transmit to his heirs and can act independently in the day to day management of the property, subject of course to rendering account of such management.

Consequently, there is succession only to the personally acquired property of a deceased person, notwithstanding the argument that because the family contributed in the training or education of a member, any property acquired by him is family and not his private property.

1.6.3: PROPERTY

Property generally denotes anything tangible or intangible that is capable of ownership,¹³⁸ and which for the purpose of succession is of such permanence that it

¹³⁵ Doumbe-Moulongo, Maurice, « Conséquence de juridictions de Droit Traditionnel Sur l'Evolution des coutumes dans le Sud cameroun » (1963) 17 Rev. Jur. Et Pol. d'Outre-Mer, 533-572, 564.

¹³⁶ As will be seen later the chances of a Muslim holding property in the name of the family are remote because generally every person holds property in his or her personal name.

¹³⁷ See Stella Munga & 5 others v. Wumnyonga Christiana & 3 others (1984) CASWP/42/84 (unreported); Teke Elias Tepi v. Teke David Mbah (1996) BCA/2cc/96 (unreported)

¹³⁸ Osborn P.G., A Concise Law Dictionary, 270.

continues to exist and be used beyond the death of the owner.¹³⁹ Property also means “ownership” and ownership describes the relationship between persons with respect to a thing. So it is possible for different concurrent ownership rights of varying magnitudes to subsist over the same property.¹⁴⁰ Succession thus gives a right of ownership to property, whether a person takes an absolute interest or as a mere trustee.

English law classifies property under realty and personalty. The classification derives from Roman law according to which legal actions were divided into actions in *rem* and actions in *personam*.¹⁴¹ Actions in *rem* were against a thing or *res* in which the claimant was not demanding compensation or forbearance from the defendant, but the restitution of the thing. Actions for the recovery of land were classed as actions in *rem*. Because they involved recovering the land itself, such actions became known as actions in realty,¹⁴² and hence the appellation realty. Actions in *personam* or against the person on the other hand were those which could be made good by the payment of damages. They too became known as actions in personalty and hence the appellation personalty.

Leaseholds are classified as personalty because actions concerning them are personal actions. Real actions are available only to freeholders, that is, only to tenants who were seised of the land. A tenant for years is possessed, not seised of the land and if dispossessed, he could bring only a personal action for the recovery of damages against the grantor.¹⁴³

¹³⁹ Lawson F. H. and Rudden Bernard, The Law of Property, Oxford, Clarendon Press, 2nd edition, 1982, 14.

¹⁴⁰ Gray K. J. and Symes P. D., Real Property and Real People. Principles of Land Law, London, Butterworths, 1981, 8-9.

¹⁴¹ T. Cyprian Williams, “The Terms Real and Personal in English Law”, (1888) XVI L.Q.R., 394-408, 401.

¹⁴² *Ibid*, 398.

¹⁴³ Burn and Cartwright, Cheshire and Burn’s Modern Law of Real Property, Oxford, Oxford University Press, 17th edition, 2006, 36.

It is important to note that fixtures are, with a few exceptions part of the land. And so except agreement to the contrary, succession to land includes the things attached to it, as expressed in the maxim *quicquid plantatur solo solo cedit*.¹⁴⁴

As for French Law article 516 of the Civil Code divides property into movable (meubles) and immovables (immeubles). Immovable property is essentially land but because of the importance of agriculture at the time of the distinction,¹⁴⁵ various items of movables were treated as part of immovable property.¹⁴⁶ The assimilation of movables into immovables is explained by Beaumanoir: “Immovables are things which are everlasting and which produce annual income; perpetuity and the production of issues characterise immovables even more than the important fact of immobility; it is these two qualities which make up their value, whereas movables are perishable and do not bring in anything”.¹⁴⁷

Property is immovable by its nature, purpose or intended objective.¹⁴⁸ Hence immovable property includes not only the land and fixtures, but also the plants thereon and fruits irrespective of whether they constitute *fructus naturales*¹⁴⁹ or are just *fructus industriales*.¹⁵⁰ Beasts of burden used in farms, pipes and hoses used to conduct water in houses or farms are also classified as immovables.¹⁵¹ Movable property is defined in article 527 to include things which are movable by nature and those which are movable by law, having no connection to land.

¹⁴⁴ What is attached to land accedes to the land.

¹⁴⁵ This was in the thirteenth century but was adopted by the drafters of the code civil in 1804.

¹⁴⁶ See Atias, Christian, *Droit Civil: Les Biens*, Paris, Librairie de la Cour de cassation, 1982, 13.

¹⁴⁷ Cited by Brissaud, Jean, *A History of French Private Law*, New Jersey, Rothman Reprints Inc., 1968, 271.

¹⁴⁸ 517 Civil code, 1804.

¹⁴⁹ These are things that grow on land with little or no human effort and except severed, are part of the land.

¹⁵⁰ These consist mainly of seasonal crops planted on land and which are normally not part of the land.

¹⁵¹ See articles 518 to 526

It is therefore a principle of French law whatever is attached to land and is capable of producing an income accedes to the land. This is the basis of the doctrine known as *la présomption d'accession*.¹⁵²

At customary law the distinction is between land and movables. There is no consensus on the question whether things attached to land accede to it. One view, against such accession, divides land into two parts, namely the natural content consisting of the soil and the artificial content consisting of the things on it.¹⁵³ The communal nature of customary land tenure justifies this view, given that land is generally held by the family head on behalf of its members. If fixtures are to become part of the land, it will mean that they come under his authority even if he did not contribute to their existence. Not only would such a situation engender strife in the family, it will act as a disincentive to hard work and inventiveness by the members.

The soil generally belongs to the family and the fixtures belong to the persons responsible for their existence¹⁵⁴ and these could be trespassers, provided that they are not intended to defraud the owner of the soil of his title.¹⁵⁵ Fixtures could be pledged or otherwise disposed of without affecting the title of the group. In *Alexander Duru v. Haddison Masalo*, the South West Court of Appeal held:

¹⁵² Article 552 Code Civil

¹⁵³ This is also the position in Muslim law as evident in *Ndjobdi v. Gabilla* (Ndop Alkali Court, Civil Suit No. 3/2002-2003, unreported). The defendant initially permitted to construct a non-permanent structure on land went ahead to erect a six roomed concrete structure. He was ordered to remove same at his cost.

¹⁵⁴ See Enonchong, Nelson, "Jurisdiction over disputes relating to 'national lands' in Cameroon" (1999) 11 RADIC, 100-128,117; Anyangwe, Carlson, "Land Tenure and Interests in Land in Cameroonian Indigenous Law," (1984) Cameroon Law Review, pp. 29-41, 41; Ewang, Andrew, "The English Maxim 'Quicquid Plantatur Solo Solo Cedit' is not a rule of Customary Law."(1996) 26 Juridis Périodique, 19-23, 21.

¹⁵⁵ In *David Ako v. John Ndumbe* (1982) CASWP/CC/54/82 (unreported) the maxim was exceptionally applied because it was found that the defendant had the intention to own the land.

“The concept of customary ownership is that plants and fixtures attached to the land are not part of the land, so that a person may who owns the land may not per se own the crops.”[Sic]¹⁵⁶

A similar position was stated by the North West Court of Appeal in *Malam Bello v. The People*.¹⁵⁷ The case concerned the sale of a house and the court described the contract as “a document evidencing the sale of a house under customary law and not the sale of land because the English maxim *quicquid plantatur solo solo cedit* is not a rule of customary law.” On this basis it was held *Victor Bodylawson v. Hope Bodylawson & 2 others*¹⁵⁸ that a house built by a member on family land belongs to the member. It is “a fallacy to say that property built by the applicants deceased’s father was jointly owned without proof of financial contributions.”¹⁵⁹

Because fixtures do not pass with the land their fate could be settled in different ways. The owner could be directed to remove them at his cost¹⁶⁰ or alternatively the owner of the land keeps the fixtures subject to the payment of compensation to their owner.¹⁶¹

A second view favours the application of the maxim to customary law. The proponents advance such arguments as the gradual erosion of family ownership in favour of individual ownership. They also contend that the early disposable huts and seasonal crops that posed no threat to the title of the family are today replaced by concrete structures and permanent cash crops, liable indubitably to pose serious

¹⁵⁶ (1984), CASWP/cc/52/80, per Njamnsi, J. See also *Enjema Liote v. Hannah Forty* (1984) CASWP/CC/15/83 (unreported); *Michael Andeh v. Paul Happi* (1983) CASWP/CC/52/82 (unreported); *Isange Ekoi Comfort v. Bongolie Ophilia Epupu* (2004) HCK/AE/K.92/2002.

¹⁵⁷ (1983) Suit No. BCA/9MS/83 (Unreported).

¹⁵⁸ (2006) HCF/PROB/AE105/04-05/1M/05 (unreported).

¹⁵⁹ Per Justice Mrs. Mpacko

¹⁶⁰ *Ngema v. Ebini* (1994) HCK/CC/34/91-94 (unreported)

¹⁶¹ This course was adopted by the North West Court of Appeal in *Moma v. Moma* (2003) BCA/5/2003(unreported), where the respondent having come out victorious in a succession dispute was ordered to compensate the appellant for the house built by him on the land.

problems of ownership.¹⁶² The ownership of the soil and of permanent structures or crops is like the concurrent existence of equivalent rights over the same piece of land. At one point there must be a fusion of the land and the fixtures.

This position was adopted In *Enyame v. Enyame*.¹⁶³ The parties were cousins both of whom had inherited land from their deceased fathers. The defendant applied for and obtained letters of administration over property supposed to be his father's but the inventory included a house built on land which belonged to father of the plaintiff. In this action the plaintiff demanded a rectification of the letters issued to the respondent by excluding the house and including it in his own letters of administration as the owner of the land on which it stood. After a visit to the *locus in quo*, it was held that:

“There was abundant evidence that the premises [land] belonged to the first applicant. From this, therefore, it is only logical that, the uncompleted building on that premises ought not to be made the property of the late Francis Enyame. The parties are agreed on the point that, the late Francis Enyame constructed on the estate of his late brother, father of the first applicant. Therefore the respondent's Letters of Administration must exclude it.”

No orders as to the payment of compensation to the owner of the building were made, meaning that the court was effectively applying the maxim without expressly referring to it.

¹⁶² James, R. W. Modern Land Law of Nigeria, Ibadan, Caxton Press (West Africa) Limited, 1973, pp. 15.

¹⁶³ *Vesenge Enyame & 3 other v. Pauline Enyame & another* (2003) HCF/PRO/AE3013/1M/03 (unreported).

CHAPTER TWO: INTESTACY IN ENGLISH LAW

Introduction

English law like other systems of law predicates succession on the fact of death. Death¹⁶⁴ is evidenced by a corpse and burial; however, disappearance might be assimilated to death. The need to ensure the continuity of the estate and liberate the spouse, if any, necessitates a presumption of death¹⁶⁵ in the case of long and unexplained disappearance, which is preceded by a presumption of continuance.¹⁶⁶

Death provides the basis for succession to the estate of the person. It thus becomes necessary to determine the beneficiaries and how the estate will be managed and liquidated through distribution. These are the matters we will be examining in this chapter, after disposing of the no less significant questions of the applicable laws, and application thereof.

2.1: THE APPLICABLE LAWS.

The rules applicable in Anglophone Cameroon are drawn from English and Nigerian statutes. The most important English statutes on the subject are the Wills Act of 1837, Wills Amendment Act of 1852, and the Administration of Estates Act 1925. The latter repealed and consolidated all previous legislation on the subject some of which smacked of customary law. It governs administration of estates generally and there is also the Non-Contentious Probate Rules of 1954 which are used for the

¹⁶⁴ Black's Law Dictionary defines death as "The cessation of life, the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc

¹⁶⁵ See section 143 (1) of the Evidence Ordinance: "A person shown not to have been heard of for seven years by those, if any, who, if he had been alive, would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not being heard of without assuming his death."

¹⁶⁶ See section 148 of the Evidence Ordinance, Cap. 62 of the 1958 Laws of the Federation of Nigeria: "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case, and in particular the court may presume... (b) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things cease to exist is still in existence."

designation of personal representatives. These are applied together with Administrator-General Ordinance, Cap. 4 of the 1948 Laws of Nigeria; Order 48 Rule 1(1) of the Supreme Court (Civil Procedure) Rules Cap. 211 of the 1948 Laws of Nigeria and the Evidence Ordinance Cap. 62 of the 1958 Laws of the Federation of Nigeria.

The status of the estate prior to distribution is governed by the Trust of Land and Appointment of Trustees Act 1996. Of no negligible importance is the Inheritance (Provision for Family and Dependents) Act 1975 which enables dependants of the deceased to apply for reasonable financial provision out of the estate. Other important sources are the Intestate Estates Act 1952 which significantly augments the rights of the surviving spouse, and the Law Reform (Succession) Act 1995, which adds to the category of persons liable to apply for reasonable financial provision under the 1975 Act and also establishes twenty-eight days as the definite period of survivorship between commorientes spouses.

Statutes such as the Legitimacy Act 1976, Adoption of Children Act 2002, the Family Law Reform Act 1987 and the Matrimonial Causes Act of 1973 are also called in when the matter involves determining the succession rights of legitimated children, adopted children, and illegitimate children respectively, and the determination of what amounts to reasonable financial provision for a surviving spouse in application of the 1975 Act.

2.1.1: Case for the application of post 1900 English statutes.

The above applicable laws, with the exception of the Wills Acts, are post 1900 statutes and this appears to be in contradiction with the enabling law. From section 11 of the Southern Cameroon High Court Law 1955 it emerges that the

applicable English laws must have been in force in England on the 1st day of January 1900.

The views diverge as to the scope of the limitation, whether it affects all the components of English law or is limited only to a particular component. One view is that only the statutory law is affected, based on “the plain meaning of the words”¹⁶⁷ used in the enabling section or from the “inescapable rules of grammar.”¹⁶⁸ The use of semicolons to separate the three components of the received law could be an indication of their independence. But the semicolon is a controversial punctuation mark, which not being a comma or full stop¹⁶⁹ could be subject to differing interpretations. If treated as full stops, the relative clause “which were in force” becomes relevant only for the received statutory law. Taken in their literal meanings to signify long pauses between the components, the word “and” which precedes “statutes of general application” effectively separates the relative clause from the first two components. The use of the verb “were” immediately after “the statutes of general application”, which is the plural form of the past tense of the verb “to be”, instead of the singular form “was” is yet another indication that common law and equity were not intended to be effected by the limitation. Again, the phrase “in so far as the *legislature* of the Southern Cameroons is for the time being competent to make laws...” automatically excludes common law and doctrines of equity. The last and probably most important indicator lies in the lettering (a), (b), (c), and the inclusion of the qualifying date in the paragraph marked (c).

¹⁶⁷Park, The Sources of Nigerian Law, 21.

¹⁶⁸ Anyangwe, Carlson, The Cameroonian Judicial System, 222.

¹⁶⁹ The New Penguin English Dictionary at pp. 1269-1270 defines a semicolon as “punctuation mark to mark a break or pause between sentence elements such as clauses but is greater than the break or pause indicated by a comma and less than that indicated by a full stop.

The second view represented by Professor Allott recognises but discards the above possibility because “one cannot base one’s interpretation of a statute on its punctuation.”¹⁷⁰ He submits instead that “by necessary intendment” the date should cover the other components of the received English law.¹⁷¹ His position must have been influenced by his reading of section 83 of the reception statute of Ghana, where the components are separated by commas. In the footnote quoted above he observes the variegated nature of the punctuation marks used in similar provisions of other countries, makes reference to provisions with no commas, those with only one comma, and apparently ignores those that use semi-colons.

On the basis of its peculiar formulation we subscribe to the view that the limitation affects only the statutes of general application. Hence post-1900 developments in the rules of common law and doctrines of equity in England are without more applicable in Anglophone Cameroon.

The reception of post-1900 statutes is, however, expressly allowed under sections 10 and 15. Section 10 relates to procedural law:

“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, or by such rules and orders in court as may be made pursuant to this Law or any other written law, and 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”

Relevant English procedural laws for the time being in force are therefore admitted whenever there is a lacuna in the local laws. Section 15 concerns probate, divorce and matrimonial causes:

¹⁷⁰ Allott, Antony *Essays in African Law: With special reference to the law of Ghana*, London, Butterworth, 1960, p. 31, note 2.

¹⁷¹ *Ibid.* 31.

“The jurisdiction of the High Court in probate, divorce and matrimonial causes and proceedings may, subject to the provisions of this Law and in particular section 27, and to rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England.”

This exception is of particular relevance to this study as the tendency has been to construe “probate causes and proceedings” as including the administration of estates and the distribution of residue. In *Godwin v. Crowther*,¹⁷² the Supreme Court of Sierra Leone interpreted a similar phrase in section 6 of the Supreme Court Ordinance, 1904, cap 205 of Sierra Leone to include matters “*sui generis*”¹⁷³ such as testamentary succession, devolution on intestacy and administration, in order to bring in the Administration of Estates Act 1925. The interpretation was rejected on appeal by the West African Court of Appeal, which held the phrase to be limited to the grant or recall of probate or letters of administration. In *Taylor v Taylor*¹⁷⁴ the trial court adopted the same interpretation as was done by the trial court in *Godwin v. Crowther*, and again, it was overruled. Kingdon, C. J. then propounded the following test to determine whether the phrase bore the meaning attributed to it by the lower courts:

“Admittedly the grant of Letters of Administration is a probate matter, but the present matter has nothing to do with the grant, it relates to the disputes as to distribution of assets. To my mind the test to be applied is ‘would this matter in England be dealt with in the Probate Division or Chancery Division?’ If in the former, it is a probate matter, if in the latter, it is not a probate matter”.

¹⁷² Sierra Leone, (1934) 2 W.A.C.A. 109.

¹⁷³ Ibid. 110.

¹⁷⁴ (1935) 2 W.A.C.A. 348, 349.

It was unanimously agreed that in England the matter would be dealt with in the Chancery Division, and so it was held that the distribution of assets did not come within the purview of the phrase “probate causes and proceedings”.

It should not be assumed, we submit, that the lower courts were ignorant of what the phrase means, as the Latinism *sui generis* in *Godwin v. Crowther* suggests that the phrase was only exceptionally interpreted in the circumstances to encompass all of the law of succession. In the unanimous judgment of the court, the worry was that adopting the interpretation advanced by the lower court would result in the local Ordinance being repealed, notwithstanding the argument that only the provision on consent would be affected.¹⁷⁵ By implication the Administration of Estates Act 1925 would have been applicable if there was no local statute on the subject, and this precisely is the case of Cameroon.

The interpretation could also be justified when considered in the light of different rules of statutory interpretation: the golden rule, mischief rule and *ejusdem generis*. The golden rule seeks to discover the intention of the legislature by interpreting the words of the statute in their ordinary or literal meaning “unless this

¹⁷⁵ There were three judges in that case and each of them spoke in defence of the local statute: MacQuarrie, J. at 111 “Mr. Boston argued that the phrase in question does include the law as to testamentary succession, devolution or intestacy and administration of assets; but that one effect of section 6 is, by the application of the Administration of Estates Act, 1925, to repeal section 13 of the Intestate Estates Ordinance, and that section only. I am unable to agree with him; it seems to me that it would follow that the whole Ordinance would stand repealed, with the result that section 24 requiring the consent of the court to a sale of land would no longer be in force, and the defence to the action would disappear.” Butler-Lloyd, J.: “Now whatever may have been the exact intention of the legislature in framing paragraph[section] 6 nothing is clearer than that that section is subject to and overridden by section 8 which make all statutes applied by the Ordinance subject to existing Ordinances of the colony not thereby repealed. The intestate Estates Ordinance was not repealed and must be taken to remain in full force and effect. This disposes of the respondent’s case, but I desire to point out that even were the Intestate Estates Ordinance repealed by section 6 the respondent would be no better off since she rests her case on paragraph 24 of the Ordinance, and I am certainly not prepared to accede to the proposition that paragraph 24 remains in force while paragraph 13 does not.” (at 112). Deane, C. J., Gold Coast: “... the Intestate Estates Ordinance has not been repealed by section 6 of the Supreme Court Ordinance of 1924.... It is to me almost inconceivable that the legislature, had they meant to repeal that Ordinance, would not have said so, instead of living to inference such an important result.” (113).

stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction in which case some secondary ordinary sense may be preferred, so as to obviate”¹⁷⁶ these effects. If the intention of the legislator cannot be found, resort is had to the mischief rule which consists in discovering mischief which the law sets out to avoid. If this also fails then the *ejusdem generis* rule becomes applicable. The rule is that when general words in a statute are followed by narrow words all of which come within the same genus or category, the meaning of the general words is to be limited by the narrow words in the absence of any contrary intention.

Either method would justify the interpretation without the need for the Latinism *sui generis*. Under the golden rule it would be an absurdity to think that the legislature would have intended the term “probate” to be so narrowly interpreted so as to exclude the administration of estates, being the area where most problems of succession are bound to arise. Textbooks on succession today carry such titles as “Probate and Practice.”¹⁷⁷

The mischief rule would produce the same results. There is no doubt that by bringing in English law generally, the colonial legislature intended to avoid the application of customary law to matters that would otherwise be governed by English law. Conscious of the negative effects of rules of customary law on certain members of the family, particularly women it must have been thought that even the pre-1900 statutes would not provide adequate protection, given the existence in those laws of provisions that discriminate against women. The mischief which the legislature set out to combat would remain undiminished, if “probate causes and proceeding” does not include distribution of the estate. It will mean that while the Administration of

¹⁷⁶ *Maunsell v. Olins* [1975] A.C. 373, 391, per Lord Simon of Glaisdale

¹⁷⁷ For instance Rowe, R. B et al., Tristram and Coote's Probate Practice, London, Butterworths 1983

Estates Act 1925 governs the grant and withdrawal of probate and Letters of Administration, distribution will be governed by statutes of distribution of 1670 which has been repealed by the 1925 Act.

Applying the *ejusdem generis* principle might pose some difficulties due to pre-condition for the existence of more words and a genus to which they all belong. Section 15 uses the word “probate” standing alone. However, *ejusdem generis* is merely an emanation of a general principle of interpretation expressed in the Latin maxim *Noscitur a sociis* (a thing is known by its associates), which means that to understand the meaning of words, especially general words in a statute, they have to be read in conjunction with other words used in the statute or with which they are connected.¹⁷⁸ In other words, the meaning of a word can be deduced from the company it keeps.¹⁷⁹ “English words derive colour from those which surround them.”¹⁸⁰ Where an enactment contains a neutral or colourless word, the context provides the colouring agent. In *Bromley London Borough Council v. Greater London Council*,¹⁸¹ the question was whether the word “economic” meant financial economy or the science of economics. Lord Scarman said: “As a matter of English usage, the term economic has... several meanings. They include both that for which the appellants contend and that for which Bromley contend. It is a very useful word: chameleon-like, taking its colour from its surroundings.” The term probate is neutral and is coloured by its association with administration and distribution of the estate.

Strict adherence to the limitation date would mean that the courts will be applying outdated rules which no longer meet the required standard of justice under

¹⁷⁸ See Bennion, F.A.R., *Bennion on Statute Law*, London, 3rd ed., Longman, 1990, 195-198; Bennion, F.A.R., *Statutory Interpretation*, 3rd ed., London, Butterworths, 1997, pp. 195-199; Bell, John and Engle, George, *Cross: Statutory Interpretation*, 3rd ed., London Butterworths, 1995, 138-139

¹⁷⁹ Anyangwe, Carlson, *The Cameroonian Judicial System*, Yaoundé, CEPER, 1987, 236-237

¹⁸⁰ *Bourne v. Norwich Crematorium*, [1967] W.L.R., 691, 696(Per Stamp, J.)

¹⁸¹ [1982] 1 All E.R., 129,174

English law. Given that the idea was to institute a system of justice equivalent and not inferior to the English standard, the objective would be defeated if, because of the tyranny of statutory provisions we are obliged to apply laws long abandoned¹⁸² in England. Fombad opines that: “Neither reason nor justice, in the absence of a clear and comprehensive Cameroonian enacted law on the issues compels such rigid interpretation [limitation date] today. The proper approach, it is suggested, must be dictated, if not in fact justified, by rational and objective imperatives of justice and fairness with due regard to the present level of our socio-economic development and situated in the general context of our overall objective legal modernisation.”¹⁸³

Anglophone courts have accordingly not heeded the limitation and consistently rely on the exception in section 15 to bring in post-1900 English statutes relevant to the law of succession. The dictum of Epuli, J. in *Nforba v Nchari*,¹⁸⁴ is commonly cited as authority for this proposition.

“In the light of section 15 as read with section 9(b) and section 27 of the southern Cameroon High Court Law 1955... where the marriage was monogamous the rules applicable would be those currently in force in England... from the surrounding circumstances, I infer that the marriage was intended to be monogamous. Therefore the current law of succession applicable in England governs the devolution of the intestate deceased’s property. That law is to be found basically in the Administration of Estates Act 1925...”

It is clear from the foregoing that Anglophone Cameroonian courts have refused to be tied down by the limitation date which would have meant applying

¹⁸² See Park, A. E. W., *Sources of Nigerian Law*, London, Sweet and Maxwell, 1963, 23-24. It will be paradoxical if England, a champion of human rights would intend the application in its former colonies of the Dower Act and Statutes of Distribution for example, not for their bias to women.

¹⁸³ Charles Manga Fombad, “The scope of uniformised national laws in Cameroon.” (1990) 3 *Revue Juridique Africaine*, 59-71, 67.

¹⁸⁴ (1999) G.L.R. 59, 63 (Gender Law Report) See also *Mbokam Nya Clarice v Tchouinjan Andre & Cameroon Development Corporation* (1999) G.L.R., 67

moribund English statutory law. In succession especially this would have meant operating a distinction between male and female descendants with respect to succession to real property, and it would have meant, equally that widows are never to aspire to succession since they would be entitled to the dower which was one third of the real property of the deceased. The application of post-1900 laws makes it possible to link the right of succession to the duty of maintenance, which as we said, should constitute the basis for succession.

2.1.2: Adaptation of the applicable English laws to local conditions.

An applicable rule of English law needs to be adapted to the local circumstances. Having been made to meet specific requirements in England, the laws would result in hardship if not modified in line with the standards of an African environment, where there are significant differences in the general life-style, customs, beliefs, social organisations, and patterns of marriage, divorce law, land law and above all, the law of succession.

However this imperative seems not to have been given much thought by the colonial legislature, as Cameroon's enabling statute makes no provision for adaptation. Section 45(3) of the Interpretation Act, cap. 89 of the 1958 Laws of the Federation of Nigeria applicable in Cameroon permits "formal verbal alterations" but the phrase "not affecting the substance," greatly limits the extent of the adaptation. It is permissible under the provision to make substitutions for names, as for example substituting "Cameroon" for "England" or "Nigeria."

Park argues that adaptation is not permissible if not contained in a statute. His reason is that courts are called upon not to "administer justice, but rather to administer the rules of law that they are directed to apply by relevant statutory enactments" and adds that "the legislature of the country can always change common

law rules that are considered unsuitable.”¹⁸⁵ One could easily associate Park’s position with the traditional position of English law that law-making is the responsibility of parliament. But even the English system, organised as it is has not always responded, at least promptly, if at all, to calls for Parliament to change “unsuitable rules” of common law. Much can therefore not be expected of Cameroon, where even making the most basic laws on matters such as succession is still a problem. Park’s fear is that leaving the task of adaptation to the individual courts might result in a multiplicity of customary laws on a given subject, which would work against the certainty and predictability of the law. But these are matters that could be taken care of by the doctrine of precedent.

Allott supports the view that even in the absence of express provisions, “the courts have an inherent power in similar terms by virtue of their general duty to administer justice”¹⁸⁶ Allott’s position is good for countries like Cameroon where no provisions for adaptation exist. The courts will have to draw from their discretionary powers to adapt rules of the received law and make them workable in the new environment.¹⁸⁷

Given that judicial discretion must be based on some legal provision, the courts could rely on the residual clause embedded in section 27(4) of the Southern Cameroon High Law 1955. It enacts: “In cases where no express rule is applicable to a matter in controversy, the court shall be governed by the principles of justice, equity and good conscience.”

¹⁸⁵ The Sources of Nigerian Law, *supra*, p.39.

¹⁸⁶ Essays in African Law, *supra*, p. 25.

¹⁸⁷ Allott, Antony Essays in African Law: With special reference to the law of Ghana, London, Butterworth, 1960, 24.

Adaptation could be by broadening the meaning of terms used or by refusing to adhere to inconvenient details.¹⁸⁸ It is for example accepted that the term “marriage” mean not only monogamous but also polygamous marriage provided that the laws of the country where it is celebrated recognise such marriages.¹⁸⁹ The effect of this in succession is that the “wife” or “widow” of a customary marriage and the children of the marriage can in certain circumstances succeed under English law.

In *Bamgbose v. Daniel*¹⁹⁰ it was held that children of a valid customary law marriage were entitled to succeed in the same capacity with children of a statutory marriage. A similar position had been adopted in the earlier case of *Re Adadevoh*.¹⁹¹ But in both cases since no claims were made by the widows the Courts abstained from making any concrete pronouncements, apart from intimating that the rights of the children to succession were independent of that of their mothers if ever they made any claims to that effect.¹⁹² In the opinion of the Privy Council as expressed in *Bamgbose v. Daniel*, “if the legitimacy [of the children] be established, the validity of his parents’ marriage should not be entertained as a relevant subject of investigation. It would be strange in the converse case where a marriage of the parents was recognised as valid the children should be deprived of their right of succession because of the difficulty in working out the rights of the wife.”¹⁹³ The position of the widow was settled in *Coleman v. Shang*.¹⁹⁴ The plaintiff, an issue of a statutory marriage was against the widow by a valid customary marriage being appointed joint administrator of the estate with her on the ground that the widow did not come within

¹⁸⁸ Allott, *supra*, p. 24

¹⁸⁹ See *Bamgbose v. Daniel* (1952) 14 W.A.C.A. 111, 114

¹⁹⁰ *Ibid.*

¹⁹¹ Also known under the appellation of *In the Matter of the Estate of Herbert Macaulay* (1951) 13 W.A.C.A. 304.

¹⁹² See p. 311 for *Re Adedavoh* and p. 121 for *Bamgbose v. Daniel*

¹⁹³ P. 122.

¹⁹⁴ [1961] A.C. 481.

the meaning of wife under section 3¹⁹⁵ of Statute of Distribution of 1670. The contention was rejected on the ground that the woman was a wife under the statute, having been lawfully married under the law of Ghana.

An important question worthy of consideration is whether the courts have powers to alter the statutory provisions to make them palatable to local conditions. Could the one third share of the deceased estate accorded to the widow of a monogamous marriage under the statute of distribution be increased, if the share is found to be too small for the number of wives at customary law? From the decision in the Nigerian case of *Labinjoh v. Abake*¹⁹⁶ this would seem impossible. In that case, the defendant, an unmarried girl under 21 years of age living with her parents was sued for the price of goods sold and delivered to her. The action was dismissed on the basis of the Infant Relief Act, 1874 on the ground that she was an infant and that infant contracts are voidable if avoided within a reasonable time. On appeal to the divisional court, it was held that the plaintiff must succeed because the Act was applied with necessary modification to the meaning of the term “infant”, held to be the age of puberty and not the statutory age. This decision was set aside in the present appeal, and Combe, C. J. said:

“I am of the opinion that the learned judge was wrong in holding that, in applying the Act, the court is entitled to alter the Act to suit local conditions. The legislature in using the term “infant” in the Act must be assumed to have been aware of the legal definition of that term and to have intended that the term should be read in accordance with that definition.”

¹⁹⁵ “ All ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplussage of such estate or estates in manner and form following : that is to say, one third part of the said surplusage to the wife of the intestate.”

¹⁹⁶ (1924)5 N.L.R.32, 35.

Without adaptation the very application of the laws would be impossible, given that the English laws of succession are made for a society where monogamy is the rule, as against the Cameroonian community where polygamy is the rule. The adaptation, it must be said has been mainly responsible to the influence which customary law still wields over matters of succession in this country.

2.2: COURTS WITH JURISDICTION TO ADMINISTER ENGLISH LAW

2.2.1: Original Jurisdiction: The High Courts.

High Courts have existed in Anglophone Cameroon since the Southern Cameroon High Court Law of 1955. Under that Law the courts had both original and appellate jurisdiction because having been modelled in line with the High Court of England, were under section 7 conferred the same jurisdiction as their English counterparts.¹⁹⁷ However the appellate jurisdiction was removed by Ordinance No. 72/4 of 26 August 1972 on the Judicial Organisation of the whole country. Although differences could still be observed in the manners in which they function, this Ordinance effectively harmonised the legal systems of the former British and French Cameroon.

The courts are situated at the level of each administrative division and are competent in succession matters arising within their jurisdiction if the deceased had property therein.¹⁹⁸ Section 16(b) as amended by article 16(c) of Law No. 89/019 of 29 December 1989 gives the courts original jurisdiction over succession: “The High Court shall have jurisdiction...in civil matters to hear suits and proceeding relating to

¹⁹⁷ “To the extent that the legislature of the Southern Cameroon is enabled to confer such jurisdiction, the High Court shall, in addition to other jurisdiction conferred by the Constitution Order or by this law or any other written law, possess and exercise within the limits mentioned in, and subject to the provisions of the Constitution Order and this law, all jurisdiction, power and authorities, other than admiralty jurisdiction, which are vested in or capable of being exercised by Her Majesty’s High Court of Justice in England.”

¹⁹⁸ See Order 48 Rules 1 and 2 of the Supreme Court (Civil Procedure) Cap. 211 of the 1948 Laws of Nigeria; *Sam Wandji Christine & anor v. Sam Mbessa Mani Christine* (2006) Suit No. HCF/105/OS/04-05 (unreported).

the status of persons and especially to civil status, marriage, divorce, filiation, adoption and *succession*, subject to the legal provisions applicable to traditional courts as regards *ratione personae* jurisdiction.”

Hence the courts have jurisdiction over all matters of succession except those over which the customary courts are competent. They are primarily competent over matters involving foreigners and persons who would otherwise be subject to the customary courts, but who contracted monogamous marriages or left wills in English form.

However, because they have exclusive jurisdiction over letters of administration,¹⁹⁹ they also occasionally exercise jurisdiction over estates in which customary law is applicable. Such matters are heard first of all by the customary courts, giving rise to next-of-kin declarations which are then presented to the High Court in view of the letters.

This is a curious practice given firstly, that both the Customary and High courts are courts of original jurisdiction in which case the decision of one must be treated as *res judicata* by the other. If because of the monopoly over letters of administration the High Courts must hear matters relating to the estates of persons subject to customary law, it is submitted that their role must be administrative only, and not empower them to go into the merits of the case. Secondly, a decision of the customary court would be final except where an application is made for letters of administration.

Even more puzzling, the procedure is not ordained by any law, a fact admitted in *Njoke v. Njoke*,²⁰⁰ according to which: “A next-of-kin declaratory judgment from

¹⁹⁹ See Order 48 Rule 1(1) of the Supreme Court (Civil Procedure) Rules Cap. 211 of the 1948 Law of Nigeria. See also Mikano Emmanuel Kiye, “The Importance of Customary Law in Africa: A Cameroonian case study”, Doctoral Thesis, VRIJE UNIVERSITEIT BRUSSEL, June , 146.

²⁰⁰ ((2006) C.A.S.W.P/35/04-05 (unreported)).

the customary court which is a practice that has evolved through out the years but not a legal requirement is only a step to the obtention of letters of administration.”²⁰¹

2.2.2: Appellate Jurisdiction: Courts of Appeal and the Supreme Court.

The judicial reforms of 1972 established Courts of Appeal for each of the country’s ten provinces²⁰² and a single Supreme Court situated in the capital of the country.²⁰³ Appeals against decisions of the High Courts are made to the Court of Appeal of the province and dissatisfaction with the outcome could give rise to further appeal to the Supreme Court situated in the capital city of Yaoundé.

2.3. DETERMINING THE INTESTATE BENEFICIARIES

The beneficiaries are persons who survive the deceased, and so like death, survivorship is a precondition for succession. Survival might be difficult to determine in situations of the simultaneous deaths of persons entitled to each other’s succession or one of who is entitled to the succession of the other. Such deaths are described as *commorientes* and the basic rule for determining survivorship in the circumstance, with the exception of spouses, is to presume that the youngest person survived.²⁰⁴

Sections 21 (1) of the Non-Contentious Probate Rules of 1954 and 46(1) of the Administration of Estates Act 1925 provide an outline of potential beneficiaries, potential because the principle of precedence might exclude some of the persons on the list. These are the surviving spouse, the children of the deceased or the issue of

²⁰¹ See also *Peter Charles v. Chinkwo Ndeh* where it was said that “A customary court decision in matters of next-of-kin declaration is not a final decision. It is only a process in the granting of letters of administration and can at best be regarded as a recommendation to the Administrator-General when he is examining an application for the grant of letters of administration.” (2006) Appeal No. BCA/62/2003 (unreported)

²⁰² See section 18 of Ordinance No. 72/4 on the Judicial Organisation.

²⁰³ See section 1 of Ordinance No. 72/6 of 26 August 1972 bearing on the organisation of the Supreme Court.

²⁰⁴ See section a commorientes is contained in section 143(2) of the Evidence Ordinance: “For the purpose of determining title to property where two or more persons have died in circumstances in which it is uncertain which survived the other, they are presumed to have died in order of seniority.”

any such child who has died during the life time of the deceased. The father or mother of the deceased, brothers and sisters of the whole blood, or the issue of any deceased brother or sister of the whole blood who has died. The brothers and sisters of the half blood, or the issue of any deceased brother or sister of the half blood who has died. Grandparents, uncles and aunts of the whole blood, or the issue of any deceased uncles or aunt of the whole blood who has died, and uncles and aunts of the half blood or the issue of any deceased uncle and aunt of the half blood who has died.

The list can go on ad infinitum as long as there are direct descendants or ascendants. Marital relationships and kinship are the factors that determine whether or not a person qualifies as a beneficiary.

There is no gender-based discrimination and the surviving spouse even occupies the pride of place. Greater attention is thus given to marital relationship. The “issue” of the deceased come next and the term signifies the legitimate children of the deceased, their descendants and subsequent generations of descendants who are living or were *en ventre sa mère* at the intestate’s death. In *the Estate of Bechem Solomon*²⁰⁵ letters of administration were withdrawn from the brother of the deceased who had administered the estate for twenty five years and transferred to the only surviving child of the deceased who was born one month after her father died.

The term “issue” also includes illegitimate²⁰⁶, legitimated²⁰⁷ and adopted²⁰⁸ children of the deceased. These have the same status as legitimate children and are as a result the subject of succession rights, not limited to the actual persons who gave them the status. The rights extend in their various categories to the estates of their

²⁰⁵ Suit No. HCK/AE/K.128/2001.

²⁰⁶ See section 14 Family Law Reform Act 1969.

²⁰⁷ See section 5 Legitimacy Act 1976.

²⁰⁸ See section 39(1) Adoption Act 1976.

brothers and sisters, grand parents, uncles and aunts *ad infinitum*, provided they or their descendants survive the deceased.

If the deceased is not survived by any of the relatives listed above, the estate goes to the Crown as *bona vacantia* as it is illegal to go beyond the class of statutory relatives. The Crown whose powers in this respect are exercised by the Treasury Solicitor may in its discretion and in accordance with the existing practice make provision for the dependants of the deceased whether related to him or not, and for any other persons for whom the deceased might reasonably have been expected to make provision.²⁰⁹

The tendency upon looking at the above list would be to conclude that the law effectively balances the interest of the family members of the deceased. However as will be seen later in this study, this is only a false image which we will not hesitate to identify as being partially responsible for the woes of our law of succession. The list may be long as it is, but not every person on it would be entitled to succession since the existence of a category at the top of the list automatically excludes the others.

2.4: ADMINISTRATION OF ESTATES

Administration is in principle the period during which the estate is supposed to be realised and prepared for liquidation. It takes effect from the death of the deceased to the time of distribution. But the fact the distribution is not mandatory leads to a situation of perpetual administration, which as we will see, is encouraged by the courts which generally decline to decree distribution. Administration is ensured by the personal representative.

²⁰⁹ See section 46(1) (vi) Administration of Estates Act 1925. Eventually we shall see that such people could apply for reasonable financial provision out of the estate under the Inheritance (Provision for Family and Dependents) Act 1975.

2.4.1: The Personal Representative.

The personal representative is the person to whom Letters of Administration of an estate are granted. Initially the appellation signified the powers to manage the personal property of the deceased but has since been extended to include real property.²¹⁰

2.4.1.1: The designation of personal representatives.

The personal representative manages the estate on behalf of the beneficiaries, who are persons entitled to maintenance by the deceased either directly or by the proxy of those in whose favour the right existed.

Cameroonian courts rely interchangeably on the Administration of Estates Act 1925 and the Non-Contentious Probate Rules 1954 to designate the personal representative. This is wrong because while the former lays down immutable rules of distribution the latter enshrines rules for appointing personal representatives, which are liable to vary when the circumstances so require.

Section 21(1) of the Non-Contentious Probate Rules of 1954 establishes the following order:

- a) The surviving spouse;
- b) The children of the deceased or the issue of any such child who has died during the life time of the deceased,
- c) The father or mother of the deceased;
- d) Brothers and sisters of the whole blood, or the issue of any deceased brother or sister of the whole blood who has died.

²¹⁰ See section 1(1) of the Land Transfer Act 1897 which assimilated realty to personalty during the period of administration. Thereafter the personal representative also became the real representative even though the former appellation has for reasons of convenience been maintained.

The list stretches to include brother and sisters of the half blood or their issue, grand parents, uncles and aunts of the whole their issue and ends with uncles and aunts of the half blood or their issue.

Remote relatives are excluded whenever there are persons closer to the deceased²¹¹ and if the relatives thus qualified are a category such as the “issue”, the court will have decide which of them is more suited for the position in the sense that he or she will manage the estate for the benefit of the other members of the category.

The courts have wide discretionary powers under section 116 of the English Supreme Court Act 1981 to pass over the person who would otherwise have been entitled to the grant of administration and appoint as administrator any other person they deem expedient if, “by reason of any special circumstances” this appears to be necessary. The discretion was emphasised in *Nanje Fabian v. Meta Edward* by Mbeng, J.

“I think that the pivotal factor for the court to consider in determining who should administer an estate, especially that of an intestate, is who is capable and honest. It is not a matter of relationship and priority as the administrator may not necessarily be a beneficiary to the estate.”²¹²

Situations that come within the meaning of “special circumstances” are many. The most common which would justify an objection and a possible passing over of the person with prior rights to a grant include unsoundness of mind, minority and the bankruptcy of the estate.²¹³ The list could be stretched to include factors such as bad character or otherwise unfitness to act, the disappearance or absence of the person

²¹¹ In *Kekerogun v. Oshodi* (1971) All N. L R. 76. the half brothers of the deceased were held to be entitled to letters of administration as against his cousin.

²¹² (2005) Suit No. C.A.S.W.P/53/2002 (unreported). The contest for letters of administration was between the half brother and son of the deceased

²¹³ See sections 32, 33 of the Non-Contentious Probate Rules 1954.

entitled and the death of a sole solicitor.²¹⁴ Further, an applicant will not be designated if he or she has an interest in the estate which conflicts with the proper administration of the estate.²¹⁵

When the person entitled is passed over pursuant to a caveat to an initial application or a revocation order, it is preferable for another person with a stake in the estate to be designated. Such persons would administer the estate expeditiously and with care as against a complete stranger who has nothing to lose or gain whether the estate is managed dilatorily and haphazardly. Besides, a beneficiary would have every reason to maximise the value of the property in the hope that it could increase his entitlement upon distribution.

In *Njonji Godlove v. Esther Njonji*²¹⁶ the plaintiff was the son of the deceased from a previous customary marriage which was dissolved by the death of the woman. The defendant was the widow of the deceased by a Christian marriage. The plaintiff's mother died when he was only two years old and he was therefore brought up by the defendant. Upon the death intestate of the deceased the family council made the widow successor to her husband. She obtained a next-of-kin declaration, and was granted Letters of Administration. The plaintiff claimed that the letters should be revoked and granted to him instead. He gave improper administration of the estate by the defendant and the fact that he was the first child of the deceased as reasons. The court qualified the conflict between the parties as "a delicate family matter" and making use of its discretion held:

"Notwithstanding section 21(1) of the Non-Contentious Probate Rules 1954 it will be more just and equitable to appoint someone else to administer the estate of the deceased... for the benefit of all the

²¹⁴ Kerridge, R., & Brierley, A. R. H. *Parry and Clark: The Law of Succession*, London, Sweet and Maxwell, 11th edition. 2002, 402..

²¹⁵ *In re Goods of Carr* (1867) 1 P. & D. 291.

²¹⁶ Suit No. HCK/AE/K.16/2000 (unreported)

beneficiaries. These beneficiaries are the applicant for grant and her four children and the caveator and his two children.²¹⁷ To this end this court hereby appoints Rev. Pastor Njonji Isaiah [brother of the deceased] ... as the Administrator of the Estate of Late Njonji Adolf Same. ”

The judgment fails to mention the facts on which the accusations of mismanagement were based. We think however that the decision to appoint the brother of the deceased, albeit a pastor, was a mistake and could be sowing seeds of discord. The pastor himself would have been a beneficiary but for the existence of the widow and the issue. His appointment indirectly revives his status as beneficiary as the tendency would be for him to consider himself in that light. This was the situation in *In the Estate of Noumbissie*,²¹⁸ where the deceased was survived by two widows and issue of both marriages. Animosity between the two branches caused administration to be granted to a cousin of the deceased who considering himself as beneficiary connived with one of the widows and as a result, cared instead for his own family and the widow and her children.

Decisions such as the above must be many and show the influence of customary law on court decisions. The courts certainly buy the customary law rule according to which women cannot be successors, for nothing would have prevented appointing the contesting parties as joint personal representatives, since this is possible under section 114(1) of the Supreme Court 1981 which sets the maximum number of personal representatives at four persons.

Alternatively a completely neutral person could be appointed if the courts are to escape the accusation of having been influenced by customary law. This is the

²¹⁷ The application of the English Non-Contentious Rules might seem to be at variance with granting succession rights to the caveator, issue of a customary marriage and his children. The position of the law as discussed in chapter two is that a subsequent Christian marriage does not bastardise the children of a previous customary marriage provided such marriage is valid under the law of the fori.

²¹⁸ (2002) 1 CCLR., 1.

import of Order 48 Rule 37 of the Supreme Court (Civil Procedure) Rules of the 1948 Laws of Nigeria:

“In a case of intestacy, where the peculiar circumstances of the case appear to the court so to require, the court may, if it thinks fit, on the application of any person having interest in the estate of the deceased, or of its own motion, grant letters of administration to an officer of the court or to a person in the service of the Government.”

This officer of the court or Government official is generally the Administrator General, who in Cameroon is the President of the High Court. There is none better suited to maintain the balance between the parties than the Administrator-General, a neutral third party having no beneficial interest, actual or presumed, in the estate.

In *the Estate of Noumbissie*²¹⁹ the letters were withdrawn from the conniving cousin and transferred to the Administrator-General. In *Galega v. Galega*²²⁰ the widow had without a next-of-kin declaration applied for letters of administration against which the defendant, the brother of the deceased issued a caveat. In spite of the animosity between the parties the trial court granted joint administration to the parties. The decision was reversed at appeal, and the administration granted to the Administrator-General on the ground that neither of the parties could administer the estate in the interest of the beneficiaries “without fanning the flames of animosity between the two families.” There was of course another ground for which the letters would have been revoked. The deceased was survived by a widow and issue and this excluded his brother as a beneficiary to have qualified him to be made joint administrator with the widow.

²¹⁹ (2002) 1 CCLR., 1.

²²⁰ Appeal No. BCA/19/93 (unreported).

Granting administration to either would have been ignoring the rights of the persons interested in the estate which normally guides courts in their choices.²²¹ The brother of the deceased was hostile to the surviving spouse and issue while the widow was opposed to the inclusion of the deceased's mother and two illegitimate children of the deceased as beneficiaries.

Apart from the above situation the Administrator-General could in his discretion apply for Letters of Administration within a period of one month following the death.²²² This would arise when there is no person immediately available who is legally entitled to succession and when the assets of an estate are seen to be at risk of appropriation, deterioration and waste.²²³ The Administrator-General acts under the authority of the court and is required to furnish periodic accounts of his administration.²²⁴

Grants for estates where no person has a beneficial interest are governed by paragraphs 3 and 4, which prescribe grants in those circumstances, to the Treasury Solicitor who claims *bona vacantia* on behalf of the Crown and to the creditors of the deceased respectively.

The above rules ensure that the persons entitled to succession are not cheated out of their rights, and this is so whether the personal representative is a beneficiary or a neutral person.

2.4.1.2: The authority and duties of personal representatives.

Personal representatives derive their authority from the letters of administration. In the interim period between the death and grant of the letters the

²²¹ See *Uyenne v. Administrator-General* (1973) 3 E.C.S.L.R, 716; *Warwick v. Grenville* (1809) 1 Phill 123, 125.

²²² Section 15 Administrator- General Act, cap. 4 Laws of the Federation of Nigeria, 1958.

²²³ Section 16, *ibid*.

²²⁴ Order 48 Rule 38, Supreme Court (Civil Procedure) Rules, 1948 laws of Nigeria.

conservation of the property is ensured by the Probate Registrar whose duty in a nutshell is “to preserve the assets, to deal with them properly, and to apply them in a due course of administration for the benefit of those interested”.²²⁵ Once granted the letters of administrations have a retrospective effect as was stated by Park, B. in *Foster v. Bates*.²²⁶

“It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrong doer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover.”

The estate vests in him as owner and not the other beneficiaries. The point was made in *Chibikom v. Zamcho Florence*, where in response to accusations that the respondent was registering the family land in her marital name, Bawak J. said:

“It is settled law that the effect of the grant of letters of administration is to vest the estate of the deceased in the administrator. Thus any applications for land certificates on part of the unregistered land owned by the deceased at the time of his death is by the administrator in his capacity as such administrator.”²²⁷

This decision encapsulates one of the dilemmas with which some of our courts are confronted-that of applying English law without adaptation. Clearly the decision contradicts the customary law by allowing the successor to register family land in her name.

²²⁵ Commissioner of Stamp Duties (Queensland) v. Livingston [1965] A.C. 694, 707 (Per Lord Radcliffe).

²²⁶ (1843) 12 M. & W. 226, 233.

²²⁷ (1997)1 CCLR, 213,219.

What the decision signifies is that the beneficiaries have no rights over the estate. All they have are equitable rights of ownership which are in “suspense”²²⁸ during this period. These might never ripen into legal ownership if the estate is insolvent, but it provides the basis for the beneficiaries to insist on proper administration. Due to the fiduciary nature of the relationship between them and the personal representative, the latter are entitled to what is known as a *chose in action* or the right to compel the proper administration of the estate whenever the former is found wanting in his duties in preserving the estate and managing it in the best interest of those entitled.

Given that their rights are only probable, depending on the solvency of the estate, the appropriateness of the term “beneficiaries” has been questioned. The alternative term, “next-of-kin”, has been advanced²²⁹ on the ground that it does not connote any rights to property, but only that the person is closest to the deceased and is by law entitled to Letters of Administration in preference to creditors.²³⁰

The initial duty of the personal representative is to realise the estate, sell and convert it into money. Part of the money is to be used for the administration, and the residue to be distributed to the beneficiaries at the end of the administration. In this respect, since the Trust of Land and Appointment of Trustees Act 1996, the estate is constituted into a “trust of land”²³¹ which empowers the personal representative to sell both personalty and realty for the purpose of the administration.²³²

²²⁸ J. Sainsbury plc v. O’Connor (Inspector of Taxes) [1991] S.T.C 318 at 326.

²²⁹ See Todd, Paul, Textbook on Trusts, London, Blackstone Press Ltd., 4th edition, 1999, 74.

²³⁰ Administrator General’s Ordinance chapter 4 of the 1948 Laws of Nigeria.

²³¹ The “trust of land” is defined in section 1 of the Act as “any trust of property which consists of or includes land” and this means that the trust is not limited to land.

²³² This replaces the “trust for sale” under section 33(1) of the Administration of Estates Act 1925, the effect of which was that the personal representative had the *duty* to sell the estate. The duty brought into play the doctrine of conversion based on the maxim that “Equity regards as done that which ought to be done,”²³² meaning in effect that land devolved as personalty even though no sale had yet occurred. The beneficiaries had interests in the proceeds, actual or presumed which were equivalent to those which they had in the land.

In fact this is what obtains in Cameroon as in most cases the estate is entrusted in the personal representative with instructions to make varying payments to the beneficiaries. Sale of the property is only one of the methods by which the money could be raised and often this is open to abuse as the tendency, often is for the personal representative to sell the land and appropriate the proceeds.

The next duty of the personal representative consists in paying off the debts of the deceased and expenses of the administration out of the net income from the sale and conversion of the property.²³³ The expenses consist of the cost of organising the funeral and the cost of the administration generally. He is expected make an inventory of the estate, to realise the investments which it is not proper to retain, to keep clear and accurate accounts, and to be ready to make such accounts available whenever required to do so by the court.²³⁴

The administration of an estate could go on *ad infinitum* because the law fails to fix a period when it must come to an end normally by distribution and effective liquidation of the estate. This is one of the problems confronting our law of succession, given that prolonged administration leads to abuse, as the personal representative generally starts treating the property as belonging to him. In the absence of a deadline for administration, distribution is only discretionary and we could not find any evidence where distribution is decided upon by the personal representative without the intervention of the court.

2.5.: DISTRIBUTION OF THE RESIDUE

Distribution gives effect to the deceased's duty of maintenance as it effectively enables the beneficiaries to get into their entitlements within the limits of

²³³ Section 33 (2) Administration of Estates Act 1925.

²³⁴ See Order 48 Rule 43 (1) of the Supreme Court (Civil Procedure) Rules, Cap. 211 of the 1948 Laws of Nigeria.

the estate. Whether the rules effectively establish parity between the beneficiaries remains to be seen.

2.5.1: The content of the residuary estate.

The part of the estate which remains after the payment of funeral, testamentary, administration expenses and debts what remains of the estate constitutes the residuary estate.²³⁵ This will normally include real and personal property but since the distinction between the two was removed in matters of succession by the 1925 property laws, divides the residuary estate, for the purpose of distribution, into personal chattels, the matrimonial home and the rest of the residuary estate.

Personal chattels are elaborately defined in section 55(1)(x) of the Administration of Estates Act 1925. They include furniture, horses, cars, plates, books, jewellery, wines and “articles of household or personal use or ornament” but exclude any chattels used at the death of the intestate for business purposes, money and securities for money. Roughly speaking the phrase includes everything that goes to make a home excluding the home itself, it thus has a meaning quite distinct from personalty.

The matrimonial home consists of the intestate’s interest in a dwelling house in which the surviving spouse was resident at the intestate’s death.²³⁶ Thus the matrimonial home constitutes a distinct item of the estate only in the case of a married intestate; otherwise it passes together with the other property excepting the personal chattels. The law talks of an “interest in dwelling house” which could be a leasehold or freehold but never a tenancy which is determinable by the landlord by notice within two years from the intestate’s death. Freehold interests will be the most common in

²³⁵ Burn, E. H. & Cartwright, J. Modern Law of Real Property, London, Butterworths, 2006, 988.

²³⁶ See Schedule 2, para. 5(1) of Intestates’ Estates Act 1952.

Cameroon given that most people build their own houses, but with real estate companies now giving out houses on *location-vente* terms it will not be unusual to find some cases of leaseholds.

The last category of distributable property will consist of anything which is neither part of the personal chattel or the matrimonial home. This will consist mainly of land, landed property, investments and money or money's worth.

2.5.2: Notification of the beneficiaries.

Section 27 of the Trustee Act 1925, enjoins personal representatives to give notice of the intention to distribute, and require interested persons to send in their particulars of claim within a maximum period of two months. When all the claims are not made after the advertisement the personal representative could nevertheless the obtain leave of court to distribute. The court then issues a "Benjamin Order" giving the personal representative leave to distribute on a particular footing set out in the order. In *re Benjamin*,²³⁷ Phillip Benjamin, beneficiary under his father's will had disappeared in his father's lifetime and thus made it difficult for the trustees to know whether he had survived the testator. There was no evidence that he was married at the time of the disappearance and no person had come forward as his wife or issue after the normal advertisements. The trustees applied to the court for an order to distribute. An order was made on the footing that Phillip Benjamin had predeceased the testator.

