The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon

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Abstract: Contemporary customary law in Anglophone Cameroon has undergone a severe transformation since the coming in force of the Southern Cameroons High Court Law (SCHL), 1955. Prior to its enactment, customary law was administered by village authorities and was not subjected to any requirements. The SCHL is an influential piece of colonial legislation applicable in the former Southern or West Cameroon (currently the two Anglophone South West and North West Regions). Apart from establishing the competence of the then High Court, the legislation provides for the reception of English law into the territory and for the enforcement of customary law subject to passing duality tests—the repugnancy and incompatibility tests. Section 27(1) governs enforcement of customary law. Seemingly, the provision had the objectives of guaranteeing the survival of customary law in Anglophone Cameroon and eliminating offensive customary practices, thereby provoking in the people a sense of reform of customary rules. However, contemporary developments revealed that inasmuch as Section 27(1) has secured the survival of customary law (as interpreted by lawyers) over the years, it has also generated a number of conceptual and practical difficulties in the enforcement of customary law by the statutory courts. There are no clear standards in determining repugnancy and this has led to uncertainty in the application of customary law. Further, the duality tests have led to a divergence between the customary law recognized by the court and that recognized in society, the consequence being that a new version of customary law has arisen which does not reflect socially recognized norms. Alternatively, through the application of the duality tests, a new version of customary law is created by the statutory courts and then institutionalized in the legal system.

Introduction

Customary law refers to custom, local usage, and belief of a particular community considered as binding on the people. Most, if not all, of these customs and usages are said to have been developed from time immemorial and handed over to the people from generation to generation. Although this perception of customary law as emanating from time immemorial has been challenged, nonetheless, it is generally accepted that customary rules existed prior to colonialism.[1] Customs and usages reflect the habit and social attitudes of the time. Generally, the concept of customary law is based on custom. The term "custom" does not imply that a

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single uniform set of rules govern all Cameroonians. Rather, Cameroonian customary law has been looked upon as consisting of countless legal systems, each developed by and applicable to a particular ethnic group. In other words, a system of ethnic identification underlies customary law: customary law has a jurisdiction limited to particular cultural boundaries and it is the possession and right of a restricted ethnic group. Thus, each of the over 250 ethnic groups recognized in Cameroon has its own customary rules. Despite the fragmentation of customary rules there are also significant similarities in the rules applicable by the various ethnic groups.

Prior to colonization, customary laws were applicable in indigenous courts throughout the territory under the supervision of traditional leaders. At the advent of colonialism, extraneous legal systems were imported into the territory, notably French civil law and English common law.[2] In Anglophone Cameroon, one of the most influential pieces of legislation enacted by the British was the Southern Cameroons High Court Law, (hereinafter referred to as SCHL), 1955. It governed the administration of justice by the colonial High Court of Southern Cameroon. Despite being colonial legislation its impact within the administration of justice is still felt in contemporary Cameroon. Indeed, it is one of the most authoritative pieces of legislation in the administration of justice in Anglophone Cameroon. The legislation establishes the competence of the High Court and legitimizes the reception and continuous application of received English laws in the territory—the provisions of Sections 10, 11, 12, and 15 are illustrative. These provisions legitimized the application of substantive English law, practices, and procedures in Anglophone Cameroon. While Section 11 provides for the application of pre 1900 English statutes and doctrines of equity, Section 15 calls for the application of post 1900 English law in respect to issues dealing with probate, divorce, and matrimonial causes.

The impact of the SCHL extends to the recognition and enforcement of customary law. Section 27(1) is the most authoritative legislative provision that expressly provides for the recognition of customary law. None of the legislation enacted since independence expressly provide for the recognition of custom. Much of this legislation, including Article 2 Paragraph 2 of the 1996 Constitution, Section 3 of the Judicial Organization Ordinance 2006, and Article 21 of Decree No. 77/245 of 15 July 1977, only makes implicit references to the recognition of customary law. Section 27(1) of the SCHL, 1955, is the only applicable law in Anglophone Cameroon that expressly provides for the recognition and enforcement of customary law.

Whenever customary law is to be enforced by the court, the impact of Section 27(1) almost always becomes apparent. The provision does not provide for the total and unconditional recognition of customary law. Rather, over the years, a pattern has emerged from the interpretation of this provision by the court: for a customary norm to be recognized and enforced by the court it must neither be repugnant to natural justice nor incompatible with a written law. Thus, prior to recognition, a customary norm is subjected to duality tests: the repugnancy and incompatibility tests. This colonial innovation, which has been endorsed by the local legislature, is not without consequences. The duality tests have restricted the scope of applicable customary law and, arguably, have provoked a sense of reform of customary law. An unavoidable divergence has also arisen between customary law recognized by the court and what is socially recognized under that name in society. Further, the repugnancy test has led to uncertainty in the application of customary law. This article advocates for the strengthening of the role of customary law in contemporary Cameroon.

The article provides a critical appraisal of almost six decades of the duality tests provided for under Section 27(1) of the SCHL, 1955. It provides an in-depth analysis of the provision and argues for the scrapping of the repugnancy test. It suggests that the test has generated uncertainty in the application of customary law, weakened the appeal of human rights rhetoric in the court, and has fragmented the legal process by creating two different versions of customary law. The article is divided into three parts: part one provides an analysis of the provision of Section 27(1) of the SCHL, 1955; part two unravels its impact on customary law; and part three discusses the path forward and suggests an alternative measure to the repugnancy test.

Section 27(1) of the SCHL, 1955: An Overview of the Provision

The recognition and enforcement of customary law in Anglophone Cameroon is provided for under Section 27(1) of the SCHL, 1955. That provision states: "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 law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom." The letter of this provision is not unique. In fact, it is derived from or replicated in other pieces of legislation applicable in the former Southern Cameroon.[3] The provision has two major effects: firstly, it recognizes customary law as a form of law; and, secondly, it provides for the regulation of customary law subject to its enforcement.

The Recognition of Customary Law in Anglophone Cameroon

Section 27(1) authorizes the High Court to "observe and enforce the observance of every native law and custom." Thus, the High Court is not only mandated to take notice of the existence of customary law within the jurisdiction of the court but must also enforce its observance in the administration of justice. Reference to the "High Court" in the provision is not restricted to the High Court of Justice. Indeed, when the provision came into force, it referred to the colonial High Court, which then exercised both original and appellate jurisdiction. Nowadays, reference to the "High Court" is construed to refer to the ordinary statutory courts such as the Court of First Instance, the High Court of Justice, the Court of Appeal, and the Supreme Court. Although customary courts are not precluded from exercising jurisdiction in conformity with the letter and spirit of the provision, technically speaking, as custom-applying courts, (as opposed to statute-applying courts), they are exempted from relying on the provision. Section 27(1) legitimizes the application of customary law in Anglophone Cameroon.

