Limitations on Testamentary Freedom in Nigeria

Uju Obuka*

Abstract

This paper examines limitations on testamentary freedom in Nigeria. The paper argues that freedom of testation however desirable it may be should not obstruct the interests of society, which require that a testator should make adequate provision for his surviving family. The paper argues further that unless the dependants merit to be disinherited, they should obtain some part of their parent's estate despite contrary disposition by the will.

1. Introduction

The law generally defers to owners in deciding the use and disposal of their property. One justification for this deference is that owners typically internalize the benefits and costs of their actions. Therefore, an owner's private incentive to use property often will coincide with its socially optimal use. Similarly, the law usually defers to donors in deciding the nature, timing, and recipients of gifts, including gifts at death.[1]

Testamentary freedom connotes the right to choose the beneficiary or beneficiaries to one's estate at death. Ordinarily, this freedom would not pose any problem where the deceased was equitable in sharing his properties to his dependants. Problem often arise where some dependants who should inherit from the estate of the deceased are left out completely or are not adequately provided for in the Will.

---

* Uju Obuka, Lecturer Department of Public &Private Law, Faculty of Law, University of Nigeria, Enugu Campus.

1 D. B Kelly, "Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications", *Fordham Law Review*, Vol. 82, (2013), P. 1.

It is unarguable that one of the basic incidents of marriage is the duty to take care of family members. The question here therefore is, what is the rationale behind a man disinheriting his family members who lived happily with him up till his demise simply because he has absolute freedom to do whatever he pleases with his property? Some writers argue that it is contrary to the philosophy and intendment of Will making to curtail absolute freedom of the testator citing the age long principle of the law deferring to owners the optimal use of their property without hindrance as their justification.[2] This paper differs from the views expressed by such writers by arguing that it is inequitable for a man to disinherit obedient and well deserving family members who lived happily with him up till his demise simply because he has a right to devise his properties as he likes. Avenues exist for a man who is disenchanted with his wife to divorce her prior to his death or to disown a recalcitrant son before his death. So long as he lived with his family up till his death, he should provide adequately for them in his Will.

2. Nature of Succession in Nigeria

Succession is the devolution of property on the death of the person concerned. The law of succession refers to the body of laws governing the distribution of a deceased person's property and it is intrinsically interwoven with the concept of inheritance. The law of succession and inheritance reflects Nigeria's plural legal system. The pattern of inheritance and succession particularly

---

[2] See for instance O.A Egwuatu, "Limits of a Testator on Freedom of Will Testament" available at www.nigerianlawguru.com., last accessed 20/4/2015. R. A. Onuoha, "Nature of Inheritance in Nigeria," *International Journal of Not-for-Profit Law* vol. 10. Issue 2, April 2008. I. E. Sagay, *Nigerian Law of Succession, Principles, Cases Statutes and Commentaries* (Lagos: Malthouse Press Ltd, 2008), p. 73. K. Abayomi, *Wills: Law and Practice*, (Lagos: Mbeyi & Associates (Nig.)Ltd, 2004), p. 254.

regarding intestate estate under customary law in Nigeria have almost as many variations as there are ethnic groups in the country and many of the variations are discriminatory in practice.[3] Indigenous customary law developed rules of inheritance for intestacy which is predominantly that inheritance is by blood.[4] Thus, an illegitimate child or a stranger cannot inherit under customary law.[5] This is not to say that the concept of testate succession was completely unknown to customary law. Customary law recognized death bed declarations made in anticipation of death so long as the declarant has knowledge of what he was doing, was aware of his properties and his beneficiaries and the declaration was made in the presence of witnesses.[6]

Succession could be either testate or intestate. It is testate where the person dies leaving a valid Will. Intestate succession on the other hand is where the deceased died without a Will or where the Will he left behind is invalid due to non-compliance with the relevant statute.

2.1 Intestate Succession

There are three systems of law governing intestate succession in Nigeria. These are the English Common Law, Statutory Law and Customary law, which includes Islamic law.[7] The system of law applicable in any given case depends on the type of marriage contracted by the deceased person.[8] For Moslems, religion is the decisive factor.[9]

---

3 Onuoha, above note 2.
4 *Ibid.*
5 Sagay, above note 2.
6 *Ibid.*
7 *Ibid.*
8 *Ibid.*
8 *Ibid.*
9 *Ibid.*

The implication of the foregoing is that where a citizen of Nigeria is married under the Statute, on his death intestate, the relevant statutory law of his domicile will govern the distribution of his estate. Customary law governs the distribution of estate of persons subject to customary law. For Moslems, Islamic law would govern the devolution of their property upon their death intestate.