The order is based on an inference and does not constitute a positive declaration of rights. It is not to deprive the beneficiary or his issue of their entitlement, if after the distribution it turns out that he or his issue survived the deceased. The order merely protects the personal representative from liability, given

²³⁷ Also known as *Neville v Benjamin* [1902] 1 Ch. 723.

that the beneficiary could institute action aimed at recovering the property from whoever it was given.²³⁸ Hence in making the order Joyce, J cautioned “I am anxious, however, not to say anything which would prevent his personal representatives from making any claim if evidence of his death at any other time should be subsequently forthcoming.”²³⁹

An alternative to a Benjamin Order is for the personal representative to take out missing beneficiary insurance.²⁴⁰ In *Re Evans*²⁴¹ the next-of-kin of the deceased intestate were his issue. He had a son and a daughter but had lost contact with the son for almost thirty years before his death. The daughter, assuming that the son was dead obtained letters of administration, and three years after the death sought legal advice and took out a missing beneficiary insurance to cover the possibility of the son’s reappearance before distributing the balance of the residue to herself. Four years later the son reappeared. The proceeds of the insurance policy were paid to him but he contended that the policy premium had not been a valid administration expense, because it had facilitated an excessive distribution to the daughter. His claim was dismissed, the premium being held to be a proper and allowable expense of the administration even though the policy was taken out to facilitate a distribution in favour of the personal representative.

Personal representatives, particularly of small estates should not be discouraged from seeking practical solutions to difficult administration problems without the expense of resort to the court. Missing beneficiary insurance may be both cheaper and more effective than a Benjamin Order.²⁴²

²³⁸ See the presumption of death in chapter four for more on this subject.

²³⁹ 726, *ibid*.

²⁴⁰ Kerridge, R, & Brierley, A. R. H. Parry and Clark: The Law of Succession, London, Sweet and Maxwell, 11th edition. 2002, 576.

²⁴¹ [1999] 2 All. E. R. 777.

²⁴² Kerridge, R, & Brierley, A. R. H. Parry and Clark: The Law of Succession, *ibid*. 577.

2.5.3: The rules of devolution.

Distribution is governed by the Administration of Estates Act 1925. Section 46 spelling out the rules of distribution is too lengthy to be reproduced here *in toto*. However, as would emerge later the manner of devolution will depend on the category of surviving relatives. When there is a surviving spouse the entitlement of the other beneficiaries will be subject to what she or he gets, and so it is only logical to use the surviving spouse as the springboard for the distribution exercise.

2.5.3.1: Devolution to the surviving spouse.

The surviving spouse is that person who was married to the deceased at the time of death. The surviving spouse may well be the widower even if experience shows that women are most likely to be in this situation due to the high mortality rate for men as a result of factors such as having to worry over maintaining the family and the tendency for husbands to be older than their wives. For these reasons the term as used in this work if unqualified signifies the widow.

In the event of the simultaneous death of the husband and wife the presumption of survivorship does not apply. Husbands as noted above are generally older than their wives and any unqualified application of the presumption will effectively be ordaining the devolution of a man's property to his wife's next-of-kin. This, it is thought would be inconsistent with the presumed intention of the parties who would most probably have favoured their respective next-of-kin.²⁴³ The exclusion of the presumption is enshrined in section 46(3) of the Intestate Estates Act 1952,²⁴⁴ this

²⁴³ See Sherrin, C. H. and Bonehill, R.C., The Law and Practice of Intestate Succession, London, Sweet and Maxwell, 1987, 164.

²⁴⁴ "Where the intestate and the intestate's husband or wife have died in circumstances rendering it uncertain which of them survived the other and the intestate's husband or wife is by virtue of section one hundred and eighty four of the Law of Property Act 1925²⁴⁴ deemed to have survived the intestate,

was modified by section 1(1) of the Law Reform (Succession) Act 1995, which now makes the presumption applicable, provided that the spouse on whose behalf the claim is made, survived by a minimum period of 28 days.²⁴⁵ The reasons for the modification are not clear but would it be far from the truth, to assume that it must have been due to the realisation that younger men are increasingly getting married to older women?

As a basic rule the surviving spouse is entitled absolutely to the personal chattels.²⁴⁶ Since personal chattels are basically the content of the matrimonial home the rule ensures that the spouse continues to live in a familiar environment, enjoys the same comfort as if the deceased was still alive and above all, reduces the impact of bereavement.

After the personal chattels whatever the spouse obtains out of the residuary estate will be subject to the entitlements of other beneficiaries. So out of the residue she gets a statutory legacy represented in a fixed net sum with interest.²⁴⁷ This bears a close resemblance to a general pecuniary legacy given to a surviving spouse by will, with a direction that it has to be paid immediately after the testator's death. Finally the surviving spouse has a life interest in half of the residue if there are surviving issue. If there are no issue but parent or brother or sister of the whole blood or their issue the spouse takes half of the residue absolutely. In the absence of the above specified relatives the spouse takes the entire residue absolutely.²⁴⁸

this section shall, nevertheless, have effect as respects the intestate as if the husband or wife has not survived the intestate.”

²⁴⁵Being an amendment this section is incorporated into and now constitutes section 46 (2A) of the Administration of Estates Act 1925:

“Where the intestate's husband or wife survived the intestate but died before the end of 28 days beginning with the day on which the intestate died, this section shall have effect as respects the intestate as if the husband or wife had not survived the intestate.”

²⁴⁶ See section 46 (1) Administration of Estates Act 1925.

²⁴⁷ This was set at £1000 by section 46(1) and currently stands at £200,000 under the Family Provision (Intestate Succession) Order 1993.

²⁴⁸ See sections 46(1) (i) and 47(2) and (3) of the Administration of Estates Act 1925.

The Administration of Estates Act 1925 makes no express provision of the widow's entitlement to the matrimonial home. If the home was owned jointly it does not form part of the residuary estate since the surviving spouse is entitled to it by survivorship. If it was owned by the deceased the spouse could under section 41 of the 1925 Act demand the interest to be transferred to her in place of its pecuniary equivalent. But this was possible only when the interest of the deceased did not exceed the entitlement of the surviving spouse in the estate.

The limitation is offset by the Intestate Estates Act 1952, the second schedule of which facilitates the acquisition of the "dwelling house" by the surviving spouse. Provided that the surviving spouse was resident therein at the time of death, an appropriation will be ordered even if the value of the asset exceeds her interest in the estate. The appropriation operates partly in satisfaction of an interest of the surviving spouse in the intestate's estate and partly in return for the payment of money by the spouse to cover the difference in value. In *Re Phelps*²⁴⁹ the Court of Appeal applied this provision and held that a widow could appropriate a house which exceeded the value of her absolute interests on intestacy by making an equalisation payment.

The above rules are intended for monogamous marriages but since *Re Adadevoh*²⁵⁰ we were told that "spouse" could be "spouses" with the effect that the applicable English law also covers situations of multiple wives. It has been noticed that the courts have adopted the flavour of entertaining matters concerning the estates of polygamists on the pretext that customary court decisions only give rise to "next-of-kin declarations" which must be submitted to the High Courts in view of letters of administration.

²⁴⁹ [1980] Ch. 275.

²⁵⁰ (1951) 13 W.A.C.A. 304.

The point had been made earlier that applicable English statutes would be adapted to local conditions. However the adaptation in this case would be that the “surviving spouse” could be “surviving spouses”²⁵¹ but the fundamental question as to whether the courts could vary the allotment intended for a single surviving spouse, to meet the new definition of that term, would meet with a negative response since *Labinjoh v. Abake*.²⁵²

2.5.3.2: Entitlement of Issue.

The issue²⁵³ if any takes what is left of the estate absolutely subject only to the life interest of the spouse in half of the residue, that is, if she does not opt for a lump sum payment. The estate is held on the “statutory trusts”²⁵⁴ for the issue subject to three qualifications. “Statutory trusts” are subject to the principle of representation according to which the issue of deceased’s child living at the intestate’s death takes that child’s share *per stirpes*. Secondly the child or issue is not entitled to a vested interest until he or she attains 18 years of age or marries before that age.²⁵⁵ If none of the children or their issue has attained a vested interest, their contingent interests will be held for them on the statutory trust. If an issue does not attain a vested interest because he died before doing so, his contingent interest passes to the other issue and where all the contingent interests fail because none of the issue attains the vested interest, the estate will be distributed as if the deceased had not been survived by any issue.²⁵⁶

²⁵¹ See *Coleman v. Shang* [1961] A.C. 481; *Adadevoh (Re)* (1951)13 W.A.C.A. 304.

²⁵² (1924) 5 N.L.R.32.

²⁵³ As explained earlier this is a generic expression for the children and descendants of the deceased, including illegitimate, legitimated and adopted children.

²⁵⁴ This type of trust is provided for in section 46 (ii) of the 1925 and all that it means is that because the issue has not yet attained a vested interest the property as to be held on his behalf by someone in loco parentis until he does so and this is usually the personal representative.

²⁵⁵ See section 47 (1) (i) *ibid*.

²⁵⁶ Section 47 (2), *ibid*.

Finally the “statutory trusts” are subject to the hotchpot principle. Actually the principle is no longer part of the English law because it has been abolished by section 1 (2) of the Law Reform (Succession) Act 1995 as regards persons dying intestate on or after January 1996. Its inclusion in this work is because it is still possible to find cases of persons who died before that date in which case the 1925 Act still applies. The principle is governed by section 47(1)(ii) of the Administration of Estates Act 1925 and requires certain benefits conferred on an issue by the intestate during his lifetime to be brought into the account during distribution. The idea is to achieve equality between the children as to the totality of the benefits received from their intestate parent, both *inter vivos* and on death. It must be said that the equality which the Act seeks to achieve might not have been intended by the deceased²⁵⁷ and this, probably, is the reason for its abolition.²⁵⁸

2.5.3.3: Entitlement of Other Relatives.

These are divided into specified and unspecified, specified relatives consist of the immediate family while unspecified relatives consist of the extended family. Specified relatives share with the surviving spouse when there are no issue while unspecified relatives only take in the absence of both the surviving spouse and issue. Both categories of relatives take only on the statutory trust²⁵⁹ and this implies the continuity of the administration since by the trust the beneficiaries are entitled not to the property itself but to the net proceeds of sale.

This is where the most pathetic cases can be encountered as was the case in *Nforba & another v. Nchari*²⁶⁰ where the 82 years old father and mother of the

²⁵⁷ More details are provided in the discussion of intestacy under the proposed Family Code in chapter 8.

²⁵⁸ See Borkowski, *Textbook on Succession*, 1997, *supra*, 22.

²⁵⁹ See section 46(1), *supra*.

²⁶⁰ 1999 G.L.R. 59. (Gender Law Report)

deceased were held not to be entitled to anything, as the deceased was survived by a widow and issue. The relevant part of the judgment delivered by Epuli J. went thus:

“In the light of section 46 (1) of the 1925 Act, where a man dies intestate and leaves issue then whether he is survived by a parent or brother or sister, the sole beneficiaries of his estate shall be the surviving spouse and issue. In the case before me, the deceased Nchari died intestate. He is survived by his wife, now a widow. He left issue, two boys and a girl.... Therefore in pursuance of section 46(1) (i) of the Administration of Estates Act 1925... the sole legal beneficiaries of the estate of ... are the widow... and the three children.... Under these circumstances, the parents and siblings of the deceased have no legal claim on his estate; *whatever they get from it will depend on the goodwill and compassion of the beneficiaries and not on any right.*²⁶¹”

The justice of these rules could be defended in English law because the state through social security, educational and health-care schemes has taken over the responsibility normally incumbent on family members to provide basic services for the young and the old. This has reduced the importance of succession as a means for providing the family with the necessary assets to sustain its members over generational time, to educate its dependent youth and to care for its ill or aged members.²⁶² No such amenities exist in Cameroon and so the responsibility lies squarely on family members to educate the young, care for the weak and old. It is thus legitimate for parents to expect to be cared for in their old age. The children are equally expected to ensure the continuity of the family by contributing towards the upbringing of other children of the family, in the same way as other family members contributed towards theirs.²⁶³

²⁶¹ Italics supplied.

²⁶² See Sussman, M.B., The Family and Inheritance, New York, Russell Sage Foundation, 1970, 2.

²⁶³ This point is discussed in chapter 7(VI) (2).

We noticed another trend whereby the courts move away from the rules of distribution and go on a frolic of their own, by operating a system of distribution not covered by the 1925 Act. In the *Estate of Bechem Solomon*²⁶⁴ for instance the widow applied for the revocation of letters of administration from the brother of the deceased in favour of her daughter who was *en ventre sa mère* at the time of her father's death. Rather than maintain the continuity of administration, the court relied on section 44²⁶⁵ of the Administration of Estates Act 1925 to partition the estate. Reliance on the Act ended with the decision to distribute and what followed had nothing in common with the scheme of distribution prescribed by the 1925 Act. Property was given to persons not entitled under the Act and family property was created.²⁶⁶ Also in *Galega v. Galega*²⁶⁷ the mother of the deceased was included as a beneficiary in spite of the existence of a surviving spouse and issue. Strict application of English law would have excluded the relatives, just as the widows would have been excluded if customary law was to be applied.

There is no doubt that the primary motivation for such decisions is to operate a system of distribution which eschews squabbles whenever the distribution of an estate excludes certain family members. Laudable, though they might be, the decisions can not be defended on any legal grounds. It is agreed that applicable English statutes must be adapted to local circumstances, but this is only as far as the adaptation does not affect a fundamental alteration of the statute.

²⁶⁴ (2006) Suit No.HCK/AE/K.128/2001 (unreported)

²⁶⁵ This section provides that "subject to the foregoing provisions of this Act, a personal representative is not bound to distribute the estate of the deceased before expiration of one year from the death."

²⁶⁶ The following order was made: "(1) The house in the village at Tali will remain and be called the family house. (2)The house in Mamfe is given and belongs to the wife of the deceased now first plaintiff. (3)The compound at Ntoko Street, Kumba is distributed as follows: (i)The six rooms permanent building is given to the defendant brother of the deceased.(ii) The two semi-permanent houses inhabited by tenants are given and belong to the second plaintiff the only surviving daughter of the deceased."

²⁶⁷ Supra for facts.

We must state that even English law recognises that the rules of distribution laid down in the 1925 Act do not adequately balance the interest and needs of members of the deceased family. It must have been realised that striking a person out of the list of potential beneficiaries because of the existence of a widow and issue does not mean that the person does not have needs, if those needs were satisfied by the deceased, and which must now be met out of the estate. This must have the prime motivation behind the Inheritance (Provision for Family and Dependants) Act 1975 as amended by the Law Reform (Succession) Act 1995.

2.6: CLAIMS UNDER THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

The Act provides an opportunity for persons with legal or moral claims to maintenance by the deceased to apply for reasonable financial provision out of the estate. To this effect section 1(1) enacts as follows:

“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) wife or husband of the deceased;
- (b) former wife or former husband of the deceased who had not remarried;
- (c) child of the deceased;
- (d) a person (not being a child of the deceased) who in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (e) any person (not being a person included in the foregoing paragraphs) who immediately before the death of the deceased was being maintained either wholly or partially, by the deceased;

That person may apply to the court for an order under section 2²⁶⁸ of this Act on the ground that the disposition of the deceased estate effected by his will or the law relating to intestacy, or the combination of his will and

²⁶⁸ This section outlines the various orders for financial provision that a court might make.

that law, is not such as to make reasonable financial provision for the applicant.”

An amendment of the Act by the Law Reform (Succession) Act 1995 added “cohabitants”, being persons who for a period at least two years before the death of the deceased lived together with him in the same household as spouses.²⁶⁹ Unlike the “dependant” the “cohabitant” does not need to prove dependence on the deceased. Household as used here has the same meaning as it does in matrimonial law, referring to a “state of affairs” rather than a place. It could exist as long as there is some element of communal living between the parties as husband and wife.²⁷⁰

The relatives of the deceased who do not come within the ambit of the Administration of Estates Act 1925 because Relatives not expressly included in the Administration of Estates Act 1925 could apply for provision under (e) as having been maintained by the deceased. Maintenance is a situation whereby “the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards the reasonable needs of the person.”²⁷¹ It is therefore an open-ended category which could avail any persons with proof of being so maintained even though they had no legally enforceable rights to maintenance against the deceased in his lifetime.

Mistresses can claim under this category and hence the Act is dubbed a “mistress-charter.”²⁷² The term mistress covers two categories of women. The first category is the “common law wife”²⁷³ or “cohabitant” as per the 1995 amendment. It is argued in favour of this category of women that “although in judicial parlance such

²⁶⁹ See section 2 the Law Reform (Succession) Act 1995.

²⁷⁰ See Borkowski, Borkowski, Textbook on Succession, 1997, supra, 252.

²⁷¹ See section 1(3).

²⁷² See Miller, Gareth, The Machinery of Succession, Portsmouth, Professional Books Limited, 1977, 26.

²⁷³ See *Sastry Velaider Aronegary v. Sembecutty Vaigalie* (1881) 6 App. Cas. 364, 371; *Malone v. Harrison* [1979] 1W.L.R. 1353.

a person is frequently referred to as a ‘mistress’ this [it?] is not entirely apt to refer to a woman with whom the deceased has lived in a stable relationship for twenty or thirty years or more.”²⁷⁴ The second category consists of women with whom the deceased did not cohabit but provided for their every need and exercised absolute control over their social life.

In *Malone v. Harrison*²⁷⁵ the testator entertained multiple relationships outside his marital life. The deceased was survived by his wife, two “mistresses” and a brother. He was separated from his wife in 1939 and so lived apart from her though not divorced. In 1958 he met the first woman who subsequently, with her son moved in with the deceased and were maintained by him until his death in 1977. The deceased had another relationship since 1965 with another woman (plaintiff) for whom he assumed the responsibility for maintenance.

The deceased in his will provided for his wife, the first woman and her son, and his brother (defendant) but not for the plaintiff. The plaintiff applied to the court for provision out of the estate and the question whether she qualified under the Act was answered in the affirmative. Hollings J succinctly stated her position:

“She was never a de facto wife [common-law-wife] or a sole mistress at any time, but for some twelve years she was a woman who it was the deceased’s pleasure to visit and relax with and have occasional sexual intercourse with, and who he took abroad with him regularly and frequently and there treated as his wife for the time being. She does not pretend to have been more than that. She does not claim to have rendered him any particular service, but she gave him her affection, even love, and he returned it after a fashion.”²⁷⁶

²⁷⁴ See Miller, Gareth, *The Machinery of Succession*, Portsmouth, Professional Books Limited, 1977, 26

²⁷⁵ [1979] 1W.L.R. 1353.

²⁷⁶ *Ibid.* 1360.

Giving the privilege of widowhood to a woman when she did not assume the duties of marriage could be questioned on moral and social grounds. The widow and children whose entitlements are liable to diminish as a result of the mistress's application must certainly and justifiably feel a strong sense of grievance. It was feared in the years immediately following the Act that this could result in a flurry of litigation²⁷⁷ from women who entertained even the most trivial but dependent relationship with the deceased. This turned out to have been a false alarm, probably due to the cushioning effects of government policy in providing various social security schemes. The same fear would be legitimate in Cameroon today should the courts decide to apply the Act. The ultimate test, we submit, should be that the applicant should come within the meaning of "cohabitant" in the 1995 amendment.

2.6.1: The Meaning of Reasonable Financial Provision.

The Act empowers the courts to make reasonable financial provision out of an estate in favour of persons negatively affected by provisions in a will or rules of intestacy.

Reasonable financial provision is divided into the "surviving spouse standard" applying to applicants of that category, and the "maintenance standard" applying to any other applicant. The test whether the provision made for the applicant under the will or intestacy is reasonable is in each case an objective one. In making the decision the courts are to be guided by the facts as known to them at the date of the hearing rather than the knowledge of the testator about the applicant at the time of the will²⁷⁸ which would make the test subjective.

²⁷⁷ See Samuels, Alec "Inheritance (Provision for Family and Dependants) Act 1975 [1976] 39 M.L.R., 183-186, 184.

²⁷⁸ See section 3 (5) of the 1975 Act

It remains, however, questionable whether the two are mutually exclusive, given that the courts are enjoined to take into account such matters as the “financial resources and financial needs which the applicant has or is likely to have in the foreseeable future.”²⁷⁹ Hence the courts have had to consider factors particular to the applicant which could conveniently be termed factors of the subjective standard.

Reasonable financial provision at the “surviving spouse standard” means “such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance.”²⁸⁰ This standard applies equally to widows and widowers but we shall conduct this discussion from the point of view of the widow.

The test is for the provision to be at least equal to that of a divorced spouse. The court’s discretion in this respect is therefore as wide as when making orders for financial provision on divorce. This means that the Act will be applied in conjunction with the Matrimonial Causes Act of 1973.²⁸¹ The position with regard to property adjustment on divorce as represented by the recent decision of the House of Lords in *White v White*²⁸² is that the objective should be to achieve a result which is fair and non-discriminatory. There is, however, no presumption of equal distribution of assets, but as a general guide, “equality should be departed from only if, and to the extent that, there is good reason for doing so.”²⁸³

Caution is therefore necessary in applying the *White v White*²⁸⁴ guidelines in the context of actions for reasonable financial provision under the 1975 Act. In the

²⁷⁹ See section 3(1), *ibid*.

²⁸⁰ See section 1 (2) (a) of the 1975 Act.

²⁸¹ Coming within the exception provided for in section 15 of the Southern Cameroon High Court Law 1955, allowing the application of post 1900 English statutes in relation to probate, divorce and matrimonial proceedings. See chapter 2, the section on the received English law for more.

²⁸² [2001] 1 A. C. 596.

²⁸³ Per Lord Nicholls of Birkenhead, 605.

²⁸⁴ [2001] 1 A. C. 596.

case of divorce there are two households to be run and the crucial question therefore is how to divide up the property fairly between the two parties. Under the 1975 Act, the deceased is dead and has no future earthly needs. He is entitled to bequeath his estate to whomever he pleases; his only statutory obligation is to make reasonable financial provision for his widow and other dependants. Hence, depending on certain factors, the concept of equality may have very little impact on the provision made. The absence of division between two households should mean that on death, a spouse should expect a greater share than on divorce.²⁸⁵

In making the order the courts are to consider the age of the appellant, the duration of the marriage and the contribution made by the appellant to the welfare of the deceased's family.²⁸⁶ The other factors call for no comment but the duration of the marriage does. A woman goes into marriage with the knowledge that her obligations to the husband are for an indeterminate duration and could take all manner of forms. If he was considerably older she might well be expected to spend a number of years nursing an invalid.²⁸⁷ So on marrying the deceased the widow must have, as per Singer, J. in *Miller v. Miller*, "a reasonable expectation that her life as once again a single woman need not revert to what it was before her marriage"²⁸⁸ and she could look forward to financial security for the rest of her life.²⁸⁹

It is suggested in every case that in making the order the courts should separate her share in "family property" before determining her proportion in the remainder of the estate which would be necessary to provide her with sufficient

²⁸⁵ See Herring, Jonathan, *Family Law*, London, Pearson Longman, 2007, 690.

²⁸⁶ Kerridge, R, & Brierley, A. R. H. *Parry and Clark: The Law of Succession*, London, Sweet and Maxwell, 11th edition. 2002, 159.

²⁸⁷ See *Cunliffe v. Fielden & Others* [2006] Ch. 361 (C. A.)

²⁸⁸ [2005] 2 FCR 713.

²⁸⁹ *Cunliffe v Fielden*, supra.

support.²⁹⁰ “Family property” as used here signifies property acquired by the joint resources of the spouses, unlike in customary law where it is property held on behalf of the family. Family property here therefore takes the form of a joint tenancy and the doctrine of survivorship operates to transfer the estate to the surviving tenant.

Where the deceased was in joint tenancy with a third party the spouse would be entitled to his own share of the property pursuant to section 9(1)²⁹¹ of the Inheritance (Provision for Family and Dependents) Act 1975, according to which: “The proportionate share of the property which would have belonged to the deceased if there had been severance of the joint ownership should be treated as the share of the property which the court was empowered to treat as part of the estate.”²⁹²

Reasonable financial provision for the maintenance standard is said to constitute “such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.”²⁹³ In *Re Christie deceased*²⁹⁴ it was held that the applicant does not need to be in “a state of destitution or financial difficulty” to apply for “maintenance”, which “refers to no more than the applicant’s way of life and wellbeing, his health and financial security of his immediate family for whom he is responsible.”²⁹⁵ A similar position was stated in *Re*

²⁹⁰ Herring, Jonathan, *Family Law*, supra, 690.

²⁹¹ “Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out, an application is made for an order under section 2 of this Act the court for purpose of facilitating the making of financial provisions for the applicant under this Act may order that the deceased’s severable share of that of that property, at the value thereof immediately before his death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purpose of this Act as part of the estate of the deceased.”

²⁹² In *Dingmar v. Dingmar* [2007] Ch. 109, (C.A.) the only substantial asset of the deceased was the family home, owned not with the widow, but with his son of a previous marriage. Upon the death the son became the sole owner by right of survivorship as confirmed by a decision of the county court, which rejected claims by the applicant that she had a beneficial interest in the property. The applicant nevertheless obtained letters of administration and applied under the 1975 Act and argued successfully for the deceased’s severable share of the property to be treated as part of his net estate.

²⁹³ See section (2) (b) of the 1975 Act.

²⁹⁴ [1979] 1 Ch. 168.

²⁹⁵ At 174.

*Coventry Deceased*²⁹⁶ where Buckley L. J. suggested that “maintenance” means “such financial provision as would be reasonable in all the circumstances of the case to enable the applicant to maintain himself in a manner suitable to those circumstances.” Thus the test as stated in *Re Christie deceased*²⁹⁷ is:

“Whether 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 would make reasonable financial provision for the applicant in the sense of such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for the maintenance of his way of life and wellbeing, health and financial security and the wellbeing, health and financial security of his immediate family for whom he is responsible.”

Provision for maintenance therefore does not mean merely the provision for the bare necessities of life, so as to keep an applicant at subsistence level.²⁹⁸ Nor is it also a windfall to the applicant which may be regarded as reasonably desirable for his general benefit or welfare.”²⁹⁹ These points were reiterated more recently *In re Land Deceased*³⁰⁰ where financial provision was made in favour of a son found guilty of the mother’s manslaughter.³⁰¹ In the words of Norris, J. “I hold that the claimant’s claim (being that of an adult son) can only be a claim for such financial provision as it would be reasonable in all the circumstances for him to receive for his maintenance. This means provision which will directly or indirectly enable the claimant in the future to discharge the cost of his daily living according to the standard established over the years whilst living with his parents.”

²⁹⁶ [1980] 1 Ch. (C.A.), 461, 494.

²⁹⁷ [1979] 1 Ch. 168, 175.

²⁹⁸ *Re Coventry Deceased* [1980] 1 Ch. 461. (C.A.).

²⁹⁹ Per Goff L. J. *ibid.* 485.

³⁰⁰ [2007] 1 W. L. R. 1009.

³⁰¹ Manslaughter might preclude a person from benefiting under a will or intestacy but not from applying under the 1975 Act.

The courts cannot on their own volition invoke the Act in favour of any person. An application must be made by the parties, generally through their lawyers not later than six months from the grant of probate or letters of administration.³⁰² The courts, however, have the discretion to accept applications made after this period, especially after distribution.³⁰³

But the courts have been unable to apply the cushioning effects of 1975 Act to good use in Cameroon, where its importance is yet to be seen. This Act is part of our law and we think that it is the duty of lawyers to bring it to the attention of the courts.³⁰⁴ It has a propensity to reduce the social tension and the scare of witchcraft often attendant on decisions that favour the surviving spouse or issue of the deceased, against relatives who feel legitimately entitled to a share of the succession.

Conclusion

The English law of intestacy effectively balances the interests and needs of family members, “family” including the marital and blood families. The list of beneficiaries takes into account the duty of maintenance and there is no gender-based bias. The surviving spouse even comes first in order precedence, subject only to the existence of issue. The principle of precedence however eliminates a substantial number of those who would otherwise have qualified as beneficiaries and this is responsible for decisions such as the Nforba case. This is basically because the courts

³⁰² Section 4 Inheritance (Provision for Family and Dependents) Act 1975.

³⁰³ The guidelines as to how the courts could exercise the discretion conferred on it under section 4 of the 1975 Act to overlook the limitation period were spelt out in *Re Salmon* [1981] Ch. 167: “(i) the discretion is to be exercised judicially, (ii) the onus lies on the applicant to make out a substantial case for it being just and proper for the court to exercise its discretion, and the court should consider (iii) how promptly, and in what circumstances, the applicant applied to the court for an extension and also warned the defendant of the proposed application, (iv) whether negotiations commenced within the time limit (if so, and time ran out while they were proceeding, this is likely to encourage the court to extend the time), (v) whether the estate has been distributed before a claim under the Act was made or notified, (vi) whether a refusal to extend the time would leave the applicant without redress against anybody or, alternatively, with a claim against his own solicitor for negligence.”

³⁰⁴ Failing to do might expose lawyers to actions in negligence under the rule *Rondel v Worsley* (1969) 1 W. L. R. 191.

have not been ready to adapt the law in such a way that persons with a legal right to maintenance in customary law could be brought in as beneficiaries.

However the existence of the inheritance (Provision for Family and Dependants) Act 1975 gives the persons excluded to apply for reasonable financial provision out of the estate. Unfortunately the 1975 Act cannot be directly invoked by the courts and this reduces the effectiveness of English law as an alternative to the existing laws of succession.

Furthermore administration has no date limit and distribution is only facultative, the attitude of the courts of which is evident in *Nana v. Nana*³⁰⁵ where it was held that “Nothing shall be partitioned as neither the plaintiff nor the defendant asked for it although through all the proceedings the plaintiff insinuated that she was entitled to the ...residence as her matrimonial home while the defendant insinuated it was the family home because she helped to build it.” This has been abused by some personal representatives who tend to treat the property as theirs during the prolonged period of administration.

³⁰⁵ (2005) Suit No. HCF/PROB/AE1/2001-2002 (unreported)

CHAPTER THREE: INTESTACY IN FRENCH LAW

Introduction

French law also presumes death in the case of disappearance even though the approach differs from that adopted in English law. It begins with a *présomption d'absence* and culminates in a *déclaration d'absence* both of which are at the instance of the potential beneficiaries or the Attorney-General.³⁰⁶

This chapter is concerned with determining the beneficiaries and their entitlements, given that French law has no interim period of administration. This will be after considering the applicable laws and their application.

3. I: THE APPLICABLE LAWS

The substantive rules governing French intestacy as applied in Francophone Cameroon are drawn mainly from articles 727 to 888 Civil Code of 1804. Other related matters such as the status of legitimated and adopted children vis-à-vis the estate of the deceased are governed by articles 333 and 358 respectively.

These articles are applied together with the amendments thereto occasioned by the presence of rules which smack of customary law. The code was made in the backdrop of conflicting customs and the idea not necessarily the modernisation but the harmonisation of the different customs, with a view to establishing a “*le droit commun*” consisting basically of codified customs binding on all persons. Much has changed on human rights since 1804 which necessitated the amendments intended to make the code a reflection of “*la civilisation Française*”. To this effect the following amendments are generally incorporated into the relevant articles: Law of 22 November to 1 December 1790 establishing reciprocal succession rights for spouses, Law of 9 March 1891 giving the surviving spouse succession rights even when the

³⁰⁶ Article 112, civil code.

deceased is survived by relatives, Law No. 72-3 of 3 January 1972 which continued and completed the above amendment in articles 765 to 767 of the code and the Ordinance of 23 December 1958 which removed the need for a court order to enable the surviving spouse take possession of the estate.

3.1.1: The application of the rules.

The enabling statutes for the reception of French law contain no provision for a limitation date and adaptation. French law is only exceptionally applied where the parties have rejected the jurisdiction of the traditional law courts or where customary law is said to be non-existent, obscure or contrary to public policy. In any of these circumstances the courts function as if there is no customary law which require adaptation.

The only known situation of adaptation is the recognition of the entitlement of the widows in polygamous marriages. This could be attributed more to the Civil Status Registration Ordinance of 1981 which recognises both monogamy and polygamy rather than the ingenuity of the courts. The real test for the courts, as is the case in Anglophone Cameroon, is whether they could vary the statutory allocation for the widow of a monogamous marriage which now has to be shared between more widows. In *Veuve Ebongue c/ Ebongue Nyambe Nestor*³⁰⁷ the Supreme Court showed its inability to effect such change when it held the widows of a polygamous marriage to be entitled to the one quarter of the estate reserved by the civil code for the widow of a monogamous marriage.³⁰⁸

³⁰⁷ Cour Suprême, Arrêt No. 14/L du 9 Décembre 1976.

³⁰⁸ Article 767(3) of the code.

3.2: COURTS ADMINISTERING FRENCH LAW.

French law is administered as a rule³⁰⁹ by modern and traditional law courts.

3.2.1: Original Jurisdiction: Tribunaux de Premier Degré

The *tribunaux coutumiers* and *tribunaux de premier degré* have jurisdiction over matters involving persons subject to the customary and Muslim laws. They are regulated by Decree No.69/DF/544 of 19 December 1969 on organisation of the traditional law jurisdictions of that part of the country. Jurisdiction over succession is exercised by the *tribunaux de premier degré* pursuant to article 4(1)(a) according to which “*Les tribunaux de premier degré connaissent des procédures relatives à l’état de personnes, à l’état civil, au mariage, au divorce, à la filiation, aux successions et aux droits réels immobiliers.*”

The courts are situated at the level of the administrative sub divisions and have jurisdiction over matters arising therein. Succession is normally opened³¹⁰ in the court of the last residence of the deceased.³¹¹ Jurisdiction is limited to matters in which the parties are natives pursuant to article 1(1) of the Judicial Organisation Decree of 31 July 1927. Sub-section 2 describes the rather than defines the term “native”:

“The following are natives within the meaning of this decree: individuals who originate from the territories under the French mandate of Togo and Cameroon, of French West and equatorial Africa not having the status of French citizens—and those who originate from foreign countries or countries placed under foreign mandate—comprised in these territories or neighbouring countries who do not in their countries of origin have European citizenship.”³¹²

³⁰⁹ This is to distinguish from Anglophone Cameroon where the high courts only exceptionally have jurisdiction over estates subject to customary law because of their monopoly over letters of administration.

³¹⁰ See article 8(8) of the Code de Procédures Civil et Commerciale

³¹¹ See article 10 of the Civil Code and article 5 of Decree No. 69/DF/544 of 19 December 1969.

³¹² “Sont indigènes au sens du présent décret: les individus originaires des territoires sous mandat français du Togo et du Cameroun, des possessions de l’Afrique occidentale et de l’Afrique équatoriale française ne possédant pas la qualité de citoyen français—et ceux qui sont originaires des pays étrangers

Therefore, every African who does not have a European status is subject to the jurisdiction of traditional law courts.

The application of French law by these courts may be explained by the fact that until the judicial reforms of 1972 they had exclusive jurisdiction over succession. Article 3(1) (a) of Decree No 69/DF/544 of 19 December 1969 endorses the application by stipulating that in the case of conflict of customs the courts could administer, *inter alia*, “the general principles of modern law.” The Supreme Court affirms the courts’ vocation to apply customary law and provisions of the civil code where customary law is silent, obscure or contrary to public order,³¹³ and the trial courts themselves have not hesitated to rely on the provision to apply provisions of the civil code.³¹⁴

The composition of the courts enables the application of French law. They are presided over by administrative or judicial authorities,³¹⁵ assisted by assessors also nominated by the administration.³¹⁶ Furthermore, the courts are attached to the Court of First Instance in the same jurisdiction³¹⁷ where they constitute the “Chambre Coutumière”.³¹⁸ Hence the president of the modern court is also the president of the

ou placés sous mandat étranger—compris entre ces territoires ou pays limitrophes ne possédant pas dans leur pays d’origine le statut des nationaux européens.”

³¹³ See Keze Isaac v. Noubissie Jean-Jacques, Arrêt No. 129 du 13 Mai 1967(obscur); Betow Omar Charles v. Ngo Mbenoum Julienne, Arrêt No. 151 du 18 Juin 1968(silence); Dame Wandji Agathe v. Dandou Frédéric, Arrêt No. 96 du 11 Mars 1969(contrary to the public order).

³¹⁴ See La Succession de Doualla Joseph, Jugement no. 232/c du 5 Mai 1988, TPG Dschang ; La Succession Kamte Louis Gabriel, Jugement no. 53/ADD/ TPD du 24 Janvier, 1994, TPD Nkongsamba.

³¹⁵This is the import of article 7 of the 1969 decree on traditional jurisdictions according to which:

- (1) The *tribunal de premier degré* is composed of a president and two assessors acting in a deliberative capacity
- (2) The president is nominated by an order of the Minister of Justice among the civil servants in the customary court area.
- (3) In case of absence or indisposition of the president, he is replaced fully by the Divisional Officer in the court area or by an assistant Divisional Officer designated by the latter.

³¹⁶ See article 10(1) of the 1969 decree.

³¹⁷Article 9(1) directs the Minister of Justice to “by order attach the presidency of a tribunal de premier degré ... to the presidency of the court of first instance of the court area.”

³¹⁸This became apparent to this researcher from a statement in the judgment of the supreme court in Affaire Baba Iyayi c/ Hadja Aminatou and Hadja Bintou, Arrêt No. 083 of 32 March 2000

customary court, who being a complete stranger in the locality would find more comfort in applying the civil code, than get into the intricate and time consuming exercise of ascertaining the customary law of the parties.³¹⁹ Litigants are also entitled to legal representation.³²⁰

The application of the civil code is automatic where customary law is silent or obscure. Where, however, there is a clear rule in existence, it can only be excluded on grounds of *ordre public* or *raison écrite*.³²¹ The courts have to make a choice between the rule of customary law and French law. French law applies automatically whenever one of the parties in the dispute is subject to French law.³²²

Where both parties are subject to customary law the fact that the deceased left a will or contracted a civil marriage becomes important. In the case of a will the question is whether it conforms to the requirements of validity in French law, as spelt out in articles 970³²³, 971³²⁴ and 976³²⁵ of the civil code.

(unreported), the relevant part of which is highlighted: “Considérant que suivant process-verbal No. 11 en date du 5 Novembre 1999 sieur Baba Iyayi a relevé appel du jugement No. 132 rendu le 28 Octobre 1999 par la *Chambre Coutumière du Tribunal de Première Instance de Yaoundé* dans l’affaire de succession de feu Alhadji Ibrahim Aba.”

³¹⁹ Avom, Vincelline Akomndja, « L’énonciation de la coutume en droit Camerounaise de la famille: Leurre ou réalité? » (2006) 116 *Penant*, 59-86, 70.

³²⁰ Article 43(1) (a) *ibid.* Timtchueng has the following to say about the state of the traditional law courts and customary law in Francophone Cameroon: “The separation between the traditional courts and those of common law [having jurisdiction over all persons] has become increasingly blurred. The characteristics of those who use traditional courts have changed. The individuals appearing in cases brought before the traditional courts are increasingly legal professionals rather than those with no formal legal training. Furthermore, the customs that were the usual source of settlement of disputes have in practice ceased being applied, while at the same time, law based on western practice is becoming more widely used and rooted in these courts”. Timtchueng Moise, ‘The gradual disappearance of the particularities of traditional courts in Cameroon’ in *Open Society Institute* (Africa Governance Monitoring & Advocacy Project, AfriMAP, Oct 2005), 1-5 at 1. Available online at: www.afriMAP.org/english/images/paper/file436f7_cb73c2d1.doc.

³²¹ We explained in 2.2.3.4 that this is the French equivalence of the English incompatibility doctrine, which establishes the supremacy of the civil code as written law over customary law.

³²² *Affaire Kouoh*, C.S.C.O., Arrêt No. 29 du 23 Avril, 1963, Bull. P.293 (Cours Suprême Cameroun Orientale).

³²³ Provides for holographic wills, which must be written, dated and signed by the testator.

³²⁴ Provides for notarial wills that must be made in the presence of two notary publics or one notary public and two witnesses.

³²⁵ Provides for wills in mystical form, being wills in a sealed and stamped envelope presented to the notary public and two witnesses with the declaration that the envelope contains his last will and testament.

3.2.2: Original Jurisdiction: Tribunaux de Grande Instances

The extension of the High Courts to Francophone Cameroon by the judicial reforms of 1972 meant that they share jurisdiction with the Tribunaux de Premier Degré. The courts are situated in each of the administrative divisions of the country and have jurisdiction over matters arising therein.

The 1972 reforms failed to mention the type of law to be applied by the high courts. Was it to be the Civil Code, the customary law, or both as is the case in Anglophone Cameroon? The answer came through the Supreme Court decision in the 1981 *Arrêt Angoa Parfait* which laid down the principle according to which “*l’option de juridiction emporte option de législation*”.³²⁶ This means that the choice of jurisdiction entails the choice of law and high courts being modern law courts can only administer French law.

These courts have jurisdiction in matters involving foreigners, native évolués and persons who have renounced their customary statuses.³²⁷ Renunciation of the customary status today no longer takes the form it did in the colonial days. Professor Camerlinck classifies renunciation into “la renunciation option” and “la renunciation admission.”³²⁸ The latter represents a complete assimilation to French law as would be the case when the deceased contracted a statutory marriage or left a valid will.³²⁹ “Renunciation option” entitles the parties in litigation to decline the jurisdiction of traditional law courts and is statutorily provided for in article 2 of the Decree of December 1969 on the organisation of traditional jurisdictions.

³²⁶ Cour Suprême Arrêt No. 28/cc du 18 décembre 1981.

³²⁷ This was made possible by article 72 of the French Constitution of 1946.

³²⁸ Cited by André P. Robert, *ibid*.

³²⁹ See Yvon Gouet, « L’Article 82 (Paragraphe1) de la constitution relatif à l’option de statut et élaboration de la ‘théorie des statuts civils’ du droit Français moderne, » (1957) 67 *Penant* 1-94, 27.

In practice, however, the courts are circumspect to assume jurisdiction in cases of “renunciation option”.³³⁰ Litigants are referred to the Customary Courts considered to be the appropriate *fora* for matters of succession. Christine Youego qualifies the attitude of the High Courts as “*contra legem*” and blames it on the ignorance of Court Registrars who fail to realise that things are no longer as they were in the colonial days, when customary courts had exclusive jurisdiction over succession,³³¹ and Nicole-Claire Ndoko describes it as “a characterised judicial obstruction,”³³² meaning that the courts deliberately avoid to assume jurisdiction because it would enable women to have succession rights.

The problem could be the wording of section 16(c) of Law No. 89/019 of 29 December 1989 amending the 1972 Judicial Organization Ordinance. This section recognises the jurisdiction of High Courts in matters relating to “the status of persons and especially to civil status, marriage, divorce, filiation, adoption and succession” but makes it “subject to the legal provisions applicable to traditional courts as regards *ratione personae* jurisdiction.”

As pointed out earlier, prior to 1972 only the traditional law jurisdictions were competent in succession matters. And the *ratione personae* jurisdiction of these courts as provided in article 1 of the un-repealed judicial organisation decree of 31 July 1927 includes those who today claim to be subject to the jurisdiction of High Courts. So the courts have simply been considering themselves as still bound by this law, since the 1972 judicial reforms and subsequent amendments say that the customary courts are to continue to function as before the reforms.

³³⁰ Since the 1972 reforms a High Court assumed jurisdiction for the first time in the 1996 *Affaire Succession Fokam Kanga Paul*, heard by the High Court of Mifi Division in Bafoussam. Jugement No. 49/CIV/du 05 Mars 1996, (1998) 34 *Juridis Périodique*, pp.43-47.

³³¹ “La situation Juridique du Conjoint Survivant au Cameroun,” (1990) 2 *African Law Review*, pp.17-44, 29.

³³² Nicole- Claire Ndoko, “L’idée d’égalité dans le Droit Successoral Camerounais: dernières tendances de la Jurisprudence en matière de la succession ab intestat” p. 1-72, 59 (unpublished).

This controversy might now be laid to rest as the present judicial organisation law³³³ no longer contains the phrase “subject to the legal provisions applicable to traditional courts as regards *ratione personae* jurisdiction.” The courts could be less circumspect, although this might likely throw open the floodgates of litigation in the High Courts to persons who should normally be subject to the jurisdiction of customary courts but who want the advantages offered by French law.

3.2.3: Appellate Jurisdiction: Courts of Appeal and Supreme Court.

Same as in 2.2.2 (supra).

3.3: DETERMINING THE INTESTATE BENEFICIARIES.

French law like English law resorts to presumptions in order to determine survivorship when persons liable to succeed each other die together. In what is referred to as the *théorie des comourants* the ages and sex of the persons are determinant in ascertaining the order of death. To this effect article 720 of the Civil Code provides:

“If many persons respectively called upon to succeed each other perish in the same event without the possibility of knowing who of them was the first to die, the presumption of survival is determined by the *circumstance of fact, in default, by reference to age or sex.*”³³⁴

Establishing survivorship from the circumstances of fact would of course be impossible since the onus would be on the person claiming succession rights to do so.³³⁵ Emphasis is therefore placed on the second method which has led to the evolution of a number of presumptions. Firstly where the persons were below fifteen years old the oldest of them, for being more robust than the others, will be presumed to

³³³ Article 18(1) (b), Judicial Organisation Law No. 2006/015 of 29 December 2006.

³³⁴ “Si plusieurs personnes respectivement appelées à la succession l’une de l’autre périssent dans un même événement sans qu’on puisse reconnoître laquelle est décédé la première, la présomption de survie est déterminé par les circonstances des faits, et à leurs défaut, par la force de l’âge ou du sexe.”

³³⁵ See articles 135 and 725 of the civil code.

have survived.³³⁶ Secondly, if they are more than sixty years old the youngest of them would be presumed have survived the others.³³⁷ Thirdly, if they are above fifteen years but less than sixty years, the youngest would be presumed to have survived. In this category the sex of the parties becomes relevant, for it is provided in the case of a man and woman of the same age or where the difference between them is less than one year that the man would be presumed to have survived the woman.³³⁸ Professor Savatier argues that this is wrong because statistically, women are more resistant to death than men.³³⁹ The last category is a mixture of persons, some below fifteen years old and others above sixty years. The presumption here favours persons of the former group.³⁴⁰ The worry here is whether it could logically be presumed that a child of one day old survived a man of sixty years and one day.

Article 731 of the French Civil Code lays down the categories of beneficiaries based presumably on proximity to the deceased:

“The properties are granted to the children and descendants of the deceased, to his ascendants, to his collateral parents and to his surviving partner in that order and in accordance with rules hereinafter to be determined.”³⁴¹

The article gave rise to a number of assumptions as to the basis of the choices. Firstly, succession is said to be based on the existence of a *lien de parenté*, between the deceased and the claimant.³⁴² We are unable to find an exact English equivalent for the term. The Collins French Dictionary translates it as “family relationship” which we submit could be appropriate for family law and not the law of succession.

³³⁶ Article 721(1) Code Civil.

³³⁷ Article 721(2), *ibid.*

³³⁸ Article 722.

³³⁹ Savatier, René, “Successions et Liberalités” (1977) *Rev. Trim. De Drt. Civ.* 801-805, 802.

³⁴⁰ Article 721(3).

³⁴¹ “Les successions sont déférées aux enfants et descendants du défunt, à ses ascendants, à ses parents collatéraux et à son conjoint survivant, dans l’ordre et suivant les règles ci-après déterminées.”

³⁴² See Guimchand, Serge, Droit Patrimonial de la Famille au Senegal, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, 421.

The concept of the “family” varies in these subjects. In Family Law it includes the spouses³⁴³ while in the law of succession it is restricted to persons related through a common ancestor.³⁴⁴

The *lien de parenté* therefore signifies a three-tiered relationship, traced from the deceased, then his parents and finally his grandparents. Naturally this interpretation would exclude adopted children and the surviving spouse. To prevent this narrow construction of the term Guinchard³⁴⁵ argues that the notion of *parenté* must be construed widely to include the surviving spouse. The *parenté* of the deceased is constituted by persons “who descend from him or from whom he descends,” and “allies” meaning the surviving spouse.³⁴⁶ With a similar preoccupation, Marty and Raynaud define the term as “the relationship between persons one of whom descends from the other, all of who descend from the same author or are assimilated to them by the law.”³⁴⁷ This last definition covers relationships by blood and adoption and excludes the surviving spouse. The compromise position between the two would result in the conclusion that the criteria for the existence of a *lien de parenté* could be biological, adoptive and marital.

The second assumption is that succession is based on the presumed affection of the deceased.³⁴⁸ And according to Trielhard³⁴⁹ “the legislator called upon to trace an order of succession must be infused with the natural and legitimate affections” of the deceased towards the claimants, so that the rules laid down are a reflection of the

³⁴³ Ibid, 6.

³⁴⁴ See Mazeaud et al, Leçons de Droit Civil. La Famille, Paris, Montchrestien, 1995, 5.

³⁴⁵ Droit Patrimonial de la Famille au Senegal, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, 421.

³⁴⁶ “La parenté du défunt est constituée par l’ensemble de ceux qui descendent de lui ou dont il descend; quant aux alliés il s’agit du conjoint survivant et de lui seulement...”

³⁴⁷ Marty, G. & Raynaud, P. Droit Civil. Les Personnes, Paris, Sirey, 3^{em} edition, 1976, p.3.

³⁴⁸ See Guinchard, Serge, Droit Patrimonial de la Famille au Senegal, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, 424.

³⁴⁹ Cited by Youego, Christine, “Sources et Evolution du Droits des Successions aux Cameroun.” Doctorat thesis, university of Paris II, 1994, 225 (unpublished).

manner in which the deceased himself would have distributed his property. Vallier therefore writes that “the classification of orders and in each order, the determination of heirs by the proximity of degree, are in principle adopted by the editors of the [Civil] Code because they correspond to the normal hierarchy of the deceased’s affection.”³⁵⁰ The civil code in articles 913 to 930 seems to endorse this theory by enjoining testators to dispose only of a given fraction of their property; the rest of which must go to the descendants or ascendants.³⁵¹

Finally it is assumed that the priority given to the relatives of the deceased is because family members have reciprocal duties.³⁵² This theme has not been developed any further apparently due to absence of consensus as to whether a surviving spouse is part of the deceased’s family for the purpose of succession.

Hence the *lien de parenté* and presumed affection of the deceased form the guiding principles in determining the intestate beneficiaries. Priority is given to the blood relations of the deceased, and the surviving spouse, considered initially as a stranger for not being a blood relative³⁵³ comes after the relatives as an afterthought.

3.3.1: Priority to the Blood Relations of the Deceased.

It is presumed that a person’s first affection goes naturally to the persons having a blood relationship with him, starting with the descendants and stretching to the ascendants. Even within these categories there are distinctions and the law presumes more affection towards persons closest to the deceased. The proximity of the descendants starts with the children while that of the ascendants starts with the parents of the deceased. Normally therefore the law will presume that the deceased

³⁵⁰ “De l’exhérédation et des legs faits au profit d’héritiers présomptifs”, Thesis, Paris, 1895, Ibid, 409.

³⁵¹ See Chabot, Rapport au Tribunat, LOCRE. T.V. 107 cited by Youego, Christine, “Sources et Evolution du Droits des Successions aux Cameroun.” Doctorat thesis, university of Paris II, 1994, 225 (unpublished).

³⁵² Breton, A, Mazeaud et Breton. Leçons de Droit Civil, Paris, Dalloz, 3e ed. 1980, 55.

³⁵³ See Raymond, Pierre, Les Successions et Les Liberalités, Paris, Sirey, 1983, 68.

must have had greater affection for his child than for a grand-child, in the same way as he would be presumed to have more affection for his father and mother than for his grandparents.

The descendants as the first recipients of the deceased's affection are comprised of the children of the deceased and subsequent descendants to the umpteenth degree. The term children include not only the legitimate children of the deceased, but also the legitimated³⁵⁴, illegitimate³⁵⁵ and adopted³⁵⁶ children.

The extension of the category of children has been accepted in Cameroon, though not without opposition from those who think that it operates to diminish their entitlements. In fact the courts have adhered religiously to the provisions of the Civil Code, provided that the conditions necessary for persons in these categories to succeed are fulfilled.³⁵⁷

The *Affaire Succession Fokam Kamga*³⁵⁸ presents a good illustration of the steadfastness of the courts. This case concerned two illegitimate children of the deceased, a former Minister of Public Health, who had been recognised and treated by the deceased as his children. Their quality as beneficiaries had been affirmed by an earlier ruling of the Tribunal de Premier Degré of Yaoundé at a time when they were still minors and the estate had to be managed by the more elderly legitimate children. In the action the plaintiffs having the age of majority claimed their own share of estate against the legitimate children who managed the property as if they did not exist. The

³⁵⁴ Article 333 Civil Code: "Les enfants légitimés par le mariage subséquent auront les mêmes droits que s'ils étaient nés de ce mariage".

³⁵⁵ Article 757 Civil Code: "L'enfant naturel a, en général, dans la succession de son père et mère et autres ascendants, ainsi que de ses frères et soeurs et autres collatéraux, les mêmes droits qu'un enfant légitimé."

³⁵⁶ Article 358 Civil Code: "L'adopté a, dans la famille de l'adoptant, les mêmes droits et les mêmes obligations qu'un enfant légitime."

³⁵⁷ A study of those conditions does not fall within the scope of this work.

³⁵⁸ TGI (Tribunal de Grande Instance) Bafoussam No. 49/ Civ of 5 March 1996.

court confirmed the earlier decision including the plaintiffs as beneficiaries and ordered the partition of the estate.³⁵⁹

After the descendants the affection of the deceased moves down the line to the second category of relatives composed of his father and mother classified as privileged ascendants,³⁶⁰ and his brothers and sisters including their descendants to the umpteenth degree, classified as privileged collaterals.³⁶¹ These are followed by the grand parents of the deceased and their own parents known as ordinary ascendants.³⁶² The fourth and last category of relatives consists of ordinary collaterals that include the uncles, aunts, and cousins of the deceased to the sixth degree or generation.

Within these categories the civil code establishes complete equality between the sexes; the only criteria for succession being the membership of a designated category. Article 745 (1) of the Civil Code stipulates: “The children or descendants succeed to their father and mother, grandfather, grandmother, or other ascendants without distinction of sex or of primogeniture...”³⁶³

Consequently, if the traditional law courts decide to apply French law the old practice of viewing the categories only in terms of their male and elderly male members will have to be abandoned. But old habits die hard and in words of Professor Nicole-Claire Ndoko,³⁶⁴ “*le juge Camerounais, tout en condamnant la pratique*

³⁵⁹ See also *Affaire Succession Kana Paul*, TGI (Tribunal de Grande Instance) Bafoussam No. 49/ Civ. of 5 March 1996 and *Affaire Succession Bihina Mbarga Gabriel*, ³⁵⁹ Arrêt No. 36 of 27 December 1990 Yaoundé Court of Appeal.

³⁶⁰ Art. 746 Civil Code.

³⁶¹ Art. 750 Civil Code.

³⁶² Art. 748, *ibid.*

³⁶³ “Les enfants ou leurs descendants succèdent à leur père et mère, aïeuls, aïeules ou autres ascendants, sans distinction de sexe ni de primogéniture...”

³⁶⁴ Ndoko, N-C., “L’idée d’égalité dans le Droit Successoral Camerounais: dernières tendances de la Jurisprudence en matière de la succession ab intestat” Yaoundé, 1990 (unpublished), p. 25

coutumière, n'en est pas encore arrivé à l'organisation prévue par code civil."³⁶⁵ It would be proper to say *le juge de fond* or the trial judge, because the appellate jurisdictions have constantly taken positions aimed at curbing this tendency of the lower courts. In the land mark decision of the Supreme Court in *Chibikom v. Zamcho Florence*³⁶⁶, it was held that any custom which deprived women of succession rights to the estate of their parents is contrary to the public order and the constitution.³⁶⁷

Primogeniture as a principle of succession was also rejected by the Court of Appeal of the West Province in *Affaire Succession Lonla Kuete*.³⁶⁸ In the opinion of the court, "Cameroonian positive law recognises in legitimate children the same succession rights to their deceased father without assigning any right of seniority to any one of them" and "It is within the intimate framework of the family that the members thereof could decide to recognise in one of the children, be he the last born, as deserving the respect, honour and reverence which they reserved to their deceased father." The general tendency is to construe primogeniture in terms of male members of the group but neither the code nor the above case distinguishes between male and female primogeniture.

3.3.2: The Inclusion of the Surviving Spouse: An Afterthought.

Marriage generally operates an extension of the conception of "family" to include the spouse but legal relations are between the spouses *inter se*. Marriage establishes succession rights between the spouses and not between either of them and the members of the other family. The Court of Appeal of Yaoundé had in this respect

³⁶⁵"The Cameroonian judge, while condemning the customary practice, has not yet embraced the organisation provided by the civil code."

³⁶⁶ Supra.

³⁶⁷ See also *Affaire Puete Jacqueline v. Nguoko Joseph*, Supreme Court, Arrêt No. 15/L du 12 Avril 1990; *Affaire Succession Guimfack Guillaume*, Jugment No. 105/C du 11 Avril 1996, TPD Dschang;

³⁶⁸ Arrêt No. 2/Coutume of 24 October 1991

to overrule a decision of the Tribunal de Premier Degré of Obala in which a daughter-in-law was designated as successor to her mother-in-law.³⁶⁹

The assertion that the inclusion of the surviving spouse in the scheme of intestacy is the result of an afterthought is justifiable. Historically, the surviving spouse could only succeed in the absence of surviving relatives. That this was a remote possibility cannot be doubted given the number and elastic nature of the classes of beneficiaries. Jean Brissuad identifies three categories of persons entitled then, to succession. These were the descendants, the ascendant and collaterals and the third category actually unusual, consisted of persons who with the deceased formed part of the same league organised for mutual defence.³⁷⁰

The widow was entitled only to the dower³⁷¹ and the widower to one quarter of the wife's estate known as the "poor man's fourth."³⁷² Only by the Law of 22 November to 1 December 1790 were reciprocal succession rights established for spouses. It also removed the unusual third category of beneficiaries. Of course it was possible even with the three categories of beneficiaries for the surviving to succeed but as such estates were classified as vacant, he or she had to vie with the state for possession, and in most cases the interest of the state prevailed.