Since independence in 1960, Cameroon has yet to enact legislation that expressly recognizes custom as a form of law. A number of post independent legislative actions only make implicit recognition of custom. Amongst them is Article 2 Paragraph 2 of the 1996 Constitution.[4] The provision provides that the State: "…shall recognize and protect traditional values that conform to democratic principles, human rights and the law." "Traditional values, it is contended, refer to the ancestral customary values of the people. This constitutional provision is subject to ambiguity. It alludes to the state offering protection to "traditional values" without stating in precise terms what those values entail and the measures that have been adopted or are to be adopted to protect them. Could it be said that the protections the state is going to provide to

"traditional values" are already those in existence, and contemplated under Section 27(1) of the SCHL, 1955, to safeguard the future of customary law? Such a question is difficult to answer considering the vagueness of the constitutional provision. Ideally, one would have thought that the state would enact a specific post- independence legislation to protect these values in conformity with the letter and spirit of the constitutional provision.

Article 3 of the Judicial Organization Ordinance, 2006, is another post-independence legislative action that makes implicit recognition of customary law.[5] It recognizes "Customary Law Courts" in the judicial system. These courts, customary courts as they are usually referred to, are competent to settle disputes using indigenous laws and customs. The recognition of customary courts, an institution mandated to apply customary law, must therefore be seen as an implicit recognition of customary law.

Further, the relevant provision of Decree No. 77/245 of 15 July 1977 is worth discussing.[6] This decree made chiefs auxiliaries of the administration and empowered them to settle disputes according to native laws and customs.[7] This is the province of Article 21 which states: "The Chiefs may, in accordance with native law and custom, and where laws and regulations do not provide otherwise, settle disputes or arbitrate in matters arising between their subjects." Technically speaking, chiefs are not part of the judicial process. Therefore, by authorising chiefs to settle disputes using native laws and customs, this provision expressly recognizes customary law albeit within the non-state justice system where the relevance of chiefs in the settlement of disputes cannot be over-emphasized.

Regarding the foregoing, the importance of Section 27(1) becomes even more apparent: It remains the only authoritative legislative instrument applicable in Anglophone Cameroon that expressly recognizes customary law. Unlike in jurisdictions elsewhere, where customary law is either recognized on the strength of a constitutional provision or a post independent legislation this is not the case in Cameroon.[8] The failure of the Cameroonian draftsman to expressly provide for the recognition of customary law either through a post-independent legislation or a constitutional provision raises a conceptual question: could this omission be regarded as a deliberate attempt to minimize the relevance of customary law in Cameroon? Alternatively, could this measure be perceived as being contemptuous of customary law? A critical analysis of the provision of Section 27(1), specifically the criteria established for the regulation and subsequent enforcement of customary law by the statutory courts, suggests an affirmative answer to these questions.

Regulation of Customary Law: Recognition Subjected to Duality Tests

Further to its recognition, Section 27(1) provides for the judicial regulation of customary law subject to its enforcement. According to the provision not all customs shall be recognized as customary law. In fact, the provision subjects the recognition and enforcement of customary law to a duality tests: the repugnancy and incompatibility tests. The express inference is that for customary law to be recognized by the court, it must neither be "repugnant to natural justice, equity, and good conscience nor incompatible with any law for the time being in force." Through these tests, the court has established control over customary processes. Each of these will be treated in turn, beginning with the repugnancy test.

According to Section 27(1) for customary law to be enforced it must, amongst others, not be repugnant to natural justice, equity and good conscience. The word 'repugnant' means highly distasteful or offensive, opposed or contrary to, as in nature.[9] The precise ancestry of the test is somewhat in doubt. However, it has been said that it arose from Roman law sources and may have been influenced by canon law.[10] It was introduced into Africa during the colonial era and since then has remained an important feature in the development of customary law in post-colonial African societies.

By virtue of the test, an indigenous law, tradition, or custom is not to be enforced if it is distasteful, offensive to equity and good conscience, and is opposed to natural justice. The test further precludes the customary court from imposing a (customary) penalty that is repugnant to natural justice or offends against human dignity or is simply barbaric. In French-speaking Cameroon, the phraseology used by the French colonial administration was to the effect that local laws and customs were to be applied only insofar as they were not "contrary to the principles of French civilization."[11] Any rule of customary law which permitted slavery, or murder, or which offended basic notions of justice was considered to be contrary to the principles of French civilization.[12] In applying the repugnancy test, it is not within the province of the court to modify an "uncivilized custom" and apply the modified version of the custom.[13] The role of the court is limited to either accepting a custom or rejecting its enforceability. A customary law must not be repugnant to natural justice if it is to be enforced. The implication is that the onus of determining what norm becomes customary law shifts from the people to the court. The repugnancy test is applied alongside the incompatibility test.

Section 27(1) also subjects customary law to the incompatibility test, which ensures that no rule of customary law can prevail over the provisions of an enactment of the national legislature. Furthermore, except as otherwise stated, where a statute adequately provides for a subject, customary law will not be enforced in respect of that subject. There is direct incompatibility where the statute states expressly its objective to abolish or modify the customary rule. The incompatibility test was aimed at subjecting customary law to the provisions of municipal legislation. Nowadays, its application has been extended to cover international treaties ratified by, and justiciable in, Cameroon including human rights treaties. Being at the hierarchy of legal orderings in Cameroon, as provided for under Article 45 of the Constitution, there are bound to be legal and constitutional implications on all other normative standards that conflict with human rights values, be they statutory, common law, or customary law.[14] Thus, through the incompatibility test, a customary norm would be rendered unenforceable should it conflict with either a municipal law or provisions of an international treaty ratified by Cameroon.

The court has not established a sequence of priority in the application of the duality tests. They are often used inter-changeably and in no specific pattern. The tests are a legacy of British colonial policy in the administration of customary law in sub-Saharan Africa and elsewhere. At the end of colonialism, the tests were maintained by most, if not all, independent sub-Saharan African states with far reaching consequences. In Anglophone Cameroon, the tests have had severe repercussions on the development of customary law.