Mention must be made here that the foregoing applies to the distribution of the movable properties of the intestate married under the Statute. In the case of immovables, the law of the place where the immovable property is situate *(lex situs*) will govern the distribution of the deceased's estate.[10] For Moslems and persons subject to customary law, Islamic law or their customary law will always govern the distribution of their property notwithstanding where the property is situate.[11] Also deserving of mention also is the fact that only property owned exclusively by the intestate could devolve according to the rules of distribution under statutory law.[12] The intestate's share in undivided family property cannot be distributed under any of the laws. Such property can only be distributed in accordance with customary law.[13]

2.2 Testate Succession

Succession is testate where the deceased left a valid Will. In Nigeria, testate succession may be governed by statutory law, customary law or islamic law. The law applicable to Wills is not uniform in Nigeria. Formerly, the Wills Act,[14] a statute of general

---

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

13 *Ibid.* See also *Thomson Oke v Robinson Oke and Anor* (1974)3SC , *Ogunmefun v Ogunmefun* (1931) 10 NLR 82 where the Supreme Court held that the deceased had no separate interest in the property sought to be devised and as such the bequest in the Will was null and avoid.

14 1837 as amended by Wills Amendment Act 1852.

application, applied throughout the country until 1959 when the then Western Region of Nigeria enacted the Wills Law of Western Region of Nigeria.[15] The Wills Law of Western Region was a re-enactment of the Wills Act 1837 and 1852 with some elements of the 1925 English Act. With the breakdown of the region into States, all the States carved out of the former Western Region adopted the Wills Law with the result that each State now has its own Wills Law modelled after the Wills Law of Western Region 1959. The Nigerian Law Reform Commission carried out a review of the pre-1900 English Statutes in force in Nigeria in 1987. Its report[16] *inter-alia*, proposed a draft law on Wills for any State which may wish to adopt it. Some States have enacted new Wills Law based on the Commission's model.[17] The result is that three models of Wills Law operate in different parts of Nigeria viz;

a. Those based on the Wills Act 1837 as amended;
b. The 1959 Western Region of Nigeria Model;
c. The model based on the Nigerian Law Reform Commission's Report.[18]

Customary law equally recognizes the making of Wills which in most circumstances take the form of oral declarations made voluntarily by the testator during his lifetime.[19] This type of Will is called oral Will or Nuncupative Will. A nuncupative Will may be made while the testator is in good health, or in anticipation of death.[20] It often goes beyond disposition of property to other

---

15 Cap 133 Laws of Western Region of Nigeria 1959.

16 Report on the Review of pre-1900 English Statutes in force in Nigeria 1991, Vol. II paras 28-42, p. 233-235.

17 States like Lagos, Oyo, Cross- Rivers and Rivers. See Wills law Cap W2 Laws of Lagos State 2004, Wills law Cap 170 Laws of Oyo State 1998, Wills law Cap 141 Laws of Rivers State 1999 and Wills Law Cap W2 Laws of Cross-Rivers State 2004.

18 See Nwogugu, above note 2, p. 404.

19 *Ibid.*

20 *Ibid.*

areas like directions as to the mode of burial and funeral ceremonies to be performed for the testator.[21] For a nuncupative Will to be valid, it must have been made voluntarily by a person with sound mind and memory, the subject matter must be disposable and identifiable, the beneficiaries must be identifiable, and the disposition must have been done in the presence of witnesses.[22]

Islamic law, like its counterpart, recognizes the making of Wills (Wasshiyyah) by Moslems in conformity with Islamic law. The basic principle of Islamic law of testate succession is that a testator can only validly dispose of one-third of his property by Will and the remaining two-third is to be distributed as if he died intestate.[23] Equally, the testator cannot give preferential treatment to any of the children.[24]

3. Testamentary Freedom and Limitations on Testamentary Freedom in Nigeria.

Testamentary freedom connotes the right to choose the beneficiary or beneficiaries to one's estate at death. It is an individual's right to determine who succeeds to things he left behind at his death. Section 3 of the Wills Act[25] lends credence to this idea. The said section provides:

> It shall be lawful for every person to devise, bequeath or dispose of by his Will executed in a manner herein after required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time

---

21 *Ibid*.

22 See *Bankole v Tapo* (1961) 1 All N.L.R 140, *Ayinke v Ibidunmi* (1959) 4 FSC 280, where the court reiterated the requirements of a valid Nuncupative Will.