The civil code adopted this position which only succeeded in making the surviving spouse an irregular heir. Not having possession of the property he or she had to apply to the court for it.³⁷³ This appeared to have been a mere formality, it was nevertheless unlawful³⁷⁴ for the surviving spouse to take possession without a court

³⁶⁹ Arrêt No.47 du 10 Janvier 1991 (unpublished)

³⁷⁰ Brissuad, Jean, A History of French Private Law, New Jersey, Rothman Reprints Inc., 1968, pp. 628.

³⁷¹ Brissuad, Jean, A History of French Private Law, New Jersey, Rothman Reprints Inc., 1968, pp. 765

³⁷² Brissuad, Jean, A History of French Private Law, New Jersey, Rothman Reprints Inc., 1968, pp. 652.

³⁷³ See Guinchard, Serge, Droit Patrimonial de la Famille au Senegal, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, 441.

³⁷⁴ Ibid.

order, even if it meant that the court had no discretion in the matter. The need for a court order was removed by an Ordinance of 23 December 1958

Today it is still difficult to state precisely the category of beneficiaries to which the surviving spouse belongs. None of the four categories of beneficiaries expressly includes the surviving spouse. She seem to occupy a category of her own as they come in only in the absence of persons having blood or assimilated relationship with the deceased. In terms of the presumed affection of the deceased the spouse comes at the end of the line, followed only by the state, said to be the ultimate love of everyone.³⁷⁵

3.4: THE RULES OF DEVOLUTION

Devolution is normally to the blood relatives but where the deceased was married and had issue the entitlement of the relatives becomes subject to that of the spouse, and this again demands that we use the spouse as the starting point. It is important to point out that unlike English law, French law treats the property as a single whole, so that there is no distinction between what would normally go the surviving spouse to assuage her pains the rest of the estate. Everything is brought into the account and distributed.

3.4.1 Devolution to the Relatives.

The system of devolution contained in the civil code is such that property devolves to the beneficiaries in accordance with the order in which they belong and the degree of proximity with the deceased. An order is represented by the various categories into which the beneficiaries are divided as identified in article 731 (above).

³⁷⁵ Guinchard, Serge, Droit Patrimonial de la Famille au Senegal, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, 424.

The existence of an order closest to the deceased excludes the others. The priority of the descendants has constantly been asserted by courts in Francophone Cameroon. In one case the Supreme Court was called upon to decide who, between the nephew of the deceased and the grand-child, was entitled to succession. It was held that “the property devolves only on the known descendants of the deceased; the said descendants cannot dispute the attribution or enjoyment of the property with the collaterals.”³⁷⁶

The exclusion also operates within the orders, this time by reference to the degrees representing the proximity of relationship with the deceased. Within each order it is possible to have persons related to the deceased in different degrees and according to article 735 of the civil code “the proximity of the relationship is established by the number of generations; each generation of which is called a degree,”³⁷⁷ signifying in other words that the degree is represented by the number of intervals between generations.³⁷⁸ The ascertainment of degrees is enshrined in articles 736 to 738 of the code which for want of space we cannot get into. The existence of persons closest in degree to the deceased excludes others within the same order. For instance the child of the deceased and the grandchild may all come within the meaning of descendants but belong to the first and second degrees respectively.

Hence the child will normally take to the exclusion of the grandchild, except through the process of representation provided for in article 739; the grandchild is made to inherit what would have gone his father or mother. Representation is defined as “a legal fiction, the effect of which is to put the representative in the place, degree

³⁷⁶ Arrêt No. 47 du 10 Janvier 1991 (unpublished).

³⁷⁷ “La proximité de parenté s’établit par le nombre de générations; chaque génération s’appelle un degré”

³⁷⁸ Guinchard, Serge, Droit Patrimonial de la Famille au Sénégal, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, 426.

and in the rights of the representatee.”³⁷⁹ It prevents the exclusion of a grandchild whose father or mother predeceased the intestate. Hence Grimaldi³⁸⁰ sees in representation “an institution by virtue of which an heir exercises the rights of another heir, of a closer degree, who died before the deceased.” And for Gerard Cornu, representation is a “substitution because of death.”³⁸¹

Representation is thus an exception to the rule that the existence of persons closest to the deceased excludes others within the same order and that property devolves undivided to the members of an order. Representation is, however, limited to the descendants of the deceased to whom it applies infinitely;³⁸² and to the children of the brothers and sisters of the deceased and the descendants of those children.³⁸³ It is not applicable to ascendants and ordinary collaterals, so the rule within these orders remains that the closest relative excludes the rest.³⁸⁴

The general position of French law is that property devolves in one bulk and not as individually divided shares.³⁸⁵ In effect succession gives rise to what is known as *l'indivision successorale*. This is a type of joint or co-ownership which cannot be equated to the English joint tenancy or tenancy in common. The four unities of time, interest, title and possession could be present but the inapplicability of the right of survivorship disqualifies it as joint tenancy. Similarly, the absence of individually identifiable shares disqualifies it as a tenancy in common. Therefore, rather than fudge an English equivalent for the type of holding we think that the French

³⁷⁹ “La représentation est une fiction de la loi dont l’effet est de faire entrer les représentants dans la place, dans le degré et dans les droits du représenté

³⁸⁰ Grimaldi, M., *Droit Civil. Successions*, Paris, Dalloz, 2e ed. 1992, 108.

³⁸¹ “La Fraternité des frères et soeurs par le sang dans le droit civil” written in honour of Professor Rene Savatier, 1992, 129, cited by Youego, Christine, “Sources et Evolution de Droit des Succession aux Cameroun,” Doctorat thesis, university of Paris II, 395.

³⁸² Article 740 (1) civil code 1804.

³⁸³ Article 742, *ibid.*

³⁸⁴ Article 741, *ibid.*

³⁸⁵ Guinchard, Serge, *Droit Patrimonial de la Famille au Senegal*, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, 426.

appellation ought to be maintained and understood to signify joint or co-ownership without the technicalities of a joint tenancy or tenancy in common.

The successors are the *alter ego* of the deceased and must as a result hold the property as did the deceased himself. Joint ownership, it was believed would tighten the bonds of family relations and enhance the productivity of the estate, as against having it partitioned in several small lots.

Should this be taken to mean that French law like the customary law favours the communal ownership of property? The answer would be in the affirmative because even though as will be seen soon partition could be ordered under article 815 of the civil code the fact remains that joint ownership is the rule. And this as we will see would likely influence the courts to prefer joint ownership to partition whenever the application is made.

To the principle of joint ownership the code posits another exception represented by a principle known as *la fente* which translated into English means “the split.” When property has to devolve to the ascendants, privileged³⁸⁶ or ordinary,³⁸⁷ the principle directs that the property be split into two, one part for the maternal family another for the paternal family. So we see the continued influence of customary law on the French law of succession.

3.4.2. Devolution to the Surviving Spouse.

We do not need to belabour the point that French law recognises succession rights for the surviving spouse only in the absence of relatives of the deceased extending to the sixth degree of ordinary collaterals. There were to be no half measures. The spouse got everything of the deceased or nothing at all. The dower and the “poor man’s fourth” had apparently been banished by the civil code with nothing

³⁸⁶ Article 748, *ibid.*

³⁸⁷ Article 753, *ibid.*

to replace them. The surviving spouse was thus condemned to a life of destitution, all because the editors of the civil code labouring under the influence of customary law still believed in keeping property in the family.³⁸⁸ The spouse being a stranger to the family could not be allowed to succeed to property therein. Pierre Raymond³⁸⁹ tries to discern the prime motivation of the editors of the civil code when he writes: “The spouse is not part of the family by blood, he entered into the family only through marriage and when, assuming that death has dissolved this, the surviving spouse leaves the family to which he was attached by the marriage and, if he is granted succession rights, he is permitted to collect property originating from the family of the deceased, at the risk of transmitting same to his own family.”³⁹⁰ Coming from an African this would have raised an uproar and coming from a product of “la civilisation Française,” it is embarrassing. For while it is true that death puts an end to a marriage, it also creates property rights in favour of the surviving spouse.

Accepted, that a person’s first affection goes to his blood relatives, it is unimaginable that one would prefer relatives as remote as the sixth or even the twelfth generation of ordinary collaterals against his own widow, mother of his children and the person with whom he shared a common life before dying. The tendency today is to confine the family to the spouses and their issue, towards whom the deceased owes legal and moral duties.³⁹¹ Furthermore, French matrimonial regime being one of community the argument about maintaining property in the family is deprived of any value. The question arises as to the family in which property should be maintained. Is

³⁸⁸ See Barch, Eugène-Louis, « Contribution à l’étude de la condition juridique du conjoint survivant » (1965) *Revue Trim. De Droit Civil*, 546-550, 547.

³⁸⁹ *Les Successions et Les Liberalités*, Paris, Sirey, 1983, 68.

³⁹⁰ « Le conjoint survivant ne fait pas partie de la famille par le sang, il n’est entré dans la famille que par le mariage et lorsque, par hypothèse, la mort a dissous celui-ci, le conjoint survivant sort de la famille à laquelle ce mariage le rattachait et, si on lui accorde des droits de successions, on lui permet de recueillir de biens provenant de la famille du defunct, au risque de leur transmettre en suite à sa propre famille. »

³⁹¹ See Raymond, Pierre, *Les Successions et Les Liberalités*, Paris, Sirey, 1983, 68.

it the family consisting of the deceased, the surviving spouse and their children or that consisting of the deceased and his blood relations, whose property must have become mixed with the products of the efforts of the deceased spouse? ³⁹²

These considerations engendered the amendments to the Civil Code discussed above, as a result of which the surviving spouse is given succession rights even when the deceased is survived by blood relatives. The right ranges from full ownership over all or part of the estate, to the right of use.

3.4.2.1: When the surviving spouse has absolute ownership.

According to article 765, the surviving spouse is supposed to take all of the property absolutely if the deceased is survived by ordinary³⁹³ as against privileged collaterals,³⁹⁴ or their descendants. The exclusion of the ordinary collateral in this article seems to have been neutralised by widely-worded article 766. It provides that in the absence of paternal or maternal relatives liable to succeed, the surviving spouse gets one half of the estate absolutely. The paternal and maternal relatives liable to succeed are no other than the father and mother of the deceased, the grandparents, the great-grandparents, the uncles, aunts and cousins, the last three of whom constitute the said ordinary collaterals. This provision is liable to extend the classes of beneficiaries to great and great-grand uncles and cousins when the relatives normally entitled are non-existent.

Another observation here is that the article provides for what the surviving spouse gets in absence of the named relatives and not for when they are present. Does it mean that she gets nothing? Article 753 provides in this respect that the entire estate devolves to closest surviving relatives. The effect of this article is however mitigated

³⁹² See Raymond, Pierre, *Les Successions et Les Liberalités*, Paris, Sirey, 1983, 68.

³⁹³ The children and descendants of Grandparents.

³⁹⁴ The brothers and sisters of the deceased.

by a phrase in article 766 to the effect that the un-divorced surviving spouse gets half of the estate “notwithstanding the provision of article 753.” This seems to underpin our assertion that the inclusion of the surviving spouse is the result of an after thought. Article 766, we submit gives rise to an ambiguity which could be removed only if it is considered that being the result of a later amendment to the civil code,³⁹⁵ it replaces article 753, itself the result of an earlier amendment³⁹⁶, whenever there is a surviving spouse.

It will certainly not be an overstatement to assert that a surviving spouse can never accede to absolute ownership, given that this is only possible when the entire lineage of the deceased is extinct. It would thus be more logical to conclude that the surviving spouse will invariably have usufructuary rights over the share of the property she receives upon distribution.

3.4.2.2: When the surviving spouse has usufructuary rights.

This arises whenever the deceased is survived by blood relatives. The quantum of these rights varies in function with the proximity of the relationship between the deceased and the surviving relatives. It accepted, however that the spouse keeps the matrimonial home³⁹⁷, though not necessarily the content which must be distributed together the other properties. Hence one finds ridiculous inventories such as was the case in *Kegne René v. Nembot Pierre & Others*³⁹⁸ where even the television set was included and given to the plaintiff rather than the widow.

The right is enshrined in article 767 of the civil code which also spells out the fractions of the estate over which it is to be exercised whenever the surviving spouse

³⁹⁵ Law No. 72-3 of 3 January 1972.

³⁹⁶ Article 2 of Law No. 57-379 of 26 March 1957.

³⁹⁷ See *Tchamo Thomas v Tiwouang nee Waffeu Jeanne*, C.S. Arret No. 46/L of 14 June 1992 (unreported); *Affaire Njanjo Teclair* Cour d'Appel de l'Ouest jugement No 17/ C, 25 Nov. 1985 (unreported).

³⁹⁸ Cour d'Appel de l'Ouest jugement No. 85/C, 17 Février 1994 (unreported)

is in competition with the descendants or the other relatives of the deceased. A third situation not envisaged by the civil code for obvious reasons is when the surviving spouse is in competition with another surviving spouse of the deceased but this is not surprising because the code envisages monogamy and not polygamy.

3.4.2.2.1: The Surviving spouse faced with the descendants of the deceased.

Article 767(2) of the civil code gives the surviving spouse the right of use and enjoyment over one quarter of the estate if the deceased is survived by descendants. There is ambivalence in the application of this article as it is manipulated by the courts to achieve the goals of customary law. It is a recognised rule of most customary laws in Cameroon that a widow with children has the right of use and enjoyment over the estate of the deceased husband and on the contrary that the property of the deceased wife belongs to the husband. Thus when the surviving spouse is a widow the courts are fast to apply the provision to the letter as against when he is a widower.

An example can be taken from the *Affaire Zang*, in which two widows of the deceased brought separate actions in the Tribunal de Premier Degré of Yaoundé demanding to be accorded equal succession rights with the children. They were declared co-heirs with the children held to be the principal heirs and one of the widows was named as administrator of the estate. On appeal to the Yaoundé Court of Appeal and eventually to the Supreme Court, it was held that in accordance with the customs of the parties which was in conformity to the civil code, the spouses had only usufructuary rights over one quarter of the estate.

In a good number of other cases the same court has in reference to decisions from the lower courts reiterated the position of the law and stated that “apart from the usufructuary right, all other qualities which are to be accorded to the surviving spouse

in competition with the children necessarily call for the reform of the decision for the want of legal basis.”³⁹⁹

However, the same court found no inhibition upholding a decision of the lower court declaring the widower to be the heir of his deceased wife in spite of the presence of six children. The court added contrary to the above statement that: “If the Beti custom which governs the parties recognises in the widower the right to succeed his wife, it does not exclude the rights of the direct descendants to expect also, to be declared as heirs of the deceased.”⁴⁰⁰ The widower as the surviving spouse thus has other qualities denied to the widow.

In a subsequent case the court apparently went against its own decision by overruling a decision of the lower court declaring the widower as co-heir with the children. From the *ratio decidendi* of the decision stating that “the widower cannot inherit when the deceased leaves children” and that “the court has violated the civil code and the Bassa custom which requires that the widower succeeds to his wife only in the absence of children”⁴⁰¹ it is clear that the court did not actually overrule its own decision. What the court did was uphold the Bassa custom which, fortunately was in conformity with the civil code.

3.4.2.2.2: The Surviving spouse faced with other relatives of the deceased.

If the courts have readily acceded to the widow’s usufructuary rights when faced with descendants the same is not true when faced with other relatives, since this implies that she is childless and therefore entitled only to maintenance and habitation from the family of the deceased.

³⁹⁹ See Cour d’Appel Yaoundé, arrêts No. 549 du 2 Juillet, 1986 ; No. 456 du 6 Mars 1986 ; No. 81 du 25 Janvier 1986. (unreported)

⁴⁰⁰ See Cour d’Appel Yaoundé, arrêt no. 186 du 24 Mai 1986, cited by Ndoko, N-C., “L’idée d’égalité dans le Droit Successoral Camerounais: dernières tendances de la Jurisprudence en matière de la succession ab intestat” Yaoundé, 1990, 49 (unpublished).

⁴⁰¹ See Cour d’Appel Yaoundé arrêt no. 153 du 14 décembre 1989.

Article 767 (3) of the civil code gives her the right of use and enjoyment over half of the estate, but no case could be found in which the code has been invoked to divide the estate equally between the widow and relatives of the deceased. When even the decision is taken to partition as in the 1974 *Affaire Tchokossi*,⁴⁰² this is never equal. In that case the widow whose husband died in 1960 brought an action in the Tribunal de Premier Degré of New Bell Bassa in Douala claiming the property left by the late husband which had been usurped by the brother of the deceased. The trial court held in favour of the widow and demanded that the property be handed to her. On appeal to the Douala Court of Appeal the brother maintained that the widow was only entitled to the right of maintenance and lodging in the estate of her deceased husband. This contention was rejected, not by confirming the decision of the lower court but by invoking the provision of the code allocating one quarter of the estate to the widow and three quarters to the brother of the deceased. The widow also appealed to the Supreme Court which only confirmed the position of the Court of Appeal.

The basis of the decision is not clear. Was it the customary law or the civil code that was applied, given that under customary law the widow would have been entitled only to the right of maintenance and habitation, and under the civil code she would have been entitled to half the estate? The absence of a legal basis for the decision led Melone to state that “the partition though unequal appears more as a judgment of Solomon rather than a response to a specific legal problem”.⁴⁰³

⁴⁰² Cited by Melone, S., «Le droit successoral Camerounais: Etudes des quelques points en jurisprudences» (1979) 17/18 Rev. Cam. De Droit, 55-79, 69.

⁴⁰³ The famous judgment of King Solomon in deciding to divide a disputed child marked him out as the wisest King to have lived (See 1 King 3, 16-28). There was, however, no legal basis for the judgment and if the child was actually divided it would have raised a further question in modern times, whether the King would not have been guilty of culpable homicide.

3.4.2.2.3: The Surviving spouse faced with other surviving spouses.

Understandably the civil code does not provide for situations of polygamy but its application in Francophone Cameroon is not limited to monogamy. We noticed in chapter three that parties have total discretion on choice of jurisdiction in civil matters. The choice of jurisdiction is also the choice of law applied by that court so if the deceased contracted a polygamous marriage and the parties opted for a modern law court, the code will becomes

In *Affaire Veuve Ebongue v. Ebongue Nyambe Nestor*⁴⁰⁴ the deceased was survived by three widows and children. The plaintiff, one of the widows, claimed in accordance with the custom of the Douala people to be entitled to a usufructuary right to the whole estate to the exclusion of the other widows. The claim was upheld by the Tribunal de Premier Degré whose primary duty is to apply the customary law of the parties. The decision of the lower court was overruled on appeal to the Douala Court of Appeal, which to fill the legal void in the civil code invoked the provision of article 767(3) applicable when the surviving spouse is in competition with children. All the widows were thus held to be entitled one quarter of the estate, a share which the code intends for a single spouse. The court considered the custom which tends to exclude widows from the succession of their husband as being contrary to the public order. On further appeal to the Supreme Court, the ruling of the Court of Appeal was upheld, giving the four widows equal rights over one quarter of the estate.

There must obviously be a feeling of injustice in giving the widows one quarter of the estate no matter the number of children against whom they have to contend. We nevertheless consider the decision as a bold step on the part of the appellate jurisdiction, for bringing the widows of deceased polygamist within the protection of the code. That the fraction allotted to the widows is small is quite

⁴⁰⁴ Arrêt No. 14/L du 9 décembre 1976 (unreported).

another matter which could not have been resolved without doing violence to the civil code.

3.5: ADMINISTRATION OF ESTATES

Unlike the English law French law has no intermediate period of administration during which the beneficiaries wait to get into their entitlements. Upon the opening of succession pursuant to article 718 of the civil code the property vests directly in the universal heirs jointly. However the fact that property devolves jointly makes administration necessary during the period of joint ownership, which could be indefinite, even though the powers of the administrator are in no way compared with those of the personal representative in English law. He must, like the successor in customary law request and obtain the consent of other beneficiaries in view of important dealings with the property.

Joint ownership is the rule in the French law of intestacy, and partition an exception, based on the rule adumbrated in article 815 of the civil code that “No one is obliged to remain in joint ownership and partition may always be provoked, unless it is excluded by judgment or convention.”⁴⁰⁵

Administration is ensured through a *jugement d’hérédité* issued by the competent court. This is the equivalent of the English Letters of Administrations issued by Customary or High Courts.⁴⁰⁶ Generally the beneficiaries designate one or more of theirs to ensure the administration⁴⁰⁷ and pursuant to article 803 of the civil code, “The heir-beneficiary administers the property and must render account of his administration to the creditors and legatees.”⁴⁰⁸ The term “legatees” which is my

⁴⁰⁵ « Null ne peut être contraint à demeurer dans l’indivision et le partage peut être toujours provoqué, à moins qu’il n’ y ait été sousis par jugement ou convention. »

⁴⁰⁶ See our discussion on the conflict of jurisdiction at 3.2.1.2 and 3.2.2.2.

⁴⁰⁷ See the statement of the Bafoussam in *Affaire Succession Lonla Kuete* (supra)

⁴⁰⁸ L’héritier bénéficiaire est chargé d’administrer les biens de la succession, et doit rendre compte de son administration aux créanciers et aux légataires »

translation for the French “légataires” could be problematic in a context of intestacy, given that it relates only to testacy. However, Dahl’s authoritative French and English Law Dictionary gives “legatee” and “heir” as the English equivalents for the French “légataire.”⁴⁰⁹ Hence the neutral word “heir” could substitute “legatees” in the article. This is more so as the explanatory notes to that article omits “légataires” and talks instead of “les intéressés.”⁴¹⁰

An administrator could also be designated by a court order at the instance of creditors and beneficiaries opposed to the decision of the Family Council. The administrator himself could abdicate his functions and apply to the court for the appointment of an *administrateur judiciaire* if due to the immensity of the estate, the complexity of its administration, numerous suits pending, conflicts of interests and opposition from the other beneficiaries, he feels incapable to effectively perform his functions.⁴¹¹

Unlike the personal representative in English law the powers of the administrator are limited due mainly to the fact that the property vests in the heirs jointly and not in the administrator who is merely a part-owner. The powers of the administrator are therefore limited to acts of representation and administration.⁴¹² Disposition of property, be it real or personal and for any purpose must be with the consent of the other beneficiaries or the judge.⁴¹³

⁴⁰⁹ Dahl, Henry Saint, *Dahl’s Law Dictionary*, Paris, Dalloz, 2001, 190.

⁴¹⁰ See the 1981 edition of the code published by LITEC.

⁴¹¹ See (1937) 2 Gazette du Palais, 579, *ibid*.

⁴¹² See Guinchard, Serge, *Droit Patrimonial de la Famille au Sénégal*, Paris, Librairie Générale de Droit et de Jurisprudence, 1980, 534 ; cited by Youego, Christine, “Sources et Evolution de Droit des Succession aux Cameroun,” Doctorat thesis, university of Paris II, 764

⁴¹³ See articles 805 and 806 of the civil code.

Conclusion

Like English law French intestacy rules also contain a long list of beneficiaries and enshrine gender equality. These are persons to whom the deceased owed the duty of maintenance either directly or by proxy, but the principle of precedence eliminates many potential beneficiaries. This is responsible for the many cases of conflict, noting, especially that French law has no equivalence of the Inheritance (Provision for Family & Dependents) Act 1975 which would cushion the effects of exclusions.

The original provisions of the civil code marginalised the surviving spouse but this has been removed by subsequent amendments. The fact that joint ownership is the rule, and distribution is an exception does little credit to the system, and even after distribution all that the spouse gets is a precarious right of use. Compared to her English counterpart therefore she cannot dispose of the property without the consent of the relatives of the deceased, or use the property to raise a loan and the property could be sold on her back. In *Tchamo Thomas v. Tiwouang nee Waffeu Jeanne*, the plaintiff, the administrator of the estate was barred from selling the matrimonial home occupied by the widow, but in so doing the Supreme Court only confirmed the precarious nature of the woman's title when it held: "*Considérant qu'en coutume Bamileke qui est celle des parties et défunt, seuls les héritiers reconnus comme tels, peuvent disposer de biens de la succession sans cependant porter atteinte aux droits de la veuve survivante, qui quant à elle, est héritière en usufruit de son conjoint prédécédé et qui dispose de droit d'usage et d'habitation sur la maison qu'elle partageait avec son mari de son vivant.*"⁴¹⁴

Perhaps the only difference between her and the customary law widow is that the right of use is granted under the civil code and cannot be tampered with; however,

⁴¹⁴ Jugement No. 46/L du 14 Juin 1992 (unreported).

without the right of ownership as her English counterpart the widow's right is a fragile one.

In the light of its affinity with customary law French law cannot constitute a model for the reform of our law of succession.

CHAPTER FOUR: INTESTACY IN CUSTOMARY LAW

Introduction

Disappearance also gives rise to a presumption of death in customary law. Initially there is a temporary management of the affairs of the person,⁴¹⁵ the period varies from tribe to tribe and is not generally long. It would hardly last for one year and could be as short as three⁴¹⁶ or five months⁴¹⁷ and possibly a few months longer.

Under the Muslim Maliki code the period of interim administration could stretch as long as seventy years, followed by a presumption of death from the date of disappearance. The administration of the estate during the period of absence is ensured by the court in whose custody the property is deposited.⁴¹⁸

That said, we have to note from the outset that intestacy in customary law is more complex compared to the received laws. This is because of the plurality of systems of succession, which are patrilineal, matrilineal and Muslim all of which have different substantive rules. The rules for determining who the beneficiaries are vary, even though as we will see the procedure for designating the successor, distribution and administration are virtually the same.

⁴¹⁵ See Ngongang-Ouandji, Andre, "La devolution successorale au Cameroun", (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 643.

⁴¹⁶ The Kaka and Baya tribes in the East Province, *ibid.*

⁴¹⁷ The Mbimous, and Moloundou of Northern Province, *ibid.*

⁴¹⁸ See Ajijola, A. D., Introduction to Islamic Law, New Delhi, International Islamic Publishers, 1989, 231.

4.1: THE APPLICABLE LAWS

The impression one gets from existing research is that the Cameroonian customary law of succession could be subsumed under a single system where the man reigns supreme.⁴¹⁹ We submit that this is one area in which the application of the *de minimis non curat lex* doctrine to arrive at such a conclusion would be inappropriate. For it would make a difference to know that there are tribes, however few, which recognize succession by women.

While male supremacy might be the rule, the over two hundred ethnic groups that make up the country could be classified under different systems of succession. The systems are either patrilineal, matrilineal, bilineal or Muslim. These are not compartmentalized into specific geographical areas and so cut across the country which experts divide into⁴²⁰ the Western Highlanders;⁴²¹ the Coastal Tropical Forest peoples;⁴²² the Southern Tropical Forest peoples and⁴²³ the predominantly Islamic peoples of the Northern Sahel and Central Highlands.⁴²⁴

Most tribes are patrilineal and the following are only examples: Bamileke, Banyang, Bakweri, Bafut, Bansa, Bali, Bakossi, Moghamo, Mankon, Bassossi, Ewondo, Eton, Bassa and Mendankwe. The common feature in all of them is the

⁴¹⁹See Youego, « Sources et Evolution de Droit des Succession aux Cameroun, » supra. 95-105; Doumbe-Mouloungou, Maurice, « Consequences des Juridictions de Droit Traditionnel sur l'Evolution des Coutumes dans le Sud Cameroun, » (1963) 17 Rev Jur. Pol. O-M, 533-572, 565 ; Ngongang-Ouandji, André, « La Devolution Successorale au Cameroun » (1972) 28 Rev. Jur. Pol. Ind. Coop. 639-662, 642 ; Binet, Jacques, « La Devolution Successorale chez las Douala du Cameroun », (1955) 65 Penant, 33-40, 35-37.

⁴²⁰ John Mukum Mbaku, Culture and Customs of Cameroon, Westport, Connecticut, Greenwood Press, 2005, pp. 1-2; Neville Rubin, Cameroon. An African Federation, p. 9.

⁴²¹ These consist of the Bamileke Bamoun, Bansa, Kom, Mankon, Mendankwe and many other smaller Tikar groups in the West and North West Provinces. The name Tikar is an omnibus term used to designate a great number of small ethnically related tribal units whose languages in general form part of a common linguistic stock but are not necessarily mutually intelligible.

⁴²²Including the amongst whom are Bassa, Douala, Bakweri, Mbo, Bafaw, Bakossi, Bassossi, Oroko found in the Centre, Littoral and Southwest Provinces;

⁴²³The Beti-Pahuin, Bulu, Fang, Maka-Njem, and Baka Pygmies in the Centre, South and East Provinces.

⁴²⁴ The Fulani (or Peuhl in French) and the "Kirdi", of the Adamawa, North and Extreme North Provinces.

eneration of men seen as the source and originator of all property. Property must be preserved in the family to provide for posterity and keep the veneration of its originator alive.⁴²⁵ Allowing women to succeed would likely conflict with this goal since upon marriage, their allegiance shifts to the husband's family, which is understandable given that her children are born therein. To attain the objective of keeping property in the family succession is either on the basis of male primogeniture,⁴²⁶ ultimogeniture, or any other competent male relative of the deceased.⁴²⁷

A few tribes practice matrilineal succession, examples of which are the Bakundu Balue in the Southwest Province, Kom, Aghem, Weh and Buh in the Northwest Province and some communities belonging to the Foulbe tribe the Northern Provinces practice matrilineal succession. Matrilineal systems venerate the woman and the reasons seem to be specific to each tribe.⁴²⁸

⁴²⁵ Ngongang-Ouandji, Andre, "La devolution successorale au Cameroun", (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 642.

⁴²⁶ See See Youego, « Sources et Evolution de Droit des Succession aux Cameroun, » supra. 95-105; Doumbe-Mouloungo, Maurice, « Consequences des Juridictions de Droit Traditionnel sur l'Evolution des Coutumes dans le Sud Cameroun,» (1963) 17 Rev Jur. Pol. O-M, 533-572, 565 ; Ngongang-Ouandji, André, « La Devolution Successorale au Cameroun » (1972) 28 Rev. Jur. Pol. Ind. Coop. 639-662, 642 ; Binet, Jacques, « La Devolution Successorale chez las Douala du Cameroun », (1955) 65 Penant, 33-40, 35-37.

⁴²⁷ Chantal, Kwende, "The Procedure for designating next-of-kin in a patrilineal tribe", term paper, Faculty of Law, University of Dschang, Cameroon, 2000.

⁴²⁸ The Balue tribe for example bases the system on a story that the founder of the tribe was accused of having committed an atrocity. To clear himself he had to swear in front of the oracles known as "beri." The accused was required to present a girl of ten years old at the swearing and both of them were to die if the allegations turned out to be founded. Having no daughter of his own he decided to use one of his nieces, the daughter of his deceased brother, but the widow objected saying that the child did not belong to him. He then turned to his sister who offered her own child and so rescued the tribe from the wrath of the ancestors. As a sign of appreciation therefore, the sister was given succession rights over her brother's property. See Pascal Nanje "Theory and practice of succession in matrilineal tribes", term paper university of Dschang, 2004 (unpublished); Anye Dieudonné, "Avoiding the Effects of Matriliney in the Balue Tribe in Ndiang Division," term paper Faculty of Law, University of Dschang, 2004(unpublished). In the Kom tribe the veneration of women is based on the belief that it is easier to establish blood relationship between a sister's child than one's own child who must have been conceived in an illicit relationship. Folklore has it that in the past there were periods when wives were allowed to go out and consort with other men. See Ache Nforba Jupiter, "Avoiding the effects of matrilineality in Kom, " term paper, University of Dschang 2004 (unpublished).

A person's property passes on his death intestate not to his paternal family which would include his own children but to his maternal family. Hence women have succession rights therein which could not be ignored, even if watered down in actual practice, due to interaction with the patrilineal system. The Balue tribe of the South West Province follows the classic pattern whereby succession is by the closest maternal relative.⁴²⁹ In the neighboring Mbonge tribe priority is given to the nieces of the deceased.⁴³⁰

The matrilineal systems of the North West Province⁴³¹ display patterns similar to the patrilineal systems. John Anthony Howard thus proposes the appellation "patrilineal tribes with matrilineal emphasis."⁴³² Although descent is traced through the mother succession is by men albeit of the mother's line. It is either the nephew,⁴³³ full and uterine brothers⁴³⁴ as against the mothers and her maternal relatives.⁴³⁵

The bilineal system of succession has elements of patrilineal and matrilineal succession. A person succeeds *as of right*⁴³⁶ from his paternal and maternal families. Our studies did not disclose any such tribes, nor does existing literature. However, we

⁴²⁹ See Anye Dieudonné, "Avoiding the Effects of Matrilineality in the Balue Tribe in Ndian Division," term paper Faculty of Law, University of Dschang, 2004 (unpublished).

⁴³⁰ See Julius, Ngape, "Property Rights of Female Children in the Mbonge tribe," term paper, Faculty of Law, University of Dschang, 2004.

⁴³¹ These are the Aghem, Bafmeng, Bu and Weh tribes.

⁴³² "Customary Law of Marriage and Succession Among the Kom of Cameroon," Ph.D. Thesis, University of London, 1972, 16. Audrey Richards had also made the point while writing of the central Bantu: "It is generally recognised that no society is entirely matrilineal or patrilineal as regards descent, inheritance, succession and authority but that the family system provides a balance of interest and rights between the two sides of the family with a predominant emphasis on one side or the other." See "Some Types of Family Structure Amongst the Central Bantu" in A. R. Radcliffe-Brown and Daryll Forde (ed) *African Systems of Kinship and Marriage*, Oxford University Press, 1950, 207.

⁴³³ See *Buo Kang Mathias v. Mih Izagha*, Wum Customary Court, Suit No. 8/02-03 (unreported); *Bah Ekom Amos v. Ebua Batali*, Wum Customary Court, Suit No. 12/02-03 (unreported). Cited by Amos, Wango Chianan, "Theory and Practice of Matrilineal Succession," unpublished term paper, Faculty of Law, University of Dschang, 2003. See also Edith, Ndima, "Theory and Practice in Matrilineal Tribes," term paper, Faculty of Law, University of Dschang, 2000.

⁴³⁴ Still of the North West Province.

⁴³⁵ See Lurshe, Chuye, "Avoiding the effects of Matrilineality: Case study: Kom," term paper, Faculty of Law, University of Dschang, 2003. See also Edith, Ndima and Chianan Wango, *supra*,

⁴³⁶ In fact one may find in the other systems situations where a person is called upon to inherit from his mother's or father's family but this is not right. It is a magnanimous gesture of the family to show appreciation for the type of relationship which the person has with the family.

noticed a limited application of it in Aghem, a matrilineal tribe, wherein succession to the throne in patrilineal.⁴³⁷ This option according to the accounts of its origin was dictated by expediency, but has since become part of the Aghem custom.⁴³⁸

Muslim law is not ethnically delimited and its general principles are drawn from surah 4, verses 8, 9, 12, 33, 34 and 170, surah 7, and from the traditions of the Prophet as recorded in the Sunna, and the consensus of Muslim scholars recorded in the Ijma.⁴³⁹

4.2: RULES GOVERNING THE APPLICATION OF CUSTOMARY LAW

The application of customary law is governed by section 27(1) of the Southern Cameroon High Court Law of 1955, section 18(1)(a) of the Native Courts Ordinance, Cap. 142 of the 1948 Laws of Nigeria and a number of already discussed French decrees.⁴⁴⁰ The provision of the 1955 Law governs the application in the high courts while that 1948 regulates application in the customary courts.

Section 27 of the 1955 Law provides:

“The High Court shall observe, and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible with any written law for the time

⁴³⁷ See Edith, Ndima, “Theory and Practice in Matrilineal Tribes,” term paper, Faculty of Law, University of Dschang, 2000; Chianan, Wango, “Theory and Practice of Matrilineal Succession.” term paper, Faculty of Law, University of Dschang, 2003.

⁴³⁸ Chianan (supra) writes, “There exist, however, peculiarity among the Aghem. Inheritance to the paramount fondom (chiefdom). Zongokwo is patrilineal. It passes from father to son. The reason is that the nephew and heir apparent of one of the early paramount fons disobeyed him and he decreed on death that he was to be succeeded by his son. After his death each of his nephews enthroned died in rapid succession and the villagers had no choice but to comply with the late fon’s wishes and enthrone his son, a practice which persists to this day.” If the above account is rooted in history, that of Edith (supra) is not: “But an exception was brought out in Aghem where it was said that the paramount fondom practises patrilineal succession meaning that only the son of the paramount fon succeeds him. An explanation was given by the paramount fon to the effect that before his grandfather died he willed the fondom to his father but the nephews chased him out of the palace. Unfortunately, those who succeeded him died and the rest were scared to take the risk. Since then the paramount fondom became an exception to the practice of matrilineal succession in Aghem where only the children of the fon and not the nephews can succeed him.”

⁴³⁹ Ajijiola, A.D. Introduction to Islamic Law, New Delhi, International Islamic Pictures, 1989, 228.

⁴⁴⁰ See chapter three.

being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom.”

Section 18(1) (a) of the 1948 Customary Courts Ordinance is similarly worded:

“Subject to the provisions of this law a customary court shall administer the native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties, such as it is not repugnant to natural justice, equity and good conscience nor incompatible directly or by natural implication with any written law for the time being in force.”

The application of customary law is not automatic, given that an alleged rule of law must be proved as a matter of fact, otherwise it is considered non-existent. And even when proved it must pass the repugnancy and compatibility and any other tests put in place by the legislature.

4.2.1: Proof of Customary Law

The unwritten nature of customary law renders its ascertainment difficult in the modern courts staffed by persons with no knowledge of its rules. Colonial Judges equated customary law to foreign law in an English court, the existence of which has to be specifically established. The point was made by Redwar, Ag. J. in the Ghanaian case of *Bimba v. Mensah*: “Native law when not incorporated by judicial decision in the law of this land ... must stand therefore on the same footing as foreign law, and must be proved by evidence of expert witnesses.”⁴⁴¹

The exigency subsists even though these courts are today staffed by Cameroon judges. They cannot be expected to have knowledge of all the systems of the customary law of succession, given even customary law as a subject does not form part of the curricula in the Universities and School of Magistracy. The Judges are thus more abreast with modern than with customary laws. This vindicates professor

⁴⁴¹(1891) Sar. F.C.L. 137.

Vanderlinden in his assertion that the African Judge is “often on the cultural plane and therefore legal, a stranger in relation to custom and the milieu where it originates and in which it is born, develops and dies.”⁴⁴²

It is incumbent on the party alleging a custom to prove its existence; for there is no presumption that any person or group of persons is governed by a custom if it is not specifically pleaded and proved to exist as a matter of fact.⁴⁴³ Customary law may be proved in two ways:⁴⁴⁴ By adducing evidence under section 14(3) of the Evidence Ordinance which provides: “Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that person or the class of persons concerned in the particular area regard the alleged custom as binding upon them...” Evidence is admitted from expert witnesses who are frequently the chiefs or other titleholders, part of whose duties are to know the customs of their people.⁴⁴⁵ In *Teke v. Teke*⁴⁴⁶ the evidence of the Fon of Batibo was determinant in upholding a will made under customary law. Expert evidence could also be gathered from authoritative text-books or manuscripts recognized by the natives whose custom it is talking about.⁴⁴⁷ Here a possible merger of the customary law of the courts and that of the public can be envisaged, because a Judge bent on ascertaining the customary law on an issue should in addition to the above sources consult the decisions of traditional

⁴⁴² “C’est dire qu’il est souvent sur le plan culturel et donc juridique, un étranger par rapport à la coutume et au milieu dont elle est originaire et dans lequel elle naît, se développe et meurt” in “Le Juge Africain et la Coutume en Afrique Aujourd’hui, cited by Christine Youego, “Sources et Evolution du Droits des Successions au Cameroun”, doctorate thesis, University of Paris II, 1994, p.246.

⁴⁴³ *Laidi Giwa v. Bisiriyu Erinmilokun* (1961) All N.L.R. 294, 296.

⁴⁴⁴ Section 14(1) Evidence Ordinance, cap. 62 of the 1958 Laws of the Federation of Nigeria: “A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence.

⁴⁴⁵ In *Wokoko v. Molyko* (1938)14 N.L.R. 41.

⁴⁴⁶ (2005) 2 CCLR 49

⁴⁴⁷ See section 58 Ibid.

councils⁴⁴⁸ whose role in settling disputes between natives in application of customary law is non-negligible.

The above renders the custom notorious and hence the second method for proving customary law. Section 14(2) of the Evidence Ordinance stipulates: “A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.” In *Laidi Giwa v. Bisiriyu Erinmilokun*,⁴⁴⁹ Taylor F.J. pointed out that:

“It is a well established principle of law that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such notoriety and has been so frequently followed by the courts that judicial notice would be taken of it without evidence required in proof.”

There is no indication on how often a custom must have been acted upon to justify its becoming notorious.⁴⁵⁰ The above dictum talks of customs having “been so frequently followed” while section 14(2) of the Evidence Ordinance speaks of the custom having been “acted upon by a court”. The position of the Ordinance which was not considered by Taylor F.J. seems to intimate that a single decision on the custom in question would suffice, if, as specified in the section, the court is satisfied that parties concerned look upon the custom as binding on them in similar circumstances.⁴⁵¹ In *Agbortar & Oben v. Chief Bessong*, Endeley J. held that “the custom that every chief in this state (and in particular those of the forest areas) rules through a traditional

⁴⁴⁸ These are non-judicial bodies set up at village levels to oversee its functioning.

⁴⁴⁹ (1961) All N.L.R. 294, 296.

⁴⁵⁰ See also Tapper, Colin, *Cross & Tapper on Evidence*, Oxford, Oxford University Press, 2004, 86.

⁴⁵¹ *Olabunmi Cole & Anor. v. Akinyele & Ors.* (1960) 5 F.S.C. 84.

council is so notorious that this court is bound to take judicial notice of it.”⁴⁵² It is not clear on which authority the notoriety of the customs was based because no previous decision on the point was cited. The statement is a truism for most African communities, but that being the first decision on the point the custom was supposed to have been established by calling expert evidence. And not being an expert, the Judge could not, even under this method have provided the evidence himself.⁴⁵³ The general rule is that a Judge cannot act on his personal knowledge of facts known to him nor may he take steps to acquire such facts in private.⁴⁵⁴

This method of proving customary law saves time and money.⁴⁵⁵ It leads to the emergence of a type of doctrine of binding precedent for customary law, with the effect that previous decisions on particular customs can be followed by other courts.⁴⁵⁶ The importance of the doctrine of binding precedent lies in the ability of other common law jurisdictions to use such decisions as binding or persuasive authorities. That this is possible in customary law is evident in the Nigerian case of *Awgu v. Neziyanya*,⁴⁵⁷ where Verity, C. J. relied on Ghanaian cases to hold that the owner of self acquired property does not require the consent of family members to dispose of it inter vivos or by will. These were held to constitute “the general principles of native law and custom throughout West Africa,” “a departure from

⁴⁵² [1968] W.C.L.R.43, 45 (West Cameroon Law Reports).

⁴⁵³ See *Iyamuse Ehigie v. Gregory Ehigie* [1961] ALL N.L.R. 842.

⁴⁵⁴ Tapper, Colin, Cross & Tapper on Evidence, supra, 89; Dennis, I. H. Law of Evidence, London, Sweet & Maxwell, 1999, 396.

⁴⁵⁵ Tapper, Colin, *ibid.* 91; Jain, M. P. “Custom as a source of Law in India”, in Renteln, Alison Dundes and Dundes, Alan (ed), Folk Law; Essays in the theory and practice of lex non-scripta, Vol. 1, the University of Wisconsin Press, 1995, 74.

⁴⁵⁶ See Woodman, G. R, “Some realism about customary Law–The West African Experience”, Folk Law: Essays in the theory and Practice of Lex Non Scripta, Wisconsin, University of Wisconsin Press, 1995, vol.pp.83-110, 91; Tapper, Colin, supra. 91.

⁴⁵⁷ (1949)12 W.A.C.A. 450, 451.

which can only be justified if it is established by evidence that native law and custom in any particular area differs from the general principles.”⁴⁵⁸

Hence Nigerian and Ghanaian authorities on customary law are used by Anglophone courts⁴⁵⁹ and academic writers offer no apologies for using decisions from these countries to substantiate assertions of customary law.⁴⁶⁰

Proving of customary law is not a precondition for its application in the customary courts.⁴⁶¹ With a vocation to apply customary law, this can normally not be considered as foreign law in these courts and the courts are constituted of persons appointed on the basis of their knowledge of customary law.

Customary court Judges administer the laws prevailing in their areas of jurisdiction being those of which they have or are presumed to have mastery. When they have to apply any other law, as would be the case in succession when the deceased was not a native of the locality, the courts will have to make up for their deficiency by calling witnesses on the custom of the deceased.⁴⁶² However, the stringency on the source of evidence under the Evidence Ordinance is not applicable. According to section 40 of the Customary Courts Ordinance Cap. 142 of the 1948 Laws of Nigeria, “any person present at the customary court, whether party or not in

⁴⁵⁸ At 451. See also the dictum of Lindley, J. in a Ghanaian case of *Biei v. Akomea* (1956) 1 W.A.L.R. 174, that “This court cannot allow local customs to override general principles in these days of changing conditions.”

⁴⁵⁹ In *Daniel Ngu Geh & 3 others v. Geh George Goddy Ndi* (2006) HCB/PD/LA/ 04-05 (unreported), for instance, a passage in Ollennu’s *The Law of Testate and Intestate Succession in Ghana* was cited to explain the nature of gift under customary law; and in *Jemba Solomon Nangoh v. Emilia Okole Otte* (2002) C.A.S.W.P./cc/14/2002, (unreported) Nwabueze’s *Nigerian Land Law* was cited to explain the fact that a native might through testamentary disposition alter the course succession at customary law.

⁴⁶⁰ Fisiy, Cyprian, in *Power and Privilege in the Administration of Law: land Law Reforms and Social Differentiation in Cameroon*, Leiden, African Studies Centre, 1992, 131, cites *Asofoatse Agbloe II & Ors v. Sappor* (1947)12 WACA 188, a Ghanaian case to establish that alienation of land by the family head without the consent of other family members is today permissible. See also Ngwafor, E. N. *Family Law in Anglophone Cameroon*, University of Regina Computer Services, Regina-Saskatchewan, 1993, 232 and Anyangwe, Carlson, *The Cameroonian Judicial System*, Yaoundé, CEPER, 1987, 241.

⁴⁶¹ See *Karchia v. Sarkin Kumin Musa* (1975) N.N.L.R. 44.

⁴⁶² See Ngwafor, E. N., *Family Law in Anglophone Cameroon*, 21; Aguda, T.A. *The Law of Evidence*, Ibadan, Spectrum Law Publishing, third ed. 1996, p.94.

such cause or matter, may be required by the court to give evidence, if and when summoned to attend and give evidence.” The other option would be to decline jurisdiction and direct the parties to the appropriate court, but this option has been criticised as liable to cause hardship if the appropriate court is not readily accessible.⁴⁶³

In Francophone Cameroon there are no statutory provisions dealing specifically with proof of customary law. This could only be inferred from the provision of article 18 (f) of judicial Organisation Decree No. 69/DF/544 of 19 December 1969 requiring judgments of customary courts to state the rule of customary law on which the decision is based, failing which the decision is null and void.⁴⁶⁴

The proof of customary law falls on assessors⁴⁶⁵ appointed in principle on the basis of their knowledge of the customary laws of the parties.⁴⁶⁶ This objective can hardly be achieved because there is for each jurisdiction, a fixed list of six persons from which assessors are chosen. Not only can this number not be representative of the different ethnic groups in a court area,⁴⁶⁷ the manner of designation leaves much to be desired. Nominations for the positions are supposed to be made by local divisional officers and presidents of the Magistrates’ Courts based on the nominee’s knowledge of the customary law they are to represent. But often and especially in the urban areas this criterion is not respected. Most assessors, because they are not of the same tribe as the litigants are completely ignorant of the customs they are called upon

⁴⁶³ See Emmanuel, Mbah, “The conflict of laws dilemma: Divorce in the conflict of laws in Cameroon,” (2000) 44 *Juridis Périodique*, 65-73, 72.

⁴⁶⁴ Procureur General c/ Mbarga Gaston et Mbarga Charles, C.S.C.O. Arrêt No. 20 du 17 Mai 1960

⁴⁶⁵ See Maticou Rou, “L’Organisation Judiciaire du Cameroun” (1969) 79 *Penant*, 33-65, 41.

⁴⁶⁶ See Article 10(2) (c) of Decree No.69/DF/544 of 19 December, 1969 on Customary Courts in East Cameroon.

⁴⁶⁷ See Avom, Vincelline Akomndja, « L’énonciation de la coutume en droit Camerounaise de la famille: Leurre ou réalité? » (2006) 116 *Penant*, 59-86, 71.

to represent. The law requires that in situations where an assessor is ignorant of the custom of the party he is to represent, the president of the court is to invite a notable of the tribe, in a consultative capacity, to sit in the hearings,⁴⁶⁸ but this is hardly respected.⁴⁶⁹ Furthermore, of the six persons, the first two on the list are permanent members while the remaining four are alternate members. In the absence of any of the permanent members, he is replaced by an alternate member.⁴⁷⁰ By implication the permanent members must always take part in hearings even if they are not of the same ethnic groups as the parties.

Having to prove customary law as a matter of fact is a very important requirement. Otherwise, fictitious persons could emerge from nowhere to claim succession rights⁴⁷¹ and rules of succession could be tailored to satisfy the greed of some persons.

4.2.2: Exclusion of customary law.

Pursuant to section 27(1) of the Southern Cameroon High Law 1955 and section 18 (1)(a) of the Customary Courts Ordinance of 1948 the exclusion of customary law is governed by the repugnancy and compatibility doctrines.⁴⁷² Section 14(3) of the Evidence Act, cap 62 of the 1958 Laws of the Federation of Nigeria introduces “public policy” as another ground for exclusion and is in line with Law No. 79-4 of 29 June 1979 on the Customary and Alkali Courts, article 1 of which enjoins the courts to apply the customs of the parties which are not contrary to law and public policy.

⁴⁶⁸ Ibid.

⁴⁶⁹ Christine Youego, “Sources et Evolution du Droits des Successions au Cameroun,” p. 246-247.

⁴⁷⁰ Article 11 (1), *ibid.*

⁴⁷¹ In *Mary Ngoh Timothy v. Njimba Jacob* (2006) Suit No. HCF/PROB/AE96/2001 (unreported) the estate was managed by the widow and the sister of the deceased when the defendant, a man unknown to both of them and to other member of the deceased family surfaced and claimed to be a relative of the deceased.

⁴⁷² These sections are full quoted above.

Exclusion in Francophone Cameroon is governed by article 51(1) of the Decree of 31 July 1927 organising the traditional justice system in that part of the country. That article enjoins the courts to apply only the customary law that is not contrary to the public order in all civil and commercial matters between natives.⁴⁷³

Hence customary law may in Cameroon be excluded on the grounds of, (a) repugnancy, (b) public policy, (c) public order or “*ordre public*,”⁴⁷⁴ and (d) incompatibility with written law.

4.2.2.1: Exclusion on the basis of the Repugnancy Clause.

The precise meaning of “natural justice, equity and good conscience” has so far eluded the courts. The difficulty was admitted by Speed Ag. C.J., in *Lewis v. Bankole*, where he described the phrase as “high sounding” and held that “it would not be easy to offer a strict and accurate definition for the terms.”⁴⁷⁵

The terms could be separated and construed individually to see if a rule of custom is repugnant to any of them. Equity will thus be taken in its technical meaning as was done in *Lewis v. Bankole*,⁴⁷⁶ where it was said that, “rules of equity, are or ought to be known to this Court, and if a native law or custom is found to be repugnant to the fundamental rules of equity it is absolutely the duty of the Court to ignore it.”⁴⁷⁷ In that case certain family members demanded that land which had been held as private property should in accordance with customary law be declared family property. The equitable doctrine of acquiescence was invoked to declare the custom “repugnant to the fundamental rules of equity.”

⁴⁷³ Journal Officiel Camerounais. 1927, 427.

⁴⁷⁴ “Ordre public” and “public policy” are not one and the same thing.

⁴⁷⁵ (1908) 1 N.L.R. 81, 83.

⁴⁷⁶ Ibid, p. 83 et seq.

⁴⁷⁷ Ibid, 83-84.

While this approach is possible for equity to which a restricted meaning can be given, it is not possible for natural justice and good conscience, which like equity in its broad meaning are incapable of definition. Hence the second and most appropriate approach is to construe the phrase as one whole. Here “equity” in its general meaning takes the same significance as “natural justice” and “good conscience”,⁴⁷⁸ and might lead to the question whether the additional words are not superfluous.

Either approach would make a difference in the customary law of succession, especially with respect to the rights of women. In the first approach, equitable maxims such as “equality is equity” will favour succession by women in the same way as the universal ideas of “natural justice” which constitute the second approach.

The second approach is however beset by divergences on the appropriate standard of justice to be applied by the courts. The judge has the discretion to choose between the English, customary or some neutral standard of justice. But judicial discretion is qualified,⁴⁷⁹ for in exercising the discretion, the judge must be guided by the law. In the words of Lord Mansfield, “Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague or fanciful; but legal and regular.”⁴⁸⁰

English law having evolved a standard of justice based on equity is considered the best example to follow.⁴⁸¹ It provides for uniformity and any other standards could throw open the floodgates, giving room to standards tailored on the basis of communities.⁴⁸²

⁴⁷⁸ Daniels, W.C. Ekow, *The Common Law in West Africa*, London, Butterworths, 1964, pp.268-271.

⁴⁷⁹ See Andrews, Neil, *English Civil Procedure*, Oxford University Press, 2003, 356.

⁴⁸⁰ *R. v. Wilkes* (1770) 4 Burr. 2527, 2539.

⁴⁸¹ See Allott, *Essays in African Law*, p. 200

⁴⁸² The point was made by Wilson J. said in *Gwao bi Kilimo v. Kisunda bin Ifuti*: “Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what justice is and what is morality. But unfortunately, the standards of different

The English standard was employed by the Privy Council in *Eshugbayi Eleko v. Government of Nigeria*⁴⁸³ to quash a decision of the Supreme court of Nigeria, which upheld an order of the Governor deporting the appellant on the basis of a custom that a deposed chief or native was required to leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office. The standard was also invoked against slavery and its incidents. In *Santeng v Darkwa*⁴⁸⁴ an argument that the child of a slave could not inherit property in the family was rejected on grounds of repugnancy and it was held that for purposes of succession the child was to be considered as a member of the family. In *David Tchakokam v. Keou Magdaleine*⁴⁸⁵, the standard was applied to invalidate a levirate marriage.

Advocates of an African standard argue that a rule of custom that has been observed for many years should not suddenly become unenforceable on grounds of repugnancy. The application of the test should take cognisance of the values of the people to whom the rule is applicable. A judge confronted with the question of the repugnancy of a rule of customary law should first consider the essential philosophy behind that rule before pronouncing on it.⁴⁸⁶ In the Southern Rhodesian (Zimbabwe) case of *Tabitha Chiduku v. Chidano*⁴⁸⁷ Tredgold J., laid down the rule that “Native customs should not be interfered with unless they impress us with some abhorrence or are obviously immoral in their incidence.”

communities are by no means the same. To what standard, then, does the Order in Council refer –the African standard of justice and morality or the British standard? I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard.”

(1938) 1 T.L.R. 403 (Tanganyika).

⁴⁸³ [1931] A.C. 662.

⁴⁸⁴ (1940) 6 W.A.C.A. 52. (Ghana)

⁴⁸⁵ (1999) G.L.R, p. 111 (Gender Law Report).

⁴⁸⁶ See Cardozo, Benjamin N., *The growth of the Law*, London, Humphrey Milford, 1934, p.62.

⁴⁸⁷ (1922) S.R.L.R. 55.

Others advocate a completely neutral standard. Park proposes a standard based on “some less specific factor, which is not derived from any legal or social system, but rather from general notions of what is just and proper.”⁴⁸⁸ Woodman thinks that, “if the repugnancy clause was to have any effect, the standard was to be external.... ideally it should be an absolute universal standard”.⁴⁸⁹ Such a standard, we think derives from natural law and does not assume the colouring of any particular, legal system, political organisation, and religion.