The Impact of the Duality Tests on Customary Law

The duality tests were designed to restrict the scope of customary law and to initiate reform of some its values. The tests have also produced some undesired effects, most of which are unforeseen consequences of the application of the tests. While the repugnancy test has led to uncertainty in the application of customary law, it has also had profound influence in the enactment of local legislation. Generally, the duality tests have led to an unavoidable divergence in customary law. I shall treat the effects in turn.

Restriction of the Scope of Customary Law

The incompatibility test has drastically restricted the scope of applicable customary law. Prior to colonialism, customary law was the main form of normative ordering and was applicable to all actions, be they civil or criminal, although such appellations were unknown to customary law. Native courts, as they were then referred to, had unlimited jurisdiction. The incompatibility test established a new order: it restricted the jurisdiction of customary law and subjected it to the provisions of written (statutory) law. In fact, where legislation has made provision a rule of customary law becomes inapplicable under the incompatibility test. A direct consequence is that customary courts have been ousted from exercising criminal jurisdiction and their civil jurisdiction is restricted within the realm of family law.

In civil matters, the jurisdiction of customary court is limited to awards not exceeding the sum of 69.200 francs CFA (approximately 105 euros). Since most civil disputes attract awards in excess of the said sum, customary courts are restricted to handling only petty civil causes. In this connection, although they have jurisdiction over polygamous marriages, it remains questionable whether they have the competence to handle incidental questions arising from such marriages including custody, property adjustments upon divorce, and financial allocations.[15] This is because disputes dealing with financial allocation on divorce usually involve monetary sums in excess of the court's financial jurisdiction. Therefore, even when a cause of action falls traditionally within its jurisdiction, a customary court may still be unable to exercise jurisdiction insofar as the claim exceeds the financial jurisdiction of the court.[16] The recent jurisdiction of the statutory court also suggests that the High Court shares concurrent jurisdiction over polygamous marriages with customary courts and that once a litigant objects to the jurisdiction of the customary court over a polygamous marriage, that court must surrender its jurisdiction over the dispute in favor of the competent High Court.[17]

Reform of the Rules of Customary Law

An anticipated effect of the repugnancy test was to initiate changes and provoke reform in customary law. It was hoped that by invalidating harmful customary values, the court would provoke to the people a sense of reform of customary laws. The importance of the repugnancy test in reviewing custom with the need to ushering in changes was aptly stated by a Nigerian judge, Justice Nwokedi, in the Nigerian case of *Agbai v. Okogbue.*[18] The judge apparently considered that the courts could contribute to the process of adopting customary usages to changing situations through the application of the test. As he stated in his judgment:

> Customary laws are formulated from time immemorial. As our society advances, they are more removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root. The doctrine of repugnancy in my view affords the courts the opportunity for fine-tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the Courts are there to enact customary laws. When however customary law is confronted by a novel situation, the Courts have to consider its application under existing social environment.

This view is subject to criticism. As a form of law that emanates from the community, ideally one would expect changes in the law to come from within the community. Attempt to use the court to reform customary law amounts to an imposition on the people. Nonso Okereafoezeke criticized the test for hijacking the people's responsibility in ushering changes in customary law and instead handing it over to the court. He writes: "Ideally, therefore a people's law should emanate from a broad spectrum of the people, rather than from a few. This is the distinction between "customary law" imposed from the top and that developed from popular practices. Laws that are imposed by a few cannot become an acceptable means of social control…"[19]

Uncertainty Due to the Absence of Clear Standards

Questions have often arisen as to the standard the court employs to determine the rules of repugnancy. How does the court reach the conclusion that a customary rule is repugnant? What are the principles used by a judge in reaching that conclusion? These are questions worth considering, for in order for a rule to be declared repugnant it has to be adjudged on certain values: it may be those of the court that is seised of the issue; it may be those of the legal system where the court is situated; it may be those of the society in general or those of a foreign jurisdiction. There are three contrasting views.

Firstly, it is believed that the repugnancy test is not measured against the standard of a foreign country, and specifically British conduct, but against standards internal to the various jurisdictions or those based on universal morality. Therefore, during the colonial era, the formula was not meant to refer to English law but was regarded as an all-encompassing basis for the administration of justice in the colonies. Olawale supports this view, stating that British colonial policy in the sphere of law was not to judge the validity of local law and custom by the standards of Western thoughts or Christian ethics, but by the canons of decency and humanity considered appropriate to the situation at hand. In this connection, the objective of the test is to administer justice and not to exclude or impose a particular brand of law.[20] This position was adopted in the Nigerian case of *Dawodu v. Danmole*.[21] The Privy Council upheld a Yoruba custom of inheritance based on the *Idi-Igi* system. According to this system, the estate is divided in equal shares among the number of wives, with each child then taking an equal share of the portion allotted to his/her mother's branch of the family. While this was said to be contrary to the British principle of equal division to all children, the Privy Council held otherwise with

respect to its applicability in Nigeria. It stated: "The principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy."[22]

Secondly, and popular amongst scholars, is the view that the doctrine is associated and interpreted with the principles of English law (or received Western law).[23] As a British-inspired legislation, it was likely to have been adjudged based on principles of British morality. In fact, during the colonial era, given that those traditionally exercising the power to hold laws to be repugnant were British or British-trained judges, the repugnancy clause may have in part been a means to enforce western-based morality. Criticizing this measure, Marasinghe writes: "There is a danger built into this approach, where English standards of justice and law are utilised for the determination of whether a rule of native law and custom passes the required 'repugnancy test'. The danger is that native laws would over the years disappear as a living system of laws."[24]

In contemporary Anglophone Cameroon although the court relies on basic notions of justice, as dictated by the legal system, those notions of justice are still, however, based on values of English received laws, which are still predominantly upheld in that section of the country. The tendency of the court to measure the acceptability of customary law based on English-inspired laws has led to a perverted value system in Anglophone Cameroon. Western inspired laws, which are foreign in orientation, are perceived as genuinely Cameroonian whereas customary laws, which are ancestral Cameroonian laws, are viewed as foreign in nature. By relying on exotic standards, the test gives the erroneous impression that standards of justice espoused by received foreign law were superior to those of customary law. This measure is flawed given that customary law and received Western laws share different social, historical, and philosophical contexts and to adjudge one based on values enunciated by the other would only produce the wrong outcome. This has negatively impacted on the perception of customary law. Commenting on the test, Okereafoezeke wrote: "Measuring the quality of a native law or custom on the basis of a foreign or alien consideration such as those brought about by British colonial laws or even local official laws does not augur well for the growth of the native justice systems."[25]