23 A.M Gurin, *An Introduction to Islamic Law of Succession, Testate/Intestate*, (Zaria: Jodda Press Ltd. 1998) P.107.

24 *Ibid.*

25 Above note 14. Section 3 Wills Law Cap 133 Western Region re-enacted the same provision but qualified the provision.

> of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon his heirs at law.

The purport of the foregoing provision is that anybody of full age can devise his properties howsoever he wishes without any hindrance. This has no doubt created a lot of problems in families as some testators have used the avenue to disinherit all their dependents and relations in favour of complete strangers. For Moslems, freedom of testamentary power enables a Moslem to dispose of his property in his Will in a manner inconsistent with Islamic tenets and teachings.

4. Limitations on Testamentary Freedom in Nigeria

The Wills Act was adopted in Nigeria as statute of general application to govern the making of Wills by persons who contracted marriage in English form rather than under customary law. Under this Act, a testator had unfettered freedom to dispose of his properties as he likes. In England, this tradition held sway as part of the common law and had been as carefully protected as the right of private property. Nigeria imported this culture as part of her colonial heritage. However, this tradition of unfettered freedom with time, flew in the face of our cultural heritage which forbade a man from giving out his properties to total strangers in preference to his family members. The right of a testator to do as he pleases with his property has been limited in England on the premise of maintenance of one's family and dependants.[26] Our legislature had to take a cue from their English counterpart by limiting this unfettered discretion in our Laws. Commenting on this development, Abayomi has this to say:

> But over the years, the unrestricted liberty of the testator to do as he pleases with his Will became incompatible with our ways and patterns of life. Sophistication occasioned by western education need not becloud our

---

[26] See the Inheritance (Family Provision) Act 1938 amended in 1975 by the Inheritance (Provision for Family and Dependants) Act 1975.

> native sense of justice. An imported system of inheritance should not overshadow the local norms which have been in existence for many centuries. It is therefore not surprising that our legislature have introduced some qualification to the right of the testator to dispose of his properties.[27]

In Nigeria therefore limitations on testamentary freedom may be grouped under the following:

i. Limitations under statutory law.
ii. Limitations under customary law.
iii. Limitations under Islamic law.

4.1 Limitations under statutory law

Section 3 of the Wills Law of Western Region of Nigeria[28] may be said to be the precursor of the laws limiting testamentary freedom in Nigeria. The said section provides that:

> Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of by his Will executed in a manner herein after required, all real estate and all his personal estate which he shall be entitled to either at law or in equity.

But for the phrase "subject to any customary law relating thereto," this section is similar to section 3 of the Wills Act 1837. The Wills Laws of the States carved out of former western region are the same as the Wills Law of Western Region. Whilst the majority of the Wills Law of the southern States tend to limit the testator's right in relation to properties he cannot dispose of otherwise than as prescribed under his customary law, the Wills Law of Oyo State, Cross Rivers State, Rivers State and some

---

27 Abayomi, above note 2, p. 254.

28 Cap 133 1959.

States in the North, tend to have their own Wills law extend this limitation to Islamic law.[29]

Thus under the Wills Laws of the aforementioned States,[30] there are two basic forms of limitations on the testamentary power of the testator. The first is limitation under customary law and Islamic law and the second is family provisions or provisions reserving right for dependants to apply for variation of the Will.

Customary law unarguably does not prohibit the making of Wills, rather it recognizes an oral Will made by a testator in strict compliance with the requirements of oral Will. Customary law however limits the property the testator can dispose of in his will. This limitation is couched in various ways by the various State Laws. Section 3 of the Wills Law of Oyo State[31] for instance provides:

> It shall be lawful for every person to bequeath or dispose of by his Will executed in accordance with this Law all property to which he is entitled either in law or in equity at the time of his death; provided that the provisions of this Law shall not apply
> (a) to any property which the testator had no power to dispose of by his Will or otherwise under customary law to which he was subject; and
> (b) to the Will of a person who immediately before his death was subject to Islamic law.[32]

---

29 See F.J. Oniekoro, *Wills, Probate Practice and Administration of Estates in Nigeria* (Enugu: Chenglo Ltd, 2007), p. 38.

30 Bauchi, Kwara, Plateau, Kaduna, Jigawa, Oyo, Cross River and Rivers State.

31 Cap. 170 Laws of Oyo State 1998.

32 See similar limitations in S. 4(1) (b) Wills law, Cap. 163 Laws of Kaduna State 1991, Wills law No. 2 1988 of Plateau State, Wills law Cap.168 Laws of Bauchi State1989, Wills law Cap. 163 Laws of Kwara State, 1991, Wills Law Cap.155 Laws of Jigawa State 1998. S. 1 Wills law Cap 141 Laws of Rivers State 2002, S. 1 Wills Law Cap W2 Laws of Cross Rivers State 2004.