In practice the courts vacillate between the English and African standard and the gender of the judge seems to influence the standard of justice adopted by the court. It might perhaps be an Olympian jump to hold that female judges invariably apply the English standard, but this is not far from the truth⁴⁹⁰ given that English rules are more favourable to women and that by natural instinct women will be more inclined to favour other women. The first judgment recognising the property rights of a woman on divorce was that of a lady Judge⁴⁹¹ and has since been followed by others including some male judges. This is an unhealthy situation for a justice system that should be gender-neutral. A common standard is therefore necessary, and if customary law is to make the necessary progress, this should be based on natural law, which would be applied on the basis of constitutional provisions on fundamental human rights.

⁴⁸⁸ Park, A. E. W. Sources of Nigerian Law, London, Sweet and Maxwell, 1963, p.70.

⁴⁸⁹ “How State Courts Create Customary Law in Ghana and Nigeria”, Bradford W. Morse and G.R. Woodman,(eds), Indigenous Law and the State, Foris Publications Dordrech-Holland/Providence RI-USA, 1988, p.181-215,193.

⁴⁹⁰ See Ngassa, Vera (Justice) Gender Approach to Court Action, Frederick Ebert Foundation, 1998, p. 97.

⁴⁹¹ This was in *Alice Fodje v. Ndansi Kette* (1986) BCA/45/86 (unreported) decided by Justice Florence Arrey.

4.2.2.2: Exclusion on grounds of Public Policy.

English Judges are circumspect to proffer a definition for public policy. In *Besant v. Wood* Jessel M.R. said: “You cannot lay down any definition of the term ‘public policy’, or say it comprises such and such a proposition, and does not comprise such and such another.”⁴⁹² Kekewick J. in *Davies v. Davies* gave the possible reasons for this when he said: “Public policy does not admit of definition and is not easily explained... public policy is a variable quantity; that it must vary and does vary with the habit, capacities and opportunities of the public.”⁴⁹³

Winfield, however, defines the concept as “a principle of judicial legislation or interpretation founded on the current needs of the community.”⁴⁹⁴ It is based on the recognition that legal rules are built upon certain implicit moral and social assumptions which cannot be readily or precisely formulated in advance and which may change fundamentally from time to time.⁴⁹⁵ Public policy is thus viewed as a legal standard that encapsulates the values which the legal system is designed to serve. It cannot, however, be invoked because a judge personally thinks that a rule is contrary to the public interest.⁴⁹⁶ It must be something which the very structure or character of the community demands. In *Mitchel v. Reynolds*,⁴⁹⁷ Lord Macclesfield had indicated that a rule is against public policy if it is “a general mischief to the public.”

The public interest goal of public policy distinguishes it from the repugnancy clause, which depends upon the personal sentiments of the judge on questions of

⁴⁹² (1879)12 Ch. D. 620.

⁴⁹³ (1887) Ch D. 364.

⁴⁹⁴ *Ibid*, p. 92.

⁴⁹⁵ Bell, John, “Conceptions of Public Policy”, in Cane, Peter and Stapleton, Jane (ed) Essays for Patrick Atiyah, Oxford, Clarendon Press, 1991. p.90.

⁴⁹⁶ Atiyah, P. S. An Introduction to Contract, 4th edn. Oxford, 1989, 360-1.

⁴⁹⁷ Cited by Knight, W.S.M “Public Policy in English Law” (1922) L.Q.R., pp.207-219, 208.

morality, often influenced by his training, religious faith, gender and cultural background. Public policy looks beyond these, to the position of government with respect to the rule in question, as ascertained from legislative enactments.⁴⁹⁸ But it is conceded that public policy could be invoked in default of legislative enactment, whenever the considerations of the public interest so desire.⁴⁹⁹

In applying a rule of customary law the court has to weigh the outcome of its decision on the whole community as well on a considerable section of it, even where they are not concerned with the outcome of the case. No doubt the interest of the individual is also a matter of public interest but inconvenience to an individual is likely to be less mischievous than if it was to the whole public.⁵⁰⁰ If preserving the public interest is the criterion for public policy, rather than some abstract conception of morality or justice, liable to vary with the “length of the judge’s foot”, it is indubitable that public policy confers a wider power of discretion than does the repugnancy clause.⁵⁰¹

Anglophone courts have not shown any enthusiasm towards public policy as a separate ground to exclude customary law. Quite often it is treated as a synonym for the repugnancy doctrine.⁵⁰² Enonchong writes that: “The term ‘public policy’... adds nothing to the common law requirements of ‘natural justice, equity and good conscience’.” In *Asaba v Sub-Chief Forfutazong*⁵⁰³, the Buea Court of Appeal relied

⁴⁹⁸ Knight, W.S.M “Public Policy in English Law” (1922) L.Q.R., pp.207-219, 212.

⁴⁹⁹ Ibid.

⁵⁰⁰ Knight, W.S.M., “Public Policy in English Law”, p.212.

⁵⁰¹ Philips, Arthur, *A Survey of African Marriage and Family Life*, Oxford, Oxford University Press, 1953, p.177.

⁵⁰² See *Anya v. Anya*, where section 2(1) of the 1979 Law on the Customary and Alkali Courts was invoked to exclude a rule of customary, on the ground that it was “against public policy, *that is*, ‘natural justice, equity and good conscience’ as spelled out in section 27 of the Southern Cameroon High Court Law 1955.” Taken from Enonchong, Nelson, “Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon” (1993) 5 R.A.D.I.C. 503-524, 504.

⁵⁰³ Taken from Enonchong, Nelson, “Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon” (1993) 5 R.A.D.I.C. 503-524, 505.

on the provisions of section 14(3) of the Evidence Act which enshrines both public policy and repugnancy, to exclude a rule of customary law. Public policy was given as the basis of the decision without reference to the repugnancy clause. English judicial tradition would have required the two concepts to be distinguished to explain why the decision was founded on public policy. Failure to do so could only mean that the learned judge considered the two concepts as being synonymous.

In *Re Adadevoh*,⁵⁰⁴ Verity, C. J. evinced the possibility of the public policy criterion being fully covered by the compatibility doctrine. In order to decide whether children, illegitimate by English law, were entitled to succession on the ground that they were legitimate in customary law, by reason of having been acknowledged by the deceased said: “The Judge would... satisfy himself first that such a custom is established and secondly, that it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any law in force in Nigeria, including therein the rules of the common law as to the unenforceability of claims *contrary to public policy*.”⁵⁰⁵

The *raison d'être* of the public policy criterion stands questioned if the same objective would be possible under the repugnancy and compatibility doctrines.⁵⁰⁶ But the absence of a general standard of repugnancy and the fact that the compatibility doctrine is effective only where there are written laws, justify the maintenance of the public policy requirement.

However, public policy is bedevilled with the spectre of the “unruly horse,” let loose on the legal profession by Justice Burrough in *Richardson v. Mellish*: “public policy is a very unruly horse and when once you get astride it you never know where

⁵⁰⁴ (1951)13 W.A.C.A. 304.

⁵⁰⁵ Ibid 310. Emphasis added.

⁵⁰⁶ Park, A. E. W. *Sources of Nigerian Law*, London, Sweet and Maxwell, 1963, p.70

it will carry you.”⁵⁰⁷ Lord Denning tried to allay the fears of the courts by intimating that “a good man in the saddle”⁵⁰⁸ should be able to steer the horse in the right path. Vestiges of the old attitude are however current in English courts. Recently in *In re Land Deceased*⁵⁰⁹ the question was whether the sole beneficiary of an estate, convicted for the deceased’s manslaughter was entitled to the provision made for him in the will. He had actually given up his employment to nurse the deceased, his incapacitated mother. At one point he negligently allowed her to catch bed sores from which she died. The Forfeiture Act 1982 was invoked to bar him from taking under the testacy of the deceased, as it would have been tantamount to allowing him make benefit out of his crime.

Alternatively he applied for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975, on the authority of section 3(1) of the Forfeiture Act 1982, which stipulates: “The forfeiture rule shall not preclude any person from making an application under any provision of the Inheritance (Provision for Family and Dependants) Act 1975 or the making of any order on the application.”

The question was whether public policy could be invoked to prevent him from applying under the 1975 Act. Section 3(1) of the Forfeiture Act 1982 on the basis of which the application was made was construed to mean that the court could only invoke public policy to deprive the wrongdoer of benefiting from the estate where it is in the public interest to do so. It was held not to be in the public interest to deprive the applicant from applying under the 1975 Act. Norris, J. held thus:

“I hold that the claimant may advance a claim under the Act. As Vinelott J. put it in *In re K* [1985] Ch. 85, 102, ‘Despite the revulsion which any

⁵⁰⁷(1824), 2 Bing, 229, 242-243.

⁵⁰⁸*Enderby Town Football Club v Football Association Ltd.* [1971] Ch. 591, 606, per Lord Denning.

⁵⁰⁹[2007] 1 W. L. R. 1009.

person must feel at conduct which leads to the death of another human being it is impossible in the tragic circumstances of this case not to feel sympathy for the [claimant]'. Indeed for my part, I do not think that, on the facts as I have found them, the forfeiture rule serves the public interest. It deprives the one person who devoted himself to the deceased's care without significant outside support (albeit that he lapsed at the end) of the benefit she intended for him and confers it upon remote relations most of who [sic] did absolutely nothing for her."⁵¹⁰

As suggested by some dicta in that case the conduct of the appellant is not in the public interest because it is occasional and affects only a few persons.⁵¹¹ This cannot be true of the custom that excludes certain persons from succession. It is all pervading and could result in the social ills described at the start of this work. It should thus be a matter of public interest worthy of exclusion on the basis of public policy, whenever the repugnancy clause fails to do so. So, should the courts refuse to "ride the horse" because of the uncertainty of its destination? Enonchong is optimistic that public policy "is not such a terrifying animal near which Anglophone judges may not approach. It is an animal which when guided correctly can pull down obsolete and unjust barriers and open the way to equality, freedom and justice based on equity and good conscience."⁵¹²

Accepted that public policy could be applied is it not time for the pejorative repugnancy clause to be abandoned altogether? Law No. 79-4 of 29 June 1979 on the Customary and Alkali Courts, directing the courts to apply only custom that is not

⁵¹⁰ At 1019.

⁵¹¹ Ibid. 1018.

⁵¹² Supra. 524. His optimism in the eventual outcome of public policy if well managed is matched to that of Winfield, supra, 91, when he writes that "Some judges appear to have thought it more like a tiger, and have refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it as Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day has looked upon it as Pegasus that might soar beyond the momentary needs of the community."

contrary to law and public policy seems to do this. It does not, however, go far enough; it fails to repeal previous provisions on the point. And even if it did it would not bind the High Courts which with the Alkali and customary courts have original jurisdiction over succession.

4.2.2.3: Exclusion on the Basis of *Ordre Public* in Francophone Cameroon.

Ordre public is a generic expression which encapsulates repugnancy and public policy. It is incapable of precise definition because of its variable nature.⁵¹³ Attempts at a definition have been variously described as “quicksand”⁵¹⁴ or a “thorny field”⁵¹⁵ on which no reasonable person would want to tread.

The tendency is to describe the concept with reference to the organisation of the state. Capitant states that it refers “order in the state, that is to say the arrangement of the institutions, the organisation of rules that are indispensable to the existence and functioning of the state.”⁵¹⁶ Thus described, *ordre public* achieves three principal goals: (1) it helps to defend certain principles of natural law such as the equality of sexes and right to property enshrined in the constitution, (2) protects the social foundations of government policy such as the secular character of the state and recognition of polygamy and (3), it enables the courts to strike down any rules of law that seem irreconcilable with the legislative policies of the state.⁵¹⁷

⁵¹³ Jacques Ghetstin, “L’Ordre Public, Notion a contenu variable en Droit Privé Français”, in Perelman, Chaïm and Vander Elst, Raymond (ed.), Les Notion a Contenu variable en Droit, Bruxelles, Etablissement Emile Bruyant, 1984, p.78.

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ “L’Ordre dans l’Etat, c’est -à - dire l’arrangement des institutions, l’organisation des règles qui sont indispensables à l’existence et au fonctionnement de l’Etat”, Introduction à l’étude de droit civil, notions générales, Paris, 1898, pp. 25-33.

⁵¹⁷ Jacques Ghetstin, supra., 94.

It is clear therefore, that *ordre public* is wider than public policy.⁵¹⁸ In addition to enabling the courts to ensure the adaptability of law to the current need of a community, it also enables the conformity of rules of customary law to the general principles of law, which in succession should be the equality of all the members of the deceased family.⁵¹⁹

Consequently, courts in this part of the country have found no difficulty in relying on the constitution which enshrines the equality of sexes to exclude a rule of customary law in favour of relevant provisions of the French civil code on the ground that its application could result in a disruption of the established social order. The adopted principle of the code is said to constitute an evolution of the custom in question.⁵²⁰

4.2.2.4: Exclusion for Incompatibility with Written Law

In addition to repugnancy, section 27(1) of the Southern Cameroon High Court Law 1955 provides for the exclusion of customary law which is incompatible directly or by necessary implication “with any law for the time being in force.” For a custom to be excluded on this ground the statute and custom must regulate the same matter, and must be in conflict. There is no incompatibility if the customary law rule and the statute rule can function without interfering with the other. In Cameroon the payment of the customary dowry is not incompatible with a monogamous marriage,

⁵¹⁸ See Dahl, Henry Saint, *Dictionnaire Juridique Dahl*, Paris, Dalloz, 2001, 602.

⁵¹⁹ Youego, Christine, “Sources et Evolution de Droit des Succession aux Cameroun,” Doctorat thesis, university of Paris II, 1994, 306.

⁵²⁰ See Enconchong, “Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon”, 519. For example *Affaire Tchokossi*, 14 February 1974 (Supreme Court); *Affaire Zang*, 30 May 1974 (Supreme); *Ebanda Njoh Elisse c/. Eyombwan Njoh Isaac*, Arrêt No.42 du 9 Mar 1978 (Supreme Court)

given that the Civil Status Registration Ordinance No. 81-2 of 29 June 1981 recognises its payment in both monogamous and polygamous marriages.⁵²¹

But the application of the requirement has been beset with the meaning to be attached to the word “law”; whether it includes both the common law and statutory law on the one hand, and the local and received English statutory laws on the other. *Re Adadevoh*⁵²² intimated that it includes the common law but that view has been rejected by experts,⁵²³ because such a position entails engaging the entire arsenal of English law against customary law. And since custom must always conflict with some rule of common law, the position would mean the demise of customary law.

An acceptable view,⁵²⁴ held in *Rotibi v. Savage*⁵²⁵ is that “law” refers to local enactments only. The defendant sought to avoid the payment of debt contracted under customary law, by invoking a provision of the Statute of Limitations, 1833, under which the debt had become time-barred. His reason was that since customary law knows no such limitation it was incompatible with the statute. His claim failed because no local statute contained a similar limitation. The same statute was pleaded in *Lawal v. Abayomi*⁵²⁶ with the intention to bar an action for account brought by family members against the successor. “Law” was held therein to include the received English law, the application of which is subject to the provision that “as regards causes and matters between natives, customary law shall be deemed applicable where it may appear to the Court that that substantial injustice would be done to either party by a strict adherence to English law.”⁵²⁷ Obviously the statute

⁵²¹ Sections 70, 71, 72 and 74.

⁵²² (1951)13 W.A.C.A. 304.

⁵²³ See for example Park, *The Sources of Nigerian Law*, London, Sweet and Maxwell, 1963, 78.

⁵²⁴ Park, *supra*. 78.

⁵²⁵ Also known as in the matter of Herbert Macaulay (1944) 17 N.L.R. 77, 82.

⁵²⁶ (1946)18 N.L.R. 45, 47.

⁵²⁷ See section 27(2) of the Southern Cameroon High Court Law, 1955.

was inapplicable because it would have resulted to injustice on the rest of the family and would have established a precedent preventing successors from rendering account of their management of an estate.

More controversy was generated by *Adesubokan v Yinusa*.⁵²⁸ A Moslem made an English will and disposed of property contrary to the rules of Moslem law. The will was rejected at first instance for being incompatible with the rule of Moslem law. The decision was quashed by the Supreme Court of Nigeria on the ground that it constituted an infringement on testamentary freedom embedded in section 3 of the Wills Act 1837.

We could not find a case in which the question has arisen in our courts. If it did the majority view which is that compatibility is determined with reference to local statutory law will certainly prevail. Because these statutes take cognisance of local conditions, any incompatibility between them and customary law would be construed as an intention to abrogate the latter.

For the courts in Francophone Cameroon customs “contrary to law” are excluded on the basis of *raison écrite*, the equivalent of incompatibility, which establishes the supremacy of written over unwritten law.⁵²⁹ Under Civil Law, law means written law since primacy is given to written as against case law. Therefore the problem as to whether “any law” includes non-statutory law does not arise. Incompatibility is judged with reference to both local and received French statutes, because the latter were specifically promulgated in that part of the country.

Conscious that this might entail the complete exclusion of customary law since it is unlikely for most rules of customary law to be compatible with provisions

⁵²⁸ [1971] N.N.L.R. 77.

⁵²⁹ See Nguini, Marcel, « Droit Moderne et Droit Traditionnel » (1973) 83 *Penant*, 1-10, 9.

of French statutes, a circular letter of the Ministry of Justice and Keeper of the Seals in January 1963⁵³⁰ established customary law as the *droit commun*⁵³¹, while the written law was the law of exception. The colonial statutes maintained after independence were to be invoked only in the event of the silence of customary law in a given matter. However, the courts go their own way. Francophone Cameroonian judges are classed amongst those who even after independence, continue to behave as if they were in the colonial days when French law was the *droit commun* and customary law was the law of exception.⁵³²

4.3: THE EFFECT OF THE EXCLUSION OF CUSTOMARY LAW

The various methods of excluding customary law underscore the desire by the authorities to maintain only the rules likely to foster harmony and peaceful existence and not those with a propensity to result in strife and social disorder.

When a customary rule that would otherwise be applicable is held inapplicable the question arises as to the effect of the exclusion. Firstly, the excluded custom does not thereby become invalid.⁵³³ The exclusion merely renders the custom inapplicable by the courts,⁵³⁴ but it continues to be applicable in non-judicial instances⁵³⁵ competent to settle matters in application of customary law. Certainly this practice is liable to retard the modernisation of the customary law because many people knowing that non-judicial instances would settle their matters in application of the old rules of custom would prefer to take their matters there. True, these decisions have no legal force and

⁵³⁰ Marticou Riou, "Les statut personnels au Cameroun", (1969) *Revue Sénégalaise de droit*, p. 40.

⁵³¹ Droit commun in French law means the law applicable to every one.

⁵³² Vanderlinden, J., "Le juge et la coutume en Afrique aujourd'hui, cited by Youego, Christine, "Sources et Evolution de Droit des Succession aux Cameroun," Doctorat thesis, university of Paris II, 1994, 333-334.

⁵³³ See Daniels, The common law in West Africa, 286.

⁵³⁴ Ibid.

⁵³⁵ See article 21 of the Decree of 15 July 1977 on the organisation of traditional chieftaincies; section 61(2) Customary Courts Ordinance, chapter 142 of the 1948.

could still be reversed by the courts but, most aggrieved persons would be less inclined to pursue the matter after the decision of the divisional officer or the traditional council.

Secondly, the courts will have to apply an alternative rule depending on the ground for exclusion. If the custom is excluded on grounds of incompatibility with local statute law the rule contained in the statute will be applied. If, on the other hand, the exclusion is on the other grounds, the initial approach is to apply an alternative rule of customary law approved by both parties as meeting the imperatives of natural justice, equity and conscience.⁵³⁶ The most common approach necessitated by the absence of alternative rules of custom is to apply the appropriate rule of the received laws. The latter option raises the question whether the rule of received law becomes assimilated to customary law or retains its status as a rule of English or French law.

Francophone courts are authorised to substitute excluded rules of customary law with the relevant provision of the civil code of 1804.⁵³⁷ The adopted provisions take the form of *coutumes évolués*. The concept was evolved in the mid-1960s when the Supreme Court of East Cameroon departed from its initial position⁵³⁸ according to which it is the responsibility of the local population through its institutions to ensure the evolution of customary law, by empowering the courts to ensure such evolution.⁵³⁹

⁵³⁶ See Park, The sources of Nigerian Law, 81.

⁵³⁷ See Doumbé-Mouloungou, M., Les coutumes et Droits aux Cameroun, Yaounde, CLE, 1972, 69.

⁵³⁸ Supreme Court, arrêt No. 15/C du 22 Janvier, 1963, Bull. No. 8, 572. « Attendu que le caractère essentiel de la coutume est d'être évolutive ; que dans le domaine qui lui est réservé par le législatuer, elle est élaborée, décidée, et mis en oeuvre par les organes institutionnelles du groupe social qu'elle concerne, et ainsi se développe, se modifie et se renouvelle d'une manière autonome et par ses propres voies en vue de son adaptation continue aux conditions et aux exigences nouvelles de la vie sociale.»

⁵³⁹ Supreme Court decision of 11 June 1963, Penant, 1966, 73. Supreme Court decision of 19 May 1964, Bull. 10

In Anglophone Cameroon the position has until recently been in line with the decision of the Privy Council in *Eshugbayi Eleko v. Government of Nigeria*.⁵⁴⁰ The court was confronted with two options in this case. Be guided by the objective of the repugnancy and public policy doctrines to exclude a supposedly modified version of the customary law or uphold the version and thus effect a modification of the customary law on the point. The court opted for the first alternative and held: “the Court cannot itself transform a barbarous custom into a milder one... It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.” Hence a rule of English law applied in the place of an excluded rule of customary law does not become a rule of customary law.

Professor Enonchong, however, seems to imply that the new rule becomes a rule of customary law:

“In practice, however, the courts use principles of English common law and equity as substitutes [and statutes of general application]. I should perhaps take leave here to sound a note of caution. It is that when a rule is to be substituted for a displaced customary law rule it should be asked whether the replacing or ‘foreign rule’ can be inserted *in toto* into the system of customary law without doing violence to the basic and unimpugned principles of that customary law as a whole.”⁵⁴¹

It is clear that he intends modification rather than substitution of the excluded rule. Daniels, fearing the disappearance of customary law had also proposed the use of the doctrine of severance, to save rules of customary law by “pruning away the palpably unpleasant aspects”⁵⁴² of the custom. The problem is that neither of them

⁵⁴⁰ [1931] A.C. 662, 673.

⁵⁴¹ Enonchong, N., “Public policy and Ordre Public: the exclusion of Customary Law in Cameroon.” (1993) RADIC, vol.5, No. 3, pp. 503-524, 520.

⁵⁴² Daniels, W.C. Ekow, The Common Law in West Africa, London, Butterworths, 1964, p. 286.

provides guidelines as to how an excluded rule could be modified. How, for instance, would the rule that a woman cannot inherit property be modified, without doing violence to the principle according to which judicial discretion can only be exercised within accepted legal rules?

As will be shown later the High Courts with authority to administer both English and customary law can only apply the customary law “binding between the parties”. Failing this, the courts could only apply English law⁵⁴³ as they have no authority to apply any other customary law which could be more favourable to women.

This question is, however, only of academic significance today, because of the extension to Anglophone Cameroon of the concept of *coutumes évolués*,⁵⁴⁴ by the Supreme Court in the *Chibikom v. Zamcho Florence*.⁵⁴⁵ Hence a rule of English law used as the substitute of an excluded rule of customary law becomes customary law and can be invoked in other cases of customary law.

4.4: APPLICATION OF MUSLIM LAW

The status of Muslim law varies from one country or community to another. In some, such as Somaliland and Northern Nigeria where its application *per se* has been expressly decreed, it constitutes the fundamental law with respect to the matters for which its application is decreed.⁵⁴⁶ It is there not applied as customary law no matter how fused it must have become with the latter. Instead it is customary law whose exceptional application is expressly or tacitly authorised.

⁵⁴³ See 3.3.2.2.1.

⁵⁴⁴ As will be shown later in 7.4.

⁵⁴⁵ Arrêt no. 14/ L du 4 Fevrier 1993 (1995) 21 Juridis Info 29.

⁵⁴⁶ See J.N.D. Anderson, *Islamic Law in Africa*, London, Her Majesty's Stationery Office, 1954, pp. 5-6.

In others it is applied as the dominant law because as a result of the presence of a Muslim majority its treatment as “the native law and custom prevailing in the area of the jurisdiction” of a customary court is justified.⁵⁴⁷ Muslim courts exercise jurisdiction over persons still subject to customary law, but who are represented in litigations by assessors. This is also the case in parts of Northern Nigeria.

In the third category, Muslim law is only a particular law attaching to greater or less extent to some group, family or individual.⁵⁴⁸ Muslim law constitutes the minority but its adherents are granted certain privileges in regard to its application and administration within their own communities. In the last category, no recognition is given to Moslem law and its application is ensured by the ordinary courts subject to the rules that govern people whose personal law differs from the local customary law.⁵⁴⁹

Cameroon is a secular state⁵⁵⁰ with a unified judicial system, thus Muslim law is neither the fundamental law of the country nor the dominant law of any community. It applies only within the third and fourth categories. The North West Province, because of the existence of a large Muslim population would fall in the third category. Muslim law is applied and administered not by ordinary customary courts but by the Muslim Alkali Courts.⁵⁵¹ On the other hand, the South West Province with only a few Muslim converts and immigrants would fall in the fourth category. Disputes involving Muslims are determined in the ordinary customary courts which with the help of

⁵⁴⁷ See Park, *The sources of Nigerian Law*, p. 180.

⁵⁴⁸ Anderson, *Islamic Law in Africa*, London, Her Majesty's Stationery Office, 1954, pp. 5-6.

⁵⁴⁹ Phillips, Arthur, (ed), *A Survey of African Law*, Oxford University Press, 1953, p. 232-233.

⁵⁵⁰ See Article 1(2) of the 1961 Constitution, and the preamble of the 1972 and 1996 Constitutions.

⁵⁵¹ More on these in the section on Jurisdiction in chapter three

witnesses applies Muslim law as “the law binding between the parties” as against the predominant law of the locality.⁵⁵²

In Francophone Cameroon Muslim law is administered in the same courts that administer ordinary customary law. Thus the rule that the courts apply the customs of the parties reduces Muslim law to an insignificant position even with the existence of a dominant Muslim population, as in the three Northern Provinces and Noun Division in the Western Province.

In-as-much as there is no derogation from the basic tenets of the law⁵⁵³ contained in the Quran and Sunna,⁵⁵⁴ Muslim law could be modified by the local customary law. The secondary sources are the agents of modification as they are themselves the results of scholastic adaptations of Quranic or Sunni provisions to the specific circumstances of their time and localities. What is accepted as Muslim law in Cameroon is thus the adaptation of Quranic and Sunna prescriptions to the customary laws of Saudi Arabia, Turkey, Egypt, India and Pakistan.⁵⁵⁵ In this respect the great Muslim scholar Dr. Hashim Mahdi, concludes his account on the evolution of Muslim law with the statement: “This is the law we have selected for presentation to all Islamic minorities of non-Muslim states, acting in accordance with the efficiency demanded of us. We have selected this law because its preparation matured for nine years at the hands of eminent scholars and committees, first in Egypt and then in

⁵⁵² See *Alhaji Garuba v. Next of Kin*, C/S 29/84-85 (unreported), submitted to the Limbe Customary Court.

⁵⁵³ Anderson, *supra*. P. 172.

⁵⁵⁴ See Ajijiola, A.D. *Introduction to Islamic Law*, p.340.

⁵⁵⁵ See François, A., *Commentary on Affaire Dame Dada Balkissou v. Abdoul Karim Mohamed*, Cour Supreme, Arrêt No. 2/L du 10 Octobre 1985, in *Juridis info*. No.8, 1991, pp. 53-59, 56, see also Ajijiola, *ibid*, p. 347.

Damascus, and because it has dealt with all that needs to be dealt with in the present day.”⁵⁵⁶

Hence local customary laws tend to lend colour to Muslim law. Anyangwe’s statement that “given the interaction over the years with the local natives and their customs, Islamic law which obtains in the Northern part of Cameroon has become diluted”⁵⁵⁷ is true of all the other communities with a Muslim population and even beyond.⁵⁵⁸ The concept of family property is for example, unknown in Muslim law, but was held to constitute part thereof in *In the Estate of Baba Nya*,⁵⁵⁹ where the customary and appeal courts in application of Muslim law held that the family of the husband of a deceased widow was entitled to her property against claims of next-of-kin (another example of the influence of custom), made by the appellant, a complete stranger claiming to be the “God-son” of the deceased. In the opinion of the appellate jurisdiction no other person is entitled to succession “when the family is still in existence. The late man died and his family came and did his death rites.”⁵⁶⁰ The influence of the local customary law is also evident in *Gboron Yaccouba & Anemena Suzanne v. Mbombo Asang & Ndam Emile*.⁵⁶¹ The deceased was a Bamoun from Noun Division, one of the communities in Cameroon with a predominant Muslim population. The widow sought for the estate to be distributed so that she gets into her entitlement under Muslim law. This was rejected by the trial court and the decision

⁵⁵⁶ Muslim Personal Law, London, TA-HA Publishers Ltd., 2009, 5.

⁵⁵⁷ The Cameroonian Judicial System, p. 13.

⁵⁵⁸ Roland and Lampue writing about Muslim law in French West Africa write “le droit Musulman observé en Afrique occidentale est assez différent de celui qu’on pratique en Afrique du Nord. Il n’a fait que recouvrir les anciennes coutumes locales et il s’est sensiblement déformé en se mêlant à celles-ci” in Philips, Arthur, A Survey of African Marriage and family Life, oxford University Press, 1953, 236.

⁵⁵⁹(1985) Suit No. C.A.S.W.P/CC/16/85 (unreported).

⁵⁶⁰ Emphasis added.

⁵⁶¹ Cour d’Appel de l’Ouest, Bafoussam, Arrêt No.001/C du 23 Octobre 1997 (unreported)

was upheld by the Court of Appeal which, basing the decision on the local customary law held that “*en coutume Bamoun, la femme n’ hérite pas.*”

4.5: COURTS ADMINISTERING THE CUSTOMARY LAW OF SUCCESSION

4.5.1: Original Jurisdiction: Customary Courts and Tribunaux de Premier Degré

We will only discuss the Customary Courts here, as their counterparts the Tribunaux de Premier Degré have already been considered in chapter three.

The Customary Courts include ordinary customary courts administering native laws and custom and Alkali courts administering Muslim law. The first Alkali Court was established in Ndop by the Alkali of Yola (Nigeria) in 1946,⁵⁶² and the Alkalis’ Courts (Validation of Acts) Law, 1960 was passed to validate all the acts of the court from the date of its creation⁵⁶³. Seven others have since been created and all of them in the North West Province.⁵⁶⁴ The Alkali of Ndop serves as the chief Alkali and goes on assizes to the South West Province where no Alkali Courts exist. Muslim litigants in the South West either take their cases to the ordinary customary courts⁵⁶⁵ or the local Imam who attempts conciliation and when this fails transmits it to the Chief Alkali for hearing during the assizes.

We noticed the absence of women in the constitution of both the customary and Alkali courts. Any changes in the customary law coming from these courts can

⁵⁶² Information provided by Mallam Muhamadou Bello, chief Alkali of Cameroon.

⁵⁶³ Section 2 of the Act reads: “Anything which has been done by an Alkali’s Court (which expressly mean an Alkali acting with or without assessors) in Southern Cameroons before the commencement of this Law in purported exercise of any such powers as are conferred on Native Courts by the Native Courts Ordinance and which would have been lawfully done if the Alkali’s Court had been a Native Court lawfully established under the Native Courts Ordinance shall be deemed to have been lawfully, validly and effectively done.”

⁵⁶⁴ The Alkali courts of Bansa, Nkambe, Mbengwi, Wum, Ndarawa, Fundong, and Kumbo.

⁵⁶⁵ See *Alhaji Garuba v. Next of Kin*, C/S 29/84-85(Customary Court ,Limbe) (unreported).

therefore only be initiated by men and might, as we shall see, only be in half measures or laden with limitations.⁵⁶⁶

This anomaly could be attributed to the continued application of the Native Courts Ordinance Cap 142 of the 1948 Laws of Nigeria.⁵⁶⁷ The English colonial policy of indirect rule prevented the administration from interfering with the manner in which the courts were composed.⁵⁶⁸ The Ordinance has been partly modified by the Adaptation of Existing Laws Order 1963, based on the Customary Courts Law of 1956 which never went into effect because the official notice in the Gazette required to render it operational was never given.⁵⁶⁹ The modifications are today contained in the Customary Courts Manual Volume 1, rendered operational by Legal Notice No.119 of 1965, which serves as guide for the customary courts. The practice, though unorthodox is to refer to the amended version of the Customary Courts Ordinance as contained in the Manual as if it is the original version of the Ordinance.⁵⁷⁰

The *ratione personae* jurisdiction of the Courts is embedded in section 14(1) of the Native Courts Ordinance of 1948:

“Every Native Court shall have full jurisdiction and power, to the extent set forth in the warrant establishing it, and, subject to the provisions of this law, in all civil and criminal matters in which *all the parties belong to a*

⁵⁶⁶ This will be demonstrated in the chapter four, dealing with intestacy under customary law .

⁵⁶⁷ Jesco Manga Williams’s v. The President, Native court Victoria. (1962-1964) W.C.L.R. 34.

⁵⁶⁸ The colonial administrators were only concerned with the conformity of the customs and court procedure with the notions of natural justice, equity and good conscience.

⁵⁶⁹ Section 1 of the Law reads: “This ... and shall come into operation on a day to be appointed by the Governor-general by Notice in the Southern Cameroons Gazette,”

⁵⁷⁰ Just a few examples: In Anyangwe’s The Cameroonian Judicial System, citations from the Customary Courts Ordinance in pages 76-77 are actually of the Customary Courts Law. Professor Enonchong in his article “Public Policy and Ordre Public: The Exclusion of customary law in Cameroon.”(1993) RADIC, 503-524 refers in page 505 to section 18 of the Ordinance and then to section 10 which actually comes from the Ordinance without noticing the oddity of two sections in the same statute saying the same thing. In *Jemba Solomon Nangah v. Emilia Okole Otte*, (2002) C.A.S.W.P/CC/14/2002 section 18 was also cited as if it is of the Ordinance.

class of persons who have ordinarily been subject to the jurisdiction of customary tribunals.”⁵⁷¹

Persons of Cameroonian nationality immediately come to mind as being ordinarily subject to the jurisdiction of customary courts. The Ordinance, however, allows the possibility for the jurisdiction to be extended to any other person of an African background who must have consented to such jurisdiction.⁵⁷² It is therefore commonplace to find foreigners submitting their cases to either the customary⁵⁷³ or Alkali⁵⁷⁴ courts.

Section 16, read together with its schedule enshrines the *ratione materiae* jurisdiction of customary courts. It gives the courts:

“Full jurisdiction in matters and causes relating to succession and administration of estates under customary law and in causes and matters in which no claim is made for, and which do not relate to, money or other property, and full jurisdiction in all matrimonial causes other than arising from or connected with a Christian marriage as defined in section 1 of the Criminal Code.”

The courts therefore are competent if the deceased was ordinarily subject to their jurisdiction. However, if the action is instituted by a creditor, for example, because of a debt owed to him by the deceased, the jurisdiction of the courts will be excluded if the amount involved exceeds the equivalent of £100 in the local CFA

⁵⁷¹ My emphasis.

⁵⁷² Historically the jurisdiction could only be extended as provided by section 14(3) of the Customary Courts Ordinance 1948, on the orders of the Governor-General and endorsed in a resolution of the Southern Cameroons House of Assembly. One such resolution extended the jurisdiction to Nigerians and “Native-foreigners. (See Anyangwe, Carlson, *The Cameroonian Judicial System*, p. 77).

⁵⁷³ The Matter of Ethel Nworie Akabueze (Nigerians), Muyuka Customary Court, Suit No.34/2003/2004.

⁵⁷⁴ Hadjih Isah v. Buba Balkissou (Nigerians), Alkali court Mbengwi, Suit No.24/91-92.

Francis.⁵⁷⁵ This should dispel misunderstandings according to which the jurisdiction of the courts is generally limited by the pecuniary value of the property involved.⁵⁷⁶

The schedule clearly excludes Christian marriages from the jurisdiction of the courts, implying that marriage types are common indicators as to whether or not a person is ordinarily subject to the jurisdiction of customary courts. *De facto* monogamous marriages common in customary societies do not *per se* divest a person of his status under customary law, given that such marriages are generally potentially polygamous.⁵⁷⁷

Another indicator is the general life-style of the deceased. In *Daniel Njike v Zachius Ehang*⁵⁷⁸ it was clear that the deceased was a polygamist, but the High Court ignored this fact and instead ordered⁵⁷⁹ the case to be tried at first instance by the appropriate Customary Court on the basis of evidence provided by the chief about the customary status of the deceased.

Leaving a will in English form would also produce the same effect as contracting Christian marriages on the basis that both are unknown in customary law as will be shown in the chapter on the conflict of laws. In either situation the deceased would not be said to have been ordinarily subject to traditional jurisdictions which should normally decline jurisdiction and direct the parties to the appropriate High Court.

⁵⁷⁵ The limitation is ordained by schedule 16(B)(1) which empowers the courts to entertain “Civil actions in which the debt, demand or damages do not exceed one hundred pounds.”

⁵⁷⁶ See Ewang, Andrew Sone, “The place of customary law in the Cameroonian Legal system” (2001) *FUNDAMINA*, 70-84, 80); Mikano Emmanuel Kiye, “The Importance of Customary Law in Africa: A Cameroonian case study”, Doctoral Thesis, VRIJE UNIVERSITEIT BRUSSEL, June 2007, 94.

⁵⁷⁷ In *Tufon v. Tufon*, Suit No. HCB/59MC/83 (Unreported), the High Court of Bamenda declined jurisdiction in a case where the marriage certificate showed that the parties were monogamously married but the surrounding circumstances showed that the marriage was potentially polygamous.

⁵⁷⁸ (1978) *The University of Yaoundé Law Reports*, pp. 92.

⁵⁷⁹ The Court was acting in its capacity as an appellate jurisdiction.

4.5.2: The High Courts.

The competence of the High Courts in the administration of the customary law of succession could be drawn from section 27(2) of the Southern Cameroon High Court Law 1955. That sub-section empowers the courts are to administer “such native law and custom as shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the courts that substantial injustice would be done to either party by a strict adherence to the rules of English law.”

For the purpose of the High Courts section 3 of the Interpretation Ordinance (Colony and Protectorate), chapter 94 of the 1948 Laws of Nigeria defines a native as including “a native of Nigeria [Cameroon] and a native foreigner.” A native of Cameroon is “any person whose parents were members of a tribe indigenous to Cameroon and the descendants of such persons, including any persons one of whose parents was a member of such a tribe”. A “native foreigner” is “any person [not being a native of Cameroon] whose parents were [Sic] members of a tribe or tribes indigenous to some part of Africa and descendants of such persons, and shall include any persons one of whose parents was member of such a tribe.”

It follows that an African from any part of the continent where tribal institutions have existed is a “native.” Moreover, persons of half-blood, only one of whose parents was an African also come within the classification. Reference to the descendants of such persons could result in a situation where Negroes from America or the West Indies would be treated as natives,⁵⁸⁰ liable to claim succession rights under customary law and their estates equally subjected to customary law.

⁵⁸⁰ Park, p.108

4.5.3: Appellate Jurisdiction: Courts of Appeal and Supreme Court

Same as in 2.2.2 (supra.)

4.6: DETERMINING THE INTESTATE BENEFICIARIES

There are no equivalents of a presumption of survivorship in customary law. Probably there is no need for one because succession is by the family which has a perpetual existence and it is impossible for the whole family to perish simultaneously. No such presumption also exists in the Muslim Maliki law⁵⁸¹ and Authority for the position is drawn from account by one of the early Muslim leaders. It is recounted that after the battle of Yamanah in which many Muslims died, Sayyiduna Abu Bakr ordered Zayd Ibn Thabit to distribute their estates. In a later appointment by Umar Ibn al-Khattab, Zayd Ibn Thabit himself narrated as follows: “Umar ordered me to take charge of distributing the inheritance of people who died in the plague, and in some cases, a whole tribe had died, so I made those who survived inherit from those who had died, but did not make those who had died to inherit from each other.”⁵⁸² It was therefore not presumed that any of the deceased persons had survived the other, because if it did their next-of-kin would have been given their shares.

4.6.1: THE FAMILY AS THE MAIN UNIT OF SUCCESSION

The rules governing the devolution of property in any society are generally a reflection of the way in which that society deals with the question of economic stability beyond the life of the present members.⁵⁸³ According to Rattray “it is in the social organisation of a people in which lie the germs of the legal system which they

⁵⁸¹ Ajjola, A. D., Introduction to Islamic Law, New Delhi, International Islamic Publishers, 1989, 231.

⁵⁸² See Abdar Rahman I. Doi, Shari’ah: Islamic Law, London, TA-HA Publishers Ltd., 2009, 415.

⁵⁸³ See Okoth-Ogendo, H.W.O., “Property Systems and Social Organisation in Africa: An Essay on the Relative Position of Women under Indigenous and Received Law,” in Takirambudde, P. N. (ed.) The individual Under African Law, Gaborone, University of Botswana, 1982, 152.

are later to develop.”⁵⁸⁴ The communal nature of property ownership therefore influences succession in customary law. With the exception of Moslem law⁵⁸⁵ succession is by the family and not the individual. The idea, writes Ngongang-Ouandji is “founded on the necessity to continue and to transmit the state of the society from the former to the present generation.”⁵⁸⁶ The rights acquired by the individual beneficiaries are those of use and enjoyment. It is immaterial that the property in question is personally acquired, for the idea of private ownership subsists only while a person is alive or dies testate. When he dies intestate the presumption is that the property becomes family property.⁵⁸⁷

In *Stella Nunga & 5 others v. Clara Kumbongsi & 4 Others*, the deceased died intestate leaving personally acquired property covered by a certificate of occupancy. He was survived by his widow who was the fourth respondent in this appeal and six children, appellants in this action. The widow to whom letters of administration were granted borrowed money from the first respondent which she was unable to repay. Against protests from the appellants the first respondent brought an action at first instance to attach the property and succeeded. The decision was reversed at appeal and Ekema, J. said:

“The late Nunga did not at his death, will the property in question to his wife, Helen Nunga. His property therefore became family property at his death. Consequently, all the beneficiaries of the Nunga estate had an interest in the estate.”⁵⁸⁸

⁵⁸⁴ Ashanti Law and constitution, Oxford, Clarendon Press, 1929, 2.

⁵⁸⁵ See Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 645.

⁵⁸⁶ « L’ordre de succession est fondé sur la nécessité de continuer et de transmettre l’état de la société, de la génération qui passe à celle qui suit. » Ibid, 642.

⁵⁸⁷ See Binet, Jacques, “La devolution successorale chez les Douala du Cameroun”, (1955) 65 Penant, 33-40, 34.

⁵⁸⁸ Cameroon Common Law Report, Part 5, 189, 194. See also *Jemba v. Emilia Kombone Bakundu Customary Court*, Civil Suit No. 25/2000/2001(unreported). The deceased intestate left two personally acquired farms. Upon his death his sister who was the mother of the parties succeeded to the property

In *Daniel Nde v. Mokom Clement*⁵⁸⁹, the parties were the grand children of the deceased intestate. The respondent as administrator of the estate instituted and succeeded in an action in trespass to land against the appellant at the trial level. This was reversed on appeal on the ground that, the land not having been distributed was family land over which both parties had equal rights to possession.

4.6.1.1: The conception of “Family” for the purpose of succession.

Ollennu’s conception of the family as “the social group into which a person is born”⁵⁹⁰ could be unequivocally applied in all the three systems of the customary law of succession. Birth into the same family with the deceased is cardinal in the relationship, meaning that persons related to the deceased in a manner other than by birth cannot aspire to be his successors. The family consists of all the persons lineally descended from a common patrilineal ancestor or matrilineal ancestress, to be seen soon.

One important question relates to the ambit of the family entitled to succession, whether it includes everyone who claims the relationship, however remote. Experts on African customary law classify the family into the extended, immediate and sub-families. The extended family is that which is originated by a grandparent or great-grand parent of the deceased and includes in order of priority that parent and his descendants.⁵⁹¹

since this was a matrilineal society. When their mother also died conflict erupted between the parties when the plaintiff as the male surviving relative claimed that the property belonged to him exclusively. It was held that both farms belonged to the parties as a family and not to an individual. In the words of the court the, “family or maternal family properties are usually inherited and enjoyed by the entire maternal family. Therefore the property of Sango Thomas Tanye who died without a surviving child is the maternal property enjoyed by the maternal family.”

⁵⁸⁹ (1998) 34 *Juridis Périodique* 39.

⁵⁹⁰ *The Law of Testate and Intestate Succession in Ghana*, London, Sweet & Maxwell, 1968, 71.

⁵⁹¹ See Ollennu, *The law of testate and intestate succession in Ghana*, London, Sweet & Maxwell, 1966, 73.

The immediate family is originated by the parent of the deceased. It includes the parent, the brothers and sisters, their children and subsequent generations of children. There is no limit to the number of generations of descent of the extended and immediate families. It could be assumed, however, that given the short life expectancy in customary communities it would be difficult to have cases in which the gap between the deceased and the claimant goes beyond two generations in each category.

The sub-family is originated by the deceased and consists essentially of his or her children if the deceased is a male in a patrilineal system or a female in matrilineal system.⁵⁹²

Ideally every one who comes within the definition of “family” should qualify as a beneficiary as this would prevent the exclusions, principally responsible for the bickering that often follows upon succession rulings. Ollennu must have had this in mind when he wrote: “When in later life a person comes to have children, he or she becomes inseparable from either the immediate family into which he or she was born, or from the generation he or she raises, he therefore must of necessity belong jointly to the trunk and to the branch.”⁵⁹³ Literally it means that the succession should be by the sub or nuclear family and the immediate family jointly. In this arrangement the immediate family would certainly come in only in order of precedence. Accepting that Ollennu intended this order of precedence, it will mean, in the absence of members of the immediate family, that members of the extended family would come in.

The arrangement would have taken cognisance of the duty of maintenance which as noted earlier should constitute the basis for succession. But it is apparently

⁵⁹² See Bentsi-Enchill, Ghana Land Law, 27.

⁵⁹³ *Supra*, 74.

too ideal to be adopted in practice, unless, perhaps, in a situation where the estate is very large and there is only a lone surviving relative of the category closest to the deceased.

Neither the patrilineal nor the matrilineal systems in Cameroon adopt Ollennu's view, each of which adopts an order of succession to reflect its basic principle.

4.6.1.2: The Patrilineal System.

In patrilineal systems, jural relations in kinship are strictly confined, through males, to a lineage or clan going back to an original ancestor. It is based on a branching process which extension and complexity increases with each generation of male children. The lineage bears the name of its founder and the rules of succession are designed to keep the lineage alive. Such a mission could only be assured by male descendants as against women who would be called to marriage one day in order to ensure the continuity of another lineage—that of their husbands. Succession to the property of an unmarried woman is subjected to the same rules notwithstanding that women are not deemed capable to ensure the continuity of the lineage.

Most studies on the customary law of succession tend to interpret the need to keep land in the family as meaning that women are not entitled to succession. Credence is given to this by studies which purport to lay down the order of succession but fail to clarify that the order relates only to the designation of the family head or successor with a mission to ensure that land remains in the family. Nwabueze for example lays down the following order (i) the issue; (ii) brothers (and sisters in some communities) of the whole blood; (iii) parents; (iv) half brothers (and half sisters in some communities); (v) issue of brothers. Etc. These orders⁵⁹⁴ embody the privileged

⁵⁹⁴ Nigerian Land Law, Enugu (Nigeria) Nwamife Publishers, 1972, 381

position of male relatives as family heads but do not exclude women from the list of beneficiaries.

The absence of clarification has given rise to the practice of excluding women even from being beneficiaries. These orders should normally only be indicative and while the headship goes to the male, each member within the category, without distinction of gender should qualify as a beneficiary.

The existence of issue either as sons and daughters excludes persons of the more remote categories. And the issue include children *en ventre sa mere*, illegitimate children acknowledged by the deceased in his lifetime and adopted children. In *Ministère Public c/ Pangou Bello*,⁵⁹⁵ the respondent failed at the trial and appeal levels to be declared successor over the estate of his son. The custom provided that the father succeeds the son when the latter dies without an heir but it was established that the widow was pregnant with the principal beneficiary in this case before the deceased's death. Similarly in *La Succession Messe Madeleine*, the deceased woman was survived by her children and her father. In this action the father claimed to be entitled to her succession to the exclusion of the children. It was held that in accordance with the Bamileke customary law when the deceased is survived by issue, these are the joint beneficiaries to the exclusion of any other persons.⁵⁹⁶ In *Jemba v. Emilia*⁵⁹⁷ the nephew and niece took because the intestate "had no child of his own who should have been beneficiaries of the assets" and their mother who was the deceased sister was also dead. In default of the immediate family, members of the extended family come in, taking in the same order of precedence.⁵⁹⁸

⁵⁹⁵ (1996) 26 *Juridis Périodique*, 24. (Tribunal de Premier Degré of Kaele and the Court of Appeal of Maroua)

⁵⁹⁶ Tribunal de Premier Degré de Dschang, Jugement No. 18/C du 15 Janvier 1996 (unreported)

⁵⁹⁷ Kombone Bakundu Customary Court, Civil Suit No. 25/2000/2001. (unreported) matrilineal society.

⁵⁹⁸ See Ngongang-Ouandji, Andre, "La devolution successorale au Cameroun", (1972) 26 *Rev. Jur. Pol. Ind. Coop.* 639-662, 652.

4.6.1.3: The Matrilineal System.

The distinctive feature in matrilineal systems is that descent is traced through the mother, all those descended from a common ancestress forming a matrilineage. This means that a man and his children must necessarily belong to different matrilineages. A man's immediate matrilineage consists of himself, his mother, his full and uterine brothers and sisters, his mother's brothers and sisters, his maternal grandmother, his maternal grandmother's maternal grand mother etc. it is from this group that he can inherit and it is they who can inherit from him. On a man's death therefore the order of succession is divided into the following categories (i) his mother, his full and uterine brothers and sisters; (ii) the issue of his full and uterine sisters; (iii) his mother's full and uterine brothers and sisters; (iv) the issue of his mother's full and uterine sisters; (v) his maternal grandmother etc.⁵⁹⁹ Clearly as in any other system of succession the existence of persons in the category closest to the deceased excludes the others and even within the categories the closeness in degrees is another ground for exclusion. For example in the first category, the existence of the mother automatically excludes the full and uterine brothers and sisters.

Two observations emerge from this arrangement. The first and undoubtedly the most distinctive characteristic of the system is that a child cannot inherit from his father, and child under the system includes that who was born out of wedlock but was recognised by the deceased and treated as his child. If there is anything repugnant in this it is that the rule could dissuade a man from acquiring property knowing that it

⁵⁹⁹ See Edith, Ndima, "Theory and Practice in Matrilineal Tribes," term paper, Faculty of Law, University of Dschang, 2000 (unpublished); Anye Dieudonné, "Avoiding the Effects of Matrilineality in the Balue Tribe in Ndian Division," term paper Faculty of Law, University of Dschang, 2004(unpublished).

would go to some relative of his mother's or even to educate his own children on the ground that the child's property will go his mother's family.

From the point of view of the child the rule cannot be dismissed immediately as being repugnant given that it could be possible that the uncle from whom he succeeds is richer than his own father. Furthermore although succession is matrilineal members of the communities live in the compounds of their various patrilineages, hence the children live in their father's compound and this means that he has obligations towards them. A father in matrilineal communities has an unquestioned obligation to house, support and advance his children⁶⁰⁰ and these are the obligations which upon the death of a man intestate are taken over by the successor and which are enforceable against him.⁶⁰¹

If the rule that children are not entitled to their father's succession has been applied with ease in the case of a deceased male it has not been the same in the case of a deceased female. The rule according to which succession follows the woman's bloodline implies that every woman is the beginning of a new family⁶⁰² and the question arises whether her direct descendants should not be given priority in succession as against her matrilineal relatives. In *Mills v. Addy*⁶⁰³ Ollennu, J. ruled in favour the descendants but apparently, only because there were no surviving members of the deceased's matrilineal family. This decision could not therefore be authority on the point since a different decision might have been possible if there were matrilineal descendants of the deceased.⁶⁰⁴

⁶⁰⁰ See Ollennu, N. A., The Law of Testate and Intestate Succession in Ghana, London, Sweet & Maxwell, 1966, 217-222.

⁶⁰¹ See *In the Matter of the Estate of Edward Anfu Whyte* (1946) 18 N.L.R 70.

⁶⁰² See *Mills v. Addy* (1959) 3 W.A.L.R. 357, 362, cited by Ollennu, *supra*, 78, in which it was said that every woman is the originator of a family.

⁶⁰³ (1959) 3 W.A.L.R. 357,

⁶⁰⁴ See Woodman, G. R. "Two Problems in matrilineal succession" (1969) 1 Rev. Ghana Law, 6-30, 18.

This was the case in *Krakue v. Krabah*⁶⁰⁵ where the plaintiff, a brother of the deceased sued the daughter of the deceased for an account of rents from the property, and an injunction restraining the defendant from interfering with the plaintiff's right. The defendant challenged the plaintiff's *locus standi* arguing *inter alia* that he was not a member of the inheriting family. It was held by the Supreme Court that the right to the immediate enjoyment vested in the immediate family, and that this consisted of all the matrilineal descendants of the mother of the deceased woman.

It seems, however, to be settled law that the issue of a deceased woman takes precedence over her matrilineal relatives. In *Krakue v. Krabah* Ollennu delivered a dissenting judgment in which he changed his earlier position in *Mills v. Addy*. Bentsi-Enchill favours succession by the descendants of a deceased woman.⁶⁰⁶ In a similar vein Woodman writes that "If a man and his female uterine cousin are the sole surviving matrilineal descendants of their grandmother, he belongs to the cousin's immediate family; but as soon as she has children, he ceases to belong to it..."⁶⁰⁷

The second observation which emerges from the order of succession is that men and women have equal succession rights, for not only are they entitled to share in the distribution of the estate,⁶⁰⁸ it is accepted as a rule that they can be family heads or successors. This is so in the Bakundu Balue matrilineal system. In *The matter of Chief Moleke of Bafaka Village*⁶⁰⁹ the sister of a deceased male was made successor as against his children.

A variation has however been noted in the Kom and other tribes in the North West Province purporting to practice matrilineal succession. Even though the general

⁶⁰⁵ Cited by Woodman, *ibid*, 19.

⁶⁰⁶ *Ghana land law*, London, Sweet & Maxwell, 1964, 128.

⁶⁰⁷ "Two Problems in matrilineal succession" (1969) 1 *Rev. Ghana Law*, 6-30, 24.

⁶⁰⁸ Ngongang-Ouandji, Andre, "La devolution successorale au Cameroun", (1972) 26 *Rev. Jur. Pol. Ind. Coop.* 639-662, 645; John Anthony Howard, "Customary Law of Marriage and Succession among the Kom of Cameroon", Ph. D. thesis, University of London, 1972, 218-222 (unpublished).

⁶⁰⁹ Mbonge Customary Court, suit no. 17-10-12 (unreported)

rule that succession follows the woman's bloodline in respected, women find themselves in a position similar to their counterparts in the patrilineal tribes.⁶¹⁰ According to Vubo, "A woman is almost confined to the role of producer of the lineage, ensuring lineage continuity although she could intercede before the ancestral spirits for the welfare of her household or usurp the right of exercising the role of caretaker over her deceased brother's property."⁶¹¹ Hence upon the death of a man succession to his property is by his nephew.⁶¹² In default of nephews the search for a successor goes down the line to his first maternal cousins rather than give succession to the nieces. Only when no cousins are found are nieces allowed to succeed but only after the fiat of a family council.

4.6.1.4: The position of widows.

None of the definitions for the term "family" includes the widow on the ground that she and the husband have different lineages. But if this is true of the extended and immediate families, it cannot be so with the sub-family. This is a family which consists of the spouses and their descendants and which ought therefore to be defined not in terms of lineage but in terms of marriage, reason why the widow ought to be considered as a member of the deceased sub-family and given succession rights therein, although not in the larger family?⁶¹³

The widow is the *bête-noire* of the family accused of the all the ills. Her greatest challenge comes from her female counterparts who, if they do not accuse her

⁶¹⁰ See John Anthony Howard, "Customary Law of Marriage and Succession among the Kom of Cameroon", Ph. D. thesis, University of London, 1972, 17.

⁶¹¹ Vubo, Emmanuel Yensu, "Matriliney and Patriliney Between Cohabitation- Equilibrium and Modernity in the Cameroon Grassfields, available at <http://www.jamboafrika.kyoto>

⁶¹² See *Buo Kang Mathias v. Mih Izagha*, Wum Customary Court, Suit No. 8/02-03 (unreported); *Bah Ekom Amos v. Ebua Batali*, Wum Customary Court, Suit No. 12/02-03 (unreported). Cited by Amos, Wango Chianan, "Theory and Practice of Matrilineal Succession," unpublished term paper, Faculty of law, University of Dschang, 2003. See also Edith, Ndima, "Theory and Practice in Matrilineal Tribes," term paper, Faculty of Law, University of Dschang, 2000.