Thirdly, there is the view that the court has not developed clear standards for the application of the test. One commentator echoed this view as follows:

> The courts have not developed any general theory on the basis of which rules of customary law are to be tested. Rather, they have adopted a liberal and flexible approach and have, on an ad hoc manner, invalidated or sanctioned a rule sought to be applied on the basis of their notion of what is fair and just.[26]

The absence of a clear standard is not without consequences: it has led to flexibility in the application of customary law, which has in turn generated uncertainty. Since no basic standard exists, the decision is based on the discretion of the court. And since it is but normal that judges hold different values of what might constitute proper conduct there is bound to be judicial uncertainty in the interpretation of the test, thus making it difficult to establish a universally valid precedent acceptable to all. As the decision of judges appears to create an uncertainty about the way in which the clause is applied, that uncertainty is passed down to customary law,

which in turn made it equally uncertain. This uncertainty is best illustrated through case law analysis. The contrasting decisions reached in the cases of *The Estate of Agboruja,* a Nigerian case, and *David Tchakokam v. Keou Magdaleine,* a Cameroonian case, is worth discussing.[27] In both instances, the courts were called upon to determine whether the system of levirate marriage under customary law (by which the wife of a deceased member of the family could be given to or married by another member of the family) offended natural justice, equity, or good conscience. In *The Estate of Agboruja*, the court approved the system of levirate marriage. In upholding the system it held:

> … the custom by which a man's heir is his next male relative, whether brother, son, uncle or even cousin, is widespread throughout Nigeria. When there are minor children it means that the father's heir becomes their new father. This is a real relationship and the new fathers regard the children as their own children. Whenever this custom prevails, native courts follow it, and no doubt somewhere or in this large country this is being done every day.

Approving the custom of levirate, the court wrote:

> … there can be nothing intrinsically unfair or inequitable even in the inheritance of widows, where those who follow the custom are pagans and not Mohammedans or Christians. The custom is based on what might be called the economics of one kind of African social system, in which the family is regarded as a composite unit.

On the contrary, the court arrived at a different conclusion in *David Tchakokam v. Keou Magdaleine* and rejected the practice as not only being repugnant but also contrary to written law. At the death of the widow's husband she was married through levirate to the nephew of her deceased husband. The new "husband" asserted claims over the property left behind by the widow's deceased husband. He averred that, being an object of inheritance under customary law, the widow was not entitled to inherit property. The court, relying on Section 27 of the SCHL, 1955, ruled in favor of the widow, granted her title over the contested properties and pronounced their levirate marriage invalid. The presiding judge wrote:

> All in all, I am unable to find that there was ever a customary levirate marriage between plaintiff and defendant and even if there were the law will not give its blessing to a marriage that is not only obnoxious and repugnant to natural justice but obviously against the written law ... Section 27 of the SCHL clearly does not permit this court to enforce a marriage which is liable to be voided under our law.[28]

Although the cases are derived from two different jurisdictions, it is important to note that the applicable rules are similar as Anglophone Cameroon and Nigeria share similar legal traditions. Nonetheless, the judges arrived at different conclusions. Whereas the Nigerian judge saw the practice as not being repugnant because of the benefits it confers to the family, his Cameroonian counterpart disapproved of it as repugnant.

The flexibility and inherent uncertainty in the application of the test is also evident in the contradictory precedents it has generated in the interpretation and enforcement of discriminatory customs. It is trite and settled law in Anglophone Cameroon that the repugnancy test is invoked to eradicate discriminatory customs. The flexibility in the application of the test has challenged this notion. On a number of occasions, judges have invoked the clause to justify decisions that validate the reliance on discriminatory customary values. This was evidently the case in *Nanje Bokwe v. Margaret Akwo*.[29] In justifying the rationale of its decision, the court ruled that the respondent, Margaret Akwo, a married woman, could not inherit from the intestacy of her deceased father in the presence of suitable male heirs. The respondent's father was deceased. Prior to his demise, he had made a gift of land to the appellant, Nanje Bokwe, which was approved by the respondent's brother. On the death of her brother, the respondent took control over the estate of her deceased father and questioned the validity of the gift made to the appellant. The Kumba Customary Court ruled in her favor, but the Court of Appeal, Buea, quashed and overtuned the judgment. The Court justified its decision in these words: "The respondent is a married woman. She cannot unless so given by a will inherit from her father let alone be his next of kin. Alfred Mbongo [respondent's brother] was his father's next of kin. Alfred Mbongo is dead and has left a male heir. In fact, the respondent has no *locus standi*."

The argument lacks merit, for the customary practice that prevents married women from inheriting on the intestacy of their deceased parents contradicts written law and is inconsistent with the established jurisprudence of the statutory courts in Anglophone Cameroon.[30] Although rulings of this nature are rare, it reflects the unprecedented level of judicial flexibility and uncertainty in the application of the test.[31]

The Repugnancy Test has Inspired the Cameroonian Legislature

An unforeseen consequence of the repugnancy test is the influence it has had on the development of the law in Cameroon. In fact, the precedents established by the court in the application of the test have had immense influence on the legislature. When a custom has been notoriously adjudged as repugnant by the court, the legislature in turn finds it necessary to enact specific legislation outlawing the custom. Thus, the legislature has drawn its inspirations from the court and has repealed by necessary implications any rule of customary law adjudged by the court as obnoxious. Some provisions of the Civil Status Ordinance, 1981, including Sections 72 and 77(2), are illustrative. These provisions outlawed some of the consequences associated with the payment of dowry under customary law, frequently adjudged as repugnant by the courts.