The above section contains provisions similar to that of Lagos State.[33] The only difference is that the Lagos law did not contain provision that this law shall not apply to the Will of a person who immediately before his death was subject to Islamic law.

The true meaning of the phrase "subject to any customary law relating thereto" contained in the State Laws has generated a lot of controversy. Opinions are divided as to the true meaning of the phrase. One view was that the phrase is a qualification of the testator's testamentary capacity rendering any purported disposition of property by Will which is inconsistent with customary law null and avoid.[34] According to this view, customary law here include the rules of intestate succession under customary law. What this means in effect is that section 3(1) had effectively taken away the testamentary powers of all persons who were subject to customary law.[35]

On the other divide is the opposing but generally accepted view which regards this interpretation as ridiculous, arguing that the intention of the Wills law was to confer testamentary power in a society in which virtually everybody was subject to one type of customary law or another.[36] The law could therefore not defeat its

---

33 See S. 1(1) Wills Law Cap. W2 Laws of Lagos State 2004.

34 See the dissenting judgement of Elias CJN (as he then was) in *Robinsonn Oke v Thompson Oke*, above note 13. Wherein he postulated that, the introductory phrase "subject to customary law relating thereto necessarily makes the power given to a testator under the subsection dependent upon the particular customary law permitting it. In effect, the power of a testator to devise his real and personal estate by Will is limited by the extent if any to which its exercise is permissible under the relevant customary law. This same reasoning was adopted by the Court of Appeal by a majority of two to one in *Idehen v Idehen* (1991) 6 N.W.L.R.(Pt 198) 382.

35 See Sagay, above note 2 at p. 142.

36 See the submissions of Rotimi Williams SAN in *Idehen's* case above which was upheld by the Supreme Court in that case.

main object merely by the inclusion of the clause subject to customary law. Section 3(1) merely qualified the subject matter or property disposed of by Will. It did not restrict testamentary capacity *per se*.[37] This second view according to Sagay[38] was not only more reasonable but was more consistent with the principles of statutory interpretation. It is absurd to contemplate that a law which is enacted to confer testamentary power ends up actually taking it away.

The Supreme Court has in a long line of cases interpreted the phrase "subject to any customary law relating thereto."[39] In *Idehen v Idehen,*[40] the Supreme Court upheld the second view that section 3(1) of the Wills law does not restrict testamentary power but merely qualifies the subject matter or the properties that can be disposed of by Will. The court stated further that a devise or bequest could be declared void it if contravenes a relevant native law and custom. In other words, that bequest in the Will which contravened the relevant customary law of the deceased testator was declared void not the entire Will. In *Idehen's* case**,** the testator Joshua Idehen, a Bini man died in September 1979 leaving behind many children. He had made a Will in 1973 in which he made several devices and bequests. In the Will, he devised to his eldest son, Dr. Humphrey Idehen his two matrimonial home in Benin city. It was common ground that the testator lived in the two houses in his life time. The two houses therefore constituted his *Igiogbe* (family seat) under Benin customary law. Unfortunately, Dr. Humphrey pre-deceased the testator and since the two houses were specifically willed to him, they would have passed into the testator's residuary estate on the death of the testator. However,

---

37 Sagay, above note 2 at p. 142.

38 *Ibid.*

39 See *Oke v Oke* above note 13, *Idehen v Idehen* above note 33. *Agidigbi v Agidigbi* (1996) 6 N.W.L.R (Pt.454) 300. *Lawal-Osula v Lawal-Osula* (1995) 9 N.W.L.R (Pt. 419) 259.

40 Above note 34.

under Bini customary law, the oldest surviving son succeeds to the *Igiogbe* automatically to the exclusion of all other children of the deceased. The oldest surviving son of the deceased along with some other children instituted this action for a declaration that the Will was invalid and that in accordance with Bini customary law of succession, the plaintiff, Joseph Idehen as the oldest surviving son of the deceased succeeds exclusively to the *Igiogbe* and to a substantial proportion of all the other properties of the deceased. The trial court found for the plaintiff and held that the part of the Will specifically devising the *Igiogbe* to the late Humphrey failed and the plaintiff was entitled to the two properties constituting the *Igiogbe*. The court nevertheless held the Will in its entirety to be valid. The Supreme Court affirmed this decision on appeal. Similarly, in *Lawal-Osula v Lawal Osula,*[41] the Supreme Court pointed out that the phrase "subject to any customary law relating thereto" is not a qualification of the testator's capacity to make a will but a qualification of the subject matter or the property disposed of or intended to be disposed of by will.