⁶¹³ See the decision of Yaoundé Court of Appeal, Arrêt No. 47 of 10 January 1991 (unreported) which ruled that a daughter-in-law could not be her mother-in-law's successor.

of having killed their brother, would accuse her of having enjoyed his wealth alone and for having probably prevented him from helping the family members. With this image of the widow and coupled with fact that she is viewed as a stranger to the family, the possibility of her succeeding are very remote.

Native law and custom generally resolved the question of the succession rights of widows by providing that they could get married to another male relative of the deceased husband and so continue to be a member of the household with all the rights that go with it. As will be shown later the institution of levirate marriage is fast ebbing out but this should not be taken to mean that widows are always left destitute.

Widows have rights erroneously described as succession rights, probably because of the death of their husbands. They include the right to maintenance, residence in the matrimonial home and arable land. These actually constitute some of the duties which the deceased owed to his wife and which were enforceable against him.⁶¹⁴

In *Nsom Fombui Amborse v. Nkuo Kelvine*⁶¹⁵ the nephew of the deceased was held to have erred in sending the widow and children out of the compound and installing himself therein. In fact the widow was reinstated in the home and the succession was transferred to a different person. Enforcement of the right to maintenance against the successor could even result in the successor losing some of his rights in favour of the widow. This is common where the deceased was entitled to financial benefits which after his death go to the successor. Such benefits are generally transferred to the widow so that the successor only has the title of family

⁶¹⁴See Mbouyom, Francois-Xavier, « Le statut juridique, politique et social de la femme au Cameroun. » (1974) 28 Rev. Jur. Pol. Ind. Coop. 600-612, 603 ; John Anthony Howard, “Customary Law of Marriage and Succession among the Kom of Cameroon”, Ph. D. thesis, University of London, 1972, 218-225 ; Dzeukou, Guy Blaise, « Le Juge entre coutume et la loi dans le droit de la famille : Essai sur le pluralisme juridique au Cameroun », thesis, university of Paris I, 2002, 428 et seq. (unpublished)

⁶¹⁵ Suit No. BOHC/PD/LA/02/02-03 (High Court Boyo Division, North West province) (unreported)

head. In *Mukete Rebecca v. Mokube Solomon Sakwe*⁶¹⁶ the widow brought an action in the customary court claiming to replace the successor on the ground that he was irresponsible and was neglecting his obligations to maintain her and the children. Her plea was upheld by the court and she was named next-of-kin for the purpose of managing the funds of the deceased.⁶¹⁷

Paradoxically a widower might without precondition inherit from his deceased wife. A distinction is made between her nuptial and ante-nuptial property. Property acquired during marriage is regarded as belonging to her husband and when he dies the property devolves as described above, without distinction between male and female descendants of the husband.⁶¹⁸ The ante nuptial property of the woman goes normally to her children and in default of children, to her relatives and never to her husband, except as regards personal property which she took to the husband's house. This principle was affirmed in *Nwugege v. Adigwe*⁶¹⁹, in which the claim by the family head of a deceased widow for letters of administration to her estate was opposed by her husband's son by another wife. The step-son was held to be the proper person to administer estate.

Inheritance of a wife's property by her husband contradicts the general principle that succession follows the blood. It could be defended by another principle of customary law in patrilineal societies that marriage transfers the wife to the husband's patrilineage and subjects her to its control.⁶²⁰

⁶¹⁶ Ekwe Customary Court, Civil Suit No. 7/7/2001. (unreported).

⁶¹⁷ See also *Kwoh Wandim Ndonyi Theresia v. Nsang Martha & Chinwo Joseph*, Suit No. C/S58/01/02 (Kom Customary Court) (unreported); *Mary Diang v. John Aboh*, Suit No. 63/01/02 (Kom Customary Court) (unreported); *Achumchu Tantoh Vivian v. Ndeh Martin Tantoh & 4 ors* (2004) Mankon Customary Court, Civil Suit No.45/03-04 (unreported).

⁶¹⁸ See Armstrong, R. G., "Intestate succession among the Idoma" in J. Duncan M. Derrett, *Studies in the Laws of Succession in Nigeria*, Oxford, Oxford University Press, 1965, 225 et seq.

⁶¹⁹ (1934)11 All \N. R. 134.

⁶²⁰ See Nwabueze, *Nigerian Land Law*. 391.

4.6.2: WOMEN IN MUSLIM LAW

The Muslim system of succession greatly modified by indigenous customary law is observed in the Muslim areas and by converts in other parts of the country.⁶²¹

In accordance with the principles of the Maliki code applicable in Cameroon, property is never held in the name of the family because the distribution is expected to take place after a brief period of administration intended to settle funeral expenses and pay the debts⁶²² owed by the deceased including any deferred dower.⁶²³ However, when the deceased's issue are still minors administration might last longer. Furthermore, the agnatic heirs could decide to maintain the property as a single entity if that option renders the property more productive and profitable. The rules of distribution are so complex that in order to be workable the property is more often than not sold and the proceeds shared among the beneficiaries.⁶²⁴ The question will certainly arise whether the administration could be entrusted to females either as daughters or widows in these circumstances.

The provision of the Quran which has guided the provisions of the Maliki code relating to women is chapter 4 verse 7 in which the Holy Prophet ordains that "From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large,- a determinate share," And by a determinate share it means that a male gets twice the share of a female.⁶²⁵

Women are an integral part of both the Quranic and agnatic heirs, these being the categories in which beneficiaries are classified. Quranic heirs are specifically mentioned and allotted specific shares of the estate in the Quran. Male Quranic heirs

⁶²¹ Discussed in chapter two.

⁶²² See Hussain, A., *The Islamic Law of Succession*, Riyadh, Darussalam, 2005, 413.

⁶²³ Muhammad Abul Hai' Arifi, *Death and Inheritance*, Lahore, Idara-e-Islamiyat, 1998, 194.

⁶²⁴ See Smith, M. G., "Hausa Inheritance and Succession," in J. Duncan M. Derrett, *Studies in the Laws of Succession in Nigeria*, Oxford, Oxford University Press, 1965, 252-253.

⁶²⁵ Chapter 4 verse 11 of the Holy Quran.

are the father, true grandfather i.e. the father's father, widower and uterine brother. Female Quranic heirs are the mother, true grandmother, widow, daughter, son's daughter(s), full sisters, consanguine sisters (same father), uterine sisters (same mother).⁶²⁶ The preoccupation of the Prophet seems in this category to have been to provide for the less privileged persons and allowing those privileged to continue to benefit in accordance with a modified version of Arabian customary law which he succeeded to render more humane. The absence of children of the deceased is therefore not an omission because they take as agnatic heirs, since only a small part of the estate is distributed to Quranic heirs. The bulk goes to the agnatic heirs and this is where the similarity with the patrilineal system becomes manifest.

Literally agnatic heirs are persons who descend from the deceased or claim the same patrilineal descent with him.⁶²⁷ Descent is reckoned in the same way as in a patrilineal system. Hence agnatic heirs consist of the issue of deceased, father and brothers of the whole blood and their issue, and the grandfather and his male descendants. Excluding women with the same degree of relationship with the deceased would have rendered nugatory the Prophet's effort to improve on the lot of women. Females are therefore assimilated as agnatic heirs whenever there is in existence a corresponding male agnate with the same degree of relationship with the deceased.⁶²⁸ For example the son makes the daughter an agnatic heir. It is in the context of agnatic heirs that the rule that males get twice the share of females is applicable.⁶²⁹

⁶²⁶ See Hussain, A., The Islamic Law of Succession, Riyadh, Darussalam, 2005, 62-66; Ajijola, A.D. Introduction to Islamic Law, New Delhi, International Islamic Pictures, 1989, 233-235.

⁶²⁷ Hussain, *ibid.* 67; Ajijola, *ibid.* 237.

⁶²⁸ Hussain, *ibid.* 69. Ajijola, *ibid.* 237

⁶²⁹ Hussain, *ibid.* 71; See Smith, M. G., "Hausa Inheritance and Succession," in J. Duncan M. Derrett, Studies in the Laws of Succession in Nigeria, Oxford, Oxford University Press, 1965, 247.

In the light of the foregoing general principles males and females have a parity in succession rights,⁶³⁰ which puts Moslem law ahead of customary law. It is not a mathematical equality but one based on the necessities of justice and the allocation of duties and responsibilities in the family.⁶³¹ Islam imposes on men various financial obligations and none on women, who contrary to men have the dowry and an inheritance.⁶³²

But there is a large gap between what the law says and the actual practice. Women are generally deprived of their rights by the male relatives. Daughters are physically or psychologically coerced into giving up their shares in return for protection from their brothers when their marriages terminate by divorce or death.⁶³³ In a study conducted by Hamisu in the Moslem communities of Cameroon one question addressed to 55 women was whether “children” usually receive their share of inheritance as prescribed by law. 39 responses were positive and 16 negative attributed to the obstructionist attitudes of some male relatives. The use of the generic “children” is of very little help in determining the gender of the persons whose rights the questionnaire sought to establish. It can only be assumed to have been females given that opposition came from male relatives.⁶³⁴ Against such attitude, the Moslem Scholar Muhammad Abdul Hai’Arifi had cautioned:

“That some people do not give sisters and daughters their share in the inheritance is certainly an act of rank injustice. Just because they are given gifts and things at the time of their marriage, they presume that

⁶³⁰ See See Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 Rev. Jur. et Pol. d’Outre-Mer, 639-662, 639..

⁶³¹ Mohamed Salah Rached Sammari, “Reflexion sur la Condition de la Femme en Droit Musulman,” (1974) 28 Rev. Jur. Pol. Ind. Coop. 548-557, 556.

⁶³² See Tahir Mahmood, “The Grandeur of Womanhood in Islam.” (1986) 5(1) Islamic and Comparative Law Quarterly, 1-14, 12; Hamisu, Rabiātu Danpullo, “Women, Property and Inheritance— The case of Cameroon.” *Recht in Africa* 2005, 143-161, 151.

⁶³³ See Owen, Margaret, *A world of Widows*, London, Zed Books, 1996, 65.

⁶³⁴ Hamisu, Rabiātu Danpullo, “Women, Property and Inheritance— The case of Cameroon.” *Recht in Africa* 2005,, 143-161, 159.

such givings [sic] were enough to take care of their rights. This is totally incorrect; gifts never cancel the right to receive from the inheritance. It is obligatory to give sisters and daughters their share in the inheritance and any effort to exclude them from it is forbidden and is also an act of tyranny committed against them”⁶³⁵

Furthermore, by being applied as native law and custom Moslem law is greatly influenced by the local customs that preceded its advent, so that its even application in all the communities can not simply be assumed.⁶³⁶ There is a tendency for the person charged with the administration to refuse to distribute, preferring to hold the estate as family property on the ground that “everyone can share and use things around.”⁶³⁷ As noted above succession by the family is not a rule of Moslem law, hence any such acts are *harām* meaning that they are prohibited, unlawful and punishable from the point of view of Islam⁶³⁸ and that everyone who indulges in them stands to face punishment in Hell.⁶³⁹ An exception to this rule is where the beneficiaries acquiesce in the idea of family property or fail to claim their rights in court. By treating the property as family property the rights of women become curtailed and they are placed in a position worse than their counterparts in the other systems, where at least, there is hope of distribution.

It seems that very few succession cases ever get to the Moslem courts, considering that Succession was one of those matters where the application of custom was allowed by early Moslem leaders. Most cases are therefore handled informally by

⁶³⁵ Death and Inheritance, Lahore, Idara-e- Islamiat, 1998, 194.

⁶³⁶ See our discussion on the application of Muslim law.

⁶³⁷ See Muhammad Abdul Hai’ Arifi, Death and Inheritance, Lahore, Idara-e- Islamiat, 1998, 193.

⁶³⁸ See Qazi, M. A., A concise Dictionary of Islamic Terms Lahore (Pakistan), Kazi Publications, 1979, 19.

⁶³⁹ Muhammad Abdul Hai’ Arifi, Death and Inheritance, supra.

instances that follow the local customary law as against Moslem law.⁶⁴⁰ When they do get to the courts the customary law prevailing in the area is more often than not favoured.⁶⁴¹

If daughters as members of the family are excluded then the widows lack the locus standi even to contemplate succession, and a fortiori to become successors. A study conducted in the Moslem North revealed a sort of indifference on the part of married women. One of them said: "I know that when my husband will die, I will have nothing, I will return to my village after the funeral and continue my life there. It has been like that through the generations, men are considered as our leaders. This is even stated in our Coranic law."⁶⁴² And another added: "I know I will return to my family. But I have my children; they will inherit and take care of me. So through them I will have something."⁶⁴³ Islamic law as against customary law makes no provision for the maintenance of widows given that they are normally entitled to an inheritance. But a widow who is thus excluded could sue for maintenance under customary law⁶⁴⁴ or cause her rights under Moslem law to be enforced by the appropriate Moslem court, a course which many avoid.

4.8: DESIGNATION OF THE SUCCESSOR

The assertion that succession is by the family must be qualified by the fact that the family as a corporate entity⁶⁴⁵ lacks the attributes of human beings which would

⁶⁴⁰ See Smith, M. G., "Hausa Inheritance and Succession," in J. Duncan M. Derrett, Studies in the Laws of Succession in Nigeria, Oxford, Oxford University Press, 1965, 245.

⁶⁴¹ See *In the Estate of Dada Baba Nya* (1985) C.A.S.W.P/CC/16/85 (unreported), where contrary to Muslim the concept of family land was upheld; also in *Gboron Yaccouba et Amemena D. Suzanne c/ Mbombo Asang et Ndam Emile Issiaka*, Court of Appeal, Bafoussam, Jugement No. 001/C of 23 October, 1997 (unreported).

⁶⁴² Ngoli Ze Irene, "Attitude of the rural woman towards the rule that a woman cannot inherit property." Term Paper, University of Dschang, p. 4, (Unpublished).

⁶⁴³ *Ibid*, p.5.

⁶⁴⁴ By refusing to follow Moslem law the successor is bound by customary law.

⁶⁴⁵ It is necessary to point out that the term "corporate" as used here is unique to customary law as English law recognises no corporation in a family as compared to a company or partnership. Hence the concept of family property is unknown under that law for even when property is acquired for the use of

enable it to exercise effective control over property. The rights and duties inherent in succession are exercised through the agency of human beings. The family therefore designates one of its members to play the role; this person is called the successor. The successor might be likened to the heir-at-law of the old English law. But whereas the heir-at-law took an absolute interest over realty, subject only to the rights of the surviving spouse, the successor takes only a possessory interest over both land and movables. He has control of the property prior to its distribution, and since distribution is often unlikely, he literally takes the place of the deceased as family head.⁶⁴⁶

He could be likened to the personal representative but with the difference that while the property vests in the personal representative in English law, in customary law the property vests in the family and not the successor.⁶⁴⁷ This position is vindicated by Ngongang-Ouandji, one time minister of Justice when he writes: “succession could be analysed in Cameroon as consisting of a transmission of the powers of administration of family property from father to sons.”⁶⁴⁸

A distinction needs to be made between the caretaker and successor. A successor is beneficiary but a caretaker not. The caretaker is generally the oldest male relative, often the brother of the deceased,⁶⁴⁹ called upon to play the role when the deceased is not survived by any male issue or the male issue is still too young. This practice is responsible for the view that when a person dies it is his brothers or father

the family and enjoyed by them as “family property”, the members thereof are considered as joint tenants or tenants in common.

⁶⁴⁶ See Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 Rev. Jur. et Pol. d’Outre-Mer, 639-662, 656.

⁶⁴⁷ See *Affaire Ebanda Njok Elie /c Eyombwain Njoh and others*, Supreme Court, Arrêt No. 42/L of 9 March 1978, (Douala tribe) (unreported); *Affaire Peuteu Jacqueline /c Ngouoko Joseph*, Douala Court of Appeal, Arrêt No. 131 of 23 May 1991 (Bamileke tribe) (unreported).

⁶⁴⁸ « La succession peut s’analyser au Cameroun comme étant une transmission des pouvoirs d’administration des biens de la famille du père au fils. » Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 642.

⁶⁴⁹ See *Daniel Njike & 3 ors v. Zachius Ehang* (1978) Y.U.L.R. 78.

who succeeds him. The result is that many a caretaker considers himself as successor and neglects his responsibilities towards the family of the deceased and appropriates the patrimony to his own use or to the use of his own children.

Successors are designated by family councils following the burial and funeral ceremonies.⁶⁵⁰

4.7.1: The Burial and Funeral

The burial is generally organised and financed by the patrilineal or matrilineal kinsmen of the deceased depending on the nature of the tribe and irrespective of whether the deceased was subject to English law.⁶⁵¹ Funerals are generally a mixture of Christian and traditional rites. In many cases, the deceased though a polygamist often belonged to some denomination. And if he did not, his family ensures the performance of Christian rites at the funeral ceremony.

Under common law individuals are generally free to determine in advance how their bodily remains should be disposed of by the inclusion of a burial clause in their will. Legally such wishes are not enforceable against the executors because of the rule that the law recognises no property in the dead body of a human being, but might have an effective moral force.⁶⁵² If they die intestate their wives decide on where the burial should take place.⁶⁵³

⁶⁵⁰ Ngongang-Ouandji, Andre, "La devolution successorale au Cameroun", (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 643.

⁶⁵¹ For example in *Njonji Godlove v. Esther Njonji* (2002) HCK/AE/K.16/2000 (unreported), the funeral of the deceased, a retired teacher who contracted a Christian marriage was organised by his entire family as emerged from the judgment; Boston, J. S., "Igala Inheritance and succession," in J. Duncan M. Derrett (ed), *Studies in the law of succession in Nigeria*, Oxford, Oxford University Press, 1965, 123.

⁶⁵² See Clark, J. B., *Parry and Clark the Law of succession*, London, Sweet & Maxwell, 1983, 6.

⁶⁵³ See Bennett, *Customary law in South Africa*, Cape Town, JUTA, 2004, 333.

The situation is not as easy in Africa because burial and succession rights seem to be intricately linked together. The Kenyan *cause célèbre*, *the Otieno case*⁶⁵⁴ epitomises the conflict between customary and modern law in this respect. The deceased a Western educated lawyer was of the Luo tribe while his wife was a Kikuyu. They had contracted a Christian marriage, led a western life-style and were therefore subject to the English law. Pursuant to English law the widow claimed that the body was to be buried at their family home near Nairobi, while the eldest brother of the deceased wanted it buried near Lake Victoria, the land of his patrilineal Luo ancestors. The Kenya Appeal Court ruled in favour of the brother and thus established a precedent in favour of customary as against English law in matters of burial.

If the deceased intimated a wish to be buried elsewhere the clansmen are not obliged to comply if this is not in conformity with custom.⁶⁵⁵ For when such a wish is expressed the situation is treated in a similar manner as would be the case when it is impossible to convey a corpse home. The family head and members of his tribe resident in the chosen place or where he died would by custom constitute his family to perform the ceremony. Something representing the deceased is then taken to report to the family which will then perform the final obsequies⁶⁵⁶ aimed at laying the deceased to rest with his ancestors.

⁶⁵⁴ Virginia Wambui Otieno v. Joash Ochieng 'Ougo' This case is fully described by Howell, Roy Carleton, "Otieno Case: African Customary Law versus Western Jurisprudence," in Renteln, A. D. and Dundes, A. (ed), Folk Law: Essays in the theory and practice of *lex non-scripta*, Vol. 1, the University of Wisconsin Press, 1995, p. 827-844. See also John W. Van Doren, "Death African Style: The case of S. M. Otieno"(1988)36 *American Journal of Comparative Law*, 329-350; Evans Monari, *Burial Law—Reflections on the S.M. Otieno Case* (1988) 31 *Harvard Law Journal*, 667-674.

⁶⁵⁵ The operative part of the judgment read: "The decision as to where and how an adult Luo will be buried rests with the clan from which he hails. Even if a man may have in his life time expressed a wish as to his place of burial, it is in evidence that the wish will be subject to the customs and traditions of his clan. The clan are not, necessarily bound to comply with those wishes if they do not conform with the customs and traditions of that clan."

⁶⁵⁶ Ollennu, N, A., The law of testate and intestate succession in Ghana, London, Sweet & Maxwell, 1966, 68.

The disputes are generally because of succession, as so aptly expressed by a Ghanaian proverb according to which “... he who buries the leper is the person entitled to take his sandals.”⁶⁵⁷ On the customary law of South Africa Bennett writes “... burial is often an emotionally and culturally charged issue. Disputes are therefore likely to arise about where and how a deceased is to be buried. These disputes arise in part because the person with the right to decide on burial usually stands to inherit the estate.”⁶⁵⁸

An article in “The Post” of 29 September 2008, a popular newspaper in Cameroon carries the caption “Court rules in favour of corpse”. The Douala Court of Appeal had just confirmed the decision of the High Court granting burial rights to the family of a deceased woman as against her husband. Her corpse had remained in the mortuary for sixteen months because of a dispute between the two families as to who has the right to bury her. The husband was allegedly responsible for her death and according to the judge he could not be honoured with the right to bury her. This seems to be overshadowed by the fact that the dispute was actually a question of succession and not necessarily the honour to bury a beloved one. This emerges from a statement by the brother according to which, “They [the husband’s family] were just dillydallying hoping that they would impoverish us but we just kept going until finally we have a legacy....”⁶⁵⁹

In *Ajong v. Ajong*⁶⁶⁰, the parties were nephews of the deceased intestate, who was not survived by any son of his. The respondent claimed to be solely entitled to his estate on the ground that he took care of the deceased from when he took ill to when

⁶⁵⁷ Ollennu, N. A., The law of testate and intestate succession in Ghana, London, Sweet & Maxwell, 1966, 69.

⁶⁵⁸ Bennett, T. W., *Customary Law in South Africa*, Cape Town, JUTA, 2004, 333.

⁶⁵⁹ Article by Elvis Tah available at <http://www.thepostnewsline.com>

⁶⁶⁰ Known in full as *Abi Zachariah Ajong v. Nji Michael Ajong* (2000) 1CCLR, 67.

he died. The appellant claimed to be entitled to share in the estate on the ground of having contributed to the funeral celebrations. The trial court held, and this was confirmed at appeal, that because both parties “celebrated Enwebadang’s death each of them was entitled to share in his estate.”⁶⁶¹

The burial is followed by a period of mourning which could last days, weeks or months. At the end the funeral is organised and rounded up with a family council, during which important matters including the payment of the debts of the deceased, maintenance of minor children and widows are discussed. These are responsibilities that require the making of arrangements on the fate of the property left by the deceased. The council thus has the mission after the funeral to decide on whom to entrust the management of the property to in the name of the family.⁶⁶²

4.7.2: The Family Council.

4.7.2.1: The Composition.

According to Doumbé-Mouloungou the family council is composed of all the adult male members of a family. Women and children, he writes are admitted only when the matters to be discussed are not weighty.⁶⁶³ The situation has so far evolved that the membership of the family council is no longer limited to male members of the family. Women are known to occupy prominent positions in this institution today.⁶⁶⁴

⁶⁶¹ Ibid. 69.

⁶⁶² See generally Ollennu, N, A., The law of testate and intestate succession in Ghana, London, Sweet & Maxwell, 1966, 68-70.

⁶⁶³ Doumbé-Mouloungou, M., Les coutumes et le droit au Cameroun, Yaoundé Edition CLE, 1972, 24.

⁶⁶⁴ See *Peter Charles Chi v. Chinkwo Nde Fidelis & Caroline Chi* (2006) Appeal No. BCA/62/2003 (unreported) where the family council there were six women as against three men and a woman served as secretary. Also in the family meeting that preceded the case of *Nzoukekang Stephen Tchinda v. Nzoukekang Eric & Seven others*, (2005) Appeal No. BCA/24/2004, unreported, there were eight men and eight women.

The council aimed at designating the successor⁶⁶⁵ or successors⁶⁶⁶ is generally chaired by the eldest male relative of the deceased, failing which it could be the village chief or his representative. Other members may include persons from the extended family, but the most important are persons entitled to the succession. These must be personally present or represented by the principal members of the family.

The principal members depend on the number of branches to a family. There is one branch if the deceased had one wife with children or was a woman. In the family of a deceased who had more than one wife with children, the children of each wife constitute a branch.⁶⁶⁷ In the first scenario each child is a principal member while in the second, the principal members are the eldest children of each of the wives irrespective of their sexes.

4.7.2.2: The Mission.

Ordinarily the family council sits as an informal court in matters involving members of the family,⁶⁶⁸ and it is in this capacity that succession matters are first submitted to them and taken to the courts only when a satisfactory solution is not found.

The mission of the council in the circumstances under consideration will be (1) to hear the will where there is one and (2) to designate a successor where none has been designated by will. Family members are not generally bound to accept the person appointed by the deceased if the choice is at variance with custom. In tribes

⁶⁶⁵ The single-heir system is practiced, for example, by tribes in the West, North West and South West provinces.

⁶⁶⁶ This is common in tribes in Centre, South and Eastern provinces.

⁶⁶⁷ See generally James, R. W., Modern Land Law of Nigeria, supra, 86-88.

⁶⁶⁸ Doumbé-Mouloungou, M., Les coutumes et le droit au Cameroun, Yaoundé Edition CLE, 1972, 26

such as Douala, Bassa, Bassossi, Mendankwe and Banyang the successor is known in advance, a choice which the deceased is not free to alter.⁶⁶⁹

This is, however, not a general rule. The Bamileke, for example recognise male primogeniture and the possibility for the deceased to designate any other of his male children as successor.⁶⁷⁰ In fact the custom in this area has evolved so that the deceased could even designate a daughter as was the case in *Nana v. Nana*.⁶⁷¹ The deceased left a will in which he named his daughter as successor and during the hearing of the will by the family it was asked if anyone was opposed to the designation. There was no opposition but it was conceded that this might eventually come from the eight years aged son of the deceased when he comes of age. What this implies is that the priority given to males is not displaced but merely that when there is no male child a person might designate a daughter as successor.

4.7.2.3: The Binding Force of Council Resolutions

Consensual resolutions of Family Council are generally binding on the members. These are sufficient to enable the administration of the estate to be pursued but often the family, in a bid to clothe the resolution with legality submits same to the customary court in exchange for a next-of-kin declaration said to be the prerequisite for the grant of letters of administration. This is in contrast with the position in Francophone Cameroon, where Family Council resolutions are submitted to the competent court in view of the *jugement d'hérédité*, the French equivalent for letters of administration.

⁶⁶⁹ See Binet, Jacques, "La devolution successorale chez les Douala du Cameroun", (1955) 65 Penant, 33-40, 35.

⁶⁷⁰ In a decision of the Court of Appeal of Bafoussam, arrêt no. 108 of 11 January 1968 it was stated thus: « Considérant qu'en coutume Bamileke, le propriété étant familiale, collective et géré par le seul chef de famille, seul le fils aîné ou le fils désigné par le chef de la faille est héritier de celui-ci. »

⁶⁷¹ (2005) Suit No. HCF/PROB/AE1/2001-2002 (unreported)

The courts will not question a resolution of the family council on the choice of the successor, provided that the council was properly constituted and the resolution was taken in accordance with accepted procedure.⁶⁷² The choice could be questioned in court only when the rightful person is shown to have been passed-over unjustly or capriciously.⁶⁷³ In *Nzoukekang v. Nzoukekang*,⁶⁷⁴ a resolution of a family council removing the plaintiff, the oldest son of the deceased from the office of successor was rejected on the ground that the resolution was not consensual and the plaintiff had done nothing to justify being passed-over.

Family council resolutions are more likely to be disregarded on grounds of repugnancy or public policy when a woman, especially the widow is excluded, even when the decision was taken by a regularly constituted family council. In the *Estate of Noumbissie*⁶⁷⁵ a family council resolution and the resultant next of kin declaration were rejected because the brother of the deceased rather than the widow was designated.⁶⁷⁶ The next-of-kin declaration and by extension family council resolutions was said not to “tie the hands of the court.” The purpose of next-of-kin declarations as disclosed in *Peter Charles v. Chinkwo Nde*⁶⁷⁷ is that it “consists of a proposal to the Administrator-General while examining applications for letters” and “does not

⁶⁷² See Woodman, G. R., “Judicial Control of the Family Meeting”, (1981-82) 13 &14 Review of Ghana Law. 222-226, 224.

⁶⁷³ See *Poh v. Konamba & Ors.* (1957) 3 W. A. L. R. 74.

⁶⁷⁴ (2005) Appeal No. BCA/24/2004 (unreported).

⁶⁷⁵ (2002) 1 C.C.L.R. 1, 5; see also *Stephen Ncha & 5 ors. v. Chi Simon Nde*, (2006) Appeal No. BCA/33/2004 (unreported).

⁶⁷⁶ The reverse is true when the person excluded is a man and notwithstanding proof of irregularity. In *Ajong v. Ajong*⁶⁷⁶ the appellant argued that the trial court erred by admitting the family council resolution. He claimed that he was not present at the meeting and that not being a constituted court nor a juristic person family council resolutions are only of evidentiary value. The response of the court in the face of the claims was that “The family council is the nearest nucleus of the family made up of the entire family members who are better placed to trace the issue of inheritance as they did. The trial court was therefore correct to rely on their findings.”

⁶⁷⁷ (2006) Appeal No. BCA/62/2003 (unreported).

bind him and consequently cannot limit him to a particular group of persons from whom an administrator may be appointed.”⁶⁷⁸

This begs the question whether the next-of-kin declaration is a *sine qua non* for letters of administration. Taminang, J. in *Chibikom No. 2*⁶⁷⁹ said that the next-of-kin declaration constitutes “the pre-requisite for granting letters of administration.” The question is whether this does not contradict the earlier description of the declarations as a “proposal”? Besides the judge seems to ignore the fact that customary courts have no jurisdiction over the estates of persons who contract monogamous marriages and that, therefore, the declaration cannot be mandatory in those cases.

Such was the situation in *Galega v. Galega*,⁶⁸⁰ where letters of administration were granted in the absence of a next-of-kin declaration. The case was held not to be good law in *Catherine Makebe v. Chambo née Wongibe Rosemary*⁶⁸¹ on the ground according to Wacka, J. that:

“With regard to the Galega case, the Court of Appeal is not bound by its decisions. Shortly after the decision in BCA/19/93: *Nwana Galega Getrude v. Wamyonga Galega Thomson*, Thomson who was granted letters of administration died. Of course some of the property was in his custody. What happened? Since he died intestate his widow disposed of some of the property having obtained letters of administration for the deceased husband’s estate. How fair is justice in this case?”

⁶⁷⁸ Francophone Cameroonian courts adopt a similar attitude as evident in the statement by Ndoko according to which « Ces délibérations sont des avis purement consultatifs pour le juge qui est tenu de vérifier leur conformité à l’ordre public et d’écarter systématiquement leurs décisions qui violent les lois et règlements. » “L’idée d’égalité dans le Droit Successoral Camerounais: dernières tendances de la Jurisprudence en matière de la succession ab intestat” Yaoundé, 1990, 8 (unpublished).

⁶⁷⁹ *Chibikom v Zamcho Florence No. 2.* (2006) HCB/PD.LA.57M/05-05 (unreported).

⁶⁸⁰ Appeal No. BCA/19/93 (unreported).

⁶⁸¹ (2005) 1CCLR., 83, 93.

The question is whether this was not just a case of abuse of the office of personal representative, common even in cases of regularly obtained letters of administration. Must it be taken that the woman behaved thus because there was no next-of-kin declaration? Of course, next-of-kin declarations embody the consent of the family and the idea that the person to whom letters are granted holds the property on behalf of the beneficiaries, but so too do the letters of administration themselves.

Anglophone Cameroon seems to be the only former British colony where a customary court judgment on the choice of the successor is said not to stand on its own.⁶⁸² This is defended on the ground that only letters of administration would give access to certain types of property left by the deceased. The question is if the “*jugement d’hérédité*, in Francophone Cameroon which emanates from the traditional law courts⁶⁸³ gives access to such property, why not the next-of-kin declaration? True, a customary successor cannot on behalf of the estate, benefit from the application of English law,⁶⁸⁴ but the property in question, which could consist of pension benefits, bank accounts, shares in a company, is not necessarily governed by English law, but by the same laws that admit the “*jugement d’hérédité*.”

However, rather than castigate the practice it is worth the while to seek its *raison d’être*, since it could be likely that by instituting the practice, the High Courts think thereby, to be able to control decisions of the customary courts deemed to be repugnant or against public policy. The “*jugement d’hérédité*” would rarely fall foul of the requirements of *ordre public* considering that the decisions are arrived at in application of the civil code.

⁶⁸² We understand that this is apparently a very lucrative business for the Probate Division of the High Court and the probable reasons for the centralisation.

⁶⁸³ This was the situation until the introduction of High Courts in that part of the country in 1972, which now share the jurisdiction to issue the letters.

⁶⁸⁴ This has been explained in chapter two.

4.7.3: The Requisite Qualities for a Successor.

Each beneficiary is a potential successor and until recently it was also required for the successor to be of the male gender. Other factors such as character, ability, suitability and other relevant qualities and circumstances are taken into consideration before deciding on the choice of the successor.⁶⁸⁵ The successor is a father figure, hence the person qualified in terms of the general principles but lacking in any of these qualities might be passed-over in favour of a more suitable person. The point was made by the Bafoussam Court of Appeal :

*« L'héritier principal est cet enfant qui, jugé apte à poursuivre l'oeuvre du père, hérite de la concession familiale, de la garde des crânes des ancêtres et des avantages y attachés et surtout du respect que toute la famille et l'entourage reconnaissent au de cujus. »*⁶⁸⁶

The Ghanaian case of *In the Matter of the Estate of Emmanuel Nelson Tamakloe*⁶⁸⁷ gives a clear picture of the person amongst the beneficiaries who could step into the shoes of the deceased and stand in *loco parentis* vis-à-vis the others and the community:

“The senior boy or girl never automatically succeeds to the estate; an election by the deceased maternal or paternal relatives must be done strictly in accordance with the rules of native custom, and in most cases the choice goes to the senior surviving son of the deceased, when not proved to be a delinquent, i.e., a drunkard, spendthrift, litigious person or general waster. When the eldest son is disqualified for any reason from succeeding, the choice is given to one of his fit younger brothers”

⁶⁸⁵ Ollennu, The law of testate and intestate succession in Ghana, London, Sweet & Maxwell, 1966, 86.

⁶⁸⁶ “The successor is that child who, judged apt to pursue the task of father, inherits the family home, the guard of the skulls of ancestors et advantages attaching thereto and above all of the respect that all the family and the surrounding recognised in the deceased.” Arrêt No. 29 du 22 Juillet 1993 (unreported)

⁶⁸⁷ Cited by Ollennu, The law of testate and intestate succession in Ghana, 87.

These considerations, including when the would-be successor is still a minor⁶⁸⁸ have resulted in daughters and widows being considered at least, for the post of temporary successors pending the birth or majority of the rightful customary law successor.

In *Lizette Kwende v. Vejai Elizabeth* the plaintiffs, issue of a deceased female applied for a next-of-kin declaration over their mother's estate, in order to *inter alia*, follow up the pension benefits. The defendants made up of two brothers and a sister of the deceased thought that the declaration should be in their favour. The Mankon Customary Court found no difficulty in holding that "The plaintiffs are empowered to administer the estate of their deceased mother ...pending such a time that a would-be successor shall be installed to take over the inheritance and administration permanently."⁶⁸⁹

Widows could, if they have issue who are still minors be exceptionally placed in an analogous position with daughters as regards next-of-kin declarations.⁶⁹⁰ It is only exceptional because not being a beneficiary the widow should normally not be successor even if only temporarily. The foregoing is only as far as patrilineal tribes are concerned. In matrilineal tribes the widow has no right whatsoever in the estate and cannot even be made temporary next-of-kin. The children who would justify such an appointment are not themselves entitled to inheritance from their father.

Hence the fact that women are successors today is not yet a cause to rejoice. Firstly, the right is only temporary. Secondly, widows are designated not in their own interests but in that of their children and they could only be designated when the

⁶⁸⁸ See Victor, Keubou, "Procedure for designating next-of-kin in Bafou (Bamileke)" term paper presented to the Faculty of Law and Political Science, University of Dschang, 2000.

⁶⁸⁹ (2006) Civil Suit No. 91/05-06 (unreported).

⁶⁹⁰ See Mary Ngoh Timothy v. Njimba Jacob Nkangah (2006) Suit No. HCF/PROB/AE96/2001 (unreported) See also Bih Che et al., "Intestacy and Widowhood in two Patrilineal Tribes: Mankon and Nkambe," term paper presented to the Faculty of Law and Political Science, University of Dschang, 2002.

children are still minors. Thirdly, as explained above widows in matrilineal and Moslem communities are generally not entitled to be designated. Finally, many succession quarrels are settled in the family hence only very few of the cases ever get to the courts. By implication there might be more women out there, to whom the right has been denied and who would not risk the stigma attendant on taking their “brothers”, “fathers” and “husbands” to court.

Herein is the importance of the *Chibikom* case⁶⁹¹ which has become a *cause célèbre* for having instituted female succession in customary law in Cameroon. The deceased intestate was survived by five widows, two concubines and 38 children including the appellant, a married woman and the eldest child of the deceased. She applied to and was made temporary next-of-kin by the Mankon Customary Court,⁶⁹² and with the declaration obtained letters of administration which, like the next-of-kin declaration were also supposed to be temporary. Some of her male relatives were dissatisfied with the grant of letters and brought an action for their revocation. Having failed in the High Court they appealed to the Bamenda Court of Appeal which revoked the letters for reasons stated as follows:

“It is common ground that the respondent at all times material to these proceedings was and is still a married woman. She belongs to a family different from the one in which she was born. She cannot inherit from her father in accordance with customary law, and a fortiori she cannot be her father’s next of kin. The respondent was doubtless aware of her disability when she applied to the Mankon Customary Court for a declaration of temporary next of kin.”

⁶⁹¹ Zamcho Florence Lum v. Chibikom Peter Fru & Others, Supreme Court judgment No. 14/L of 14 February 1993.

⁶⁹² In Zamcho Lum Florence v. Susana Bih & Two Others (1985) Civil Suit No. 22/85-86, Mankon Customary Court (unreported).

The woman proceeded to the Supreme Court which quashed and annulled the decision of the lower court. The ratio decidendi of the decision went thus:

“Not only was the decision of their learned lordships based on sex discrimination in gross violation of the ... contents of the preamble of the constitution, but it was in total misrepresentation of section 27 of the Southern Cameroon High Court Law which ensures the observance of the native law and custom only on the sole condition that it is neither repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law in force in the Republic, that they applied the so called principle of native law and custom which sustained a discrimination based on the sex of individuals.”

After this decision female succession can never be the same again. It establishes a precedent which is so far followed by the lower courts.⁶⁹³ Previously it would have been heretical for a woman to aspire even to the office of a temporary successor,⁶⁹⁴ as always there would be male relatives to play the role of caretaker.

That decision did not however end the squabbles in the Chibikom family, due particularly to the fact the next-of-kin declaration was temporary, a point which the Supreme Court failed to address. Another appeal on the same estate is pending in the Supreme Court. In *Chibikom No. 2*⁶⁹⁵ the customary next-of-kin upon attaining majority obtained a next-of-kin declaration from the same customary court and with this demanded the revocation of letters of administration previously issued to Zamcho Florence. The decision in this second appeal will no doubt establish once and for all

⁶⁹³ Few examples are *Keyaka Francis v. Taah Regina* (2000) BCA/10/2000 (unreported), where the daughter of the deceased was made successor against her paternal cousins; *Catherine Makeba Joke v. Chambo*, HCB/PD/CA/46m/99-2000 (unreported).

⁶⁹⁴ See Irene Ngum, “Rethinking Female Succession to Property in Cameroon- The decline of customary law?” *Recht in Africa* 2004, 121-132, 128

⁶⁹⁵ *Chibikom Richard Fru v. Zamcho Florence Lum & Administrator General Mezam High Court* (2006) HCB/PD/LA.57M/04-05 (unreported)

whether a successor could in addition to the reasons given above, be deposed on the ground, simply that the next-of-kin declaration was temporary.

We foresee the supreme court considering the matter as *res judicata* and thereby confirming its previous decision without upsetting the status of the next-of-kin, who would then as the father of the family be consulted by the administrator in all but the routine matters concerning the administration.⁶⁹⁶ It would be establishing the position which the lower courts have so far avoided to address directly, that the offices of successor and administrator could be held by different persons.

The point was canvassed in *Chi Stephen & others v. Simon Ndeh*.⁶⁹⁷ The appellant was the duly designated successor and demanded the revocation of letters of administration granted to the respondent who though a beneficiary was not the successor. The appellant argued that the administration ought as of right to have been granted to him as successor while the respondent contended that the successor was not necessarily the person entitled to the letters. The court's ruling went in favour of the appellant on the ground that the other beneficiaries were in favour of him managing their common inheritance. The point as to whether the offices could be held by different persons was not addressed and therefore remained open. It could occur as was the case in the *Chibikom* case that the popular choice of the beneficiaries is against public policy because it is incompatible with written law such as section 27 of the Southern Cameroon High Court Law 1955 and the constitution. Hence in *Peter Charles v. Chinkwo Nde*⁶⁹⁸ it was argued that "while succession may, according to many traditional norms in this province[North West] be limited to male children, the administration of an estate is open to all close relatives of the deceased including wives and children, whether males or females." But unfortunately again the court was

⁶⁹⁶ See Nwabueze, *Nigerian land law*, supra, 430.

⁶⁹⁷ (2006) Appeal No. BCA/33/2004 (unreported)

⁶⁹⁸ (2006) Appeal No. BCA. 62/2003 (unreported).

silent on the point. The Tribunal de Premier Degré of Dschang was categorical on the point that the successor is also the administrator: « être l'héritier principal consiste à administrer les biens de la succession et gérer les biens non encore partagés ou demeurés indivis entre les cohéritiers. »⁶⁹⁹

It will not be unique to Cameroon if *Chibikom No. 2* comes out with a decision that the offices could be held by different persons. It is the position in Nigeria⁷⁰⁰ and Ghana, both of which like Cameroon encourage the appointment of successors as administrators of the estate, but nevertheless recognise that the right for successors to be thus appointed is not inalienable.⁷⁰¹

4.7.4: The Chibikom case as *Coutume Evolué*.⁷⁰²

Chibikom must be viewed as a milestone in the evolution of the women's succession rights in Anglophone Cameroon. It was the first decision on the point from that part of the country to get to the Supreme Court. And it would appear that until then the highest judicial body was unaware that the appellate jurisdictions of the Anglophone provinces almost religiously observed the rule that a woman cannot inherit property, when that right had been recognised in Francophone Cameroon⁷⁰³ through the concept of *coutumes évolués*. The decision was based on the enabling

⁶⁹⁹ "Being the successor consists in administering the property of the succession and the managing property not yet divided or held communally by the beneficiaries." Jugement no. 67 13 Juillet 1991 (unreported)

⁷⁰⁰ See Nwabueze, *supra*.

⁷⁰¹ In Ghana, section 79 (2) of the Administration of Estates Act (Act 63) provides that the courts shall "In granting administration have regard to the rights of all persons interested in the estate, including the successor, if any under customary law, and, in particular, administration with will annexed may be granted to a devisee or legatee and administration may be limited in any way the court thinks fit." These choices could be derogated from on the strength of section 79(3) (ii) according to which "if by reason of the insolvency of the estate of the deceased or of any circumstances, it appears to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would not by law have been entitled to the grant of administration, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient..."

⁷⁰² See the effects of the exclusion of customary law

⁷⁰³ See Enonchong, N. "The exclusion of customary law in Cameroon", *supra*, 518.

statute for the application of customary law and not some English statute that would have taken it out of the realm of customary law.

But the attitude of Anglophone courts towards that decision is different. They seem not to understand that customary law is not static⁷⁰⁴ and that a rule of customary law does not become assimilated to English law simply because it adopts a position similar to it. They tend to think that the case alone does not suffice to enable a woman to be named successor/administrator and so it is always buttressed with English statutes, notably the Non Contentious Probate Rules of 1954 and the Administration of Estates Act 1925.

This is because High Courts have the monopoly over letters of administration.⁷⁰⁵ Customary courts have not the powers to grant letters of administration but could pursuant to their auxiliary powers order administration without such letters.⁷⁰⁶

Letters of Administration are therefore not a mandatory requirement and in fact most estates are administered without them. They are nevertheless necessary for access to property such as bank accounts, company shares, and accident and pension benefits. In customary administration the administrator might not be able to bring an action pertaining to the estate if the resolution of the problem will require the application of English law. In *Njoke v. Njoke*⁷⁰⁷ the appellant was unable to use a customary court declaration of next-of-kin to institute an action on behalf of the estate in the High Court. In the words of Mukete, J:

“For an estate to sue either the beneficiary applies for a grant *ad litem* or obtains letters of administration. Both are obtainable from the High Court. However a person declared next of kin by the customary court

⁷⁰⁴ See more on our discussion on customary law in chapter two.

⁷⁰⁵ See the discussion on the jurisdiction of High Courts.

⁷⁰⁶ See section 47 (1) of the Customary Courts Ordinance 1948.

⁷⁰⁷ (2006) C.A.S.W.P/35/04-05 (unreported).

can go before that court for any remedy that that court can give. But if he seeks a remedy in the High Court, he must comply with the rules of the game in the High Court....”⁷⁰⁸

Hence holders of customary court declarations of next-of-kin, if they intend the estate to benefit from the application of English law and to have access to funds left by deceased, must submit the declarations to the High Courts in exchange for letters of administration.

The High Courts seem to think that because the letters are issued on the basis of an English statute, the administration, including the rules of priority must be in accordance with English law. This point was informally raised by one of the writer’s postgraduate students⁷⁰⁹ with Justice Ayah, then the Administrator-General of the Kumba High Court. His view was that the point was yet to be raised by any lawyer and that even if this happened only the appellate jurisdictions would have the final say, since they as trial courts could only apply English law for the reasons given above. This position is arguable, on the ground that the Supreme Court (Civil Procedure) Rules of the 1948 Laws of Nigeria which gives the courts authority over letters of administration lays down the procedure to be followed by the High Courts, with authority to administer the English and customary laws. It cannot therefore be assumed that only the English law is applicable since the courts will normally apply the substantive law that is relevant in any given situation.

Hence applications for grants concerning the estate of a person subject to English law should be governed by the English law of priorities while customary law

⁷⁰⁸ See also *Lawal & Ors. v. Younan & Sons* (1961) All N. L. R. 245, 253. The plaintiffs as customary administrators relied on the Fatal Accident Acts of 1846 and 1864 in their action for negligence against the defendants. Ademola, J., said that “it is clear a person to whom power is given under customary law to administer the estate of deceased person, is a person empowered by that law to administer the estate of the deceased where customary law can be invoked, and such power cannot be extended to matters which are statutory rights under English law and to which statutory remedies apply.”

⁷⁰⁹ Kembang Richard, Chief Registrar of the Court and Probate Clerk.

should be applied when the deceased is subject to it. But what obtains is a situation whereby no distinction is made between the two as the courts almost invariably apply the English rules of priority. In *Mary Ngoh v. Njimba Jacob*⁷¹⁰ the quarrel was between the widow and brother of the deceased. The Probate Practice Non Contentious Rules of 1954 were applied to grant “administration” to the widow when this was in fact a potentially polygamous marriage. In *Peter Charles v. Chinkwo Fidelis*⁷¹¹ consolidated with *Chinkwo Fidelis v. Chi Caroline*⁷¹² the court recognised that the intestate had more than one wife but still invoked the Administration of Estates Act 1925.

Lest we be misunderstood, we are not contesting the appointment of the spouses in these cases as administrators. The point is that they could still have been appointed in application of customary law by relying on the *Chibikom case* provided that in the estimation of the courts, they were the persons most suited to administer the estates in the interest of all the other beneficiaries.

In *Nana v. Nana*,⁷¹³ Ngassa, J. adopted what we think was the right position when she abstained from invoking the provisions of the Non Contentious Probate Rules of 1954 on the ground that the “applicant-for-grant was polygamously married to the deceased.” But apparently she too did not consider the *Chibikom case* authority enough to permit approving the grant of letters to a woman regularly chosen by the customary law instances as successor. The Convention on the Elimination of All Forms of Discrimination Against Women was invoked even though it is yet to be enacted into law by the Cameroonian legislature.

⁷¹⁰ (2006) Suit No. HCF/PROB/AE96/2001 (unreported).

⁷¹¹ (2003) Suit No. HCB/PD/LA.36M/99-2000 (unreported).

⁷¹² (2003) Suit No. HCB/PD/LA.26M/99-2000 (unreported).

⁷¹³ (2005) Suit No. HCF/PROB/AE1/2001-2002 (unreported)

4.7.5: FACTORS WHICH INHIBIT THE DESIGNATION OF WOMEN AS SUCCESSORS

Of all the dependants of the deceased, women have without doubt borne the full brunt of the customary law, reason why we deem it germane to consecrate this section to the examination of the ground advanced by customary law to exclude them from the important office of successors, deemed to be the preserve of men.

The successor is appointed on the basis of the principle of male primogeniture⁷¹⁴ whereby the eldest male child is given priority, or male ultimogeniture according to which priority is given to the youngest male descendant of the deceased.⁷¹⁵ A different approach would have been expected in matrilineal systems given that women are venerated, but this is not the case, and for Asanga to lament: “in matrilineal communities... one would expect the woman to have more rights. However, this is simply a community in which descent is traced through the mother’s line. When it comes to succession, a man is succeeded not by his own children but by the male children of his full blood sister from one womb.”⁷¹⁶

Responsible for this state of affairs is the early communal life of Cameroonians as explained in the problem statement.

It is thought that women could be unreliable as successors, since upon marriage their loyalties become divided between the biological and marital families. Naturally, loyalty to the marital family is stronger because the woman’s children are part of that family. It is feared that a married woman might take away the property to their husband’s family. In the case of land, there is evidence that some married women register their family land in their marital names. This was the case in

⁷¹⁴ See *Efosi Kombe v. Lydia Ngale* (1980) C.A.S.W.P/cc/5/79 cited by Enonchong, N. “Public Policy and Ordre Public: The Exclusion of customary law in Cameroon.” (1993) 5(3) RADIC, 511.

⁷¹⁵ In *Joseph Tanjang Bamu v Emmanuel Awankem Bamu*, (1990) Appeal No. 65/86, unreported, one of the witnesses said that “by our tradition the eldest child in Mendankwe is not made successor.”

⁷¹⁶ “Rethinking Female Succession to Property in Cameroon- The decline of customary law?, *Recht in Africa* 2004, 121-134, 124.

*Chibikom v. Zamcho*⁷¹⁷ where after being named administrator of her late father's estate, the respondent, a married woman, set about registering the family land in her marital name. This was in spite of the prohibition enshrined in section 10 of the land registration decree of 27 April 1976, according to which, "Trustees of an inheritance may not obtain land certificates for its properties in their own name."⁷¹⁸

To justify women's exclusion customary law evolved the idea that because they are destined for marriage and procreation are themselves "property" liable to pass to the successor.⁷¹⁹ This is underpinned by the payment of the bride price said to constitute the purchase price for the woman.

4.7.5.1: The Bride-Price: basis for the "Woman as Property" theory.⁷²⁰

The terms bride-price and dowry⁷²¹ are often used interchangeably. This usage is wrong because dowry in western jurisprudence consists of property which a girl receives from her parents upon marriage and which forms part of her ante-nuptial property.

We are yet to learn of any dowry being paid at customary law in Cameroon. Moslem law has a system of dower *mahr* in which it is the bride-groom and not the bride's parents who makes gifts to her. The *mahr* is a precondition for marriage in

⁷¹⁷ (1997) 1 C.C.L.R. 212

⁷¹⁸ Decree No. 76-165 of 27 April, 1976. Unfortunately the judge defended the action of the respondent on the ground that as administrator the estate vested in her and that it was the duty of the government department responsible for land registration to mention that she registered the land in her capacity as administrator.

⁷¹⁹ See *Mary Umaru v. Asopo Makembe* (1981) C.A.S.W.P/CC/87/81, cited by Enonchong, N., "Public Policy and Ordre Public; The exclusion of customary law in Cameroon," (1993) 5(3) RADIC, 503-525, 512.

⁷²⁰ Professor Enonchong uses the term "property rule" which we humbly submit is inappropriate given that the treatment of women as property is not a rule of law as such, but only a possible reason for the exclusion of women from succession. "Public Policy and Ordre Public: The exclusion of customary law in Cameroon," (1993) 5(3) RADIC, 503-525, 512.

⁷²¹ Other appellations such as "marriage consideration", "bride-wealth" marriage gifts, "and marriage payment" have also been used.

Moslem law.⁷²² Because it is made to the bride and not her parents Moslem jurists argue that this does not constitute the purchase price of the bride.⁷²³

The bride-price on the other hand is payment made by the bride-groom to the parents of the bride.⁷²⁴ This is clear from the definition of dowry proffered in section 2 of the Limitation of Dowry Law, Cap. 76 of the 1956 Laws of Eastern Nigeria, and adopted for the purpose of the bride-price by Professor Nwogugu.⁷²⁵

“Any gift or payment, in money, natural produce, brass rods, cowries or any other kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that persons which is intended or has taken place.”

This is the practice in non-Moslem communities while Moslem communities either practise both the dower and bride-price simultaneously or only the dower. Where both are practised the dowry is kept in abeyance pending divorce or death.⁷²⁶ In *Saidu Manu v. Hubeba Usmanu*,⁷²⁷ the defendant after divorce had sued the plaintiff in the Alkali Court of Mbengwi claiming the promised “cow and calf being ‘Sadiki’ a bridal gift from the groom according to Islamic Law.” The court held in favour of the plaintiff, against which decision the defendant instituted the present appeal. The decision of the lower court was upheld and Wacka, J. said: “The question of the law on ‘Sadiki’ requires no polemics. As long as there is consummation, even if the marriage lasts only for hours the bride is entitled to her ‘Sadiki.’ We have no reason therefore, to differ with the trial court on its finding of facts.”

⁷²² See Ajijola, A.D. *Introduction to Islamic Law*, New Delhi, International Islamic Pictures, 1989, 154.

⁷²³ See Lemu, Aisha et al. *Woman in Islam*, Markfield, The Islamic Foundation, 2003, 19.

⁷²⁴ Kasunmu and Salacuse in *Nigerian Family Law*, London, Butterworths, 1966, 77, define the term as “a payment of some sort --- made by the boy or his family in order to establish a valid marriage.”

⁷²⁵ *Family Law in Nigeria*, Nigeria, Heinemann, 1996, 51.

⁷²⁶ Phillips, Arthur, *A Survey of African Marriage and Family Life*, Oxford, Oxford university Press, 234.

⁷²⁷ (1997) Appeal No, BCA/9CC/ 95 (unreported)

Where only the dowry is maintained an amount of money is paid to the parents of the bride who could utilise part thereof for the preparation of the marriage.⁷²⁸ In *Zeinabu Sadi Buba of Issu v. Alhaji Jae Mundayi*,⁷²⁹ it was disclosed in a divorce case that the parents of the girl had obtained money from her purported husband to prepare her for the marriage. Effectively therefore, the dower in these communities takes the form of the bride-price. This is statutorily recognised in Francophone Cameroon as a French colonial order of 1926 converted the Moslem dowry into the bride-price and made it payable to the parents of the girl.⁷³⁰

The bride-price is therefore commonly practised under the Moslem and non-Moslem customary laws. The question, however, is whether it constitutes the purchase price of the bride.

The fact that the payment is to the parents of the bride lends credence to the purchase price analogy propounded by early European observers⁷³¹ and now sustained by western educated Africans who ignore the many differences that exist between a customary marriage and a commercial transaction. Similar payments were in fact current in early English law. These were never considered as the sale of the bride, but rather as a sale of the *mund* or right of protection which the parents have over their daughter.⁷³² This helped to maintain the personality of the woman as an entity capable of owning property, contracting, liable for torts and crimes committed

⁷²⁸ See Nwogugu, E. I., *Family Law in Nigeria*, Heinemann Educational Books (Nigeria) Plc., 1996, 59.

⁷²⁹ Ndop Alkali Civil Suit No. 4/2002.2003 (unreported)

⁷³⁰ Article 3 of Arrêté of 26 December 1922, codifying the Moslem law of marriage: « En fait c'est à la femme elle-meme que la dot devrait être versée, en fait la coutume a prévalu de verser le prix de la dot aux parents de la femme. » (Phillips, A. (ed), *A Survey of African Marriage and Family Life*, Oxford University Press, 1953, 236).

⁷³¹ Schwimmer, Brian, "BrideWealth". http://www.umanitoba.ca/faculties/arts/anthroponlogy/tutor/marriage/bride_wealth.html p.2.

⁷³² See Holdsworth, *A history of English Law*, vol. II, London, Methuen, 1923, 87.

by her.⁷³³ Jacob laboured for seven years to be given Rachael's hand in marriage⁷³⁴ and this was not considered as the purchase price.