Under customary law, dowry has great significance.[32] Generally, dowry is seen as the symbolic act that validates a customary marriage and also signifies its dissolution. Only upon the full payment of dowry by the bridegroom-to-be could there be said to be a valid marriage. Conversely, and in principle, it is only upon the full refund of dowry by the wife (or her family) to the husband that a marriage can be considered terminated. A dowry compensated the family of the bride for the emotional and physical loss of a reproductive daughter. It was part of the compensation system, a form of social control.[33] The bride price involves a bartering negotiation. The higher the bride price, the greater the pressure exerted by parents on their

married daughter so that she stays with her husband. By agreeing to receive a high bride price on the occasion of their daughter's marriage, the parents would therefore manifest the importance they attach to the union and their willingness to preserve it in all circumstances. And the willingness of the groom's parents to pay a high bride price in the first place would express the same intent. In short, a high bride price serves as a commitment device aimed at minimizing the risk of marriage break-up.[34] Women in general have an interest in keeping bride price payments low since the payment must be returned to the husband if the woman initiates a divorce—a high bride price thwart women's efforts to sever a union, for their kin may be unwilling or unable to return it.[35] The payment of bride price established the marriage contract with all its rights and obligations.[36]

It has been argued that amongst the Igbo of Nigeria, bride price is not perceived as a way of buying the bride but as an act of respect toward her parents and kin.[37] With the introduction of paper money and the capitalist economy, women are commodified and sold to the highest bidder. Money introduced, which replaces cattle and other goods, takes on the form of price as the money acts as an expression of value.[38] Excessive bride price demands have made it very difficult for girls to find husbands.[39]

The court in Anglophone Cameroon has provided a slightly different interpretation of the concept of bride price or dowry. Dowry is perceived as the root cause of the problems facing women in traditional Cameroonian societies and may have influenced their status vis-à-vis property in these societies. The dictum of Justice Inglis in the North West Court of Appeal case of *Achu v. Achu* is revealing:

> … customary law does not countenance the sharing of property, especially landed property, between husband and wife on divorce. The wife is still regarded as part of her husband's property. That conception is understood by the payment of dowry on marriage and on the refund of same on divorce.[40]

Amongst the most criticized consequences associated with dowry is the presumption that a child begotten by a wife during the continuation of her customary marriage with her husband remains the issue of the husband irrespective of whether or not he is the biological father, provided that the dowry paid on her behalf had not been refunded to him. Therefore, even if begotten with a third party during the continuation of the marriage, the issue becomes that of the husband. This principle was, for example, applied in the notorious case of *Ngeh v. Ngome.*[41] The wife gave birth to twin children with another man after abandoning the matrimonial home. Since the wife had not refunded the bride price, the Kumba Native Court and the Special Appeals Officer held that the children belong to the husband. This was rejected, on further appeal, by the then West Cameroon High Court as being repugnant to natural justice, equity, and good conscience. Following the precedent established in this decision, the statutory court has regularly relied upon it in declaring the custom repugnant and unenforceable in similar causes of action. This has influenced the legislature to enact the provision of Section 72 of the Civil Status Ordinance, 1981, which outlaws this customary practice. That provision states: "The total or partial payment of a dowry shall under no circumstances give rise to natural paternity which can only result from the existence of blood relations between the child and his father." Therefore, any customary rule that violates this provision becomes unenforceable in the light of

the incompatibility test as it offends a statute. Once such a statute is enacted, the court is subsequently prone to rely on its provisions rather than on the customary precedent that had in the first place influenced the enactment of the statute.

Another customary practice phased out by legislation inspired by the court is widow inheritance or levirate marriage. This practice is widespread in the West and North West Regions of Cameroon and is also based on the premise of a dowry. According to the custom, the dowry payment on behalf of a woman also makes her part of her husband's property and answerable to his family. Provided she has not refunded the dowry, the death of her husband does not terminate the marriage: she may be inherited along with other property by either a brother-in-law or any other heir designated by the husband's family. The statutory court has repeatedly held the custom as obnoxious.[42] Section 77(2) of the Civil Status Ordinance was introduced to give legislative backing of the views of the court. That section of the ordinance states:

> In the event of death of the husband, his heir shall have no right over the widow, nor over her freedom or the share of the property belonging to her. She may, provided she observes the period of widowhood of 180 days from the date of the death of her husband, freely remarry without any one laying claim whatsoever to her or any compensation or material benefit for dowry or otherwise received, either at the time of engagement, during marriage or after marriage.

This provision outlaws the practice of levirate marriage and ensures that the widow, rather than being perceived as property that cannot own property, is given the authority to exercise her right of proprietary ownership.

Unavoidable Divergence in Customary Law

One of the most problematic effects of the repugnancy test is the divergence that has emerged in the rules of customary law. This divergence is a consequence of both the processes of administering customary law through the duality tests on the one hand and the subsequent establishment of customary law on the other. Both processes are interrelated.[43]

The duality tests have led to the birth of two versions of customary law over the years: lawyer's customary law and sociologist's customary law. When the court refuses to enforce a customary norm by declaring it either repugnant or incompatible with a written law, it only prevents the rule from being recognized in the state legal system. In most instances, the rule continues to be applicable by the people within the particular district in total disregard of the jurisprudence of the court. Although the court does not qualify the rule as customary law it is, however, regarded as such in society, thus leading to a fragmentation of the legal process and a divergence in customary rules.

Gordon Woodman has documented on this divergence. He states that rules recognized by the court as customary law (lawyer's customary law) do not necessarily correspond to socially accepted norms in society (sociologist's customary law). This divergence, he asserts, occurs during the process of the establishment of customary law before the court. Judicial establishment entails the institutionalization of the rule in the official legal system thereby making it available for use by the courts. Woodman explains some of the reasons for the

divergence. It may arise from mistaken findings on the content of sociologists' customary law. Further, even if such mistakes do occur, courts sometimes have to reach conclusions on the content of customary law when sociologists' customary law is in the mode of change. He further asserts that the second part of the rule in *Angu v. Attah* is liable to produce another divergence between the court's customary law and the society's customary law. There have been instances, he notes, where controversial points of law were settled by referring to one or few decided cases that were in turn based on weak evidence. Moreover, because previous decisions may be treated as binding authority, there is a further possibility that the courts might disregard local variations in customary practice. Further, once a rule has been judicially recognized, it is liable to be applied to ethnic groups other than those whose customs were in issue in the decisive cases.[44]

This divergence in customary rules and the subsequent fragmentation of the legal process is evident in Cameroonian society especially if recourse is had on the substance of the applicable customary rules within the state and non-state justice systems dominated by traditional courts. There is a variation between the customs applicable in traditional courts, perceived as genuinely ancestral, and those enforced by state courts, viewed as bastardized versions of customs. Within traditional societies, the argument is that the customary values enforced by traditional courts are reflexive of the views and ethos of the local communities whereas those enforced by state courts have undergone severe substantive transformation and, in most occasions, cannot be justified by corresponding social practices within those communities.