The implication of the limitation in the Wills law therefore is that where under his personal law, a testator could not have alienated a particular property even in his life time, he cannot devise such property in his Will. The reason for this limitation is that such property under customary law could only devolve in a particular way and not otherwise.

Another limitation contained in the Wills law of the States is that relating to moslems. Islamic law just like customary law does not prohibit the making of Wills by Moslems. Rather it places limitations on the amount of the testator's estate that can be disposed of in a Will. A moslem testator is forbidden from giving out more than 1/3 (one third) of his estate to persons outside his family members and he cannot give preferential treatment to any of his children. Neither can he disinherit any of the children unless

---

41 Above note 38.

they are bastards or non-Moslems.[42] This Islamic injunction obviously is the brain behind the exclusion of the Wills Law of Oyo, Rivers, Cross Rivers and most States in the North from applying to a person who immediately before his death was subject to Islamic law. The provision of section 4(1) of Kaduna State Wills Law[43] is apposite here. It provides:

> It shall be lawful for every person to bequeath or dispose of by his Will executed in accordance with the provision of this Law, all property to which he is entitled either in law or in equity at the time of his death provided that the provisions of this law shall not apply;
> (a) to any property which the testator had no power to dispose of by Will or otherwise under customary law to which he was subject;
> (b) to the Will of a person who immediately before his death was subject to Islamic Law.

Thus, under the foregoing provisions, the right of the testator to make Will is preserved but in the exercise of such powers, recourse must be had to the tenets of Islamic law. In other words, the testator must not go contrary to Islamic prescriptions regarding how to share his property. The Kaduna State Wills Law even extends the limitations to those subject to customary law. In other words a testator cannot devise in his Will any property, which he was forbidden by customary law from disposing of otherwise than in accordance with the customary law.

Another limitation contained in the Wills law of the States is that relating to family and dependants provision. This limitation according to a learned author is a machinery created by the law to make reasonable provision for members of the family or other

---

42 See Chapter 4 of the Koran. See also *Ajibaiye v Ajibaiye* (2007) All FWLR (Pt. 359) 1321.

43 Cap 163, Laws of Kaduna State 1991.

dependents a testator fails to provide for or fails to adequately provide for in his Will.[44]

The Wills Act which applied in Nigeria as a statute of general application conferred on testators unfettered discretion to dispose their properties without any hindrance. Dependants who were not provided for or adequately provided for were left without any redress. This no doubt meted out a lot of hardship on those dependants left out of the Will. In order to ameliorate this hardship, the UK parliament enacted the Inheritance (Family Provisions) Act,[45] which empowered the courts to make provision for family members and dependants not provided for or adequately provided for in the Will. These legislations not being statutes of general application are not applicable in Nigeria.[46] Our law makers saw the need to borrow from their English counterpart.[47] The Nigerian Law Reform Commission that reviewed all pre 1900 English statutes in force in Nigeria in its report[48] recommended the introduction of similar provisions of English law into our Wills Law.[49] S. 2 of the Wills Model Law[50] provides:

> (1) Notwithstanding the provisions of section 1 of this Law, where a person dies and is survived by any of the following persons;

---

44 Abayomi, above note 2 p. 264.

45 1938 amended by the Inheritance (Provision for family and Dependants) Act 1975.

46 See Nwogugu, above note *2* p. 402.

47 *Ibid.*

48 Above note 16.

49 *Ibid*.

50 Some States have adopted the Model Law. See for example Sections 4(1) of Oyo and Abia State Wills Law 1998 and 2001 respectively, S. 127 of Enugu State and Anambra State Administration and Succession (Estate of Deceased Persons Law) 2004 &1991 respectively. S. 2(1) Wills Law Cap W2 Laws of Lagos 2004, S. 2 Wills Law Cap. W2 Laws of Cross Rivers State 2004, Wills Law Cap 141, Laws of Rivers State 2002,

(a) the wife or wives or husband of the deceased; and
(b) a child or children of the deceased.
(c) A parent, brother or sister of the deceased who immediately before the death of the deceased was maintained either wholly or partly by the deceased, that person may apply to the court for an order on the ground that disposition of the deceased's estate effected by his Will is not such as to make reasonable financial provision for the applicant.