Due to the sale analogy, statements such as "I have no business with girls who are supposed to be in their husbands' houses"⁷³⁵ and "I am surprised that the widow of my late father is also challenging me for the next-of-kin on behalf of the son, of which she is my property"⁷³⁶ are commonplace. Academics such as professor NKouenjin think similarly that the payment of the bride-price makes marriage a sale contract.⁷³⁷ And the judiciary joins in the fray when in *Achu v. Achu* Inglis J says that "the wife is still regarded as part of her husband's property. That conception is underscored by the payment of dowry on marriage and on the refund of same on divorce."⁷³⁸ Yet in *Nanje v. Bokwe*, the same judge ruled that a "woman cannot, unless given by will, inherit from her father, let alone be his next of kin."⁷³⁹ The question is whether a will has such magical powers to convert a chattel into human or whether a woman is property only in intestacy and human in testacy.

Mbarga argues, fortunately, that :

"La femme n'a jamais été et n'est pas une chose, un bien quelconque du patrimoine. Et elle n'a jamais été considérée comme telle dans la tradition africaine, quoi qu'on en ait dit. La femme est une personne physique qui a toujours eu ses droits et obligations, différents de ceux de l'homme certes, dans la civilisation africaine. La place que celle-ci lui a assignée a peut-

⁷³³ See Glanville Williams, "The Legal unity of husband and wife" (1947)10 M.L.R., 16-31, 18

⁷³⁴ See the Holy Bible Genesis 29: 18-20.

⁷³⁵ Statement of a brother when invited by the sisters to attend a family meeting to decide the fate of the property left by their late father and which he was mismanaging. The uncooperative attitude led to the case of Peter Chi Charles v. Chinkwo Nde Fidelis & Caroline Chi (2006) Appeal No. BCA/62/2003 (unreported)

⁷³⁶ Statement by defendant in Elive Njie Francis v. Hannah Efeti Manga (C.A.S.W.P/CC/12/98 (unreported)

⁷³⁷ Yotnda, Muarice Nkouenjin, *Le Cameroun a la Reserche de son Droit de la Famille*, Paris, Librairie Generale de Droit et de la Jurisprudence, 1975. « Les sommes que verse le mari ne sont ni des cadeaux ni des symboles, encore moins des assurances ou ciment d'alliance ; mais il s'agit d'un achat et tout autre appellation doit s'analyser comme tel,» 63.

⁷³⁸ Appeal No BCA/62/86 (unreported). See also Ndumu v. Ndumu, Suit No. HCB/97/MC/86 (unreported) ; Ngnitedem Etienne v. Tashi Lydia, Appeal No. BCA/46/86 (unreported)

⁷³⁹ (1983) C.A.S.W.P./CC/22/82, cited by Enonchong, N, supra, 511.

*être été inférieure à qu'il occupait l'homme, soit ! mais de là à dire que la femme était et est considérée comme une chose, comme un bien chez les africains, c'est inexact et faux. »*⁷⁴⁰

Oki J. in the Nigerian case of *Ibikade v. Aize* distinguishes the bride-price from purchase price in a sales contract:

“Is the term “dowry” equivalent to the term “price”? The purchase price of an article is a single sum payable (even if by instalments) to the owner or owners of the article. Dowry on the other hand is not usually a single or simple sum like the price. ”⁷⁴¹

Furthermore anthropological studies show that the actual sums transferred as bride price are less significant as economic inducements or assets, than as counters in a social exchange system that binds two families together in marriage.⁷⁴²

If the payment of the bride price makes marriage a sale transaction *sui juris* it becomes necessary to determine what is sold. Is it the person or the fruits of her womb? It can certainly not be the person because in certain customs, such as the Banyang in the South West Province when a married woman dies she has to be buried in her family of origin.⁷⁴³ The idea that the bride price is payment for the fruits of the woman's womb emanates from certain customs according to which the paternity of a

⁷⁴⁰ “The woman has never been and is not a thing, a chattel whatever of the patrimony. And she was never considered as such in African tradition, whatever is said on the subject. The woman is a physical person who has always had her rights and obligations, different from those of men of course, in African civilisation. The place assigned to her by this might be inferior to that occupied by men, very well! but from there to say that a woman the woman was and is considered as a thing, as a chattel among the Africans, is inexact and false,” Emile Mbarga, “Quelques réflexions sur le projet de la loi reorganisant l'état civil au Cameroun Oriental et portant diverses dispositions relative au mariage” (1966) 76 *Penant* 286-302, 291.

⁷⁴¹ (1974) *U.I.L.R.* 18, 21. Also Ngwafor, E. N. *Family Law in Anglophone Cameroon*, supra, 72.

⁷⁴² Brian Schwimmer, supra.

⁷⁴³ Apparently this is not unique to Cameroonian tribes, for upon her death, the Congolese-born wife of the President of Gabon was buried in her native village in the Congo Republic and the reason given for this was the desire by her family to “S'entiner au strict respect des us et coutumes Odimba.” In *Rapatriement: Edith Lucie Bongo sera inhumée au Congo*,” *Cameroun Tribune* of 15 April 2009, available on line at <http://www.cameroun-info.net>

child is in the payer of the bride price as against the biological father. However since *Ngeh v. Ngome* that custom has been declared to be contrary to natural justice, equity and good conscience.⁷⁴⁴ That apart it has also to be noted that barrenness is not a ground for nullity or divorce. In a contract of sale of goods the purchaser reserves the right to reject the goods on grounds that they are not merchantable or fit for the purpose for which they are bought.

Far from being the purchase price the bride price serves *inter alia*⁷⁴⁵ as proof of the parents' consent to the marriage.⁷⁴⁶ The law is against using the bride-price as a condition for the essential validity of marriage.⁷⁴⁷ The validity of marriage and bride-price are, however, intricately linked as long as the bride-price is the only means by which the consent of the girl's parents could be established. A parent wishing to contest the validity of a marriage does not need to plead non or partial payment of the bride-price.⁷⁴⁸ It suffices that he pleads the absence of his consent⁷⁴⁹ whereby the burden shifts to the spouses to show that consent was given. The bride-price constitutes a sort of "registration" of customary marriage since it is such an overt and notorious act witnessed by many people that it is impossible later to deny having received it.

⁷⁴⁴ (1962-1964) W. C. L. R., 32. (selected judgments of the High Court of West Cameroon.)

⁷⁴⁵ Some other functions of the bride-price are that (1), it serves as a bond to unite the families of the spouses, (2) compensate the bride's family for the loss of her services (3) is a stabilising factor in the marriage and enhance the man's affection and devotion to the woman since the payment of the bride-price is a sign that he values her highly. See Nsereko, *supra*, 693-697; Yotnda, Muarice Nkouenjin, Le Cameroun a la Reserche de son Droit de la Famille, Paris, Librairie Generale de Droit et de la Jurisprudence, 1975, 71-79.

⁷⁴⁶ See Kasunmu, A. B. and Salacuse, J. W., Nigerian Family Law, London, Butterworths, 1966, 78.

⁷⁴⁷ See Enonchong, N., "Public Policy and Ordre Public; The exclusion of customary law in Cameroon," (1993) 5(3) RADIC, 503-525, 508.

⁷⁴⁸ Section 70 (1) (b) of the Civil Status Registration Ordinance of 1981 provides : "Any action against the validity of a marriage as a result of the total or partial failure to execute a dotal or matrimonial agreement shall be rejected on grounds of public policy."

⁷⁴⁹ Section 64 (2) *ibid*, "The consent of the spouse-to-be shall be valid only when supported by that of his father and mother."

4.7.5.2: Women as heritable property: Levirate Marriage.

The fact that the bride-price is seen to concretise the union between two families rather than two individuals has far reaching consequences.⁷⁵⁰ The death of the man does not normally terminate the marriage, as it is possible, with the consent of the woman, for her to be attached to another member of the family in marriage.

It was an old Jewish custom for the “levir” or brother⁷⁵¹ of a deceased to take over his wife in order to produce a son for the latter and perpetuate his name.⁷⁵² The objective in customary law is different. It assuages the widows’ incapacity to succeed⁷⁵³ and Professor Elias writes that the union is “a scheme of social insurance against neglect and hunger for the deceased’s dependants.”⁷⁵⁴ In *The Estate of Agboruja*⁷⁵⁵ it was explained that the basis of the custom was to ensure the continued maintenance of the widow and her children and was not repugnant as contended by the widow; unless it could be shown that the new husband was wicked towards that family when the deceased was still alive. The male relative becomes a new father for the children and is responsible for their upbringing as if they were his own children.

The term “widow inheritance” is also commonly used giving the impression of compulsion. Widows have always had the option to refuse to take a relative of the deceased as husband⁷⁵⁶ without thereby forfeiting the right to maintenance by the

⁷⁵⁰ See Melone, Stanislas, “Le Droit Successoral Camerounais: Etude de Quelques Points en Jurisprudence (1979) 17/18 Cameroun Law Review, pp. 53-97, 66.

⁷⁵¹ Taken in context this would include other male relatives of the deceased including sons in polygamous families.

⁷⁵² See Deuteronomy 25: 5-10.

⁷⁵³ Ombion, Simon, « L’application de la loi du 7 Juillet 1966 portant diverses dispositions relatives aux mariages dans l’ex Cameroun Oriental » Masters thesis, Yaounde, cited by Melone, supra. 66. Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 655.

⁷⁵⁴ Elias, T. O., *Nigerian Land Law*, London, Sweet & Maxwell, 1971, 195.

⁷⁵⁵ (1949) 19 N. L. R. 38.

⁷⁵⁶ See Mbouyom, Francois-Xavier, « Le statut juridique, politique et social de la femme au Cameroun. » (1974) 28 Rev. Jur. Pol. Ind. Coop. 600-612, 612. Nwogugu, E. I., *Family Law in Nigeria*, Heinemann Educational Books (Nigeria) Plc., 1996, 223.

family if they remain in the family.⁷⁵⁷ The true significance of the expression is not necessarily that the successor inherits the widow as wife,⁷⁵⁸ but rather the responsibilities towards her, which were initially those of the husband. An Ashanti proverb cited by Rattray says that “The one who takes the gun of the deceased also takes the widow”.⁷⁵⁹ The gun symbolises the means of livelihood and one cannot take it away without assuming the responsibility to feed the mouths that depended on it.

Therefore whether the widow becomes a wife to the successor or any other person depends on her consent. This was emphasised by a West African chief who described the situation as follows: “If somebody dies any member of the family can go secretly to any of the wives and find out if she would marry him. If the woman agrees, there is a customary present which the relative gives to the woman.... If there is agreement between the woman and the man, the man is to go and inform the oldest person in the family.”⁷⁶⁰ In his study on the Bali tribe in Cameroon Rubin establishes that widows generally have three options. They could return to their parental homes, remain in the home of the successor under his guardianship as a widow, or become the wife of one of the relatives of the deceased. Where she elects to return to her parental home the bride price must in principle to be returned, although the right may be waived by the family.⁷⁶¹ Where she chooses to remain in the husband’s compound as a widow, with or without children, the obligation to refund the bride price is removed and she is entitled to maintenance from the husband’s family.

⁷⁵⁷ See Rubin, *infa*.

⁷⁵⁸ Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 *Rev. Jur. Pol. Ind. Coop.* 639-662, 655.

⁷⁵⁹ *Ashanti law and custom*, Oxford, Clarendon Press, 1929, 28.

⁷⁶⁰ See Armstrong, R. G., “Intestate Succession among the Udoma,” in J. Duncan M. Derrett, *Studies in the Laws of Succession in Nigeria*, Oxford, Oxford University Press, 1965, 215

⁷⁶¹ In fact the general practice today is for the woman to be allowed to return to her parents without the demand for the bride-price but if she is young and remarries then the new bride-price is used to pay off the first.

Indubitably therefore, the consent of the widow is necessary especially as article 77 (2) of the Civil Status Registration Ordinance No. 81-02 of 29 June 1981 provides that “In the event of the death of the husband, his heirs shall have no right over the widow, or over her freedom.” When there is consent the matter cannot get to court, and in fact we came across a case which is representative of the actual situation. In *Asane Florence v. Ndeh Thomas*⁷⁶² the plaintiff’s mother and three other widows were taken over by her “uncle” when their husband died. Other children were born of these unions and the defendant was one of them. In the case, however, the point in issue was not the levirate marriages but rather whether the plaintiff was to succeed to property as the child of her biological father or of the father by inheritance.

The courts generally castigate levirate marriages as being contrary to natural justice, equity and good conscience. Thus in *David Tchakokam v Keou Magdaleine*⁷⁶³ it was stated that “any custom which says that a woman or any human being for that matter is property and can be inherited along with a deceased’s estate is not only repugnant to natural justice, equity and good conscience, but is actually contrary to written law.”⁷⁶⁴

In the light of what is said about the bride-price and levirate marriages it is clear that the “woman as property” theory is in sharp decline. The process was started in the divorce case of *Fodje v. Kette*,⁷⁶⁵ described by Professor Ngwafor as “a famous

⁷⁶² (2006) Suit No. HCK/AE/K.28/98 (unreported)

⁷⁶³ 1999 G.L.R. 111.

⁷⁶⁴ Ibid, 118, per Ngassa, J. See also the ruling of the South West Court of Appeal in *Elive Njie Francis v. Hannah Efeti Manga*. The appellant claimed that in accordance with the Bakweri custom he had provided a sack cloth for the widow of his uncle and this made him the next-of-kin of the deceased and husband to the widow. This contention was rejected by the Bwenga Customary Court which named the widow as next-of-kin. The decision was upheld at appeal, with Nana, J., saying that “Even if it is the Bakweri custom that by buying a sack cloth for the widow of the deceased, the provider is deemed next-of-kin, that custom cannot be enforced by this court. It is repugnant to natural justice, equity and good conscience.” (1999) Suit No. CASWP/cc/12/98).

⁷⁶⁵ Appeal No. BCA/45/ 86 (unreported) cited by Hamisu, Rabiata Danpullo, “Women, Property and Inheritance– The case of Cameroon.” *Recht in Africa* 2005, 143-161, 149.

first,”⁷⁶⁶ because Arrey, J. granted the wife the right to occupy the matrimonial home as well as collect rents from two other houses.⁷⁶⁷ An appeal against that decision to the Supreme Court is still pending. This could just be indicative that the highest judicial authority considers the case to have been rightly decided. The equality of sexes is a matter of public policy proclaimed in the preamble of the constitution. The principle is also enshrined in article 2 of the African Charter on Human and Peoples’ Rights, which has been ratified by Cameroon.⁷⁶⁸ In this respect the high judicial body overruled a decision of the Bamenda court of appeal in *Chibikom v. Zamcho Florence* in which a married woman was held not have the capacity to administer her father’s estate.

4.8: ADMINISTRATION OF ESTATES IN CUSTOMARY LAW.

Because administration is governed by the Supreme Court (Civil Procedure) Rules of the 1948 Laws of Nigeria, most estates in this country tend to be administered in accordance with English law.

The *Chibikom Case* for example was subject to customary law as evident in the fact that the deceased was survived by five wives. But the court had no qualms in holding that “it is settled law that the effect of the grant of letters of administration is

⁷⁶⁶ Ngwafor, E. N., “Cameroon: Property Rights for Women- A Bold Step in the Wrong Direction” (1991) 29 (2) *Journal of Family Law*, University of Louisville, 296.

⁷⁶⁷ Professor Ngwafor commends the boldness of the judge but criticises the decision for having been arrived at without reference to existing customary law or English precedents, both of which would have resulted in the woman being excluded. It could be submitted, however, that the decision could have been justified on grounds of the repugnancy of a custom which treats women as property. The English position at the time that the law knows of no community of property between spouses could not have been applied without necessary modification. Most spouses in Africa acquire property only after marriage and given the contribution, direct or indirect of either it becomes difficult to actually say whose property it is, although in the case of land it might be registered in the name of one of the spouses. In England on the other hand spouses go into marriage already owning property or a substantial part of it. But even here the idea of the “community of surplus” comes up as spouses are expected to share the benefit of any increase in their wealth produced during the marriage by their work or thrift.

⁷⁶⁸ See Enonchong, “ . N., “Public Policy and Ordre Public; The exclusion of customary law in Cameroon,” (1993) 5(3) *RADIC*, 503-525, 511.

to vest the estate of the deceased in the administrator,”⁷⁶⁹ when the rule in customary law is that property passes to the family⁷⁷⁰ and not the successor, who is only the agent with an interest in the estate appointed by the family.

Although customary courts do not have jurisdiction over letters of administration their decisions are sufficient to ensure administration of an estate in customary law. This could be under auxiliary powers conferred on them by section 47(1) of the Customary Courts Ordinance, 1948:

“A customary court may, whenever it shall think it necessary to do so for the preservation, proper custody or management of any property in dispute in a cause, appoint any person as a receiver or manager to receive and to take charge of the property and to deal with it in such a manner as shall be directed by the said customary court.”

This is by no means different from the powers which letters of administration conferred on personal representatives. Letters are therefore not indispensable and in fact most estates in this country are managed without them, even though the point needs to be made that such estates are generally deemed to be unrepresented in law, so that an action cannot be maintained on their behalf in the High Courts.

The point was made *Njoke v. Njoke*⁷⁷¹ where next- of- kin prior to obtaining letters of administration instituted an action in the High Court purporting to protect a house which was part of the estate. The suit was held to be inadmissible whereupon the plaintiff appealed to the South West Court of Appeal, which upheld the decision of the trial court:

“For an estate to sue either the beneficiary applies for a grant *ad litem* or obtains letters of administration. Both are obtainable from the High Court.

⁷⁶⁹ (1997) 1 CCLR, 213, 219.

⁷⁷⁰ See Bentsi-Enchill, *Ghana land law*, supra, 142.

⁷⁷¹ (2006) Suit No. C.A.S.W.P/35/04-05 (unreported).

However a person declared next-of- kin by the customary court can go before that court for any remedy that that court can. But if he seeks a remedy in the High Court, he must comply with the rules of the game in the High Court under Cap. 211, Order 48 by obtaining the letters of administration required by the law.”

The responsibilities incumbent on the successor are actually those of the family, hence he needs the consent of the family, express or tacit, to carry out his functions.⁷⁷² He cannot, for example dispose of property nor sue in respect of it without the consent of the family. He pays the debts left by the deceased and funeral expenses.

Funeral debts are normally settled with contributions from members of the extended family and donations from sympathisers. If the available amount is insufficient to settle the funeral expenses the balance is discharged by dividing it among the members of the immediate family. The debts of the deceased could be paid by disposing of some of the property,⁷⁷³ but this is only the last option as the family will hardly permit that land be sold to settle debts. Generally therefore the successor pays the debts out of his pocket and the rule is that responsibility for the debts is not limited to the value of the estate.⁷⁷⁴

Other duties include legally enforceable rights to maintenance by the dependants of the deceased who will include the children, widows, and members of the direct and extended families of the deceased.⁷⁷⁵ Generally the movable property is

⁷⁷² See Nwabueze, Nigerian Land Law, *supra*, 430.

⁷⁷³ See Kwende, Chantal, “Procedure for designating the next-of-kin and his powers over property in the Baforchu tribe” Term Paper, University of Dschang, 2000. (unpublished)

⁷⁷⁴ Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 658; Binet, Jacques, “La decvolution successorale chez les Douala du Cameroun”, (1955) 65 Penant, 33-40, 36.

⁷⁷⁵ Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 647 ; Bentsi-Enchill, Ghana Land Law, *supra*, 167.

distributed shortly after burial and funeral ceremonies and so powers administration are actually exercised only with respect to land.

Land under customary law can be community land, chieftaincy land, family land, and privately owned land. Only the last two categories raise questions of succession but a discussion of community lands is necessary because of its role as a pool of land from which the needs of persons excluded from succession could be met. Chieftaincy land will not be of interest to us in this study, because by the 1974 land reforms⁷⁷⁶ properties occupied by persons *qua chiefs* were converted into the public property of the state,⁷⁷⁷ and so ceased to be the subject of succession. Public property of the state is said to be inalienable, imprescriptible and un-attachable.⁷⁷⁸

4.8.1: COMMUNITY LAND

It happens during the early settlement of each community that the land acquired either as a result of conquest or peaceful settlement generally belongs to the entire community,⁷⁷⁹ placed under the authority of the chief. Eventually members of the community are allotted part thereof or appropriate parcels of the land on behalf of their families, existing or prospective.

Un-occupied lands are never the subject of succession as they continue as community lands under the authority of the chief and could be put to rational use by any member thereof. In *Agbortar v. Chief Besong*, Endeley J. said “That land falling within settled and well defined village boundaries is communal property of the village is so well entrenched a fact as to be axiomatic. The communal rights are exercised

⁷⁷⁶ The land reforms of 6 July 1974 are contained in three ordinances that were followed in 1976 with an equivalent number of decrees of application. The relevant ordinance is Ordinance No. 74-2 of 6 July 1974

⁷⁷⁷ Section 4 (i) reads “The artificial public property of the state shall comprise the concession of traditional chiefdoms and property relating thereto, and more especially in the provinces where the concession of chiefdom is considered as the joint property of the community, the chief having only the enjoyment thereof.”

⁷⁷⁸ Section 2 (2)

⁷⁷⁹ Kanga, Victor, Le Droit Coutumier Bamiléké au contact des droits Européens, Yaoundé, 1959, 130.

over areas of land which are unoccupied by villages for building or farming purposes. Any benefits, financial or otherwise which accrue from the use of such land by strangers would go to the village community as a whole in accordance with their democratically ascertained wishes.”⁷⁸⁰ It also accepted that members of the community could do anything on the land subject only to the interest of the village community to which it belongs.⁷⁸¹

They provide a pool of land from which allotments could be made to needy persons through application to the chief, and these include persons excluded by the rules of succession.⁷⁸² Because of the gender bias of customary law one would be tempted to think that men would be more favoured by the chief to whom the application is made for such grants of land. However, the case of *John Kpumia v. John Abongwe*⁷⁸³ shows that women could also benefit from grants from community lands.

Providing land to members of a community out of this pool of land would be virtually impossible today, considering that the 1974 land reforms converted lands that previously fell under the authority of chiefs into national lands of the second category⁷⁸⁴, the acquisition of which passes not by a simple application to the chief but to the administrative authorities. The fact that applications are made to administrative officers not influenced by custom could be advantageous to women given that women are not prevented from acquiring land for valuable consideration. However the process is long and expensive and the lands are allocated for investment

⁷⁸⁰ (1968) WCLR, 43, 45.

⁷⁸¹ Anyangwe, *supra*. 34.

⁷⁸² See Tambi Eyongetah and Robert Brain, *A history of Cameroon*, London, Longman, 1974, 44-45.

⁷⁸³ (1978) Y.U.L.R. 78. In that case the husband of the deceased claimed succession rights over land left by the deceased on the ground that they had contracted a Christian marriage. Evidence was adduced to prove that the land in question had been granted to the deceased by the paramount chief of Mankon and that since she did not will it to her husband it had upon her death become family property.

⁷⁸⁴ These are unoccupied lands and occupied land became national lands of the first category which could be registered by their occupiers.

and not habitation.⁷⁸⁵ Occasionally the chief might request a portion of the national land to accommodate the increasing population. Often very little land is obtained in this way and most of it ends up in the hands of a few influential men and women, leaving out those who are actually in need of land as a result of the customary law of succession.

4.8.2: FAMILY LAND

These lands are created out of community lands in the manner described and members obtained them not in their personal names but in the name of their families, actual or anticipated. The passage of time has not in any way diminished the attachment of Cameroonians to the concept. Family lands continue to be created by individual family members out of their personally acquired land by will, gifts *inter vivos* and by the acquisition of land with family resources.⁷⁸⁶ When a member who acquired land with the use his own resources dies intestate and did not contract a monogamous marriage which will lead to the presumption that he intended the received law to regulate his succession, the courts generally presume that it has become family property.⁷⁸⁷

This attitude towards land can be explained by certain factors. In subsistence economies land is the main source of wealth and livelihood. To be without land is to be like a tree without roots. Of no less relevance is the religious significance of land, believed to be the means of communion between the living and the dead believed to be the real owners of the land. This fact is acknowledged for Cameroon by Anyangwe: “land throughout Cameroon (and throughout Africa) has religious or

⁷⁸⁵ It is stipulated in section 2 of Decree No. 76-166 of 27 July relating to the terms and conditions for the management of national lands that “Temporary rights shall be granted for development projects in line the economic, social or cultural policies of the nation.”

⁷⁸⁶ James, R. W. Modern Land Law of Nigeria, Ife University Press, Ile-Ife Nigeria, 1975,55-56.

⁷⁸⁷ See John Kpumia v. John Abongwe, (1978) Y.U.L.R. 78.

supernatural significance as tribal or family ancestors are buried on the land, or the land is itself a deity which requires placating.”⁷⁸⁸

This reverence for land is observed more in the rural communities even though this is ebbing as a result of advancing urbanisation and education. The population of the urban areas no longer hold such reverence for land neither do they think that the function of land is limited to providing man with means of subsistence. Land, according to this segment of the population, should in addition to subsistence afford the possibility for investments and serve as collateral security for loans.

This is possible only when communal ownership of land gives way to individual ownership and its corollary- alienation. In fact as far back as 1908 in *Lewis v Bankole*, Speed C. J had predicted the demise of communal land ownership through a “legislative or judicial *coup de grâce*.”⁷⁸⁹ A legislative *coup de grâce* was given by the Cameroonian legislature in the 1974 land reforms whereby the customary system of land tenure was purportedly abolished. The combined effects of sections 14⁷⁹⁰ and 15⁷⁹¹ of Ordinance No. 74-1 of 6 July 1974 lead to the assumption that all lands held under customary law including those in effective occupation have been nationalised. Though not express, a circular letter⁷⁹² of the Minister of Finance issued in 1976, purporting to represent the government position stated to the effect that the Ordinance had effectively put an end to customary land rights in the country. Certainly a circular letter cannot supersede the provisions of an ordinance and for this reason very little

⁷⁸⁸ Anyangwe, Carlson, “Land Tenure and Interests in Land in Cameroonian Indigenous Law.” (1984) Cameroon Law Review, 29-41, 35.

⁷⁸⁹ (1909) 1N.L.R. 81, 83.

⁷⁹⁰ “National lands shall as of right comprise lands which at the date on which the present Ordinance enters into force are not classed into the public or private property of the state and other public bodies.”

⁷⁹¹ “National land shall be divided into two categories:

(1) Lands occupied with houses, farms and plantations, and grazing land manifesting human presence and development.)

(2) Lands free of any effective occupation.”

⁷⁹² Cited by Ngwasiri, C.N. “The impact of the present land tenure reforms in Cameroon on the former west Cameroon.” (1984) Cameroon Law Review, pp. 73-85, 76.

weight has been attached to this circular. The abolition is also assumed from section 17(2) which calls upon the holders of customary titles to register same in their names or the names of the group if they are family heads.⁷⁹³ This too is not mandatory and the lacuna has been exploited by traditionalist judges to perpetuate the continued existence of customary land tenure.⁷⁹⁴ Even academics such as professor Ngwasiri argue that “one cannot abolish an aspect of customary law simply by enacting legislation to say that one has done so.”⁷⁹⁵

Membership of the group entails rights over the family property which we noticed in the introduction is heritable. Lands which a member occupies for residential or other purposes devolves as a matter of principle to his descendants and in default reverts to the family to be reallocated to the other members of the family.

Successors tend to consider these as part of their inheritance which upon their death should also devolve to their own descendants. This is fallacious as evident in *Ndiba v. Ndiba*⁷⁹⁶ where it was held that the property which the deceased father of the defendant held as a family member remained family property and did not pass with the estate administered by the defendant.

Even improvements on the land do not change the family character of the land. Thus it was held in *Bodylawson v. Bodylawson*,⁷⁹⁷ that a house did not cease to be family property because of the renovation work done on it by the deceased, father of the plaintiff, to repair the damage caused by fire.

⁷⁹³ “Provided that customary communities, members thereof, and any other person of Cameroonian nationality, peacefully occupying or using lands in category 1 as defined in article 15, on August 5 1974, the date of entry into force of the present Ordinance, shall continue to occupy or use the said lands. They may apply for land certificates in accordance with the terms of the decree....”

⁷⁹⁴ See for example *Thomas Ngo v. Moses Lukong & Another*, Appeal No. BCA/ 10/75 (unreported); *Daniel Nde Ndenka v. Mokom Clement* (1995) Appeal No. BCA/11/93 (unreported); *Stella Nunga & Five Others v. Wumnyonga & Three Others*, (19..) 5 CCLR 189.

⁷⁹⁵ *Ibid.* 76.

⁷⁹⁶ (2006) Suit No. HCK/AE/K.77/98 (unreported)

⁷⁹⁷ (2006) Suit No. HCF/PROB/AE105/04-05/1M/05 (unreported).

A member is also entitled to a share in any proceeds arising from the sale of the property and the rents and profits accruing from it.⁷⁹⁸ Members have a voice in the management of the property which consists in being consulted directly or through the principal members for important transactions concerning the property. There is also the right of ingress and egress on the property held by members of which the main effect is to prevent actions for trespass to land between members of the family.⁷⁹⁹ Actions in trespass to goods and conversion are, however possible if upon entering land in the possession of another, a member interferes with the property of that person to justify any of the actions.

4.8.3: PERSONALLY ACQUIRED LAND

Not even the customary law is against the acquisition of land by family members in their personal name and with their private resources. Such lands could validly be disposed of *inter vivos* or by will and could be held under registered or unregistered titles.

Security of such tenure is guaranteed by the system of land registration introduced by the 1974 land reforms. It must be said that the system has been used by many an unscrupulous successor to register family land in their individual names.⁸⁰⁰ Section 9 of Decree No. 76-165 of 27 April 1976 governing land registration empowers members of the customary communities to register lands in their individual or collective names. The precondition for registration is “occupation” of the land from 5 August 1975 which is the date when the 1974 Land Tenure Ordinance went into force and the successor, even though a derivative owner of a portion of the land as any other member also has the power of supervision of all the land.

⁷⁹⁸ See *Bodylawson v. Bodylawson*, *ibid.*

⁷⁹⁹ *Daniel Ndenka v Mokom Clement* (1995) Appeal No. BCA/11/93 (unreported).

⁸⁰⁰ See Youego, Christine, “La Situation Juridique du conjoint survivant au Cameroun”, (199) 2 *African Law Review*, 23

We take “occupation” as used here to mean possession which is the basis for title to land.⁸⁰¹ Possession is the exclusive occupation of land with powers to exclude intruders. It may be argued that the successor does not have exclusive possession because the other family members have possession as well. However the parameters for determining the exclusiveness of possession are not the actual occupation but the powers of control and management which include the ability to institute legal proceedings against intruders. These are the prerogatives of the successor,⁸⁰² and although other members of the family could institute legal proceedings to protect the family land, this is only when the successor neglects or fails to do so.⁸⁰³ Hence the requirement of occupation favours the successor against the other family members. Section 10 of the land registration Decree No. 76-165 of 27 April 1976 is against the trustees of an inheritance obtaining land certificates in their names, but this has not prevented such occurrences.⁸⁰⁴

The concept of personally acquired property runs into difficulties in the African context due to the role played by families in bringing up its members. Accordingly there are people who argue that the concept does not exist at all, since without the assistance of the family the person would have had nothing to call his own. The point was however made in the Ghanaian case of *Larbi v. Cato*⁸⁰⁵ that:

“While it [the support] places upon them certain recognised moral obligations towards the family it does not stamp with the mark of the family everything that they afterwards acquire by their own efforts, whether as lawyers, doctors or merchants or by activity in other fields. If

⁸⁰¹ See Harpun, C, Bridge, S & Dixon, M, Megarry & Wade: The Law of Real Property, London, Sweet & Maxwell, 2008, 89.

⁸⁰² See *Mahmudu v. Zenuah* (1934) 2 W.A.C.A. 172; *Kwan Nyieni* (1959) G.L.R. 67; *Adagun v. Fagbola* (1932) 11 N.L.R. 110; *Bassey v. Cobham* (1924) 5 N.L.R. 92; *Uwana v. Ewa* (1925) 5 N.L.R. 25.

⁸⁰³ See *Mahmudu v. Zenuah* (1934) 2 W.A.C.A. 172;

⁸⁰⁴ This as we saw was one of the points of contention in *Chibikom No.1* (above).

⁸⁰⁵ [1960] Ghana Law Report, 146.

the contrary were the correct view there is hardly a person of distinction in the country who could claim to possess anything that he could call his own, and much of the body of the customary law on the disposal and inheritance of self-acquired property would be cast away, which is the *reductio ad absurdum* of the whole argument.”

Self-acquired property however maintains that status in the lifetime of the owner and when he dies testate bequeathing the said property to the beneficiaries individually.⁸⁰⁶ When he dies intestate a presumption arises in favour of family property.⁸⁰⁷ The absolute right which he had over the property in his lifetime is in recognition of his effort and this comes to an end on his death intestate.

Family property created out of privately acquired property must not be confused with the family property already discussed, which the deceased must have held on behalf of his immediate or extended family. Both are of course family property but subject to different rules of devolution. The first category of family property devolves to the members of the sub family while that in the second category is limited to the immediate and possibly extended families.⁸⁰⁸

Hence the circle of successors for family property of the second category is wider as it is not limited to members of the sub-family generated by the deceased. In *Joseph Bamu v. Emmanuel Bamu*⁸⁰⁹, the respondent was made successor to the estate of his deceased father who was also in possession of land obtained from the family when his own father died. The respondent purported to treat the family property as being part of the succession but was met with opposition from members of his father’s

⁸⁰⁶ See *Stella Nunga v. Clara Kumbongsi* Cameroon Common Law Reports, Part 5, 189.

⁸⁰⁷ See *Adeyeye v. Adewoyin* (1963) 1 All N. L. R. 421.

⁸⁰⁸ Ngongang-Ouandji, Andre, “La devolution successorale au Cameroun”, (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 646.

⁸⁰⁹ (1990) Appeal No. BCA/65/86 (unreported)

immediate family who argued successfully that his succession did not include the land obtained from the family.

Another problem is in the distinction between family properties of both categories. Successors have a tendency to use resources from family property to develop, or set up their own property, so that when they die their own successors find it difficult distinguishing between the two categories of property. The solution to this problem could lie in the direction of a requirement that letters of administration must be obtained by every person appointed successor and that each grant of administration should apart from detailing the particular properties in respect of which administration is granted,⁸¹⁰ include projections on envisaged development of the property. These would enable the identification of accretions to the estate which would otherwise be claimed by the successor as private property. In *Bodylawson v. Bodylawson*,⁸¹¹ the plaintiff was estopped from excluding other beneficiaries from obtaining rents from family property on the ground that it was the private property of his deceased father. The father had carried on renovation works on the buildings and replaced buildings consumed by fire with new ones. Similarly in *Peter Charles v. Chinkwo Fidelis*⁸¹² the plaintiff failed in his bid to exclude the other family members from enjoying proceeds of part of family property on the ground that it was property which his deceased father had redeemed from a pledge.

⁸¹⁰ See Order 48 Rule 11 of the Supreme Court (Civil Procedure) Rules, Cap. 211 of the 1948 Laws of Nigeria.

⁸¹¹ (2006) Suit No. HCF/PROB/AE105/04-05/1M/05 (unreported).

⁸¹² (2003) Suit No. HCB/PD/LA.36M/99-2000 (unreported).

4.8.4: DISTRIBUTION OF THE ASSETS

At the end of the administration the successor is expected to distribute the property. Movable property as we said is distributed shortly after the funeral.⁸¹³ Every member without distinction of sex receives something even if the entitlements are not equal. The share of the property which each person receives is a function of the responsibilities entrusted on him by the family meeting.⁸¹⁴

It is common practice in all the tribes for the female relatives to receive the items of adornment of a deceased female, while things such as kitchen utensils go primarily to the successor for the use of his wife. In the case of a deceased male it would only be expected that his sons get his items of clothing as well as the utensils of his trade because generally a son should take over the father's trade. In *Ajong v. Ajong*,⁸¹⁵ the deceased had no son but was survived by daughters and two nephews who were the parties in this case. He left property including palm and raffia trees which the customary court shared between the nephews. In the present appeal one of the nephews claimed to be solely entitled, but the appellate court upheld the partition and stated the law regarding the distribution of such property as follows: "The Widikum Customary Court [law?] is grounded on patrilineal succession. The question of palm trees and raffia mats is a male affair and that is why apparently, none of the ... three daughters are interested in the matter."⁸¹⁶ Items of furniture are also shared and in most of the cases the successor gets most, if not all of it.⁸¹⁷

⁸¹³ Ngongang-Ouandji, Andre, "La devolution successorale au Cameroun", (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 649.

⁸¹⁴ See Youego, Ch., "Sources et Evolution de Droit des Succession au Cameroun," Doctorat thesis, university of Paris II, 1994, 623.

⁸¹⁵ (2000)1 CCLR. 67.

⁸¹⁶ Ibid, 70.

⁸¹⁷ See Guy Bertrand, Momo, Le Partage des successions en droit Camerounais, University of Dschang, Maitrise dissertation, 1997, 45-48 (unpublished).

The distribution of land is not countenanced⁸¹⁸ unless there is proof that the beneficiaries can no longer live together as a family because of squabbles borne of the fact that the successor is depriving the others of their rights in the use and enjoyment of the property. Distribution proceedings could be initiated through the successor⁸¹⁹ and when he refuses, through a court order. When consensual, the distribution is normally conducted by the traditional council upon application by the family. The Council visits the *locus in quo* in order to ascertain the extent of the property and determine how to allocate the shares. In the absence of agreement an application could be made to the Customary Court to order the partition. The decision to partition is generally followed by wide publicity requiring the presence or representation of all the beneficiaries.

Distribution operates on the basis of the hotchpot principle according to which every member must account for and bring into the hotchpot any family property in their possession. This must however be distinguished from outright gifts of property made by deceased in his lifetime to members of his family. It would appear that gifts of property made in conformity with accepted procedure do not come into the hotchpot. In *Geh v. Geh*⁸²⁰ Taminang, J, excluded a gift from an inventory by quoting the statement by Ollennu that “A most essential [?] of customary law regarding either gifts inter vivos or testamentary is that it should be made in unambiguous terms and must have the widest possible publicity, in other words customary law does not favour gifts made clandestinely.”⁸²¹ Secondly, all the

⁸¹⁸ Youego, *ibid*, 623.

⁸¹⁹ Binet, Jacques, “La devolution successorale chez les Douala du Cameroun”, (1955) 65 *Penant*, 33-40, 36, 40.

⁸²⁰ (2006) HCB/PD/LA/243M/04-05 (unreported) Also in *Arrêt Mpempele*, the deceased made an inter vivos gift of a house to one of his son. When he died the other five children questioned the validity of the gift in order to have the house brought back into the succession and partitioned. It was held by the Supreme Court that the gift was valid and could not be set aside. *Cour Suprême Arrêt No. 47/L du 21 Fevrier 1980*.

⁸²¹ The Law of Testate and Intestate Succession in Ghana, *supra*, 228.

beneficiaries are treated alike and finally the eldest of the beneficiaries has the priority of choice after the property has been broken down into portions.⁸²²

Distribution is *per capita* or *per stirpes* known in French law respectively as *partage par tête* and *partage par souche*. The various tribes in Cameroon have appellations that relate to either method. The Bassossi for example will talk of *Nlue*, meaning head, when referring to the *per capita* method, and *Abum*, meaning womb when referring to the *per stirpes* method.⁸²³ The choice seems to depend more on the nature of the family. The *per capita* method is good for the estate of a woman as well as that of a man survived by one wife or who had children only by one wife.⁸²⁴ The *per stirpes* method is suitable where the deceased is survived by children from more than one wife.

The *per stirpes* method could be stigmatised for being repugnant to natural justice, equity and good conscience where there is inequality between the number of children of each wife or where some of them have no children. This notwithstanding, it appears to be universally followed where there is no objection to its use. Its application was in fact solicited in *Affaire Tengou Emmanuel*.⁸²⁵ The deceased was survived by children from two wives and one illegitimate child and the property was accordingly divided into three shares, even though one of the widows had six children and another had three. Also in *Ambo v. Angah*⁸²⁶ the deceased was survived by two widows with issue from both marriages. Letters of Administration were granted to one of the widows and constant bickering led the other widow to institute an action for a revocation of the letters. The court opted for distribution because due to “the unsavoury and uncomfortable relationship of the plaintiff and defendant which

⁸²² See *Richardo v. Abal* (1926) 7 N. L. R. 58.

⁸²³ The Yorubas call them *Ori Ojori* and *Idi-Igi* respectively.

⁸²⁴ See James, *Modern Land Law of Nigeria*, supra, 159.

⁸²⁵ Cour d' Appel Bafoussam, Arrêt No.19/C du 26 Janvier, 1995 (unreported)

⁸²⁶ (2006) Suit No. C.A.S.W.P/23/2004 (unreported).

undoubtedly smacks of bad blood... it is[was] in the interest of the parties to share the above named property between them.” The property was divided between the branches irrespective of differences in the number of children. The method was proposed by the Fon of Mankon in the Chibikom case when the successor demanded partition on the ground that her life was at stake if she continued as successor. In the final communiqué from the palace the property was divided in accordance with the number of wives and the oldest child of each wife advised to apply for letters of administration.

That the method is applicable to cases of multiple wives with children is only a presumption which could be rebutted by evidence showing that the family prefers the *per capita* method, or that the customary law actually prescribes the latter method because the allocation of responsibilities during the funeral was also *per capita*.⁸²⁷ The family has the discretion to decide whether or not use the *per stirpes* method. In the Ghanaian case of *Siaw v. Sorlor*⁸²⁸ Ollennu J. said: “Although that may be the general custom, that is sharing *per stirpes* according to mothers, there is discretion in the family to share *per capita* if in their opinion the sharing according to the number of mothers will work hardship, or would be against natural justice, equity and good conscience.” The *per capita* method was adopted in *La Succession Doualla Joseph*⁸²⁹ where the deceased was survived by ten children unevenly divided between three widows.

The decision to adopt either method must be made expeditiously and not dictated by envisaged economic benefit. In *Akerele v Balogun*⁸³⁰ it was held that a

⁸²⁷ James, *supra*, 159.

⁸²⁸ (1960) G. L. R. 77, 79.

⁸²⁹ Tribunal de Premier Degré Bafoussam, Jugement No. 232 ?c du 5 Mai 1988 (unreported)

⁸³⁰ (1964) L. L. R. 99.

member who has accepted a benefit under one method of distribution cannot later demand that the rest of the estate be distributed by the other method.

Distribution in customary law does not change the family character of the land. True the beneficiaries might register the lands thus obtained in their personal names, but because they receive the shares as family heads, the interests of the other persons must be recorded and protected in the land register. This is possible under section 16(1)(b) of land registration Decree No. 76-165 of 27 April 1976, according to which when an application is made for registration “any interested party may intervene with an application for registration in the event of a claim being based on the existence of a real right or of an encumbrance liable to be entered in the certificate under preparation.” Hence any alienation of the land is subject to these interests.

Conclusion

It is evident from the foregoing that the customary law of succession accounts for most the succession woes in this country. The need to keep property in the family based on a land tenure system which has long outlived its usefulness is used to justify the exclusion of women from succession. Administration is indefinite and distribution is only symbolic since at the end of the day the property still remains in the family. Children are also seen to be at the mercy of care-takers who qua successors have a tendency to using the property for their benefits and for that of their immediate families.

By failing to adopt the broad based category of beneficiaries put forward by Ollennu customary law fails in the position as the received laws. It adopts the system of succession to the nearest and so excludes persons who had depended on the deceased for their maintenance. The effect of such exclusion is at least reduced in

English law because of the existence of the Inheritance (Provision for Family and Dependents) Act 1975. No such facility exists in customary law and the end result has been that successors cannot have peaceful enjoyment of the property. Either there is physical intervention or threats of witchcraft.

Since this ends the examination of the different systems of intestacy, we are able to assert that neither of them meets the objectives of a good succession law set out at the beginning of this work. The principle of precedence reduces the categories of beneficiaries and so it is difficult to say that the law actually ensures the continuity of the obligation of maintenance which the deceased had towards certain members of his family. This is only done as far as the members of the nuclear family are concerned but the duty of maintenance does not end here, as a person has the duty to maintain his parents and other needy members of the family.

Neither system has a satisfactory system of administration, given that this is generally indefinite and prolonged administration is what gives rise to abuse. With the exception of English law, distribution gives rise to the right of use only. The situation is exacerbated by the absence in Cameroon of a social security scheme that could take care of vulnerable persons.

CHAPTER FIVE: THE CONFLICT OF LAWS

Introduction.

With three different systems of intestate succession, each of which has different substantive rules, administered by a parallel system of modern and customary law courts, a study of the rules of conflicts is only normal in a study of this nature. The usual type of conflicts will normally be internal conflicts, which arise when persons in a territory having different systems of private law enter into judicial relations.⁸³¹ Conflicts of this category will be expected between different systems of customary law *inter se* and between the received and customary law.

The rules for resolving internal conflicts differ from the rules of private international law, which since the decision in *Ghamson v. Wobill*,⁸³² were held not be applicable in the resolution of internal conflicts. Rules of private international law are evolved to resolve conflicts between different legal systems operating in different territories and are therefore unsuited to the problems of internal conflicts. This statement would need qualification in the case of Cameroon where no local rules exist to govern conflict between the common law and civil law.

The variegated nature of the conflicts therefore makes the existence of uniform rules impossible and so to better understand the rules, we propose to examine them within the different courts, after explaining the central position of the personal law in succession matters.

5.1: PERSONAL LAW: THE LAW GOVERNING SUCCESSION.

Succession like other matters of personal status is governed by the personal law of the deceased. Personal law is acquired by birth or descent. It is based on the

⁸³¹See Bartholomew, G.W., "Private Interpersonal Law" [1952]11&CLQ, 325-344,325.

⁸³²(1947) 12 W.A.C.A. 181.

conception of man as a social being, so that those transactions of his daily life which affect him personally, such as marriage, divorce, legitimacy, many kinds of capacity and succession may be governed universally by the law deemed most suitable and adequate for the purpose.⁸³³ The law acquired by birth or descent could be replaced by codified law if the code supplants all other laws. Our law of succession is yet to be codified, and so what constitutes the personal law will certainly vary, depending on whether the deceased was subject to the customary or received law.

When the conflict is internal the personal law governs the devolution of all the property without distinction between movable and immovable property. When the conflict is external the rules subject movable property to the personal law of the deceased and immovable property to law of the *situs*.⁸³⁴ The submission of immovables to the law of the place rather than the personal law of the deceased is explained by the desire by states to protect their sovereignties.⁸³⁵ This distinction is of course unknown in internal conflicts which because they arise within the same territory do not involve any concerns as to the protection the sovereignty.⁸³⁶

Even in private international law the movable/immovable dichotomy has been criticised for encouraging the fragmentation of the property of the deceased and thereby ignoring his intentions, which would certainly not have been for the property to be divided up and subjected to different laws.⁸³⁷ The argument about protecting the sovereignty is today questioned by scholars who contend that the protection of sovereignty is the domain of public international law. Private international law being

⁸³³ See Graveson, R.H., Conflict of Laws, London, Sweet & Maxwell, 1974, 188.

⁸³⁴ See David McClean, Morris: The Conflict of Laws, London, Sweet & Maxwell, 2000, 379,

⁸³⁵ See *Freke v. Lord Carbery* (1873) L. R. 16 Eq. 461, 466, cited by J.H.C. Morris, "Intestate Succession to Land in the Conflict of Laws" (1969) 85 L.Q.R., pp. 339-371 at 342;

⁸³⁶ See Bouckaert, F. "Les Regles de Conflit de Lois en Afrique Noire", (1967) 77 *Penant*, 1-12, 4.

⁸³⁷ See generally J.H.C. Morris, "Intestate Succession to Land in the Conflict of Laws" (1969) 85 L.Q.R., pp. 339-371; Clarkson, C. M.V., and Jonathan, Hill, The conflict of Laws, Oxford, Oxford University Press, 2006, 453.

a species of private law ought to be preoccupied with finding fair and just solutions to meet the legitimate aspirations of parties in dispute.⁸³⁸

These criticisms favour the application of the personal law of the deceased in the devolution of all of his property irrespective of the nature of conflict. In this respect the Hague Conference on Private International Law of 1988 adopted a draft Convention on the law applicable to succession. The Convention proposed the adoption of the personal law in the devolution of movable and immovable property. This is still to be as law in France and Great Britain.⁸³⁹

5.2: CONFLICT OF LAWS IN CUSTOMARY COURTS

What is personal law in the customary courts? Being the law acquired by birth or descent the personal law of persons subject to the jurisdiction of these courts cannot but be customary law. Normally the persons would be born to a tribe which is either patrilineal or matrilineal or must have been born of Muslim parents.⁸⁴⁰ The question of conflict does not arise if a person lived, married and died in his or her place of origin. Conflicts are however made possible because of the disappearance of rigid geographical divisions between tribes, intermarriages, and the corresponding growth of mobility among the population, for various economic and social reasons. When a settler dies in the tribe where he resides, and neither the received nor local statutory law is applicable, the local customary court has jurisdiction and has to decide on the applicable law. Would it be the law of the locality or the personal law of the deceased?

⁸³⁸Ibid. For a detailed analysis of the objectives of choice of law rules in private international law, See Jaffey, A. J. E., "The foundations of rules for the choice of law", in Fentiman, Richard (ed), Conflict of Laws, Singapore, Dartmouth, 1996, 368-392.

⁸³⁹ Moves with similar objectives have been engaged in the European Union since 2002 and it is proposed when they go operational they shall bind non-EU states also. See Clarkson , C. M.V., and Jonathan, Hill, The conflict of Laws, Oxford, Oxford University Press, 2006, 445.

⁸⁴⁰ The particular case of conflict involving Muslim law will considered separately.

5.2.1: REGULATION OF CONFLICT BETWEEN DIFFERENT SYSTEMS OF CUSTOMARY LAW IN ANGLOPHONE CAMEROON

There are no specific rules for the resolution of conflicts of this nature, but it is thought that these could be resolved in reliance on the principles governing the laws to be applied by these courts. To think otherwise would mean that each system evolves its own rules of conflict, an option rejected by Bennion because it might result in inconsistent rules.⁸⁴¹ It is not only a question of inconsistency, but also one of the predictability and certainty of the law in a society with a multiplicity of tribal laws.

The application of customary law is purportedly governed by Law No. 79-4 of 29 June 1979 attaching the Customary and Alkali Courts to the Ministry of Justice⁸⁴² and the Customary Courts Ordinance of 1948. The former, which fortunately does not abrogate the latter, provides without more in article 2 that “The Customary and Alkali Courts apply customs of the parties which are not contrary to law and public policy.” The provision is drawn from section 51 of a French Decree of 1927 organising the traditional jurisdictions in Francophone Cameroon. But it is inadequate in the case of succession which is governed by the personal law of the deceased and not of the parties. True, the parties could have the same personal as the deceased, but this cannot always be assumed. Hence that provision is complemented in Francophone Cameroon with article 3(1) (b) of Decree No. 69/DF/544 of 19 December 1969 governing traditional law jurisdictions in that part of the country, which provides that the custom of the deceased prevails whenever it conflicts with that of the parties. This Decree is

⁸⁴¹ Bennion, F.A.R., *The Constitutional law of Ghana*, London, Butterworths, 1962, 446.

⁸⁴² Prior to this law the courts were unlike their Francophone counterparts placed under the Ministry of Territorial Administration.

not applicable in Anglophone Cameroon and this renders inappropriate the application of the 1979 Law therein.

This leaves the Customary Courts Ordinance of 1948, section 18(1) of which ordains the administration of the “the native law and custom prevailing in the area of jurisdiction of the court or the law binding between the parties...” What constitutes the “prevailing custom” was considered in *R v. Ilorin Native Court*⁸⁴³ where “prevailing” customs were construed to signify “predominant” customs. This generated some debate as to the significance of the term “predominant.” To Park, it signifies the law of the majority tribe.⁸⁴⁴ This position would entail assimilating the laws of the minority tribes in the area to those of the majority tribe.

Professor Allott, on the other hand, is of the opinion that the term “does not refer to the majority-tribe or to the native customary laws actually found in the area but to the single predominant system of law.”⁸⁴⁵ This seems to be a better view since construing the expression in terms of tribes would imply the non-applicability of Muslim law.⁸⁴⁶ The interpretation also eliminates the fear of foisting the law of the majority tribe on the other tribes in the locality.

In succession the predominant law of a locality is also the personal law of the deceased if he was a native of the locality. Otherwise, the second option- “the law binding between the parties” becomes the applicable. The point was made by West African Court of Appeal in the Ghanaian case of *Ghamson v. Wobill*⁸⁴⁷, accepted as authority in West Africa that “the law binding the parties” is the personal law of the deceased.

⁸⁴³ (1953) 20 N.L.R. 144.

⁸⁴⁴ Park, *The Sources of Nigerian Law*, 117

⁸⁴⁵ Antony Allott, *Essays in African Law: with special reference to the law of Ghana*, London, Butterworth, 1960, p 160.

⁸⁴⁶ Which was in issue in *R v. Ilorin Native Court*.

⁸⁴⁷ (1947)12 W.A.C.A.181.

The view according to which personal law is immutable and follows the person wherever he goes⁸⁴⁸ therefore seems stronger in customary law. As a general rule a person cannot shed one customary law in favour of another.⁸⁴⁹ Migration and settlement in a different locality have been advanced and rejected as possible factors of change. The point was raised in the *Yinusa case*,⁸⁵⁰ where it was argued that because the propositus resided and died in a place different from his tribe of origin, his estate was subject to the customary law of his place of residence. The contention was rejected and it was held that “The mere settlement in a place, unless it has been for such a long time that the settler and his descendants have merged with the natives of the place of settlement and have adopted their ways of life and customs, would not render the deceased or his descendants subject to the native law and custom of the place of settlement.”

Whether a person has converted to the personal law of the place of residence is in fact not easy to prove. In Cameroon most settlers purport to be part of the local community and yet belong to tribal unions representing the various settler populations. When a settler dies his remains are conveyed to his home for burial. Hence conversion cannot be conclusive proof of an intention by the deceased to change his customary law, often the convert is influenced by some gain that such conversion would bring without the intention to become part of the community.⁸⁵¹

⁸⁴⁸ See Lush, L.J. in *In re Goodman's Trust* (1881) Ch. D. 266, 278; *Arret du 22 Mai 1905*, Cour de Cassation (1905) 1 Penant, 205; *Arret du 18 Octobre, 1950*, Cour de Cassation (1952) 1 Penant, 123. (Both French cases are cited by Youego, Ch., “Sources et Evolution de Droit des Succession aux Cameroun,” Doctorat thesis, university of Paris II, 1994, 201-202.

⁸⁴⁹ See Omidire, Kolapo, “Change of personal law under customary law in Nigeria”, (1990) 39 I&CLQ, 671-675, 673.

⁸⁵⁰ *Yinusa v Adesubokan*, reported in [1970] J.A.L. 56-67, 58.

⁸⁵¹ See Bartholomew, G. W., “Private Interpersonal Law”, (1952) 1 I. & C. L. Q, 325-344, 343.

Not even marriage has such an effect on women in spite of contentions that upon marriage a woman becomes the husband's property. She always conserves her personal law which governs the devolution of her ante-nuptial property when she dies.

Exception is made to the general rule, if the personal law of the deceased has not been sufficiently established.⁸⁵² In *Ekem v. Nerba*⁸⁵³, another Ghanaian case, the deceased intestate was a Nigerian resident in Cape Coast (Ghana), where he married two wives of the Fanti tribe. The present dispute opposed a daughter of the deceased who claimed a share of the estate and the widow who claimed that the property in question had been jointly acquired by her and the deceased husband. The argument on joint ownership was rejected and question became whether the Fanti law of succession which is matrilineal and gives children no interest in their fathers' property or the personal law of the deceased would be applicable. The deceased had contracted customary marriages which as we saw do not change the personal law and so the question ought not to have arisen at all.⁸⁵⁴ The personal law of the deceased was held to be applicable but the impossibility to establish this personal law led to application of the law of the locality, which goes against the rule that migration does not change the personal law. Verity C. J. justified the decision in the following terms:

“As it is, although it is common ground that the deceased Johnson was a Nigerian it does not appear from the evidence to what part of Nigeria he belonged, and there is nothing to show what would be the nature of the law applicable, if some foreign law is binding between the parties...”⁸⁵⁵

⁸⁵² Park, *supra*. 119.

⁸⁵³ (1947) 12 W.A.C.A. 258.

⁸⁵⁴ “It is necessary to mention that the deceased, Johnson, was a native of Nigeria, and that though he was long resident in Cape Coast, it was not shown that he had lost his domicile of origin.” *Ibid*, 258.

⁸⁵⁵ p. 260.

We take issue with this decision, as we are surprised that the appellate court decided on the application of the law of the locality in spite of the fact that it excludes the children. Even though there is nothing in the judgment to show that attempts were made to prove the customary law of the deceased the court ought to have treated the case as one for which there was no applicable rule of customary law. The lacuna, we submit ought to have resulted in the court invoking the repugnancy doctrine to decide on which law to apply. Certainly any law which excludes children from succession is prima facie “repugnant to natural justice, equity and good conscience.” Whenever this is established, English law ought to apply and not an alternative rule of customary law, which in this case was the law of the locality. This was an appellate court with competence to administer both the English and customary laws.