It should be mentioned that the divergence in customary laws is unavoidable for two reasons. Firstly, in applying the provision of Section 27(1) of the SCHL, 1955, the court is only mandated to either apply a custom or reject its enforceability. It is not within the mandate of the court to modify an outdated custom and apply the modified version. Moreover, due to the near absence of law reporting in Anglophone Cameroon, court judgments have very limited reach. Their effect is mostly felt only by the parties to the disputes. Thus, rejection of a custom by the court would only have an impact on the litigants. It does not prevent its observance in society. The effect is a potential variation between the court and society on the substance of customary law. Secondly, Woodman argues that the divergence is unavoidable because of the very nature of state courts—they have a peculiar character, which demands in every case an answer to a question which sociologists' customary law has never had to answer, and cannot answer. Therefore, sociologists' customary law never answers the question before the court, and hence, lawyers' customary law which does, must have a different meaning. Woodman writes:

> The state courts' remedies and procedures are such that they cannot reproduce the circumstances in which social norms operate and by which they are enforced and consequently they cannot simply "apply" those norms. The legal systems of necessity exercise a creative function: when they appear to apply customary law, they in reality create a new type of "customary law". An alternative formulation is to say that customary law is institutionalized by the state legal system. However, "institutionalization" should not be taken to imply that the product is not substantially new.[45]

He concludes that the divergence between lawyers' customary law and sociologists' customary law must be seen not as a consequence of unfortunate, remediable defects in the process of establishing lawyers' customary law, but as a necessary, irremovable phenomenon in the enforcement of customary law by state courts. It follows that it is erroneous to regret or criticize the divergence.[46] Thus, the divergence stems from the different methods employed by the court and the sociologist in investigating customary law. In the foregoing, Diamond objects that sociologists' customary law is not law.[47] And Allot states that lawyers' customary law is not customary.[48]

Strengthening the Role of Customary Law: Scrapping the Repugnancy Test

The impact of the duality tests, and specifically the repugnancy test, on customary law in Anglophone Cameroon has been far reaching indeed. The tests have played a crucial role in the development of customary law in Anglophone Cameroon. They have assisted in fostering an equitably gendered society through the rejection of discriminatory customary values against women. The repugnancy test has positively impacted municipal legislation. Despite these commendable achievements, the application of the tests has threatened the future of customary law as a living form of law. Even though the incompatibility test has restricted the application of customary law in the legal system, it is the repugnancy test that deserves greater attention. Unlike the repugnancy test, the incompatibility test is based on precise and unambiguous standards established by the national legislature to regulate the application of customary law. In this connection, the incompatibility test has generated little or no controversy, as the standards employed in determining incompatibility are mostly derived from within the local context.

The benefits achieved through the application of the repugnancy test have come at a high and unacceptable cost: its flexibility has created uncertainty in customary law making it difficult to establish a universally valid precedent; by relying on standards which are exotic in nature, it has created the illogical impression that standards of justice espoused by western-style law were superior to those of customary law; by transferring to the court the people's responsibility in ushering changes in customary law it has challenged the ancestral foundation of customary law; and the test has assisted in the balkanization and fragmentation of the legal process and contributed in the subsequent divergence in customary laws. Such developments are extremely damaging to the growth of customary law and have threatened its future in the legal system. Indeed, the repugnancy test has served its time and if there is a genuine desire to enhance the role of customary law, a need arises to repeal it.

There is a need continuously to review customary rules to ensure that they reflect changed circumstances. This objective could be efficiently accomplished without recourse made to the repugnancy test. In fact, there are mechanisms available to the court, which, due in part to the repugnancy test, are underutilized. Emphasis should be placed on promoting the incompatibility test and vigorously extending its scope of application to incorporate human rights. Human rights values have become the new emancipatory rhetoric relied upon in several jurisdictions in sub-Saharan Africa to regulate the values of customary law. The human rights corpus is founded on values most of which are diametrically opposed to those espoused by customary law: human rights propagate gender equality and non-discrimination whereas customary law legitimizes gender discrimination; consent to marriage is manifest in modern

human rights discourse as opposed to widow inheritance under customary law; the punishment of banishment under customary law conflicts with the notion of free movement of persons under human rights; individual responsibility under human rights is contrary to collective responsibility under customary law, etc. Although human rights treaties ratified by Cameroon are incorporated into municipal law by virtue of Article 45 of the constitution, unfortunately human rights values do not have broad appeal in Cameroonian society. This could be partly attributed to the near neglect of human rights values by the court in preference to the repugnancy test. In fact, the courts have become over-reliant on the repugnancy test and have, regrettably, used it as a supplement for the language of human rights. Practically, in most customary causes where the saliency of human rights issues abound, rather than employing the language of human rights in the determination of the suit, courts in Anglophone Cameroon prefer to invoke the repugnancy test. Thus, emphasis should be placed on human rights which are capable of regulating and transforming customary values to reflect changed circumstances. Repealing the repugnancy test would increase the appeal of human rights rhetoric in the courts. It would also ensure judicial certainty in the application of customary law and would improve its status vis-à-vis statutory law in the legal system.

The repugnancy test, when introduced in the colonial era, was well-intentioned and was suitable in tackling challenges in an era when most African states were still under colonial rule and the ideology of human rights, due then to the global politics of suppression and colonialism, was not widely acknowledged by major western powers. It was then an approved novelty available exclusively to the colonial state to eliminate local practices deemed offensive to human dignity. In an era of human rights, the repugnancy test has become a grossly inadequate and insufficient a mechanism to measure harm and mediate wrongs in the contemporary world.

Although recourse to human rights would be a credible replacement for the repugnancy test, it would, however, not solve one of the most daunting issues related to contemporary customary law in Anglophone Cameroon. In the absence of the repugnancy test how could change in customary law be initiated through the people? The repugnancy test has failed to provoke any substantial change in social attitudes as customary law has demonstrated resilience. Repugnant customary values are still being observed in society resulting in a divergence in customary laws. The reason for this development is simple. The nature of the operations of the court requires it to determine the validity of substantive customary rules without adopting measures to alter the operations of such rules in society. Repealing the repugnancy test would transfer the responsibility of ushering changes in customary law from the courts back to the people. One of the most devastating effects of the repugnancy test is that it has created the illogical impression that customary law is created at the level of the court and is then imposed on society.