(2) In this section, reasonable financial provision means
(a) in the case of an application made by virtue of subsection 1(a) of this section by the husband or wife or wives of the deceased except where the marriage with the deceased was subject of a decree of judicial separation in accordance with any customary law and at the date of the death the decree was in force and the separation was continuing means such financial provision as it would be reasonable in all circumstances of the case for a husband or wife to receive whether or not that provision is required for his or her maintenance.
(b) in the case of any other application by virtue of sub section 1 above means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

(3) For the purpose of subsection (1)(c) above, a person shall be treated as being maintained by the deceased, either wholly or partly if the deceased was making a substantial contribution in money's worth towards the reasonable needs of that person.

(4) An application under this section shall be exercisable only within the period of six months of the grant of probate.

Whereas the model law has been adopted fully by some of the States,[51] Lagos and Anambra States have only partially adopted the model law relating to family provision. Whilst the Wills law of Lagos State recognizes only wife or wives, husband, child or children of the testators, the Anambra State Law[52] varies from the model provision in many respects and seems more akin to the English Act of 1975.[53] The person whose estate is in question must be domiciled in Anambra State. The definition of a child is more elaborate under the Anambra State Law and relates only to a male who has not attained the age of 18 years or a female who has not attained that age and has not been married at a younger age. The child must be attending an educational or vocational institution or is incapable of maintaining himself due to some physical or mental disability.[54] Another major difference between the model law and the Anambra State Law is that whereas the model law is restricted to a Will, the Anambra State law applies in the case of a Will or intestacy or a combination of both.[55]

The implication of the above provision is that family members of the deceased who were left out of the Will or who were not adequately provided for can apply to court to vary the Will so as to make reasonable provision for them. Where such application is successful, the court will then alter the Will and make provision for the applicants. To be qualified for this order, the application must be made within six months of the grant of probate otherwise the application will not be entertained.

4.2 Limitations under Customary Law

---

51 Oyo, Rivers and Cross-Rivers States.

52 S. 127 of Administration and Succession to Estate of Deceased Persons Law, Cap. 4 Laws of Anambra State 1991.

53 See Nwogugu, above note 2 p. 403.

54 S 127, note 51 above

55 *Ibid.*

To protect the family as the basic unit of social organization, all societies have over time evolved rules of succession for the devolution of property of a dead person regardless of whether he died testate or intestate.[56] The rules of inheritance under customary law in Nigeria is as varied as the ethnic groups themselves. Under most systems of customary law, inheritance is by blood.[57] This means that on the death of a man only his family members are entitled to inherit his estate to the exclusion of nonfamily members. In most systems,[58] the concept of male succession (primogeniture rule) prevailed whilst in some areas,[59] succession is based on the concept of family property.

Under most systems of customary law, the testator cannot disinherit his children or dispose his properties in such a way that the male children will not get anything from the estate.[60] In some areas particularly in parts of Edo and Delta States, the ancestral home or the family seat must be inherited by the eldest surviving son who performs the final burial rites of the deceased.[61] In some others particularly in Ibo land, the eldest surviving son inherits his deceased father's estate as a trustee for his younger brothers. The rationale behind allowing the eldest surviving son to step into the shoes of his father is to ensure that family heritage and line of succession are reasonably preserved and also to preserve family cohesion and harmony. Furthermore, the testator under most systems of customary law particularly amongst the Igbos cannot

---

56 See A. S. Maliki, "An examination of the Nature and Operations of Islamic and Statutory laws of Testate Succession in Kaduna state Nigeria" *European Scientific Journal*, June edn. Vol. 8, No. 13. (2012) p.108.

57 Onuoha, above note 2.

58 This concept is prevalent amongst the Ibos, and people from Edo and Delta States.

59 This is particularly true amongst the Yorubas.

60 In Iboland for instance the eldest surviving son steps into the shoes of his father and holds the entire estate in trust for his other brothers.

61 This ancestral home or family seat is known as the *Igiogbe.*

devise his landed properties to his female children or to the wife or wives. This custom had from time immemorial held sway in Iboland until the Court of Appeal in *Mojekwu v Mojekwu*[62] held that the Igbo custom which disentitles a female child from inheriting her father's estate is repugnant to natural justice, equity and good conscience. The Supreme Court more recently in *Ukeje v Ukeje*[63] and *Anekwe v Nweke* [64] voided the said Igbo customary law that disentitles women from inheriting from their fathers and husbands. The court was of the opinion that the said custom violates section 42(1) and (2) of the 1999 Constitution which guarantees freedom from all manner of discrimination and is therefore void to the extent of the inconsistency. It is humbly submitted that this is a step in the right direction more so when female citizens from other localities are not subject to such discrimination.