The law of the locality rule would be good in cases of inter vivos dealings in land, because the parties whose personal laws differ from that of the locality entered voluntarily into the transactions and are taken to have consented to the application of the local law.⁸⁵⁶ This will also be true of succession if the deceased was a native of the locality, for those interested in the land would be local people subject to the local customary law.⁸⁵⁷

The foregoing are relevant in cases of intestacy and would be useful in cases of testacy too, because the terms of a will would reflect the intention of deceased which could differ from his personal law.

More would be said of wills elsewhere in this work, so we can only state here that natives could make wills, written or nuncupative, in which dispositions could be made which operate a change in the customary law that would otherwise have been

⁸⁵⁶ See Park, 119.

⁸⁵⁷ Bennion, F.A.R., The Constitutional law of Ghana, London, Butterworths, 1962, 448.

applied. Nuncupative or oral wills made by a person of sound mind in the presence of responsible and disinterested witnesses⁸⁵⁸ are generally accepted in customary law and do not present any problem of applicable law.

5.2.2: REGULATION OF CONFLICT BETWEEN DIFFERENT SYSTEMS OF CUSTOMARY LAW IN FANOPHONE CAMEROON

Since 1921, a French colonial decree stipulated that traditional law jurisdictions apply “exclusively the customs of the parties.”⁸⁵⁹ This was reproduced in article 51(1) of the Judicial Organisation Decree of 31 July 1927 which represents the current position. These texts do not refer directly or even obliquely to the personal law of the deceased. However, to understand the provision in the context of succession it has to be read together with sub-section 2, currently article 3(1) (b) of the Judicial Organisation Decree No. 69/DF/607 of 3 December 1969, according to which: “In the case of conflict of customs, it is provided: For questions relative to succession and testaments according to the custom of the deceased.” This means that the conflict must be resolved in application of the customary law of the deceased.

In effect therefore, it is the personal law of the deceased which is applicable. For the absence of conflict will mean that the parties have the same personal law with the deceased. And the restriction on the ability to change from one customary law to another is also applicable. So a person who migrates to a place where the customary law differs from his own and even marries a woman of that tribe does not find his status change as a result.

But if a situation as that in *Ekem v. Nerba* (discussed above) was to arise the solution would certainly not be the law of the locality. One of the situations in which

⁸⁵⁸ See Oluyede, P.A., Nigerian Law of Conveyancing, Ibadan University Press, 1975, p.77.

⁸⁵⁹ Article 29, decree of 13 April 1921, (1923) II Penant, p.86.

the courts are allowed to administer the civil code is where the customary law is found to be silent.⁸⁶⁰

5.3: CONFLICT OF LAWS IN THE HIGH COURTS

What is personal in the High Courts? It is assumed that persons over whom these courts are competent are those who, for one reason or the other are said to have shed their customary statuses. This is because while it is impossible to change from one system of customary law to another, it is accepted that a person could change from customary to modern law. Again, we refer to Bramford Griffith J. in *Cole v. Cole* when he says:

“Where on the other hand, the matter before the court contains elements foreign to native life, habit and custom, the court is not bound to observe native law and custom.”

It is generally presumed that the personal law of the deceased changes if he contracted a monogamous marriage or left a will in modern form or if the parties renounce the jurisdiction of customary courts, as is possible in Francophone Cameroon. The personal law then becomes English or French law for the purpose of succession.

The existence of a local statutory law on the subject could supersede customary law and become the personal law of the deceased, if the statute expressly supplants customary law. But if the statute does not abolish customary law then it only becomes applicable upon the existence of any of the events identified above.

⁸⁶⁰ See *Betow Omar Charles v. Ngo Mbenoum Julienne*, Arret No. 151 du 18 Juin 1968. The competence of the courts to apply customary law has already been discussed in chapter 3.

Cameroon is yet to have a statutory law on succession and so the question does not arise.⁸⁶¹

The point to make and which is the *raison d'être* of this inquiry is that English or French law does not automatically become applicable on the mere existence of a monogamous marriage or a will, because persons who stand to benefit if customary law is applied would not concede to the change of personal law without a fight.

5.3.1: REGULATING CONFLICT BETWEEN ENGLISH AND CUSTOMARY LAW.

Choice of law questions are fairly easy when the parties are natives, for customary law is normally applicable, except its application is excluded for some such reasons as repugnancy or incompatibility or the parties opted for the application of English law. The principal cause for conflict between the customary and English laws is the possibility for persons, natives and non-natives alike, to enter into transactions unknown in customary law and this raises the question as to whether it is the customary or English law which governs the transaction. The answer lies in section 27(3) of the Southern Cameroon High Court Law, 1955 according to which:

“No party shall be entitled to claim the benefit of any native law or custom, if it shall appear either from express contract or from the nature of the transaction out of which any suit or question may have arisen, that such party agreed that his obligation in connection with such transaction should be regulated by English law or that such transactions are unknown to native law and custom.”

Monogamous marriages and English Wills are examples of transactions said to be unknown in customary law. Their mere existence *prima facie* subjects the deceased's

⁸⁶¹ There is of course a family code in the making and we will in chapter 7 consider whether it should completely abrogate the customary law of succession.

his estate to English law. It is only *prima facie* because it could be argued that these matters are not really unknown, given that their equivalents exist and differ from English law only on points of formality.

Now, could the terms marriage and wills be construed as constituting transactions in the proper meaning of the word, which signify an agreement on a given subject between the parties present in court, and the legal consequences of which are limited to them, except where on the basis of the doctrine of privity of contracts third parties are said to derive benefits or liabilities under the contract. Marriage is a contract and comes within the meaning of “transaction”, but only with respect to *inter-vivos* incidents of marriage such as divorce.⁸⁶² As concerns the *post-mortem* incidents the “transaction” is *sui generis*, because disputes in succession will never involve the spouses *inter se*. If succession rights are enforceable at all, it is because marriage works a transformation of the status of the spouses and creates extensive legal consequences affecting not only them but their children and relatives as well.⁸⁶³

Wills on the other hand can never qualify as transactions. They are not even unilateral contracts or contracts made for the benefit of a third party entitling the latter to enforce them on the basis of privity. Wills are essentially unilateral acts⁸⁶⁴ of the testator, of which the existence is generally unknown to the beneficiaries. But like all gifts, wills expressly create enforceable rights on behalf of the beneficiaries.

⁸⁶² A. B. Kasunmu, “Intestate Succession In Nigeria” (1964)1 N.L.J., pp.50-58, 56; Bennion, F.A.R., The Constitutional law of Ghana, London, Butterworths, 1962., 440-444; Park, *supra*, p.111.

⁸⁶³ J.W. Salacuse, “Birth, Death, and the Marriage Act: Some Problems in Conflict of Laws.” (1964)1 N.L.J., pp.59-72, 59.

⁸⁶⁴ Park, *supra*, p.111.

5.3.1.1: When a Native Contracts a Monogamous Marriage.

We saw earlier that the schedule to section 16 of the Customary Courts Ordinance 1948 bars customary courts from exercising jurisdiction over the estate of a person who contracts a Christian marriage. Judicial blessing for this position of the law was given in the Nigerian case of *Cole v. Cole*.⁸⁶⁵ John William Cole, a native of Lagos had contracted a Christian marriage with the plaintiff, Mary J Cole in Sierra Leone. The spouses later returned to Lagos where John William Cole died intestate survived by his widow, son and brother. The action was initiated by the brother of the deceased claiming to be declared sole successor and trustee for the son of the deceased, excluding the widow. The trial court in application of customary law held in his favour. The widow instituted the present appeal claiming that because they had contracted a Christian marriage, English law should be applied to vest the estate in her on behalf of their son, Alfred Cole. English law was held to be applicable because “a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law.”⁸⁶⁶ This has been described as the “inherent incident”⁸⁶⁷ theory according to which English law inexorably follows the celebration of a Christian marriage.

Our choice of the term “monogamous marriage” instead of “Christian” or “statutory” marriage” is because Christian marriages are unknown in Cameroon,⁸⁶⁸ and the statute which governs marriages in Cameroon recognises monogamy and polygamy. For the present purpose the term signifies the classical statutory marriage defined as “a marriage which is recognised by the law of the place where it is

⁸⁶⁵ (1898) 1N.L.R. 15.

⁸⁶⁶ p.22

⁸⁶⁷ Salacuse, J.W., “Birth, Death, and the Marriage Act: Some Problems in Conflict of laws” (1964)1 N.L.J. 59-72, 60.

⁸⁶⁸ Generally the parties celebrate a civil marriage before going to the church for the blessing thereof, and this might be immediately after the civil marriage or years after.

contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.”⁸⁶⁹ It is thus not the *de facto* monogamous marriage in customary law which legally, is potentially polygamous, since there is no commitment to the rule of “one man one wife.”

The tendency in Cameroon is to describe marriages celebrated under the Civil Status Registration Ordinance No. 81-2 of 29 June 1981 as statutory.⁸⁷⁰ This is because section 49 provides that a marriage certificate must *inter alia* specify the form of marriage chosen by the spouses and there is space in the marriage certificate for this.

However, that a polygamous marriage is described as “statutory” because celebrated under the above Ordinance does not alter the personal laws of the spouses who remain subject to customary law.⁸⁷¹ A marriage certificate for them serves as proof of the marriage, and for workers, it gives access to such funds as family allowances.⁸⁷² Upon dissolution by death the widow or widower would need it to obtain probate for a will or apply for letters of administration.

One problem with which the courts have been confronted arises from the additional requirement for spouses to specify the system of property rights. It is common for the space reserved for this information to be left blank because most often, the Registrar who does not know the significance of the requirement skips the question.⁸⁷³ Even when the question is posed, some responses raise problems relating

⁸⁶⁹ See section 3B of the Interpretation Ordinance (Colony and Protectorate) cap. 94 of the 1948 Laws of Nigeria. Lord Penzance had in *Hyde v. Hyde*, (1866) L.R. &D. 130 defined marriage in Christendom as “the voluntary union for life of one man and one woman to the exclusion of all others.” This definition has been superseded by events and can no longer be taken as representing the actual position, given, for example, the proliferation of divorce which means that a marriage is not union for life. For more on the shortcomings of the definition, see Poulter, Sebastian, “The definition of marriage in English law.” [1979] 42 M.L.R. 407-429.

⁸⁷⁰ See *Nana v. Nana* (2005) Suit No. HCF/PROB/AE1/2001-2002 (unreported)

⁸⁷¹ See *Tufon v. Tufon* Suit No. HCB/59/MC/83 (unreported).

⁸⁷² See Ngwafor E. N. *Family Law in Anglophone Cameroon*, supra. 41.

⁸⁷³ See Ngwafor E. N. *Family Law in Anglophone Cameroon*, supra, 178.

to the applicable law. There are cases where the spouses chose monogamy as the form of marriage and on the question of the system of property rights they state “according to the native laws and customs” of the husband’s tribe.

What this means effectively is not clear. The phrase, said to represent the system of property rights, is construed by some Judges as effectively signifying a customary marriage. By implication spouses have opted for monogamy and polygamy, a possibility rejected by Ekema, C.J. in *Kumbongsi v. Kumbongsi*: “A man is either polygamously married or monogamously married but not the two forms simultaneously.”⁸⁷⁴ The impact of the construction however remains as a result of which the courts have the discretion to decide which form of marriage to uphold. The inclination is in favour the customary marriage, for according to Asu, J. in *Tufon v. Tufon*⁸⁷⁵, “The inference is that what the parties stated as the marriage, i.e. Native Laws and Customs of Kom people was what they intended. The insertion of the word ‘monogamy’ is therefore *absurd*.”⁸⁷⁶

This contrasts sharply with the position adopted by courts in other countries with similar problems. An example is the Southern Rhodesian case of *Rex v. Machingura*⁸⁷⁷ where the court upheld the Christian marriage on the ground that because it is celebrated according to “civilised rites” it supersedes marriage celebrated according to native law and custom. This would be avoided if the phrase were to be taken for what it stands for, to wit, the system of property rights. True, it is incompatible with monogamy but that is no reason for it to be taken out of context. The most that the courts would have done should have been to ignore it, uphold the

⁸⁷⁴ Suit No. C.A.S.W.P/ 4/84 cited by Ngwafor E. N. *Family Law in Anglophone Cameroon*, supra, 42.

⁸⁷⁵ Suit No. HCB/59/MC/83, unreported but cited by Ngwafor E. N. *Family Law in Anglophone Cameroon*, supra, 39. See also *Kumbongsi v. Kumbongsi*, Suit No. C.A.S.W.P/ 4/84, *ibid*; *Lyonga v. Lyonga*, Suit No. C.A.S.W.P/CC/5/94 (Unreported)

⁸⁷⁶ Emphasis added.

⁸⁷⁷ (1932) S. R. 67.

type of marriage and presume the appropriate system of property rights, which is separate property. There is no doubt that property arrangements on marriage are only a consequence of the marriage⁸⁷⁸ and can therefore, not override the marriage itself and become determinant in the choice of law. Biblically marriage is not conceived in terms of property as Genesis chapter 2 verse 24 ordains simply, “Therefore shall a man leave his father and his mother, and shall cleave unto his wife, and they shall be one flesh.”⁸⁷⁹

Little wonder therefore that in *Nana v. Nana*,⁸⁸⁰ Ngassa, J. expressly rejected all previous decisions on the point:⁸⁸¹ “I deviate from the school of thought which holds that once the above *superfluous* words appear on a marriage certificate it renders the marriage customary and polygamous.”⁸⁸² This was a succession case in which the marriage certificate bore “monogamy” as the form of marriage and the phrase “according to the native laws and customs of the Bamileke people”, for the system of property rights.

Another problem likely to raise choice of law questions relates to customary marriages purportedly converted into monogamous marriages. Section 81 of the Civil Status Registration Ordinance 1981 provides that “customary marriages shall be recorded in the civil status registers of the place of birth or residence of one of the spouses.” It seems doubtful, if this could amount to conversion, giving the marriage validity independent of the previous customary marriage. It is conceded that the process only serves to provide evidence for an existing customary marriage.⁸⁸³

⁸⁷⁸ See Herring, Jonathan (ed) *Family Law: Issues, Debates, Policy*, London, William Publishers, 2001, 17.

⁸⁷⁹ Also in study on why people marry there is no indication that people marry for property. See Herring, Jonathan, *Family Law*, London, Pearson Longman, 2007, 38.

⁸⁸⁰ (2005) Suit No. HCF/PROB/AE1/2001-2002 (unreported).

⁸⁸¹ *Tufon v. Tufon* Suit No. HCB/59/MC/83 (unreported); *Kumbongsi v. Kumbongsi*, Suit No. C.A.S.W.P/ 4/84(unreported); *Lyonga v. Lyonga*, Suit No. C.A.S.W.P/CC/5/94 (Unreported).

⁸⁸² Emphasis added

⁸⁸³ See Ngwafor E. N. *Family Law in Anglophone Cameroon*, supra, 37.

However, nothing in the law prevents the spouses of a potentially polygamous marriage from going through a fresh marriage ceremony which would effect changes to their personal law if they choose monogamy and the appropriate system of property rights.

*Kumbongsi v. Kumbongsi*⁸⁸⁴ appears to have excluded the possibility for such conversion. But it could hardly be conclusive on the point and is justified only on its own facts. The plaintiff was already married with three wives under customary law. For the purpose of obtaining family allowance, he decided with the respondent, the first wife to have their marriage registered and as it was before the 1981 ordinance, this could only be done through a court judgment. The court declaration resulted in a marriage certificate containing the mention “monogamy with common property.” This was subsequently disclaimed by the plaintiff and led to a decision of the Court of Appeal ordering the rectification of the marriage certificate. This was only normal, given that the plaintiff, already polygamously married could no longer change his personal law. The decision would certainly not have been the same if he had been only potentially polygamously married.

The “inherent incident” theory has been adopted in Cameroon in the oft-quoted dictum of Epuli, J. in *Nforba v. Nchari*:

“Where a married Cameroon man or woman domiciled in Cameroon dies intestate, the rule of succession applicable to his estate will depend on whether the marriage was monogamous or polygamous. In the light of section 15 as read with section 9(b) and section 27 of the Southern Cameroon High Court Law 1955, as well as sections 3, 16 and 34 of Ordinance No. 72/4 of 26th August 1972, as amended, on Judicial Organisation, where the marriage was monogamous, the rules applicable will be those in force in England and where the marriage was polygamous

⁸⁸⁴ Suit No. C.A.S.W.P/ 4/84(unreported).

the rules would be those of the relevant native law and custom provided they are not repugnant to natural justice, equity and good conscience would apply.” [sic]⁸⁸⁵

As noted above there are people who would reject the automatic application of the rule in *Cole v. Cole* and advocate instead the application of rules of customary law evolved for a similar situation. Rules of English law were developed in response to a social and economic environment peculiar to England and have nothing in common with Cameroon, except, perhaps for the fact that the spouses are monogamously married. The rule is criticised for advocating an immediate and automatic application of English law without regard to the socio-cultural differences between England and African countries and for ignoring the intention of the parties who might not have attained a stage of culture and development that should reasonably make them subject to English law. Even if they had, contracting a Christian marriage might not necessarily mean that they intended to divest themselves of their customary status. Often a Christian marriage is only a concretisation of the spouses’ faith in Christianity, with no effect on their general life style. They continue to live as members of the extended African family and to assume their customary family responsibilities.⁸⁸⁶

Against the “inherent incident” theory, therefore, is posited the “manner of life”⁸⁸⁷ established in *Asiata v. Goncallo*.⁸⁸⁸ The spouses of Muslim backgrounds met in Brazil due to slavery where they contracted a Christian marriage. They returned to Nigeria and the man took other wives under Muslim law without objection from the wife by Christian marriage, and later died intestate. Asiata, the plaintiff in this case

⁸⁸⁵1999 G. L. R. 89, 63.

⁸⁸⁶ See H. F. Morris, “Attitudes Towards Succession Law in Nigeria During the Colonial Period” [1970] J.A.L., pp.5-16, 12

⁸⁸⁷ Another coinage of Salacuse, *supra*

⁸⁸⁸ (1900) N.L.R. 41

was the issue of one of the Muslim marriages and sought to recover possession of a piece of land that belonged to the deceased.

The question was whether as the issue of a customary marriage coming after a Christian marriage, she had the *locus standi* to institute the action. It was held on the basis of the “inherent incident” theory that she lacked the capacity to institute the action. But the decision was reversed at appeal on the ground that in spite of the Christian marriage deceased lived and died as a Muslim.

The “manner of life” theory waters down the rigours of the “inherent incident” theory by reducing the rule in *Cole v. Cole* to having only established a presumption that by celebrating a monogamous marriage the spouses intended the application of English law.⁸⁸⁹ Customary law continues to be applicable unless by the express intention of the parties contained in a will⁸⁹⁰ or by their “manner of life”, it is evident that they intended English and not customary law to govern the post-mortem effects of their marriage.

In *Ajayi v. White*⁸⁹¹ it was suggested that the two theories could be applied to the estate of a deceased couple. The property in dispute in this case was that of the wife a deceased pastor. There was evidence that the parties had treated the property in question as family property. And rather than base the application of customary law on this fact, Baker, A.C.J., delivering the judgment of the court said:

“The original owner was no doubt the wife of an educated man but it is very doubtful whether she was literate or knew anything about the

⁸⁸⁹The point was made by Van Der Meulen, J. in *Smith v. Smith* (1924) N.L.R. 107: “The fact that a man has contracted a marriage in accordance with the rites of the Christian church may be very strong evidence of his desire and intention to have his life generally regulated by English law and customs, but it is by no means conclusive evidence. In my opinion the question as to what law it is equitable to apply in any given case can only be decided after examination of all the circumstances of the case”. See also *Petrides J in Haastrup v. Coker* (1927) 8 N.L.R. 68, 70.

⁸⁹⁰ See *Smith v. Smith* (1924) N.L.R. 105, and *Ajayi v. White* (1946) 18 N. L. R. 41

⁸⁹¹ (1946) 18 N.L.R. 4.1

English law of succession; if she had done so it is more than probable that she would have made a will.”

It follows that the devolution of the husband’s property would have been submitted to English law if his manner of life was different. We can only suppose that their Lordships felt in any case that the spouses must have gone in for the regime of separate property. If that is the basis then the decision would run into difficulties being applied today, given the gradual disappearance of the system of separate property in favour of community of property.⁸⁹²

Another novel situation arose in *Haastrup v. Coker*.⁸⁹³ The deceased contracted a Christian marriage but later took fifty more wives after succeeding his father as chief, not because he wanted to but because custom so demanded. Some, he married under customary law and others he took under widow inheritance. In this action the plaintiff, an issue of one of the customary marriages sought, on behalf of all the children, to set aside a sale of family land by one of the issue of the Christian marriage to the defendant. English law was held to apply whereby the plaintiff was held not to have the capacity to sue in the name of the Haastrup family, since he was an issue of a customary union. The argument that the “manner of life” theory ought to apply because there was no proof that the deceased and his wife were professing Christians was jettisoned.

This was a case in which the spouses lived a “palace life” in accordance with custom and the “manner of life” theory ought normally to have applied. The decision could be defended on one point not raised in the judgment, that the deceased did not take more wives on his volition, he was compelled by custom to do so, and this distinguishes the case from *Asiata v. Goncallo*. Hence even though living “a palace

⁸⁹² See Simon Tabe Tabe, “Property adjustment after divorce in Cameroonian statutory law: Rapprochement of the common and civil law systems?”, 2 RADIC (2002), 703-717, 711.

⁸⁹³ (1927) 8 N.L.R. 68.

life” he remained committed to his Christian marriage, and according to Sagay, “the prior monogamous marriage had, however, taken the distribution of the Oba’s property from customary law into English law.”⁸⁹⁴

From the foregoing it becomes questionable whether the “inherent incident” theory espoused by Epuli, J⁸⁹⁵ is appropriate for Cameroon. The celebration of a Christian marriage might as noted above only be intended to strengthen the faith of the spouses, rather than to divest them of their customary statuses and subject the devolution of their property to English law.⁸⁹⁶ Cameroon is a country where many people go to church on Sunday mornings and in the evenings,⁸⁹⁷ dressed in traditional regalia, are participating in cultural activities.

Perhaps therefore the easiest way to assume the automatic application of English law is if the deceased left an English Will rather than if he contracted a monogamous marriage.

5.3.1.2. The Existence of a Will in English form

Since the Nigerian case of *Apatira v. Akande*⁸⁹⁸ it was established that a native could make a will in English form. English wills must not only be in writing, they have to conform to certain strict formalities concerning signature and witnessing of the will.⁸⁹⁹ When these formalities are complied with, then by all intents and purposes English law of testacy is applicable.

⁸⁹⁴ Sagay, Itse, “Widow Inheritance Versus Monogamous Marriages: The Obas’ Dilemma,” (1974) JAL 168-172, 171.

⁸⁹⁵Nkengong, John Monie adopted a similar position “The Development of the Laws and Constitutions of Cameroon” Ph. D Thesis, University of London, 1970, 788, (unpublished).

⁸⁹⁶ John Anthony Howard, “Customary Law of Marriage and Succession among the Kom of Cameroon”, Ph. D. thesis, University of London, 1972, 333,(unpublished). See also Allott, A. N., Essays in African Law: With special reference to the law of Ghana, London, Butterworth, 1960, 219.

⁸⁹⁷ Sunday evening are generally set aside by tribal and cultural groups to hold their meetings.

⁸⁹⁸ (1944)17 N.L.R 149.

⁸⁹⁹ See section 9 Wills Act 1837.

The attitude of the courts suggests that a native who translates his will into writing must always have had English law in contemplation with the effect that non-respect of the formalities brings in English rules of intestacy.⁹⁰⁰ And so the courts fail to consider whether a will not admissible to probate because it fails to conform to the formality could be admitted as a customary will subject to customary law.⁹⁰¹

But in *Teke v. Teke*⁹⁰² the Bamenda Court of Appeal upheld a customary will. Generally the courts are diffident to do so when an estate comprises commercial assets, bank accounts, pension benefit and any other assets which require a High Court grant before they can be assembled for distribution. The will must be proved in the normal way or if it fails letters of administration are granted as if the deceased had died intestate.⁹⁰³ No such assets were involved in this case and that is why the appeal emanated directly from the customary court without transiting through the High Court responsible for probate and letters of administration.

Conclusively, the High Courts when confronted with a matter between natives and the choice is between English and customary law, customary law should be the first option, unless as result of the manner of life or the existence of a will in English form, English law is seen as being most likely to meet the reasonable expectations of the deceased. And we want to think that the deceased would have been averse to

⁹⁰⁰See the Bamenda Court of Appeal Judgment in *Marianne Bongyilla Ntoh v. Che Peter* Suit No. BCA/48/2003 (unreported). *Pauline Mbonjoh v. Peter Ngabi Eyoh* (2005) Suit No. HCK/AE/K.19/02-05 (unreported).

⁹⁰¹See *Tantoh v. Tantoh* where a deceased polygamist made a will which was not admitted to probate because though signed by the testator it was not attested by witnesses. The will was set rejected for failing to comply with section 9 of the Wills Act of 1837 in spite of the argument that it could be admitted as evidence of the testamentary intention of its maker. See also the Nigerian case of *Onwudinjoh v. Onwudinjoh* (1957) 11 E.R.L.R. 1, the court refused to countenance a will not complying with the Wills Act without even discussing any possibility of its alternative validity under customary law.

⁹⁰² (2005) 2 C.C.L.R. 40.

⁹⁰³ See Harvey, Brian, *The Law and Practice of Nigerian Wills, Probate and Succession*, London, Sweet & Maxwell, 1968, 43

having persons who depended on him in his lifetime being left out his succession.

5.3.2: THE REGULATION OF CONFLICTS BETWEEN FRENCH AND CUSTOMARY LAW.

Since the extension of High Courts to Francophone Cameroon pursuant to the 1972 judicial reforms, jurisdiction was assumed for the first time in the 1996 *Affaire Fokam Kamga*⁹⁰⁴ decided by the High Court of Mifi Division. It was a bold step for the courts to assume jurisdiction in matters not classified as “*conflit mixte*,” being cases involving persons, one of whom is subject to customary law and another to French law.

In 1948 the French Minister of Overseas Territories had issued a declaration that “in a case of conflict between the normal legal system of the French common law and a local legal system, it is the former which must necessarily win.”⁹⁰⁵ Luchaire also wrote that “French law being that of the state prevails over local law; it also prevails because it constitutes the common law, while the local status is a status of exception.”⁹⁰⁶

In *affair Kouoh* the Supreme Court of East Cameroon held: “In the case of internal conflict in interpersonal matters between the common law or written law status governed by the local Civil Code on the one hand, and customary status on the other, it is a general rule that in mixed causes, the first prevails over the second and becomes the law of the parties.”⁹⁰⁷ The deceased, subject to the Douala customary

⁹⁰⁴ See Moïse, Timtchueng, (1998) 34 *Juridis Périodique*, pp. 43-47, 45.

⁹⁰⁵ Cited by R.D. Kollwijn “Conflicts of Western and Non-Western Law” in Alison Dundes Renteln and Alan Dundes (ed), *Folk Law*, Volume 1, The university of Wisconsin Press, 1995, pp. 775-793 at 781.

⁹⁰⁶ Gonidec, *Les Droits Africains*, p.267.

⁹⁰⁷ “S’agissant en l’espèce d’un conflit de droit interne, en matière interpersonal entre statut personnel dit de droit commun ou encore de droit écrit regime par le Code Civil local, d’une part, et statut coutumier d’autre part, il est de règle que dans les rapports mixtes, le premier l’emporte sur le second

law was married to a Senegalese woman who had French citizenship. In the present action pitting the widow against the children of a previous marriage, the latter asked for the application of customary law of succession while the widow demanded the application of French law. The Court held French law applicable on the ground that the “widow acquired the right to succeed, not from the relationship of origin with the deceased, but from the marriage that united her with Kouoh.”⁹⁰⁸

French law thus becomes the personal law of the deceased if he contracted a civil marriage, as ordained in a 1929 decision of the French *Cour de Cassation* according to which the spouse of local status “by appearing before the civil status registrar had submitted himself to French law,” and that “the union pronounced in the name of French law entails necessarily all the consequences that the common law⁹⁰⁹ attach to it.”⁹¹⁰ Hence in *Baba Iyayi v. Hadja Aminatou*⁹¹¹ the Supreme Court confirmed the decision of the trial courts which applied Moslem law on the ground that the deceased had not contracted a civil marriage.⁹¹²

et fait la loi des parties.” Affaire Kouoh, C.S.C.O., Arrêt No. 29 du 23 Avril, 1963, Bull. P.293 (Cours Suprême Cameroun Orientale).

⁹⁰⁸ “La veuve tirait sa vocation successorale, non de la parenté d’origine avec le défunt, mais du mariage qui l’avait unie à Kouoh”. See also the decision of French *Cour de Cassation* of February 14 1929 in which it was held that the spouses, “by appearing before the civil status registrar submitted themselves to French law...the union pronounced in the name of French law entails necessarily all the consequences that common law attach to it.” (“Le conjoint de statut local en comparant devant l’officier d’état civil sextant soumis a la législation Française... l’union prononcée au nom de la loi française entrains nécessairement toutes les conséquences que le droit commun y attaché”) Crim. 14 fevrier, 1929, sirey, 1930, p. 280.

⁹⁰⁹ It is necessary to explain that when French law used the term common law it is not in the same sense as English law. Rather it means it means the law which is applicable to every person, for even in France there were local customs limited in their application but the civil code was applicable to all persons. Similarly, the customary law is limited to natives but the civil code applies to them and non-natives equally.

⁹¹⁰ “Le conjoint de statut local en comparant devant l’officier d’état civil s’étant soumis a la législation Française” “l’union prononcée au nom de la loi française entrains nécessairement toutes les conséquences que le droit commun y attaché” Crim. 14 fevrier, 1929, sirey, 1930, p. 280.

⁹¹¹ Arrêt No. 083 of 32 March 2000.

⁹¹²In their usual cryptic nature the ratio decidendi of that case reads thus : « Considérant que tous les enfants de cette succession sont des enfants naturels nés du mariages coutumières non célébrés devant l’Officier d’Etat Civil ; Considérant par conséquent que les dispositions du code civil relatives au partage judiciaire sont inaplicable en l’espèce ; Par ces motifs ; Statuant publiquement, contradictoirement en matière civil de droit local et en dernier resort, confirme le jugement entrepris. »

As is the case in Anglophone Cameroon the fact that the deceased left a will might also be determinant. The question will certainly be if the Will conforms to the requirements of validity in French law, as spelt out in articles 970⁹¹³, 971⁹¹⁴ and 976⁹¹⁵ of the civil code.

In *Nguea Lottin v. Quan Samuel*⁹¹⁶ the deceased Kwedi Nguea Maurice, a native of Douala left a will in which his daughters were appointed successors and a stranger was appointed as guardian for his children. In an action at Tribunal de Premier Degré of Douala, the plaintiff (appellant) argued that both provisions violated the Douala customary law. The appointment of the daughters as successors was upheld on the ground that the custom according to which daughter are excluded from succession infringes the preamble of the constitution which enshrines the equality of sexes. The designation of a stranger as guardian for the children was also upheld because according to the court, there is no rule in Douala customary law which prevents a father from organising the guardianship of his children in a manner which he considers best to protect their interests. This decision was upheld by the Douala Court of Appeal. On further appeal to the Supreme Court, a third ground of appeal was added, namely, that the will, said to be holographic, was not executed in conformity with article 970 of the civil code requiring such wills to be in the hand writing of the deceased.

After confirming the decisions of the lower courts on the points of customary law the court ruled on the validity of the will as follows: “The validity of the will must be appreciated with regard to the custom of the deceased in conformity with

⁹¹³ Provides for holographic wills, which must be written, dated and signed by the testator.

⁹¹⁴ Provides for notarial wills that must be made in the presence of two notary publics or one notary public and two witnesses.

⁹¹⁵ Provides for wills in mystical form, being wills in a sealed and stamped envelope presented to the notary public and two witnesses with the declaration that the envelope contains his last will and testament.

⁹¹⁶ Arrêt No.67 du 11 Juin 1963 (CSCO).

article 51 of the Decree of 31 July 1927; since custom does not impose any special formality, it is not forbidden for the testator to adopt the form of written law, without the validity of the will being dependent on that law.” Hence in the case of testacy French law is always very likely to be applied whether or not the Will complied with the requirements of form laid down by that law.

This is different from the position in Anglophone Cameroon where English law becomes applicable only when the Will conforms to the formalities laid down in section 9 of the Wills Act 1837. But the position in Francophone Cameroon could be explained by the fact that French Wills like customary law wills do not require any strict formality, as it suffices that they are written, signed and dated.

5.3.3: RESOLVING CONFLICT BETWEEN DIFFERENT SYSTEMS OF CUSTOMARY LAW IN THE HIGH COURTS IN ANGLOPHONE CAMEROON.

These types of conflicts would actually be unusual in these courts given that matters in which different systems of customary law are in conflict should normally be heard in the Customary Courts. If the subject arises here at all it is because as we noted earlier, the High Courts have evolved a practice of entertaining such matters on the basis of their exclusive jurisdiction over letters of administration.

Now since such conflicts were never envisaged there are in fact no provisions to regulate them. The practice in former British colonies is to apply the provisions governing similar conflicts in the customary courts.⁹¹⁷ However, the fact that High Courts are established at Divisional levels⁹¹⁸ could render the determination of the “law prevailing” in the area quite difficult. It cannot be assumed that like the customary courts there will only be one predominant system of customary law in the

⁹¹⁷ Park, Sources of Nigerian Law, London, sweet and Maxwell, 1963, p.118.

⁹¹⁸ See section 14, Judicial Organisation Ordinance No. 72/4 of 26 August 1972.

divisions which consist of many tribes within a number of sub-divisions, since unlike the customary courts the jurisdiction of the high courts is based not on tribal lines. The application of the predominant law would not, therefore, be possible. Alternatively, therefore, the courts would apply “the law binding between the parties” which according to *Ghamson v. Wobill*⁹¹⁹ constitutes the personal law of the deceased. Since assessors are not allowed in the High Courts, this will have to be established through the procedure of proving customary law discussed in chapter two.

5.3.4: RESOLVING CONFLICT BETWEEN DIFFERENT SYSTEMS OF CUSTOMARY LAW IN THE HIGH COURTS IN FRANCOPHONE CAMEROON

The High Courts in Francophone Cameroon apply French law exclusively. By taking their matter to the high courts the parties are presumed to have agreed on French law being the applied on the basis of the rule according to which “the option of jurisdiction entails the option of applicable law”. And since the high courts do not, like their Anglophone counterparts have monopoly over the *jugement d’hérédité* it is impossible to envisage a situation where they will be faced with cases in which both parties are subject to customary law.

5.3.5: THE UNUSUAL SITUATION OF REGULATING CONFLICTS BY THE USE OF RULES OF PRIVATE INTERNATIONAL LAW

Politically Cameroon is a unitary state and this is the subject matter of article 2 of the constitution of 18 January 1996 which states *inter alia* that: “The Republic of Cameroon shall be a decentralised unitary state... It shall be one and indivisible.” As a result the country has a single executive, legislature and judiciary. But this is where the unity ends, for in the absence of harmonised laws the common and civil laws continue to be applied in the Anglophone and Francophone sectors respectively. In

⁹¹⁹ (1947)12 W.A.C.A.181.

that case therefore, English and French laws are said to be in conflict when for example an Anglophone gets married to a Francophone.

The question is whether this is not just a species of an internal conflict. Marriage which we have said effects a change in personal is regulated by the Civil Status Registration Ordinance No. 80-2 of 29 June 1981. The Ordinance governs marriage generally and when a monogamous marriage is celebrated, either the English law applies depending on the place of its celebration. So celebrating a marriage under the Ordinance cannot give rise to a conflict between English and French laws. In fact such a situation, if it ever occurs, will actually be a case of bigamy, where a person contracts an ordinance in one part of the country and without dissolving it contracts another in the other part of the country.⁹²⁰

Normally a marriage should give rise to conflict between either of the received laws and customary law and should be dealt with in the manner already described above. But it would appear that when a person contracts a civil marriage and moves out of the jurisdiction of his legal system, considerations of internal conflict cease to be relevant. He or she is legally speaking an Anglophone or Francophone and not a Bamiléké, Ewondo, Bakweri, Bulu, Banyang, Bassossi, Meta, Kom, Balue etc. Being so considered, the person is subject to the English or French law and when they are involved in a relationship with a person on the other side or have died leaving property therein, it becomes a matter for the rules of private international law to determine the applicable law.

In Anglophone Cameroon, it is suggested that conflict with civil law constitutes an external conflict and should be governed by rules of private

⁹²⁰ Bigamy is a crime in Cameroon punished under section 359 of the Penal Code.

international law.⁹²¹ Faithful to the English position a person's personal law derives from his domicile⁹²² and in this respect *Enongenekang v. Enongenekang*⁹²³ is famous for having established the existence in Cameroon, of the common law and civil law domiciles:

“In this country we do not yet have a single system of law. It follows for the purpose of matrimonial proceedings [and succession] that one cannot have a Cameroonian domicile. Every person should be domiciled in either one or other part of the territory where the legal system pertaining to his personal law applies.”

Hence a person is either subject to the English or French law and this is understandable, for although defined as a person's “permanent home”⁹²⁴, a person's domicile associates him to a given legal system.⁹²⁵ Domicile is therefore not synonymous with a country which might, as is the case of Cameroon have more than one legal system.

On the other hand the Francophone courts following on the footsteps of France base the personal law on nationality.⁹²⁶ Nationality is said to represent a person's political status by virtue of which he owes allegiance to some particular country⁹²⁷ and the notion derives from the understanding that laws are made for an ascertained people than for an ascertained territory. Hence Cameroonians have a single personal law irrespective of where they are found on the national territory and this is French law as far as the matter is tried in a Francophone court.

⁹²¹ See Ngwafor, E. N., *Family Law in Anglophone Cameroon*, p.22-23

⁹²² See Peter North and J.J Fawcett, *Cheshire and North's Private International Law*, London, Butterworths Thirteenth Edition, 1999, pp. 134-161.

⁹²³ Suit No.HCSW/28MC/82, per Inglis J. (unreported)

⁹²⁴ See Lord Cranworth V-C in *Wicker v. Hume* (1858) HLC 124, 160.

⁹²⁵ See Collier, J. G. *Conflict of Laws*, Cambridge, Cambridge University Press, 2001, 37.

⁹²⁶ See Peter North and Fawcett, *Cheshire and North's Private International Law*, London, Butterworths Thirteenth Edition, 1999, pp. 134-161.

⁹²⁷ *Ibid*, 159.

A number of mock situations would be helpful in describing the nature of conflicts that could arise between English and French laws and how the courts would handle them.

(1) Two Anglophone Cameroonians contract a monogamous marriage in the Anglophone town of Nguti. They migrate to and settle in Nkongsamba a Francophone city and acquire land therein and one of them dies.

(2) Two Anglophone Cameroonians meet in Nkongsamba and contract a civil marriage at one of the local civil status registration centres. They acquire property there and one of them dies.

(3) Two Francophone Cameroonians from Nkongsamba migrate to the Anglophone Cameroon town of Nguti. They had contracted a civil marriage in Nkongsamba and while in Nguti they acquire property there and then one of them dies.

(4) Two Francophone Cameroonians from Nkongsamba meet in the Anglophone town of Nguti. They contract a monogamous at the local civil status registration centre; acquire property and then one of them dies.

The first two situations concern Anglophone Cameroonians who find themselves in Francophone Cameroon and the last two concern Francophone Cameroonians who find themselves in Anglophone Cameroon. In all the situations the courts of the place of migration would rightly assume jurisdiction. Article 8(8) of the French Civil Procedure Code provides that succession proceedings are commenced in the last residence⁹²⁸ of the deceased while Order 48 rules (1) and (2) of the Supreme Court (Civil Procedure) Rules, Cap. 211 of the 1948 Laws of Nigeria gives the courts jurisdictions over property situated in their jurisdiction. The real question, however, will be that of the applicable law as the assumption of jurisdiction

⁹²⁸ French law conceives residence in the same way in the way as English law does domicile.

does not necessarily mean the application of the law of the forum in the devolution of the estate.⁹²⁹ In determining the applicable law it is the marriages that are relevant given the fact established above that migration cannot change the personal law.

On the basis of the domicile rule, an Anglophone court will normally apply English law in the first hypothesis as the deceased was an Anglophone Cameroonian and contracted monogamous marriage there. For the same reasons French law will apply in third situation even though the matter is heard in an Anglophone court. Problems are bound to arise in the second and fourth situations because the marriages are contracted under laws different from the laws of the domicile. However since it is marriage that affects a change in the personal law English law should still apply in the fourth hypothetical case, for even though the deceased was a Francophone Cameroonian, he married in Anglophone Cameroon. For similar reasons French law will apply in the second situation.

There have been a number of cases involving conflict between the two systems and all of them have been divorce cases. The only case we could find on succession is *In the Estate of Sam Edward Charlie*.⁹³⁰ The deceased was a Francophone who died intestate leaving property in both parts of the country and in France. The high court of Buea assumed jurisdiction as result of the property found in the division. This is one of the cases in which the court ought normally not to have assumed jurisdiction because the deceased was a polygamist and this matter pitted one widow and the oldest issue of the deceased against the other widow. The court assumed jurisdiction because the eldest son applied for letters of administration therein. The son had been named successor by the family council and with this applied for and obtained a next-of-kin declaration from Customary Court of Limbe.

⁹²⁹ See David McClean, *Morris: The Conflict of Laws*, London, Sweet & Maxwell, 2000, 417.

⁹³⁰ (2002)HCF/AE/24//2001-2002 (unreported)

Since the deceased was a Francophone and therefore of the civil law domicile the court held French law to be applicable, as a result of which the letters were granted to the eldest son. This was on the basis of the rules of priority contained in article 731 of the Civil Code which place children in the first category and widows in the fourth, coming after the descendants, ascendants and collaterals. English law would in the circumstances have granted the letters to the surviving spouse pursuant to the rules of priority contained in section 21 (1) of the Non-Contentious Probate Rules of 1954.

We need to deplore the fact, however, that nowhere in the judgement is it acknowledged that the case involved conflict between English and French laws, since it was only by so doing that the application of French law in an Anglophone court be justified. French law is not the law of the forum in Anglophone Cameroon and its application needs to be justified.

Returning to the hypothetical cases the nationality rule adopted in Francophone Cameroon will make French law applicable in all the cases that arose within its jurisdiction. This position has been adopted in number of divorce cases notably the famous *Arrêt Lantum*⁹³¹ in which Yaoundé High Court assumed jurisdiction even though the parties were Anglophone Cameroonians living and working in Yaoundé.

Now the nationality rule requires the application of national laws and it is no secret that Cameroon is still to have a national law of succession. The tendency is to present the received laws as if they were Cameroonian laws. In the Law Faculties the former departments of English Private Law and French Private Law are now known as *département de "Droits d'inspiration common law"* and *département de "Droits*

⁹³¹ CS No. 23/CC du 13 Décembre 1979, cited by Ngwafor, E. N., Family Law in Anglophone Cameroon, 22.

d'inspiration Française”⁹³² respectively, suggesting that these are Cameroonian laws as influenced by the respective colonial laws.

This is true as far as concerns the harmonised laws,⁹³³ because the French Civil Code of 1804 on which basis the national law theory was developed had the principal objective to replace the various *coutumes* with a system of unified law applicable to French people everywhere.⁹³⁴

That a country with a unified legal system should follow such divergent paths in the resolution of conflicts that arise between its laws cannot but be preoccupying, in the midst of clamours for unified rules for the resolution of conflict between different legal systems.⁹³⁵ Professors Pougoué and Anoukaha, arguably amongst the country’s best legal minds of Francophone extraction, in recognition of the oddity make the following suggestion towards establishing a common rule:

“If the relationship in issue *is not mixed*, it is practical and logical to apply the law of the Anglophone or Francophone sector from which both parties originate. *The law of the domicile prevails over the law of the residence*. If the relationship *is mixed*, that is to say involving an Anglophone and a Francophone, it will be necessary to *set out clear rules of conflict* except privilege is given to the proper law system...or the search for the law most favourable to the interest in issue (for example the interest of the child).⁹³⁶

⁹³² The Departments of English Private Law and French Private Law were thus named since the university reforms of 1993.

⁹³³ Some harmonised areas are the Labour Law, Criminal law, Criminal Procedure, Land tenure.

⁹³⁴ See article 3 (1) of the Civil Code.

⁹³⁵ See the projection of Francescakis made way back in 1964 and which is even more relevant today, with African countries increasingly common together in commercial and economic unions: «Les courants politiques actuels pourraient amener les législateurs Africains à reconsidérer les règles Européens de droit international privé. Plus particulièrement, le panafricanisme serait appelé, tôt ou tard à éliminer progressivement le principe de la nationalité au profit de celui de la territorialité, dans le but de faciliter les apports de droit privé entre les différents Etats africains. » In Problemes de Droit International privé en Afrique noire indépendante, Recueil des Cours 1964, tome II. 275-261, cited by Bouckaert, F. “Les Regles de Conflit de Lois en Afrique Noire”, (1967) 77 *Penant*, 1-12, 2

⁹³⁶ See Pougoué, Paul Gerard and Anoukaha François, “Legislation comparé,” *Juridclasseur*, 1996, vol.3, p. 7. My emphasis.

From all indications they must have been inspired by the numerous divorce cases to think only of the inter-vivos consequences of marriage, but the suggestion would be good for the law of succession too. We think, with due respect that the first hypothesis for not being a mixed cause is not a case of conflict of laws but rather a case of conflict of jurisdiction. They are thinking of situations where the parties find themselves on the other side of the legal divide. Jurisdiction in divorce might be different but as explained above any court within which jurisdiction the deceased left property would be competent in succession. The second hypothesis being a mixed cause between English and French law is a case of conflict of laws and the solution, we think is not far way, to necessitate setting out “clear rules of conflict”. The answer lies in the solution to first hypothesis which in effect adopts the domicile as the basis of the personal law of the parties and would be applicable where Anglophones and Francophones marry. We have gone beyond the age when marriage was said to operate a fusion of the legal personalities of husband and wife. Upon marriage the spouses maintain their individual personal laws and in the case of succession it is the personal law of the deceased spouse that should govern the devolution of his or her estate, irrespective of the part of the country in which they are found.

5.4: CONFLICT INVOLVING MUSLIM LAW

5.4.1: When Muslim law becomes the personal law.

Without any doubt Muslim law constitutes the personal law of an individual where it is the fundamental or even the dominant law. If it is the fundamental law, it is the personal law of everyone within its jurisdiction.⁹³⁷ If it is the dominant law it would pass as under the denomination of “native laws and customs prevailing in the

⁹³⁷ In this case the jurisdiction could be the whole country in a unitary state with a single legislature; it could also be a region in a Federation with each state having its own legislature as in Nigeria.

area of the jurisdiction” of a customary court and is the personal law of the natives of that area.⁹³⁸

Neither of the above exists in Cameroon and so Muslim law could only become the personal law of persons who profess the faith and conduct themselves in a manner to show that they intend such a consequence. Professing the faith merely gives rise to a rebuttable presumption that a person has adopted Muslim law as his personal law.

One could become a Muslim through birth by Muslim parents, marriage and conversion.⁹³⁹ A Muslim by birth could renounce the status even though this option is rendered difficult by the fact of being stigmatised as apostasy, attended by consequences such as the dissolution of an existing marriage to a Muslim woman⁹⁴⁰ and forfeiting succession rights to the estate of a Muslim relative.⁹⁴¹ In a strong Muslim country like Algeria where Muslim law coexists with French law, a person is only subject to Muslim law if he is Muslim by birth and has embraced the faith.

Contracting a Muslim marriage automatically subjects the spouses to Muslim law with regard to the incidents of the marriage. Like other customary law marriages, marriages between Muslims must be recorded in civil status registers of their area of jurisdiction, in accordance with section 81(1) of the 1981 Civil Status Registration Ordinance if they intend to have official evidence for the marriage. There is no evidence of any Moslem marriages having been so recorded but it can be assumed when spouses register their marriage they will expressly state that it is a Muslim marriage.

⁹³⁸ Muslim law, we noted is applied in Cameroon as customary law pursuant to the interpretation section of the Southern Cameroon High Court Law 1955.

⁹³⁹ Paras Diwan, “Who is a Muslim” (1978) *Indian Socio-Legal journal*, Vol. IV, No.1, 75-85, 76.

⁹⁴⁰ See I. O. Agbede, “Application of Islamic Law in Nigeria”, (1971) 5 *N.L.J.*, pp.119-128, 125.

⁹⁴¹ See A.D. Ajijola, *Introduction to Islamic Law*, New Delhi, International Islamic Publishers, 1989, 170.

Conversion could be through a ceremony in a mosque in which the person has to accept the principle of the unity of God, and of Muhammad as the Prophet of God.⁹⁴² It could also be by a mere declaration or profession of the faith,⁹⁴³ through a ceremony culminating in the convert taking a Muslim name. Whatever form conversion takes, the rule is that mere conversion does not automatically change a person's personal law.⁹⁴⁴ For conversion to have that effect it must be shown that the convert intended Muslim law as his personal law. This would be established from the state of his knowledge at the time of conversion. If after being informed of the possible consequences of the act with respect to his property after death he still goes ahead with the conversion, then the personal law changes. In India, as an indication that the convert was duly informed, he is expected to sign a declaration that he desires to be governed by Muslim law in matters of succession.⁹⁴⁵ The position in Cameroon as regards conversion can be ascertained from this exchange between me and the Chief Alkali of Cameroon:

Me: "How is conversion to the Moslem faith done in Cameroon"?

Chief Alkali: "The person is made to come to the Mosque for a number of days to be educated on the Koran."

Me: "How long"?

Chief Alkali: "Could take days or weeks depending on how fast he learns".

Me: "Then"?

⁹⁴² Ibid.

⁹⁴³ This point was made by Lord Macnaughten in the Indian case of *Barolo Razes v. Aga Mohamed*. (1893) 21, I. A. 56 at 64.

⁹⁴⁴ See I. O. Agbede, "Application of Islamic Law in Nigeria: A Reflection", (1971) 5 *The Nigerian Law Journal*, pp.119-128, 121.

⁹⁴⁵ See *Paras Diwan*, supra. 81.

Chief Alkali: “At the end we give him a Moslem name (optional), tell him to always do the ablutions and that he has to bury his parents normally when they die.”

I listened intently for more and seeing that he was silent, asked: “Is that all”? “Yes”, he answered. Then I added: “So you do not tell them what happens to their property when they die”? “No”, he answered and everyone present⁹⁴⁶ laughed including himself.

Conversion to the Muslim faith cannot therefore in Cameroon be said to automatically effect a change in the convert’s personal law. In fact in Cameroon there many cases where people convert to the Muslim faith because of some political or economic advantage that conversion entails and when such persons die their property devolves normally in accordance with their personal law of birth. It may therefore as in India require some overt declaration for Muslim law to become the personal law of a convert.

5.4.2: Resolving conflict between Muslim law and the other systems of law.

The resolution of conflict with any system of customary law begins with the consensus among Muslim Maliki Scholars that a non-Muslim may not inherit a Muslim’s property and vice versa. This is based on a *hadith*⁹⁴⁷ according to which inheritance is an expression of solidarity and enhances cooperation, a principle which could hardly bind persons of different religious faiths.⁹⁴⁸ Hence a convert forfeits his succession right in his family and the others cannot expect to succeed from him,

⁹⁴⁶ This discussion took place in the presence of the Registrar-in-Chief of the Ndop High Court and the full panel of the Alkali court which excluding the Chief Alkali himself included: Ismaila Muhamed (Member), Ali Garba (Member), Mbonifor Shu Peter (Clerk), Bambili Garba and George Omia (Messengers).

⁹⁴⁷ Recordings of solutions to problems that arose after the Holy Prophet and were resolved with reference to sayings or actions of Prophet in His lifetime.

⁹⁴⁸ See Hamisu, Rabiatu Danpullo, “Women, Property and Inheritance– The case of Cameroon.” *Recht in Africa* 2005, 143-161, 156.

except, of course, with respect to property which he held as a family member and which upon his conversion should normally revert to the family.

Decisions are liable to vary depending on whether the matter is determined in the Alkali or the customary courts. The customary courts would on the basis of the rule in *Ghamson v. Wobill* be expected to apply Muslim law as the personal of the deceased and therefore the law binding between the parties. Instinctively the tendency as was the case in *Alhaji Garuba v. Next-of-kin*⁹⁴⁹ the courts would the application of the customary law. If on the other hand the matter is tried by an Alkali court the tendency is generally for Muslim law to be applied.⁹⁵⁰ In *Ndjobdi v. Gabilla*,⁹⁵¹ the Ndop Alkali court was faced with a dispute involving a Muslim and a non-Muslim over the estate of deceased Muslim. Muslim law was held to be applicable on the grounds that the “plaintiff is a Muslim by faith and tradition while the defendant is a non-Moslem” and “the properties claimed are the properties of a Muslim.”

In Francophone Cameroon where Muslim law has no status as such, conflict with customary law will most certainly be resolved in favour of the latter, on the ground that Muslim law is not indigenous to Cameroon and that Cameroon being a secular state should not permit court decisions to be based on religious beliefs.⁹⁵² However this is only as far as it will not be repugnant to the public policy to apply the rule of customary law which Muslim law is in conflict. In *Affaire Baba Iyayi*⁹⁵³ the Yaoundé court of Appeal upheld a decision of the Tribunal de Premier Degré which had distributed the property in accordance with Moslem law, against the contention of

⁹⁴⁹ Limbe Customary Court, Civil Suit No.29/84-85.

⁹⁵⁰ Ijaodola, J.O. “The proper Place of Islamic Law in Nigeria”, (1969) 3 The Nigerian Law Journal, pp.129-140, 131.

⁹⁵¹ Civil Suit No. 3/2002-2003

⁹⁵² See the unanimous decision of the Supreme Court in *Dame Dada Balkissou v. Abdoul Karim Mohamed*, Arrêt No. 2/L du 10 Octobre 1985, discussed earlier

⁹⁵³ Arrêt No. 083 of 32 March 2000

the eldest son that customary law should be applied to make him sole beneficiary and successor.

Conflicts between Muslim and the received laws will be governed by the same rules as conflict between customary and the received laws. It means that in Anglophone Cameroon Muslim law will be excluded if the deceased contracted a Christian marriage. Of course this will be apostasy on the part of the Muslim but it could occur in circumstances similar to *Asiata v. Goncallo*. When this happens the question of the applicable law will have to be resolved on the basis of the rules in *Cole v. Cole* and *Asiata v. Goncallo*.

In Francophone Cameroon the position as understood in *Baba Iyayi v. Hadja Aminatou*⁹⁵⁴ is that French law will supplant Moslem law if the deceased contracted a civil marriage.

When a Muslim dies testate it will be inferred that he intended the application of French or English law.

Conclusion

This chapter provided the opportunity to establish the different types of conflict of law situations that could arise in Cameroon's law of succession. Internal conflicts are seen as the usual types of conflict to expect within a single territory while the external conflicts are actually artificial. The latter could one day disappear when an Anglophone or Francophone Cameroonian who finds himself on the other side of the legal divide will be regarded as being subject to his or her personal law acquired by birth or descent.

⁹⁵⁴ Arrêt No. 083 of 32 March 2000

CHAPTER SIX: MOVING FORWARD-PRIVATE ORDERING THROUGH THE MAKING OF WILLS.

Introduction

Wills or testaments are oral or written declarations by persons of sound mind and understanding⁹⁵⁵ in the form prescribed by law⁹⁵⁶, in which property is disposed in favour of others. Wills take effect on death, to distinguish them from gifts *inter vivos*. Testamentary power is generally viewed as enabling a person to make provisions for certain persons. A person's aspiration when he acquires property is to ensure a better life, primarily his or her sub-family composed of the spouse and children. Other relatives could, of course, be part of these aspirations, but generally only in the absence of persons of the priority group. This responsibility does not end when he dies and might even be aggravated by death due to the loss of a breadwinner.⁹⁵⁷

Herein can be found the importance of Wills even though the tendency is to construe wills as being in lieu of rather than in addition to what would be obtained under the intestacy rules. Such feelings have led to assertions according to which when intestacy rules provide adequately for the family after the death of the deceased there is very little inclination to resort to the technique of wills making.⁹⁵⁸ Unger extols the virtues of Wills when he writes:

“If the rules of intestate succession are unsatisfactory from the point of view of the family the power of testation assumes the character of an instrument serving for the protection of the family. If the distribution of the intestate's property is not in accordance with the wishes of the

⁹⁵⁵ To be considered briefly in the second part of this chapter.

⁹⁵⁶ To be considered briefly in the second part of this chapter.