Even though customary laws are evolutionary in nature, this evolution is yet to be effectively reflected in Cameroonian society, especially in the rural areas, due, in part, to the conservative interpretation of custom. It is therefore relevant to adopt measures which are capable of initiating reforms of the law through the people. The jurisprudence of the court has been geared towards rejecting the enforcement of barbaric customary practices without necessarily tackling the underlying causes of such practices in society. Given this, it becomes

difficult to alter social attitudes. Thus, to usher in change in social attitudes, emphasize should be placed on the socialization process that underpins customary law. Thus, a program that targets the socialization process rather than its side effects is required. Initiatives should be encouraged from within the social group considered as appropriately relevant in safeguarding basic human rights, while also attempting to initiate changes in customary practices. This will require both sensitization and dialogue. Programs should be initiated from within the community to encourage dialogue with community leaders and the community in general to explore ways of encouraging changes in customary values reflexive of human rights. Unlike the jurisprudence of the statutory court, such changes emanating from within the community will not be perceived as imposition from the top but rather as reflexive of the wishes and aspirations of a greater majority of the people. This is the only way social changes will command the respect and authority needed to foster a redirection in the community's perceptions. This will also generate a feeling of ownership of the law and, with it, the legal process. Therefore, if adequate measures are taken towards this direction through seeking changes in the socialization process there is a possibility that the re-emerging socialization process would invariably incorporate human rights values. Conversely, human rights values will in turn respond to the aspirations of the socialization process in Cameroon without those values necessarily departing from their core principles.

Conclusion

Section 27(1) of the SCHL, 1955, has had, and continues to have, a tremendous impact on the administration of customary law in Anglophone Cameroon. Few would have thought that a piece of colonial legislation, aimed at recognizing customary law subject to duality tests, would produce such far reaching effects. Prior to colonial rule customary laws were applicable throughout the territory and were not subjected to any qualifications. The advent of colonialism led to the importation of extraneous legal orderings into the territory, notably French civil law and English common law. The SCHL, a legacy of British colonial administration in the former Southern Cameroon, virtually ended the dominance of customary law in favor of western received and inspired laws. Section 27(1) provides for the recognition of customary law subject to it passing duality tests, the repugnancy and incompatibility tests. Thus, the onus of deciding whether a custom passes the duality tests falls within the province of the superior statutory courts.

Even though Section 27(1) has led to some positive effects, notably the rejection of harmful customary practices, over the years the application of the provision has generated a disturbing trend of circumstances that have severely and negatively impacted on the construction of customary law. The courts have not developed a particular standard for the application of the repugnancy test leading to judicial uncertainty in the application of customary law. In view of its vagueness and ambiguity, the court sometimes employs exotic standards in determining whether or not a rule passes the repugnancy test. These exotic standards, having no basis in Cameroonian society, are used to invalidate customary rules. By subjecting customary law to western standards of justice, customary values, despite their social relevance within the local context, are gradually being eroded and in turn are replaced by values extraneous to local circumstances. This has severely impacted the nature and character of ancestral customary law.

One of the most undesired effects of the duality tests is the divergence that has ensued in the rules of customary law. Although this divergence is unavoidable and is, amongst others, attributed to the different methods employed by the courts and society in investigating customary law, it has, however, led to a balkanization of the legal process and the fragmentation of customary law. Through the over-reliance on the repugnancy test, it has weakened the appeal of human rights discourse in the court.

The repugnancy test has served a good purpose but its consequences are far too costly for the future of customary law. In an era of human rights discourse, to strengthen the role of customary law in Anglophone Cameroon, it is essential for the courts to be more engaging with human rights values which, if effectively utilized, are capable of efficiently regulating customary law. The repugnancy test must therefore be repealed and grassroots initiatives initiated through the people and targeting the conservative socialization process in Cameroon in order to provoke changes in customary laws. If these measures are efficiently adopted, the future of customary law in the Cameroonian legal system would be secured.

Notes

1 It has been argued that customary law is of recent development and a product of the colonial state. See Snyder 1981; Chanock 1995; Nyamu 2000, pp. 405-06. The dominant view in African legal theory suggests that customary law existed prior to the establishment of the colonial state in sub-Saharan Africa. See Anyangwe 1987, pp. 139-40; Ngwafor 1993, pp. 7-9.

2 Cameroon was initially colonized by Germany. With the defeat of Germany during World War I, the country came under the colonial rule of France and Britain. The French occupied the former Northern or East Cameroon (now referred to as Francophone Cameroon) while the British administered Southern or West Cameroon (now referred to as Anglophone Cameroon). For a detailed history of Cameroon see Ngoh 1996.

3 Amongst these is Section 18(1) of the Customary Court Ordinance, 1948, a colonial piece of legislation applicable in the Federation of Nigeria and the former Southern Cameroon. It defines customary law as: "The native law and custom prevailing in the area of the court insofar as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by natural implication with any written law for the time being in force."

4 Law No. 96-06 of 18 January 1996 (amending the 1972 Constitution).

5 The ordinance came into force through Law No. 2006/015 of 29 December 2006. It amended certain provisions of the Judicial Organization Ordinance, 1972.

6 This degree regulates the activities of chiefs and chiefdoms in Cameroon. Before the degree came into effect there had been two previous administrative instruments recognizing chiefs in Cameroon. These were Order No. 244 of 4 February 1933 to lay down regulations governing traditional rulers and all subsequent amendments thereto and Southern Cameroons Law No. 7 of 10 December 1960 to provide for the recognition of chiefs within Southern Cameroon and matters relating thereto.

7 A chief is a traditional head of an ethnic group or village community and is imbued with traditional authority. Before the colonization of Cameroon, chiefs were said to command enormous respect and authority. Nowadays, they act as the link between the administration and the people. The position has become extremely politicized as chiefs are mandated to deliver the electorates to the ruling party.

8 Most countries of the South Pacific region have made provisions for the recognition of customary law in their constitutions. For example, see Section 76, Schedule 3, Paragraph 3 of the constitution of the Solomon Islands, 1978, and Articles 47(1) and 95(3) of the Constitution of Vanuata, 1980. In Africa, several countries have made express recognition of customary law or customary dispute mechanisms in their constitutions. See, for instance, Sierra Leone's constitution defines common law as including customary law, Constitution of Sierra Leone, 1991, S. 170(2); Kenyan Constitution Art 2: (4) states that "Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." See Cuskelly 2011.