Mention must also be made of the Osu caste system prevalent amongst the Ibos which prevents certain persons from inheriting from their ancestors. Under this system, persons who or whose ancestors are sacrificed to the gods are regarded as outcast and are disentitled from inheriting from the freeborn. This practice had continued despite the enactment of the Abolition of the Osu System law.[65]

Another limitation on the disposing power of the testator under customary law is the prohibition against disposing family property. As already pointed out, in some communities in Nigeria particularly among the Yorubas, all the children of the deceased regardless of age and sex are entitled to inherit equally from their deceased parents. Succession in Yorubaland is based on the

---

62 (1997) 7 NWLR (Pt. 512) 238.
63 (2014) LPELR- 22724. SC.
64 (2014) LPELR-22697. SC.
65 1956.

concept of family property. Family property according to the court in *Coker v Coker*:[66]

> Is a residence which the father of a family sets apart for his wives and children to occupy jointly after his demise. All his children are entitled to reside there with their mothers and his married sons with their wives and children…No one has any chargeable or alienable interest in the family house. It is only with the consent of all those entitled to reside in the family house that it can be mortgaged or sold.

Thus, family property belongs to all the children whether males or females and no individual member of that family has any alienable interest in the property. The inalienability of family land according to a learned author, derives perhaps from a religious or magico religious attitude towards land regarded as a sacred trust of the living undertaken in memory of the dead.[67] For Elias, inalienability is a defence mechanism to protect the interest of present and future generations of a homogenous group otherwise known as the family to ensure that the living do not dissipate the wealth or interests of their progeny.[68]

It is a general principle of law that you cannot give what you do not have, (*Nemo dat quod non habet)*. Family property belongs to every member of the family and no individual member has a divisible interest in the property that will enable the individual to devise either *inter-vivos* or in his Will such indivisible interest. This principle is the bedrock of the Supreme Court decision in *Thomson Oke v Robinson Oke & Anor*,[69] where the Court held that the testator could not devise a house he built on the family land of his wife by his Will. Same principle was upheld

---

66 (1938) 14 NLR 83 at 86. Quoted in Abayomi, above note 2, p. 262.

67 *Ibid.*

68 T. O. Elias, *Nigerian Land Law and Custom* (London: Routledge and Kegan Paul, 1951), p. 326.

69 Above note 13.

in *Ogunmefun v Ogunmefun*[70] where a family member devised by Will her undivided share in the family property and the court held that she has no distinct interest in the property and as such, cannot devise the property in her Will which was unpartitioned family property. The purport of this limitation therefore, is that a testator has no alienable interest in family property which belongs to every member of that family and as such cannot give out either in his Will or *inter-vivos* such property.

4.3 Limitations under Islamic law

Islamic law like its counterpart recognizes the right of Muslems to make Wills. It however places limitation on properties that can be disposed of by Will. The mode of distribution and properties disposable are clearly stipulated in the Koran.[71]

Under Islamic law, a testator cannot validly bequeath more than one-third of his property unless his heirs consent to the bequest after the testator's death. Equally, a testator cannot make a valid bequest to a person who is a legal heir, unless the other heirs consent to it after his death.[72] Islamic law, unlike indigenous customary law still applicable in some States[73], recognizes the right of daughters and wives to inherit from their deceased fathers and husbands and in this wise, it stipulates a fixed amount of the estate to be inherited by females. A wife is entitled to one-eight of the net estate of her husband where the deceased left children and one-fourth where there are no issues. If there are more than one wife then, the one-eight or one-fourth will be shared amongst them respectively.[74] Similarly, girls are entitled to inherit half of what the males get. An only daughter is entitled to half of the deceased's

---

70 *Above note 13.* See also *Taylor v Williams* (1935) 12 NLR 67, *Davies v Sogunro* (1936) 13 NLR 15, *Agidigbi v Agidigbi above note 38.*

71 See Chapter 4 of the Koran.

72 See Maliki, above note 56.

73 Like Adamawa, Borno and Plateau States.

74 See Chapter 4 v 12 of the Koran.

estate. Where there are more than one daughter, they will share two-thirds of the estate.[75] The sons must inherit a portion equal to that of two females.[76] Parents are entitled to one-sixth of the estate where the deceased left issues and where there are no issues, the mother is entitled to one-third if the deceased is also survived by brothers and sisters.[77] Sisters of the deceased can only inherit in the absence of the following surviving the deceased; father, son, grandson or great grand-son, paternal grand-father and great grand-father and in this respect, if the deceased has one sister, she will inherit half of the estate and if they are more than one, then they will share two-third of the deceased estate. If the deceased has full brothers, then, a sister will take half of the amount a brother receives. [78] In all cases, the distribution is after the payment of debts and legacies.