⁹⁵⁷ See Bentsi-Enchill, *Ghana Land Law*, 207.

⁹⁵⁸ See for instance the statement of Maine after the enactment in France of the 1804 Civil Code “in France at this moment, the heads of families generally save themselves the trouble of executing a will”,⁹⁵⁸ and Amos and Walton: “the small proportion of Frenchmen who make wills is perhaps an indication that the legal rules of succession are satisfactory,” cited by Unger, “The Inheritance Act and Family” (1943) M.L.R. 215-228,217 & 218 respectively.

family, the power of testation becomes, not the means of effecting disinherison but the method for the preservation and just distribution of the estate among the family.”

He fails to avert his mind to the fact that Wills might not always produce the effect described. This idealistic conception of wills is partly responsible for current intestacy rules of most, if not all the legal systems, because the tendency is to deliberately lay down unbalanced intestacy rules with the hope that wills will cover any deficiencies. As a system of private ordering wills are susceptible to being affected by a number of factors liable to cast doubts on their reliability as instruments through which the interests and needs of family members would be taken care of, when, as is the case in Cameroon the applicable rules of intestacy fail to do so. Hence we are in this chapter going to examine the extent to which wills could be relied upon to provide that balance between the interests and needs of family members which the various systems of intestacy have failed to ensure.

6.1: WILLS AS INSTRUMENTS TO AVOID DEFICIENT INTESTACY RULES

It is generally accepted that wills provide an instrument through which provision could be made in favour of persons for whom the existing intestacy rules give nothing or very little. The notion of testamentary freedom embraced by all legal systems is largely responsible for this, even if in some, the freedom is limited to a given fraction of the estate.

6.1.1: TESTAMENTARY FREEDOM

6.1.1.1: Testamentary freedom in English law.

English law recognises absolute testamentary freedom as evident in the statement according to which a person “may disinherit... his children and leave his

property to strangers to gratify his spite or to charities to gratify his pride.”⁹⁵⁹ This must not be taken to mean that all is left to the whim of the testator as even though there is absolute freedom statutes such the Inheritance (Provision for Family and Dependant) Act 1975 are intended to check the abuse of the freedom. Hence a beneficiary capriciously excluded by a will could sue under the Act for reasonable financial provision.

6.1.1.2: Testamentary freedom in French law

French law allows a person to dispose only of a certain fraction of his estate if survived by descendants and ascendants that normally have a legal claim to his succession. These are entitled to specific portions of the estate which correspond to their entitlements on intestacy in French law and cannot be disposed of by will. The reserved portion of which the testator may not dispose by will is one half of the estate if survived by one child, two-thirds if there are two children and three-fourths if there are three or more.⁹⁶⁰ When there are no descendants but ascendants of the paternal and maternal lines, half of the estate may be disposed of by will and three-fourths when there are ascendants of one lineage only.⁹⁶¹ It is clear that the widow is not entitled to a reserve portion.

6.1.1.3: Testamentary freedom in customary law.

The concept of modern wills might be new to customary law but the sanctity of a person’s last wishes has always been respected even when written wills were unknown. It is accepted in customary law that a person might through a will alter the course of inheritance to his property.⁹⁶² The only known restriction is against the

⁹⁵⁹ See *Broughton v. Knight* (1873) L.R. 3P & D. 64, 65-66. (Per Sir J, Hannen)

⁹⁶⁰ See article 913 of the 1804 Civil Code.

⁹⁶¹ See article 914, *ibid.*

⁹⁶² See Binet, Jacques, “La dévolution successorale chez les Douala du Cameroun”, (1955) 65 *Penant*, 33-40, 38.

disposition of family property, but this more a case of *nemo dat quod non habet* rather than one of limitation to testamentary freedom.⁹⁶³ The freedom is however tempered by the repugnancy doctrine as the courts will not hesitate to set aside a will if its content is found to have been influenced by malice. Hence in *Jesco Manga Williams v. Helen Otia & Chief Ikome*⁹⁶⁴ a will in which the deceased left the major part of his property to his friend as against his polygamous family was rejected because the disposition was held to be repugnant to natural justice, equity and good conscience.

6.1.1.4: Testamentary freedom in Muslim law.

Muslim law also has a system of limited testamentary freedom. A Muslim cannot by a will dispose of more than a third of his estate⁹⁶⁵ unless the disposition is approved by a valid custom, there are no heirs at all, the heirs give their consent or the husband or wife is the sole surviving heir and the disposition does not affect his or her intestate entitlement.⁹⁶⁶ It must be noted that it is one third of his disposable property which is concerned here and this must exclude any property as a trustee.⁹⁶⁷ Secondly, persons already entitled to benefit at intestacy cannot be beneficiaries under a will.⁹⁶⁸

The question is whether these restrictions are limited to wills made in Muslim form where no particular formality is prescribed, or also cover wills made in English form. In *In the Estate of Baba Nya*⁹⁶⁹ the deceased had willed part of his property to his widow and although this contradicted Muslim law no objections were raised. Problems started when the widow also died and the appellant, as the Imam presented

⁹⁶³ See Van Den Wiele, "Les Systemes Familiaux et Matrimoniaux au sein de Societes Negro-Africaines », (1963)17 Rev. Jur. et Pol. d'Outre-Mer, 429-507, 461.

⁹⁶⁴ Limbe Customary Court, Civil Suit No.LM/16/97 (unreported)

⁹⁶⁵ See Muhammad Abdul Hai' Arifi, Death and inheritance, 164; Ajijola, Introduction to Islamic Law, 268; Hussain, The Islamic Law of Succession, 385.

⁹⁶⁶ See Ajijola, *ibid.* 281.

⁹⁶⁷ Muhammad Abdul Hai' Arifi, Death and inheritance, 149.

⁹⁶⁸ See Muhammad Abdul Hai' Arifi, Death and inheritance, 164; Ajijola, Introduction to Islamic Law, 268; Hussain, The Islamic Law of Succession, 385.

⁹⁶⁹ (1985) C.A.S.W.P/CC/16/85 (unreported). See also *Apatira v. Akande* 1944)17 N. L R. 149.

a will in which the property was granted to him. It was argued that the property should go to the family of the deceased Baba Nya and not the appellant who was a complete stranger. Respondents also argued that even if the appellant was entitled, it would not be to more than one third of the property. The will was thus set aside at the trial level.

This was undisturbed on appeal though not because of Muslim law restrictions, but because the formal requirements for English wills were found not to have been complied with and the Muslim law of intestacy applied. The court however used the case to establish that a Muslim who chose to make a will in English form and complied with the requirements could break with the restrictions imposed on Muslim wills. Mbuagbaw, J. said:

“Under Moslem law a man may not bequeath by his will more than one third of his estate. This stringent limitation on powers of Testation may be abrogated by writing a will in English form.”

This decision must be contrasted with the Nigerian case of *Yinusa v. Adesubokan*,⁹⁷⁰ where Bello J. admitted that a deceased Muslim could make a will in English form but cautioned:

“He (a Muslim) has no right to deprive his heirs, who are entitled to share his estate under the Muslim law, of their respective shares to which they are entitled under the Muslim law.”

The decision was reversed on appeal⁹⁷¹ because the limitation was incompatible with section 3 of the Wills Act, 1837, which enshrines testamentary freedom.⁹⁷² The

⁹⁷⁰[1970] 14 J.A.L. 1,57-64, 62.

⁹⁷¹T.T. Adesubokan v. Rasaki Yinusa, reported in Nigeria Lawyers' Quarterly, Vol, 6, No. 1-4, pp. 186-193.

⁹⁷²Per Ademola C.J.N. at p. 193.

decision gave rise to a spate of criticism⁹⁷³ because contrary to the settled law it resolved the issue of compatibility between law and custom with reference to the received rather than local statutory law.⁹⁷⁴ For that reason the decision of the trial court is said to constitute the better, though not conclusive view.⁹⁷⁵

6.1.2: THE EXTENT TO WHICH WILLS ARE USED TO MODIFY DEFICIENT INTESTACY RULES

Wills are known to have been used to grant succession rights where none exists at intestacy or increase such rights. We will see how far this is true under the various systems.

6.1.2.1: English law.

English intestacy rules are not gender-biased and above all, favour the surviving spouse against the relatives of the deceased. These could all be varied, for example, by a man who having contracted a monogamous marriage is subject to English law. Dispositions could be made in favour of sons by appointing them as executors of an estate, a role reserved for their mothers under intestacy. A man without children could make use of his testamentary power to prevent the bulk of his estate from passing to his wife and eventually to her family.

In *In re Ntoh*⁹⁷⁶, the plaintiff and the deceased were monogamously married. The respondent, brother of the deceased produced a will in which the later appointed him successor to his estate, this was admitted to probate and Letters of Administration were granted to him. The plaintiff instituted the present appeal on the grounds, first, that the purported will was invalid, and secondly, that it disposed of property jointly

⁹⁷³ See for example, Olawale Ajai, "Legal Pluralism and the Mis-handling of Moslem Wills: Further considerations of *Adesubokan v. Yinusa* and the Internal Conflict Rules," (1986) *Nigerian Current Law Review*, 127-140.

⁹⁷⁴ See supra. 2.2.3.4 dealing with the exclusion of customary law that is incompatible with written law.

⁹⁷⁵ See Oluyede, P.A., *Nigerian Law of Conveyancing*, Ibadan, Ibadan University Press, 1978, p.73.

⁹⁷⁶ *Marianne Bongyila Ntoh v. Che Peter* (2006) Appeal No. BCA/48/2003 (unreported).

owned by her and the deceased. The first ground of appeal was successful and the second failed because the appellant could not adduce evidence of joint ownership with the deceased as the marriage certificate did not mention the system of property rights. It would have been expected that once the will was held to be invalid the deceased would be assumed to have died intestate⁹⁷⁷ and administration transferred to the appellant. This was not to be, as the court pursued the second ground of appeal even though distribution was not in issue and because the appellant could not produce evidence of joint ownership, went ahead to transfer administration to the Administrator-General.

Hence as far as the English intestacy rules are concerned wills could be used to provide for other family members, even though they could apply for reasonable financial provision under the Inheritance (Provision for Family and Dependants) Act 1975.

6.1.2.2: French law.

French rules of intestacy establish parity between male and female relatives of a deceased but place the surviving spouse in the last position in the order of priority. All of these could be altered with use of wills, such as providing for persons who would be excluded by the rules and appointing the widow as successor.

In *Affaire Dame Bebey*⁹⁷⁸ the widow was able to be made successor on the basis of a will in which the deceased excluded his son, the rightful successor under customary law. The deceased claimed in the will that the son did not recognise his parental authority, beat him, made him understand that he was not his father and threatened to change his name.

⁹⁷⁷ See in *In the Estate of Charly Namalongo* (2005) Suit No. HCK/AE/K. 19/02-03 (unreported).

⁹⁷⁸ *Veuve Ekambi Elise c/ Bebe Moise* Arret no. 46/ of 4 May 1995 (Supreme Court) (unreported).

Provision could be made in favour any person within the legally disposable portion. But the freedom also means that the property could be willed to other persons and that the widow, not being entitled to a legitimate portion could be left destitute. The only security for widows would be through the system of property rights. French law recognises joint property rights between spouses and this is given effect in a *contrat de mariage*⁹⁷⁹ specifying their respective interests in the matrimonial property.

This will restrict the husband's testamentary power over the property but often the parties are blinded to this security measure by the euphoria that precedes the marriage and certain that their marriage would last "*pour le meilleur et pour le pire*". This often turns out to be true; however, questions of property rights arise not only upon inter vivos dissolution of the marriage, but also upon dissolution by death. The contract is the only proof that the property was jointly owned by the spouses; otherwise she will be required to adduce evidence of her participation in their acquisition.⁹⁸⁰

6.1.2.3: Customary law.

The succession rights of women in customary law are inferior to those of the male relatives of the deceased. Female relatives receive an insignificant share of an estate after distribution and could be successors only temporarily. Whatever rights widows have depend on the existence of children, otherwise, they are at the mercy of whoever is the successor.

⁹⁷⁹ See section 1400 Civil Code.

⁹⁸⁰ See Arret Eding (1967)CSCO 6 Juin, Arret Dayas (1971) CSCO 12 Juin, cited by Ndoko, « L'idee d'egalite dans le droit successoral Camerounais : Dernieres tendances de la jurisprudence en matieres de successions ab intestat. » (1990) unpublished, 55 ; see also Lizette, Elomo-Ntonga, Affaire Koum: Commentaire (1990) 3 Juridis Info. 99-103.

It is common for a person to circumvent the effects of customary intestacy by making provision for the female members of the family including the widows. In *Jemba v. Emilia*⁹⁸¹ the deceased made a will in due form in which he devised certain property to his wife and remainder to the appellant in this case. When the wife also died instead of the estate going to the appellant, it was distributed between the appellant and his sisters. The appellant protested against the distribution in an action to the customary court but failed to have the will respected. The decision of the trial court was reversed by the Buea Court of Appeal. Nana, J relied on a statement by Nwabueze:

“A Nigerian [Cameroonian] can by testamentary disposition defeat the course of inheritance in intestacy under customary law. For he will have no cause to make a will at all if all he can do by it is to confirm the scheme of inheritance that would have resulted upon an intestacy under customary law.”⁹⁸²

In *In re Lokendo*⁹⁸³ the deceased, survived by a brother and sister, had made a will in which he devised part of his estate to his sister. As the only surviving male relative of the deceased the brother was granted a next-of- kin declaration over the whole estate and with this, applied for Letters of Administration. The sister posited a caveat demanding exclusion of the portion given to her under the will from the inventory. Her plea was upheld,⁹⁸⁴ giving rise to the present appeal. It was argued that rather than admit the will to probate the court ought to have followed the evidence of the traditional council on the custom of the deceased. In an earlier action in the customary court, the will was rejected because that court “would not allow her [to]

⁹⁸¹ Suit No. C.A.S.W.P/CC/14/2002 (per Nana J) (unreported) See also *Nana v. Nana*(2005) Suit no. HCF/PROB/AE1/2001-2002(unreported), in which the deceased designated his daughter as his successor.

⁹⁸² *Nigerian Land Law*, supra,

⁹⁸³ *Lokendo James v. Francisca Diangi Lokendo* (2006) Suit No. C.A.S.W.P/21/2005.

⁹⁸⁴ (2004) suit No. HCK. AE/K.61 2001 (Unreported).

inherit because she was a woman and married.” It was held at the appeal that the farm devised to the respondent should be excluded from the inventory.

The court probably overlooked the fact that this was a case of partial intestacy governed by section 49 of the Administration of Estates Act 1925. The whole estate vests in the personal representative⁹⁸⁵ whose duty at the end of the administration, is to pay out the various legacies to which the estate is subject and then distribute the rest in accordance with intestacy rules.⁹⁸⁶ The difference between a testamentary bequest and the rest of the estate is that while the latter might be subject to a continuing trust the former must be given out to the beneficiary. We do not think that the woman would have been negatively affected if the normal course was to be followed.

In *In re Johnny*⁹⁸⁷ the deceased left part of his property to his widow and part to his adult children. Soon after the death of their father the older sons of the deceased by other women invaded and ransacked the property allotted to the widow. In an action to the Bamenda High Court it was ruled that the defendants were to desist from further acts of interference with the property. In *Teke v. Teke*⁹⁸⁸ the opinion of the chief was determinant in admitting the validity of a disposition in a customary will designating the younger of two brothers as successor over the estate of their uncle. In *Ossengue Francois v Jackie Cecile*,⁹⁸⁹ a will purportedly designating a step-daughter as successor over the estate of her step-mother against the widower was upheld by the Customary Court of Tombel. This decision was reversed by the South West Court of Appeal not because it preferred the widower against step-daughter but because the will was found to have been a forgery. The reversal does not therefore detract from

⁹⁸⁵ Section 33 Administration of Estates Act 1925.

⁹⁸⁶ See supra. 5.2.2.

⁹⁸⁷ *Grace Lum Johnny v. Tresor Ndeh Johnny* (1989) Suit No. HCB/14.M/89 (unreported).

⁹⁸⁸ (2005)2 C. C. L. R. 40.

⁹⁸⁹ (2000) Suit No. C.A.S.W.P/CC/15/99 (unreported).

the fact that the courts are willing to give effect to customary wills which make dispositions contrary to intestacy at customary law. In *Nguea Lottin v. Quan Samuel*,⁹⁹⁰ the deceased a native of Douala left a will in which he made gifts to his daughters and appointed a stranger as guardian for his children. The will was upheld by the Douala Customary Court and Court of Appeal, to the chagrin of the plaintiffs who claimed that it violated the principle of Douala customary law which excludes women from succession. The decision of the lower courts was confirmed by the Supreme Court

6.1.2.4: Muslim law.

Muslim law grants succession rights to every relative of the deceased including widows. What a will could do therefore would be to increase the entitlements recognised by the rules of intestacy. We should in this respect mention that Muslim law does not allow testamentary dispositions in favour of persons who already qualify as Quranic or agnatic heirs under the rules of intestacy.⁹⁹¹ The limitation is explained by the fact that wills in Muslim law have the prime objective of giving Muslims the opportunity to make provision for persons who would, otherwise not be entitled to succession.⁹⁹² Hence dispositions can only be made in favour of strangers.

The limitation contradicts Surah 2(180)⁹⁹³ which gives priority to the testator's family without prejudice to charitable bequests. Furthermore verse 240 of the same chapter prescribes that: "Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence." This verse is said to

⁹⁹⁰ Arrêt No.67 du 11 Juin 1963 (CSCO).

⁹⁹¹ See Muhammad Abdul Hai' Arifi, *Death and inheritance*, 164; Ajijola, *Introduction to Islamic Law*, 268; Hussain, *The Islamic Law of Succession*, 385.

⁹⁹² Ajijola, 269; Hussain, 385.

⁹⁹³ *Infra*, the effect of Muslim wills at 9.4.

have been abrogated by subsequent verses⁹⁹⁴ dealing with intestacy giving women succession rights. Verses in the Quran are said not to abrogate one another and the most that a subsequent verse could do to an earlier verse would be to restrict its scope.⁹⁹⁵ Muslim *Sunni* scholars are themselves not unanimous about the restrictions⁹⁹⁶ and they are not part of the *Shi'a Muslim* law.⁹⁹⁷

6.2: THE LIMITATIONS OF WILLS AS INSTRUMENTS TO AMEND DEFICIENT INTESTACY RULES

The effectiveness of wills depends on the testator rather than on some legislative intervention. In these circumstances wills cannot be counted upon to achieve the objective of always modifying deficient intestacy rules. A number of factors, most of which may be independent of the testator's intention might reduce the effectiveness of wills in this respect.

6.2.1: Uncertainty of testamentary provisions.

The legislature has no control over the contents of a will and so it cannot be guaranteed that provisions in a will are always going to be positive, aimed at making up for deficiencies in intestacy rules. Wills are justified by the fact that the testator has property liable to exist after his death, which must be disposed of. Hence the presumption is always that wills can only dispose of property but it is common for wills to make other dispositions, such as the way in which the corpse would be disposed. Above all a will may contain provisions to deprive intestate beneficiaries of even the little they would have been entitled to at intestacy.

⁹⁹⁴ See Hussain, The Islamic Law of Succession, supra, 384.

⁹⁹⁵ Ajijola, 269.

⁹⁹⁶ See Hamisu, Rabiātu Danpullo, "Women, Property and Inheritance-The case of Cameroon." *Recht in Afrika* 2005, 143-161,153.

⁹⁹⁷ Coulson, Conflicts and tensions in Islamic Jurisprudence, Chicago, Chicago University Press, 1969, 32.

This is common in systems with absolute testamentary freedom. In *Findi Laban Njo & ors v. Enow Emmanuel* the testator willed all of his farms and cocoa plantations to his youngest son, leaving nothing for the older and other children. The other children did not contest the choice of the first son which was clearly in contradiction to customary law, but argued that he holds the property on behalf of them all. Their contention was rejected and the youngest son was given allodial ownership.⁹⁹⁸ Similarly in *Re Kinge Francis Evakisse*⁹⁹⁹ the appellant, daughter of the deceased and the respondent, his nephew, both of who presented different wills by the deceased claimed the right to be designated next-of-kin. At the Buea Customary Court the daughter's claim was dismissed because she was not even included as beneficiary in the will tendered by her. An appeal to the South West Court of Appeal failed, and on further appeal to the Supreme Court, the decision was quashed, not on the point of law but on the ground that the customary courts have no jurisdiction over wills in English form. The matter was remitted to the same Court of Appeal, which would be expected to overrule the jurisdiction of the customary court and transmit the matter to the High Court. It is unlikely for the decision to differ, for not only did the name of the applicant not feature on either of the wills which were fairly detailed,¹⁰⁰⁰ the will under which the nephew claimed was more recent to constitute a codicil revoking the first will.¹⁰⁰¹

Where freedom of testation is limited as in the French and Muslim laws a person is limited only in the extent of property he could dispose of by will, but is free to disinherit persons to whom specific portions are assigned under the rules of

⁹⁹⁸ Limbe Customary Court, Civil Suit No. LM/105/2001 (unreported).

⁹⁹⁹ Also known as *Manyi Pauline Evakisse v. Joseph Evakisse Evelle* (1999)1 G.L.R. 17

¹⁰⁰⁰ She could only succeed to have the wills set aside if it is proved that the testator lacked the mental capacity as established in *Banks v Goodfellow*.

¹⁰⁰¹ The first will under which the daughter claimed was executed on 30 November 1979 while the one under which the nephew claimed was executed on 14 January 1985.

intestacy. In *Affaire Okalla*¹⁰⁰² the deceased in his will designated one of his sons as successor, excluded his widow and daughters and gave property to collaterals. The persons thus excluded claimed that no sufficient reasons were given for their exclusion, the will gave property to collaterals against the law and the will failed to respect the fixed portion of a widow. It was held that they were rightly excluded. It could be argued in this case that the widow was not one of the beneficiaries entitled to a definite share of the estate; but the daughters were, given that French law does not discriminate between male female blood relatives.

6.2.2: Apathy towards the making of wills and Ignorance.

Many people do not make wills because making a will is seen as precipitating ones own death.¹⁰⁰³ Studies conducted in Great Britain and which would be true of any other society reveal that most people keep putting off making their wills at some future time only to end up dying before doing so.¹⁰⁰⁴ So there is a correlation between age and will-making and for a country with a very low rate of life expectancy like Cameroon, one can only expect most deaths to be intestate.

Will-making would normally also have a correlation with social class as the tendency is for the educated and the affluent to make wills. However, Cameroonians, educated and uneducated alike are more conversant with the making of nuncupative wills which are not subject to a complicated formality as does modern wills, than with modern wills. It is on the point of formality that the ignorance is more pronounced because most persons without distinction of social class are known to make wills without legal assistance. For by seeking legal assistance they will know that section 9 of the Wills Act 1873, which is the only pre-1900 English statute of general

¹⁰⁰² Jugement no. 25 du 7 novembre 1979, Tribunal Grande Instance, Yaounde.

¹⁰⁰³ See Brian W Harvey, The law and practice of Nigerian wills, probate and succession, London, Sweet & Maxwell, 1968, 68.

¹⁰⁰⁴ See Andrew Borkowski, Textbook on succession, London, Blackstone limited, 1997, 3.

application which application has not been questioned, lays down specific formalities for English type of wills. The will must be in writing, it must be signed by the testator in the simultaneous presence of two witnesses, failing which it is inadmissible to probate. Most wills are rejected in this way and are thus prevented from effecting any change that must have been intended by their authors.

The courts are impervious to any arguments that though not valid in English law the wills could be valid in customary or Muslim laws. This was the position of Ames J. in *Apatira v. Akande*: “The fact that the deceased was a Nigerian [Cameroonian] cannot make any difference to the necessity of complying with the requirements of the Wills Act.”¹⁰⁰⁵ In *In the Estate of Charly Namolongo*¹⁰⁰⁶ the will was held to be invalid because in the words of the Judge, “when I look at exhibit ‘C’ I notice that all the witnesses signed before the testator. For exhibit ‘C’ to be admitted as a Will it has to comply with the requirements of section 9 of the Wills Act as subsequently amended.” In *Tantoh Agnes v. Achunche Vivain* the plaintiff, widow of the deceased presented an unattested will signed by the deceased appointing her as successor to the estate. The signature was authenticated but because of the want of attestation, the will was held not be admissible to probate, in spite of entreaties by the plaintiff that the document, though not technically a will should be admitted as a guide in ascertaining the testamentary intention of the deceased.

6.2.3: Failure of wills for the want of animus testandi.

The absence of *animus testandi* constitutes another ground for wills to be refused by the probate division of high courts and thereby prevents it from achieving the desired objective. The expression is used to describe the capacity to make a will and the knowledge and approval of its contents. The test for testamentary capacity is

¹⁰⁰⁵ (1944) 17 N.L.R 149.

¹⁰⁰⁶ (2005) Suit No. HCK/AE/K.19/02-03.

contained in the judgment of Cockburn J in *Banks v. Goodfellow*¹⁰⁰⁷ which establishes in a nutshell that the testator must understand: (1) the effect of his will being carried out at his death, though he need not understand their precise legal effect; (2) the extent of the property of which he is disposing, though he is not required to carry in his mind a detailed inventory of it; and (3) the nature of the claims on him.

The requirement of knowledge and approval is based on the assumption that wills are written not by the testator but by a third party, generally a legal practitioner. The legal burden of proving testamentary capacity and knowledge and approval rests on the person seeking to obtain probate of the will. Once it is proved that testator was capable at the time of execution, and the will was executed duly complying with the statutory formalities, knowledge and approval are to be presumed.¹⁰⁰⁸ However, if circumstances surrounding the execution raise a suspicion that the will did not express the testator's intention, knowledge and approval must be specifically proved. The absence of such proof could be indicative that the will was made as a result of undue influence or the fraud of another person. The will in *Marianne Bongyilla v. Che Peter*¹⁰⁰⁹ was held to have been a forgery because at the time of its purported execution in a lawyer's chambers the deceased was bedridden in hospital and the medical records showed that he lacked the necessary mental capacity to make a will. The will was also seen to have wrongly described some of the property, excluded property which ought to have been included and instead included property which had been sold by the purported testator.

¹⁰⁰⁷ (1870) L.R.5 Q.B. 549, 565.

¹⁰⁰⁸ See Charles, H, Stuart, B, & Martin, D. *Megarry & Wade: The Law of Real Property*, London, Sweet & Maxwell, 2008, 558.

¹⁰⁰⁹ (2006) Appeal No. BCA/48/2003 (unreported).

Conclusion

While it is possible for wills to effect changes to intestacy rules and make up for any deficiencies therein, they cannot be completely relied upon to effect the changes that are necessary to make the law of succession conflict-free. Wills are subjective and so their content might not actually reflect what the average man would expect of them. Furthermore, there is a general reluctance towards the making of wills and also, in spite of the testators' good intentions wills might fail for the want of formality, or *animus testandi*.

Notwithstanding the shortcomings wills remain a necessity in every legal system. Taking testamentary power away would be infringing on one of the fundamental rights of Cameroonians, to dispose of their property in any manner they wish, subject only to public policy considerations. Government position on this aspect of human rights is reflected in section 1(1) of the Land Tenure Ordinance No. 74-1 of 6 July 1974 which stipulates: "The state guarantees to all natural persons and corporate bodies having landed [and movable] property the right freely to enjoy and dispose of such lands [movable property]"

What needs changing is the perception of wills. The fact that wills have over the years been perceived as constituting a panacea for the inadequacies of intestacy rules has led many a legislature to condone discriminatory intestacy rules, hoping that these would be rectified by wills. Wills, we submit, should not be viewed as compensating for inadequate intestacy rules; they should rather serve the same objective as reasonable financial provision for the surviving spouse under the Inheritance (Provision for Family and Dependants) Act 1975.¹⁰¹⁰ This means literally that the effect of wills should be to pamper the beneficiary by giving him or her

¹⁰¹⁰ This is explained in chapter two.

something more than intestacy rules do, and on the other hand that in the absence of a will the person should not be pauperised.

For wills to have this effect there is need for legislative intervention to lay down equitable intestacy rules. This means that they are not exclusionary, make distribution mandatory and enshrine a system of distribution which should leave everyone satisfied within the limits of the estate, so that it makes no difference whether or not there is a will. How far the proposed Family Code meets these objectives is what we intend to discover in the next chapter.

CHAPTER SEVEN: MOVING FORWARD-INTESTACY UNDER THE FAMILY CODE.

Introduction

Hopes are focused on the family code to lay down intestacy rules that would ensure the necessary balance in the conflicting interests of the family members and thereby reduce the dependence on wills to compensate for the weaknesses of intestacy. To do this the code needs, as a matter of course, to be an innovation on the existing laws. It should provide criteria for succession, it should remove the principle of succession to the category of beneficiaries nearest to the deceased, and it should replace the current open-ended system of administering estates with a definite period of administration and make distribution mandatory.

7.1: THE GENESIS OF THE CODE

Cameroonians know that the idea of a code has been conceived since independence and it has taken almost half a century for the initial step to be taken in this direction, through a government bill¹⁰¹¹ tabled in Parliament during the 2006 legislative year. That the bill has not yet been enacted into law is not surprising to this researcher, given that law making is generally a very slow process in the country. Cameroonians have for long awaited the advent of a law governing family relation in the country¹⁰¹² and are confident that however long it takes the code will one day become a reality. Parliament to which it has been submitted has the powers to amend and not reject bills.¹⁰¹³

¹⁰¹¹ See article 29(1) of the 1996 Constitution.

¹⁰¹² See generally Tataw, Mbeng, "Ou en est-on avec le droit de la famille au Cameroun"? (2005) 115 Penant, 347-357.

¹⁰¹³ See article 29(3).

7.2: THE SCOPE OF THE CODE

The code could best be described as a consolidating statute for the reason that it brings together all existing enactments relative to family relationships, and proposes initial legislation for other areas such as succession. The code consists of 697 sections divided into fifteen parts:

Part one: The binding nature of laws, ordinances, regulations and international treaties and agreements.

Part two: The law of persons.

Part three: Civil status.

Part four: Nationality.

Part five: Marital relationships.

Part six: Affiliation.

Part seven: Adoption.

Part eight: Relationship by blood and by marriage.

Part nine: Maintenance.

Part ten: Guardianship and emancipation.

Part eleven: Incapacity.

Part twelve: Property regimes.

Part thirteen: Succession.

Part fourteen: Gifts.

Part fifteen: Wills.

The code is therefore an all-embracing piece of legislation which when it goes operational will at least achieve one objective of codification, which that of making the laws readily accessible. It will remove the need of having to look for the law from different sources and this will be of particular importance to the law of succession which interacts with all the other matters.

7.3: THE STATUS OF THE CODE

Elsewhere codifications are preceded by the publication of draft codes with accompanying commentaries. These usually explain the solutions adopted, give their motivations and indicate any national or foreign sources which inspired them.¹⁰¹⁴

In the absence of such publication in Cameroon the question of its status is left to conjecture. The concern here is whether the code when it becomes law will be a harmonisation of only the received laws, in which case it will leave the customary law intact or it will abrogate the rules of customary law. Judging from the effects of existing statutes such as the Civil Status Registration Ordinance of 1981 and the Land Tenure Ordinance of 1974 one would be more inclined to think that the customary law would be unaffected, even though the code will occasionally be brought in stealthily, as is the present case with the received laws.

This position will likely be at variance with government policy since independence which has been to ascertain and record the acceptable aspects of customary law which could then be integrated within the modern law.¹⁰¹⁵ The idea has been to remove the dichotomy between modern and customary law in the area of

¹⁰¹⁴ See Krzeczunowicz, G. "The Ethiopian Civil Code: Its usefulness, relations to custom and applicability" [1963] J.A.L. 172-177, 172.

¹⁰¹⁵ In 1962, Njoya Arouna, the Federal Minister of Justice while opening the first session of the West Cameroon High Court in Buea had expressed the desire of Government to elaborate laws in all the domains that will take a large account of African customary laws. See Eloi Lagoui: « Les Problèmes Particuliers de Codification du Cameroun. » (1966) 28 Rev. Jur. Ind. Coop. 107-112, 110.

civil law generally and to have only one civil law.¹⁰¹⁶ Of course this would stifle the adaptability of customary law to new situations, but it would be the better of two evils. It is preferable to have rules of customary law ascertained and integrated within a modern legal system, and allowed to evolve normally within the system as a whole, than to let them continue in their repugnant state.

It can be assumed that for having interacted for so many years with the received systems, which has seen the rejection of customary law intestacy rules on grounds of repugnancy or public policy, that the customary law of succession has attained an acceptable stage of evolution that needs to be codified and applied uniformly in the whole country. We, like others before us want to be guided in our attitude to customary law during codification by Professor David according to whom “most customs are uncertain or vary from place to place, group to group and time to time and made it inconceivable even to consider an idea of a mere legislative consolidation of all the customary rules that are found to be followed in practice.”¹⁰¹⁷

The objective of codification is generally to establish a uniform system of law that will not only make the law readily accessible but would also guarantee the cardinal principles of modern jurisprudence, which are certainty, regularity and predictability of court decisions. These cannot be possible if all the code does is to harmonise the French and English laws while leaving customary law which is should be the real reason for the reforms intact.

¹⁰¹⁶ Anyangwe, Carlson, The Cameroonian Judicial System, Yaoundé, CEPER, 1987, 266-267.

¹⁰¹⁷ In “A Civil Code for Ethiopia: Considerations on Codification of the Civil Law in African Countries,” (1963) *Tulane Law Review*; “A New Legislative Approach to Customs: The Repeals’ Provision of the Ethiopian Civil Code of 1960”, (1963) *Journal of Ethiopian Studies*, cited by Krzeczunowicz, “The Ethiopian Civil Code: Its usefulness, relations to custom and applicability” *supra*, 173 and Farnsworth, E. A. “Law Reform in a developing country: A new code of obligations for Senegal” [1964] *J.A.L.* 6-19, 16.

Certainly there would be the problem of application if the code is said to include customary law. Anglophone Cameroon will be the most affected in this respect because the customary courts will not be able to apply its provisions given that unlike their Francophone counterparts they are limited only to the application of customary law. But this is something that can be taken care of by simply organising the customary courts in the same line as the tribunal de premier degré. It will also require making a demarcation, based probably on the pecuniary value, between estates over which the customary courts and high courts are competent as is the case in Malawi, for example.

7.4: THE SUBSTANTIVE PROVISIONS ON SUCCESSION

7.4.1: THE BENEFICIARIES.

The code provides no definition for the term beneficiaries or the nature of relationship with the deceased necessary to qualify as such. All that is done in this respect is to adumbrate the conditions for succession in section 503, according to which:

“A beneficiary shall be required to possess the following qualities:

- a) be alive or should have been conceived during the devolution of succession,
- b) be related to the deceased in a relationship which permits such a person to aspire to succession,
- c) shall not be barred from succession.”

Relevant to the question as to who the beneficiary is, is section 503(b) which is not helpful. One would have expected a clear definition of the type of relationship rather than the highly ambiguous “relationship which permits such a person to aspire to succession.” This could well be a legal or social relationship, but for the salutary intervention of sections 502 and 511. Section 502 reads:

”Succession in the absence of a will shall devolve on the surviving spouse, the children, parents, brothers and sisters in accordance with the provision of section 503 et seq.”

Section 511 provides:

“Where the deceased shall be survived neither by a father and mother nor by brothers and sisters or their children, a quarter of the estate shall devolve by one half to *a blood relative of the parent* and the other half to *a blood relative of the collateral parent.*”

We must admit the difficulty concerning the meanings of the word “parent” used in the highlighted phrases and to which we propose the following interpretations: Firstly, we assume that it signifies the father and mother of the deceased. In which case the “blood relative of the parent” is no other than the ordinary collaterals in French law, who consist of uncles or aunts or their issue. This class of beneficiaries might stretch to infinity as the section does not limit the beneficiaries to any particular generation of descendants. Secondly, it stands not for “parent” according to the first interpretation, but for “relative” in which case any other relative in the absence of those mentioned above could take as *parent collateral*.

The two sections put together give the following as beneficiaries arranged in order of precedence: The surviving spouse, the issue, the mother and father, brothers and sisters or their issue, uncles and aunts or their issue, and descendants of grand parents.

The code has therefore gone the same way as the existing laws by establishing an order of succession based on precedence and by so doing automatically excluded certain persons with a legal right to maintenance. Section 336 of the code provides that the legal obligation of maintenance shall result from blood and marital relationships. The obligation arising from blood relationship is limited in the case of direct lineage or immediate family, to the second degree, and in the case of collaterals

or extended family, to the second degree as well. The legal obligation of maintenance resulting from marriage is limited the first degree, which means between the spouses and their children. It is surprising that while a person is alive he has to maintain so many people and when he dies the category is reduced by the principle of precedence. The reverse would have been preferable where upon death the number of persons claiming succession rights should have been increased to include persons claiming by the proxy of those with a legal right to maintenance. It is only normal that the classes of persons with a right to maintenance should be restricted because the law takes into consideration the needs of the person himself. But when he dies the need to maintain himself no longer exists and this, we think should be the logic behind the long lists of beneficiaries in the case of death.

The problem is that law makers always consider the different parts of the laws they make as being independent of each other, when in fact they are interrelated and provisions of one part could be called in to complement another part. With that in mind the beneficiaries in succession ought to be based on the combined effect of the succession and maintenance provisions. We noticed that the descendants of the children of the deceased are not entitled to maintenance but are entitled to succession, and consider it paradoxical that they should thus be entitled while the persons for whose maintenance the deceased was responsible are excluded by their mere existence. These children get maintenance as a legal right from their own parents and also succession rights from the deceased. If the law provided that certain persons are to be maintained it must have seen that they are in need and must this end with death, to permit the over-enrichment of the direct descendants of the deceased?

The classes of beneficiaries could be added to through the principle of representation¹⁰¹⁸ common in French law whereby children of deceased or those of his brothers and sisters who die before attaining a vested interest are represented by other persons who are given the same rights as the children. This is in direct contrast with English law where a child who dies before attaining a vested interest and without issue of his own, is deemed not to have survived the intestate.

Children as used in the code include legitimate, illegitimate and adopted¹⁰¹⁹ children¹⁰²⁰ and their descendants. Brothers and sisters include both those of the whole-blood and half-blood and their children.¹⁰²¹

Section 507(a) ordains the equality of sexes as it provides that “children irrespective of sex shall have priority over parents” and article 507(b) continues that children of both sexes shall benefit equally. The question is whether the equality is limited to children only or the provision is indicative of what should obtain in every category of beneficiaries. It is certainly only indicative as we would take this as an example of muddled drafting observed all through the code. Section 507 (a) is superfluous because already the rules say that other relatives are excluded when there are children in existence¹⁰²² and the children can only share with the surviving spouse.¹⁰²³ We must also deplore the absence of clarity in the way the term “parent” has so far been used. Using the term in the English text is a wrong translation of the word “parents” in the original French text, which would mean “relatives” rather than “parents”.

¹⁰¹⁸ Section 18.

¹⁰¹⁹ Section 311 of the code defines adoption as “the legal process by which a child shall sever his relationship with his family of origin and establish a new one with his adoptive family” and section 312(2) adds that “adoption shall confer on the adopted child all rights of a child born legitimate.”

¹⁰²⁰ Section 330 provides that parentage shall be either legitimate illegitimate or adoptive.

¹⁰²¹ See section 511 which makes express reference to the children of the bothers and sisters.

¹⁰²² Section 505.

¹⁰²³ Section 504.

There is affinity with English laws as far as the position of the surviving spouse¹⁰²⁴ is concerned. She occupies the last position in French law and does not normally feature in customary law. Under the code she is the first in order of priority as evident in section 502 quoted above.

The influence of the received laws is evident in the categories of beneficiaries and like those laws the code enshrines a system of priorities whereby the other relatives are excluded when there is surviving spouse and issue. Only when there is no issue does the surviving spouse take with the other relatives. It is doubtful if this system is suitable for Cameroon, given the absence of a system of social security schemes which have made it workable in Great Britain and France.

7.4.2: ADMINISTRATION OF ESTATES

As in French law the estate devolves on the beneficiaries jointly,¹⁰²⁵ which necessitates a period of administration before distribution. The administration is ensured by one of the beneficiaries pursuant to section 549(1) according to which “The beneficiary heir is responsible for administering the property of the succession.” Again it is not clear what beneficiary heir means but we can only suppose that he is some one like the personal representative in English law, but who differs in the sense that he must always also be a beneficiary.

The question is whether this is an end of an era for the Administrator-Generals in Anglophone Cameroon. This is certainly not the case considering section 499(1) according to which “Matters relating to the appointment of personal representative, to wit executors and administrators shall be governed by the law of wills.” This is

¹⁰²⁴ We shall use the feminine gender because as we said earlier women are more likely than men to be found in this position, but it should be mentioned that the expression “surviving spouse” is gender neutral.

¹⁰²⁵ See section 563.

another case of muddled drafting as the additional words; “of wills” are superfluous. The “law of wills” certainly does not govern the appointment of administrators. “The law” simpliciter would suffice to govern the appointment of executors and administrators and it is the relevant law applicable in either part of the country that would be applied in doing so.

What this means is that the methods for designating the administrator have not changed. In priority the administrator should be a beneficiary,¹⁰²⁶ even if the code is silent on the order of priority to guide the designation. We cannot but assume that the order of succession described in sections 502 and 511 would be followed and so the code gives the surviving spouse a greater chance than does the French and customary laws. In the absence of a surviving spouse the choice would fall any of the other beneficiaries without distinction of sex. But this is subject to the possibility of the first person in the order of priority being passed-over in favour of another person in an inferior category or the Administrator-General in Anglophone Cameroon or “*Administrateur Judiciaire*” in Francophone Cameroon.

An inventory is drawn up by the beneficiaries and together with a statement of acceptance by the designated person, is presented to the registry of the competent High Court.¹⁰²⁷ This would be a welcome innovation in Anglophone Cameroon as it will mean the elimination of the next-of-kin declaration taken as a precondition for the grant of letters of administration.

The administrator organises the funeral, pays the debts of the deceased within the limits of the estate¹⁰²⁸ and is liable to render account of his administration.¹⁰²⁹ He

¹⁰²⁶ This is the purport of section 564(2): “Unless otherwise agreed the administrator shall be appointed by a majority of the beneficiaries, in accordance with number of undistributed shares.”

¹⁰²⁷ Section 544.

¹⁰²⁸ Section 548 (1).

¹⁰²⁹ Section 549(1).

shall have a free hand in the administration of the joint property,¹⁰³⁰ meaning that he could without consulting the other beneficiaries lease the property for the purpose of administration.¹⁰³¹ However, he must seek and obtain the consent of the others before obtaining a loan on the security of the property or selling the property.¹⁰³² Against these rights is the obligation to render periodical accounts of his administration.¹⁰³³

It is worthy of note that the code fails to limit the period of administration, meaning that it could go on indefinitely with the attendant social problems resulting from abuse by the so-called administrators.

7.4.3: DISTRIBUTION OF THE ASSETS

As is the case in French law distribution is not compulsory. Section 575 adopts the sacrosanct expression of article 815 of the French civil code which only confirms the facultative nature of distribution:

“No person shall be compelled to remain in joint ownership and distribution may always be requested unless it was stayed by judgment or an agreement or stipulated by a will.”

The beneficiaries might agree to maintain the property as one whole,¹⁰³⁴ but each of them has an identifiable share¹⁰³⁵ and section 601 excludes real property in the rural areas and farms from distribution.

The code enshrines the hotchpot principle in article 577 which provides that each beneficiary who had received property from the deceased shall have to bring it back into the estate before distribution. There is an exception to this rule in that the principle is not applicable when the deceased expressly or by implication prevented

¹⁰³⁰ Section 565(1).

¹⁰³¹ Section 565(2).

¹⁰³² Section 565(3)

¹⁰³³ Section 549.

¹⁰³⁴ Article 563(1).

¹⁰³⁵ Article 569.

its application. As in customary law therefore there would be situations under the code when some beneficiaries will receive more than others because of such gifts. However the test for ascertaining the intention of the deceased is not objective but subjective, given that the deceased in making the gift hardly considers all the circumstances including death. As a subjective test the onus is on the person who claims such an intention to prove it.¹⁰³⁶ Therefore in spite of the provision the principle becomes applicable and what it means is that the inventory includes the property or its value and when the distribution is done the beneficiary's share is reduced accordingly.

It is assumed that the deceased would always be a married person; hence the entitlements of the beneficiaries are conditioned by this fact. Section 504 gives the surviving spouse one-quarter of the estate where the deceased is survived by issue, parents, brothers and sisters or their issue, while section 505 gives half where there are no issue or parents and section 506 gives the entire estate in the absence of other beneficiaries.

The code provides for distribution in the case of polygamy in section 504(2) which stipulates: "In the case of polygamy, all the widows shall be entitled to a quarter share of the estate divided *pro rata* according to the number of years each widow lived with the deceased." One would certainly have expected the fraction of the estate allotted to the surviving spouse to be increased in the case of polygamy. The one quarter share which is also the position under the French Civil Code is intended for the spouse of a monogamous marriage. If the code recognises polygamous marriages then it ought also to realise that it will be inequitable for what is judged reasonable for one spouse to be shared among more spouses. One could perhaps be

¹⁰³⁶ See Hardy v. Shaw [1975] 2 All E. R. 1052.

reading into this a tacit revulsion to polygamy, an idea which is borne out even by the deliberately obscure definition of marriage. Marriage according to section 218 of the Code is defined as the “The voluntary union of one man and one woman resulting from a solemn declaration with a view to creating a family.” The initial impression is that the code outlaws polygamy or is not applicable thereto, but for the absence of the standard phrase “to the exclusion of all of all others during the subsistence of the marriage,” which leads to the conclusion that the man is not precluded from contracting other marriages.

Distribution under the code as in English law results in the beneficiaries obtaining absolute titles. To this effect section 621 according to which “Each co-heir shall be deemed to have inherited alone and directly all the property comprised in the share.” But the effect of this is limited by other provisions which tend to limit the ambit of distribution. This is the case of section 601 which stipulates that “The sharing of real property located in rural areas shall be an exception. This principle shall also apply to farms.” Such limitation betrays the desire to maintain the customary system of land tenure in these areas, but distribution, it must be said does not necessarily mean that land is broken up into smaller pieces. And in fact, it is recognised under section 593 that “Real property shall be presumed to have been distributed even where there are common shares that cannot be distributed or that are to remain in the joint ownership.” With such provisions the limitation with respect to land in the rural areas becomes unnecessary.

Conclusion

If the Code could be credited for effecting any changes at all it will be that of according women succession rights in the same as men and bringing the spouses in as beneficiaries. This will of course be effective only if the scope of the code covers the

customary law, given that the applicable received laws already enshrine these rights in line with the preamble of our basic law which declares that “the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights.”

Apart from that the code has not but adopted the position of the English and French laws. Hence the weaknesses of the current law of succession, namely the absence of criteria for succession, principle of precedence, unrestricted period of administration and unclear rules of distribution have been left unscathed. The code is therefore victim to one of the problems of codification in Africa, where the tendency is to adopt the laws of the former colonial with a few cosmetic changes, failing to know that laws are made for a particular social and economic environment. When laws are relocated to a different place their success cannot be readily assured and Montesquieu recognizes this when he opines that only in the most exceptional cases will the institutions of one country serve those of another, law is “closely linked with its environment because of factors such as climate, fertility of the soil, the size and geographical position of the country, the kind of life led by the people, their wealth, density, trade and so on.”¹⁰³⁷

¹⁰³⁷ Cited by Allan Watson, “Legal transplant and law reform”, [1976] 92 L.Q.R. 79-84, 79.

Chapter Eight: CONCLUSION.

8.1: GENERAL CONCLUSION

It will certainly not be an overstatement at this point of the thesis to assert that our law of succession is not sufficiently equipped to remove the social problems of which we complained at the start. True, some notable strides have been made such as granting women succession rights through the notion of *coutumes évolués* in Francophone Cameroon and *Chibikom v. Zamcho* in Anglophone Cameroon. These are not far reaching enough as to influence the law especially in the rural areas and although the family code enshrines this right, much will depend on if it is made applicable to persons subject to customary law.

Preoccupation with the succession rights of women seems to have blinded people on the fundamental weaknesses of our law of succession, which when removed would constitute a major stride towards ridding the law of its weaknesses and also reducing the social problems.

The weaknesses of the law have been pointed out whenever appropriate, but we can here refresh our memory on the major ones. There is the absence of a general criterion for succession. Without specifying the basis, English and French laws set out a long list of family members as possible beneficiaries, but the exact impact of this is diminished by the principle according to which succession is by the persons closest to the deceased in terms of relationship. Hence the existence of a surviving spouse and issue automatically excludes the other relatives however needy they might be. We noted in this respect the pathetic case of *Nforba v Nchari*¹⁰³⁸ that the 84 years old mother of the deceased was told that anything she would have out of the estate of a son she brought up and educated, depended on the benevolence of the widow. It is

¹⁰³⁸ (1999)1 G.L.R. 59.

assumed that the only needy persons are widows and children, but this is not true as there are other persons who equally depended on the deceased for their livelihood. When these persons are excluded without an alternative means of sustenance they could resort to unorthodox methods such as violence and witchcraft to manifest their anger.

The situation is even more preoccupying under customary law of which the criterion for succession is influenced by the desire to keep land in the family. This has resulted in the exclusion of women generally and in the matrilineal systems this includes the issue of the deceased. The categories of excluded persons increase with the adoption by customary law, of the principle of precedence.

Clearly women bear the full brunt of the law since apart from their wholesale exclusion under customary law they might also be excluded under the received laws by being part of the excluded remote category. This therefore lends credence to the view according to which the exclusion of women from succession impedes sustainable development. Sustainable development may be looked upon as the process of planned or directed social change.¹⁰³⁹ The other way of looking at development seeks to redefine its processes and objectives “into the direction of rapid social change and redistribution of political power”.¹⁰⁴⁰ Hence development is not just to be measured in terms of technological and economic variables but rather in terms of “the collective personality of the society”. The processes of development are, on this view, designed to foster a “collective” spirit (“a sense of belonging to a society, pride in national achievement, fulfillment in helping one’s distressed neighbours”), creation of “aspiration frontiers” (dissemination of appropriate values), generation of self reliance

¹⁰³⁹ Upendra Baxi, ‘Introduction: law and “development”’ in Csaba Varga (ed) *Comparative legal cultures* (Aldershot: Dartmouth Publishing Company Ltd, 1992), 465-482 at 465.

¹⁰⁴⁰ Baxi, U. ‘Introduction’, at 465.

and “participatory-democracy”.¹⁰⁴¹ From this standpoint, the “development” resulting from growth model (stressing centralized planning, expression of modernized industrial sector and assistance from developed countries) is really underdevelopment.¹⁰⁴² Therefore, development seems to be a contextual process conceived to be related in time and space. Generally, it is a process that strengthens the human capacity to produce, create wealth and initiatives, leading to advancement and improvement in the mode of life.

If this is the meaning of sustainable development then certainly the exclusion of woman must impact on development as a whole. Women constitute 52 percent of the country’s population and yet cannot participate in the development process because the law of succession does not give them access to land, the main factor of production.

Even when a person qualifies as beneficiary in Cameroon there is no guarantee of a better life. This is because administration of estates is unlimited and distribution is facultative. Prolonged period of administration gives room for abuse since at a certain point in time the administrator starts considering himself as the owner. This is the period when the responsibilities towards the other beneficiaries are ignored and they have to resort to other means to earn a livelihood.

It is rather unfortunate that the draft bill on the family code contains no provisions aimed at righting these weaknesses, which might even have been oblivious to the authors. In these circumstances there is no light at the end of the tunnel for the weaknesses and by extension the social problems related to the law of succession, since the need to earn a livelihood will always send the excluded persons into the streets and crime.

¹⁰⁴¹ Baxi, U. ‘Introduction’, at 465.

¹⁰⁴² Baxi, U. ‘Introduction’, at 468.

8.2: WHAT LAW OF SUCCESSION, THEREFORE, FOR CAMEROON?

The problem with the code as indicated above is the feeling that laws can simply be transplanted from one jurisdiction to another without the necessary adaptation to make them workable therein. If our law of succession is in its present mess it is because of the existing laws and so if the code does nothing but adopt these same laws, there is good reason to question whether its *raison d'être* has ever been law reform or simply consolidation.

Marcel Nguini, one time president of the Supreme Court had provided the following guide to law making when he stated the following as being the objective of law:

« La finalité du droit est celle de garantir un monde organisé dans la paix, à laquelle aspirent tous les peuples de bonne volonté; celle d'être l'instrument principal de cohésion et de la stabilité internes nécessaires à l'édification de nouveaux états. »¹⁰⁴³

This would be possible if the code was preceded by ground work, but to the knowledge of this researcher who has been involved in the teaching of the law of succession since 1998, no such studies were conducted.

The conception must have been that the only problem confronting the law is succession by women and this was taken care of. If studies were conducted in the field, it would have been discovered there are other fundamental weaknesses in the

¹⁰⁴³ “The finality of law is that of guaranteeing a society organised in peace, to which all people of good will aspire; that of being the principal instrument of cohesion and of internal stability necessary to the edification of new states,” Nguini, Marcel, “Nguini, Marcel, «Droit Moderne et Droit Traditionnel » (1973) 83 Penant, 1-10, 7.

law which need equal attention and which if they persist are likely to render insignificant the succession rights given to women under the code.

The weaknesses concern the absence of a clear definition of the basis for succession, the unlimited period of administration, the facultative nature of distribution and the nature of interest obtained after distribution. These are the areas in which we propose reform.

8.2.1: On the beneficiaries.

The present choice of the beneficiaries leaves much to be desired mainly because of its exclusionary nature based on the principle of precedence. This would not be so if maintenance is considered to be the criterion and considering that the need for maintenance does not cease upon the death of the person. The family code already enshrines the equality of sexes but it is also necessary to increase the categories of beneficiaries to the members of the immediate family in accordance with Ollennu's view and in line with the provision on maintenance under the code. In this way members of the nuclear and immediate families succeed jointly, and this would go a long way to alleviate the social problems attributed to the law of succession. Other countries have adopted such a broad-based class of beneficiaries. This is the case in Ghana under the Intestate Succession Law of 1985,¹⁰⁴⁴ Malawi under the Wills and Inheritance Ordinance 1964,¹⁰⁴⁵ and Odje proposes a similar system for the Mid-Western Region of Nigeria.¹⁰⁴⁶

¹⁰⁴⁴ See Dankwa, E. V. O. "Property Rights of Widows in their deceased husband's estate." (1982-85) U. G. L. J. 1-24, 18.

¹⁰⁴⁵ See Simon Roberts, "The Malawi Law of Succession: Another Attempt at Reform." [1968] J.A.L. 81-88, 85.

¹⁰⁴⁶ Odje, M. "Integration in the field of the law of succession in the Mid-Western Region of Nigeria" in Integration of customary and modern legal systems in Africa, University of Ife Press, Ile-Ife, Nigeria, 261-292, 285-288.

So Cameroon would not be the only country which increases the category of beneficiaries to the members of the immediate family and we do not want to envisage the extended family, in fact our studies did not reveal any cases in which members of this category are claiming succession rights. In all these countries the objective has been to strike an acceptable balance between the demands of the customary heirs and those of the nuclear family. And there is no doubt that the extended category of beneficiaries will go a long way to reduce the social problems inherent in succession matters.

The other alternative would be for the law to continue in its exclusionary form, and in order to eliminate the social problems the state will have to put in place social security schemes as is the case in England and France. If the system appears to be functioning well in these countries it is because of these amenities which tend to dissuade persons, such as parents from looking forward to succession in the estates of their issue. As this is impossible given the state of our economic development, there is need for a law of succession which would cause people not to look up to it for such assistance.

8.2.2: On Administration

The administration of estates under all the systems is indefinite and most of the cases of abuse are when a person has managed an estate for so long that he starts confusing it with his own personally acquired property. A definite period of administration would therefore be advisable at the end of which there must be distribution.

8.2.3: On Distribution

By extending the categories of beneficiaries it will also require adjusting the rules of distribution. Taking from the example of the other countries where beneficiaries are expanded to include the immediate family, the estate will have to be divided into two parts, one part for the nuclear family and the other immediate family. Normally the percentage allotted to the nuclear family is more than that allotted to the immediate family and the distribution within the group ought to be left to the discretion of the courts. In this way the inequalities noticed in the case of multiple spouses would be eliminated.

8.2.4: On the effect of distribution

In order to provide beneficiaries the latitude to enjoy the full benefits of the property there is need to redefine the effect of distribution. Should distribution give rise to an absolute and alienable interest or a usufructuary interest? It is normal for distribution to result in absolute ownership so the beneficiaries of land could be free to raise loans on mortgages by using the land as security. The family code does not guarantee such an outcome, probably because of the fear to disrupt the customary land tenure system and the fear that the next generations of families might not have land if the beneficiaries are given unbridled powers of alienation. But we think that this should not be an impediment to distribution given that such lands will be subject to the land registration law, which we saw entitles persons with an interest in land for which an application for registration has been made to have such interests protected in the land registers.

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