9 Okereafoezeke 2001.

10 Uweru 1980, pp. 289-90; Marasinghe 1998, p. 25.

11 Salacuse 1969, p. 60.

12 Ibid., p. 60.

13 Kuruk 2002, p. 17.

14 Article 45 of the constitution states: "Duly approved or ratified treaties and international agreements shall, following their publication, override national laws provided the other party implements the said treaty or agreement."

15 Some judges have held that they do not have such competence. See, for example, the judgment in the cases of *Mosima Elizabeth v. Mosima Simon Ngeke* (Suit No. CASWP/CC/95: reported in Ngassa and Time 1999, vol 1, p. 43) and *Aboh Lucy v. Kang Sume David* (Suit No. HCF/38/96: reported in Ngassa and Time 1999, vol. 1, p. 75). However, in the case of *Fomara Regina Akwa v. Fomara Henry Che* (Suit No. BCA/11CC/97: reported in CCLR 2002, Part 9, p. 32) the North West Court of Appeal, Bamenda, disagreed and held that Section 16 of Law No. 89/017 of 29 July 1989 as amended by Law No. 90/12/90 organizing the judiciary makes provisions for customary courts to have competence in some of the matters relating to the status of persons. This view was further re-affirmed in the case of *Abi Zacharia Ajong v. Nji Micheal Ajong* (Suit No. BCA/4CC/2000: reported in CCLR 2002, Part 9, p. 67) where the court held that although matters of succession fall within the jurisdiction of the High Court, however, by virtue of Section 27(1) of the SCHL, 1955 the jurisdiction of customary court is not ousted.

16 However, it was held in the case of *Ngu Emmanuel Ngum v. Jacob Assaah Tamufor* (Suit No. BCA/3CC/87: reported in Ngassa and Time 1999, vol. 1, pp. 127-35), that the customary court may provide awards in excess of its financial jurisdiction insofar as such awards are made in the exercise of its customary jurisdiction, particularly in the dissolution of a customary marriage.

17 See the case of *Christiana Etombi v. Ndive Woka John* (Suit No. CASWP/CC/09/2001: reported in Kiye 2007, pp. 94-95).

18 7 N.W.L.R. Part 204, 391 at 417. Derived from Iheme 2002.
19 Okereafoezeke 2001.
20 See, amongst others, Olawale 1962, p. 104; Uweru 1980.
21 1 W.L.R 1053 (1962).
22 Derived from Palmer and Poulter 1972, p. 160.
23 Scholars in support of this view include, among others, Anyangwe, 1987, p. 243; Marasinghe 1998, p. 7-14; Okereazofeke 2001.
24 Marasinghe 1998, p. 35.
25 Okereafoezeke 2001.
26 Ezejiofor 1980, p. 43.
27 For the Nigerian case, see Yakubu 2002; for the Cameroonian case, see Suit No. HCK/AE/K.38/97/32/92: reported in Ngassa and Time 1999.
28 Page 119, Paragraph 1 of GLR 1999 vol 1, pp. 111-26.
29 Suit No. CASWP/CC/22/82: unreported.
30 See, amongst others, Rule 21(1) and (2) of the Non Contentious Probate Rules, 1954. The decision contradicts the position of the court in the cases of *Elive Njie Francis v. Hannah Efeti Manga* (Suit No. CASWP/CC/12/98: unreported); *Nyanja Keyi Theresia & 4 Ors. v. Nkwingah Francis Njanga and Keyim - administrators of the estate of Keyi Peter* (Suit No. HCF/AE57/97-98: unreported); and *Chibikom Peter Fru & 4 Ors. v. Zamcho Florence Lu*m (Supreme Court judgment No. 14L of 14 February, 1993). In these cases, the court used the repugnancy test to reject the enforcement of discriminatory succession and inheritance customary rules against women.
31 Another case where the court justified its decision on a repugnant custom is *Abi Zacharia Ajong v Nji Micheal Ajong* (Suit No. BCA/4CC/2000: reported in CCLR 2002, Part 9, pp. 67-72). In this case, the court justified the exclusion of the daughters of the deceased in the administration of the deceased's estate and instead divided the estate equally amongst two conflicting males. According to the court's rationale, custom does not permit women to engage in the business associated with the running of the estate (farming of palm trees and making raffia mats), which is exclusively reserved for men. The court concluded that the exclusion of the daughters in administering the estate of their deceased father was not repugnant to natural justice. By inference, this decision legitimizes a discriminatory and chauvinistic interpretation of a custom that assigns subjective and inferior social roles to women.
32 Dowry is also known as bride price. In traditional African societies, and in accordance with customary law, it constitutes money, goods, and/or property that the bridegroom-to-be is expected to provide to the family of the bride-to-be before the solemnization of the marriage. In some circles, it is mistaken to be the money the husband uses to "purchase" his wife and is said to be the root cause of most problems associated with the status of married women under customary law.
33 Pratt 2003, p. 89; Gaspert and Platteau 2010, p. 5; Gueye 2010, p. 74.
34 Gaspert and Plateau 2010, p. 7.

35 Ibid., p. 8.
36 Meyer 1969, p. 45.
37 Nwapa 1966, p. 23.
38 Ekong 1992, pp. 93-4.
39 Gueye 2010, p. 76.
40 Suit No. BCA/62/86: reported in Ngwafor 1993, p. 196.
41 W.C.L.R. 32 (1962-1964): reported in Ngwafor 1993, p. 273.
42 See, for example, the case of *David Tchakokam v. Keou Magdalei*ne (Suit No. HCK/AE/K38/97/32/92: reported in Ngassa and Time 1999).
43 The process of judicial establishment of customary law is based on the celebrated case of *Angu v. Attah* (1916). According to the principle, for customary law to be enforced by the court it must, firstly, be proved to exist as a matter of fact, and, secondly, judicial notice has to be taken of a rule after it has been frequently proved. The process of judicial establishment is closely interrelated with judicial regulation—recognition subjected to duality tests. Judicial regulation is the prelude towards the establishment of customary law. Once customary law has been regulated (i.e., found not to be either repugnant to natural justice or incompatible with a written law) it is established before the court. Conversely, if a customary rule has not been established such a rule must be regulated prior to its establishment. See Kiye 2007, p. 141.
44 Woodman 1988.
45 Ibid., p. 181.
46 Ibid., p. 156.
47 Diamond 1971, p. 45.
48 Allott 1960.

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