5. Justification for Limiting Testamentary Freedom in Nigeria

There is no doubt that the family is the basic unit of every society. To protect the family as this basic unit therefore, all societies the world over have fashioned means of ensuring the continued existence of the family. This explains the cardinal rule of most systems of customary law in Nigeria forbidding a man from giving out his properties to total strangers in preference to family members. Will is a concept recognized under customary law. Under that system a testator cannot disinherit his family members. In any event where the testator disinherits any family member, the extended family may amend the Will. This is particularly true in most communities in Iboland. This system augured well for all and sundry as any testator who would not want the extended family to meddle in his estate after his death was forced to be equitable in his distribution. The white man's culture that gave the testator an

---

75 Koran Chapter 4 v 11.
76 *Ibid.*
77 *Ibid*.
78 Koran Chapter 4 v 176.

unrestricted freedom in disposing his properties as he likes is at variance with the cultural prescriptions of most communities in Nigeria that sought to preserve the family heritage. It is not surprising then that our lawmakers limited that freedom in our laws.

Reasons abound for limiting testamentary freedom in Nigeria. They range from social responsibility, to religious, cultural prescriptions, legal and moral obligations.[79]

Legal obligations are those which the law impose on a person during his lifetime. Moral obligations on the other hand are those that flow from legal obligations and are community standards expected of a parent. Parents owe their children legal and moral obligations to maintain and support them until they are capable of handling their affairs. Equally, the law imposes an obligation on a husband to maintain his wife during marriage. This duty was firmly established under common law and continues even when they are no longer living together. These financial responsibilities of marriage and parenthood constituted a serious imposition on a person's absolute property rights during his lifetime and should not terminate with death. It was for this reason that the legislature limited the wide testamentary freedom, by making provision for those dependants who were not provided for or adequately provided for in the will to apply for the will to be varied so as to make reasonable financial provision for them.[80]

Furthermore, our custom in Nigeria is mindful of the fact that the family as a social unit needs a means of its continued existence and survival. To ensure this objective, most custom carefully prescribe that certain properties must devolve in a particular way. The idea is to ensure that family heritage is preserved for the benefit of the present and future generations. It was for this reason that the eldest surviving son of the family must

---

79 See Egwuatu, above note 2.

80 See above note 49.

inherit the family seat to enable him continue with his duties as the head of the family. Equally a person was forbidden from alienating family property which does not belong solely to him, neither does it form part of the distributable estate of that person.

From religious perspective, Islamic law clearly recognizes the need for one to provide for those who would suffer as a result of his demise. Islamic law therefore limited the quantum of properties that can be disposed of by a Muslim in his will.[81]

It is the contention of this writer that limiting testamentary freedom is justified so as to force people to honour their obligations towards their dependents especially if those dependents had been at peace with the testator prior to his demise. Any testator who feels strongly about disinheriting his spouse or children should take appropriate steps in either divorcing the spouse or disowning the children. So long as he does not do that he owe the living a duty to provide for them in his Will.

6. Conclusion

We have demonstrated in the above discourse that the limitations on the testamentary freedom of a testator are geared towards ensuring that people live up to their expectations of providing for their family even beyond death. The need to limit absolute freedom of testation arose out of the incessant complaints, family rancour and feud emanating from family members left out of a Will. All the laws that seek to limit testamentary freedom are instrument designed by law to ensure that justice is done. Where the testator has been fair in distributing his estate in his will, there will not be intervention by the courts or the statute, neither will there be family rancour or feud. The concept of giving out one's property to total strangers in preference to family members is inequitable and totally alien to our culture that places much emphasis on the preservation of family heritage.

---

81 See Koran Chapter 4.

Nigeria is not alone is this march to end absolute freedom of testation. England from where we imported this tradition has questioned the desirability of allowing a testator to turn over his dependants to the state for support and they have enacted provisions allowing the courts to make provisions for family members not adequately provided for in the Will. Although some States in Nigeria have borrowed a leaf from the legislature in England and enacted family provisions, it is humbly submitted that other States should enact their own Wills law and incorporate such provisions that will enable the courts to make provisions for family members left out of Will. If provisions like these exist in our laws, family rancour and feud emanating so soon after the death of someone will be reduced to the barest minimum. Equally, testators who would not want the courts to meddle in their affairs will be forced to do equity by distributing their estate equitably amongst their dependants.