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Repugnancy And the Incompatibility Clauses and Their Impact on Customary Law: Some Lessons for Cameroon

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Abstract: The repugnancy doctrine was introduced in Cameroon in the 18th Century through received English laws. This doctrine prescribes that the courts shall not enforce any customary law rule if it is contrary to public policy or repugnant to natural justice, equity and good conscience. The doctrine is generally criticised for its use of foreign standards to assess the validity of the customary law rules. This article, however, contends that repugnancy doctrine had played a positive role in the development of customary law in Cameroon by removing it harsh aspects. Most African country repealed the repugnancy provisos when they obtained independence, but Cameroon still retains it. The article makes reference to the position in South African. In the South African context, this article found that the repugnancy proviso had outlived its usefulness and courts now apply customary law subject to the constitution and any legislation that specifically deals with customary law. This position, the article commends for Cameroon.

Keywords: Repugnancy Clause, incompatibility clause, Customary Law, Customary Court.

Introduction

The early contacts of the British with the territories which constitute the modern Cameroon territory were in the early 19th century. After the First World War, the League of Nations through article 22 of the Covenant gave former German Cameroon to Britain and France as a mandate territory. Britain received one-fifth of Cameroon and for easy administration, London divided the territory into two parts: a northern portion which was administered as part of Northern Nigeria and the southern portion which was administered as one of the provinces of Eastern Region of Nigeria[1].

This article attempts an examination of the repugnancy clause and its impact on Cameroonian customary law. it compares the impact of repugnancy clause on customary laws in other common law jurisdictions like Nigeria and South Africa. It is contended that the repugnancy doctrine had played a positive role in the development of customary laws across Africa by removing their harsh aspects. The British adopted indirect rule[2] as the main policy in tackling the problems that troubled the West Africa colonies. It was a system of local administration whereby traditional political institutions were maintained but made to adapt to the interests and directives of the British administration. This was especially so because the institutions had to adapt to the requirements of modern units of local administration. In other words, indirect rule was a system of governance under which "natural rulers" were given the opportunity to rule their subjects under the guidance of the British authorities.[3]The administration of Southern Cameroon as a mandate territory could be regarded as a real beginning of British colonial conquest in Cameroon. However,

[1]Carlson Anyangwe., *The Cameroonian Judicial System*(Yaoundé, Publishing and Production Centre for Teaching and Research), P. 46

[2]It was a system of administration which the British colonial administration governed the colonial peoples through their own traditional institutions, indirect rule was applied in varying degrees depending on the circumstances and degree of advancement of each territory. The British maintained tribal institutions and acted merely as supervisors of native affairs. One effect of the system of administration was that it encouraged tribal allegiance, for, within a given territory the various tribes behaved as though they were states within a state. The system of indirect rule was however flexible and inculcated a sense of responsibility in the natives. Their traditional institutions were adapted for the purpose of local governance or native administration. These traditional institutions were left almost intact 'so that they may develop in a constitutional manner from their own past, guided and restrained by traditions and sanctions which they have inherited, moulded or modified as they may be on the advice of the British officers, and by the general advice and control of those officers'. See Carlson Anyangwe., *The Cameroonian Judicial System*(Yaoundé, Publishing and Production Centre for Teaching and Research), P. 59

[3] V.J. Ngoh., *History of Cameroon since 1800*(Limbe: Presbyterian Printing press, 2002) p. 168

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before the partitioning of Cameroon, Southern Cameroon was although under German rule independent with distinct customary law system.

With the introduction of the English law into the country, the indigenous/ customary law rules were relegated to the background, coming after received foreign law, statutes of general application and other ordinances.[4] The validity of these customary law rules were assessed based on the English principles and the idea of justice. Repugnancy doctrine was one of the English principles introduced to assess the validity of customary law. Based on these foreign standards, substantial rules of customary law were found offensive, inconsistent with the English sense of justice and therefore declared invalid. The subjection of customary laws to repugnancy tests in Cameroon Courts during the colonial and post-colonial era has attracted the attention of criticisms of different stakeholders, such as judges and legal analysts depending on your point of view. Notwithstanding the persistence of concern and criticisms of different stakeholders, Repugnancy tests on several Cameroon customs have continued and the Cameroon courts have been making landmark decisions in that respect.

Many writers both in Cameroon and other common law jurisdictions[5] have dwelled on this subject matter of Repugnancy tests on several customary laws. When issues of subjection of customary law to repugnancy are brought before the courts, the courts have never failed in condemning barbaric customs. The courts have set aside several Cameroon customs on the ground that such customs failed the Repugnancy tests.[6] In some instances, the courts have made conflicting decisions on the same custom.[7]

[4]The Administration of justice in Cameroon suffered a serious dislocation in the interregnum between the outbreak of World War I and the coming into force of the mandate system in 1922. It was not until 1922 that the judicial and legal services in the British Cameroons were put on a systematic footing. In the interval between the outbreak of WWI and 1922 the administration of justice in the territory was haphazard and uncertain. When the British got her own share of Cameroon in March 1916, she decided to administer it along her contiguous territory of Nigeria. The Governor General of Nigeria issued proclamation N° 1 of 1916 authorizing "All British military officers in command of detachments of troops and all British civil officers appointed to temporarily administer any territory of Cameroons …. as from the date of their appointments to hold courts with full jurisdiction in civil and criminal matters in which natives are concerned in so far as it is known, and, if not known, the laws of that part of Nigeria in which they hold appointments immediately prior to their present appointments". Justice in the British Cameroons was until further notice, to be administered by British administrative and military officers. They hold courts in which they exercise full jurisdiction in Civil and Criminal matters. However, they could only try cases in which all parties were natives. Each court applied the law which obtained in the place of its location. If there were doubt as to which law to apply, the law of the place in Nigeria where the presiding officer previously held appointment applied. It was however unclear whether this referred to imported English law or customary law. This was clearly a chaotic way of dispensing justice. It was also unsafe because everything was virtually left to the individual whims and caprices of the officers concerned. However, this was only a stop-gap as the British had not by then established a durable administrative structure in the territory. See C. Anyangwe., *The Cameroonian Judicial System*(Yaoundé: Publishing and Production centre for Teaching and Research, 1987) p.69

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

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

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

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Notwithstanding the scholarly efforts and judges' contributions in condemning every trace of "barbaric" customs, those barbaric cultural practices have persisted in many Cameroonian societies.[8]After Cameroon political independence,[9] Cameroon courts continued subjecting several indigenous customs to repugnancy tests. In the light of these tests, it is the contended that the repugnancy test has restricted the scope of the application of customary law, the test has brought about reforms in customary law and there is uncertainty in the application of customary law due to the absence of clear standards.

Definition And Nature Of Major Concepts

The term "Customary Law", Repugnancy Clause" and "Natural Justice, Equity and Good Conscience" are dominant in this article and thus, is expedient, at the onset, to examine their meaning. Black's Law Dictionary[10] defines customary law as: "practice that by its common adoption and long, unvarying habit have come to have the force of law". Customary law is equally viewed as the rules, practices and norms of a particular community which regulate the lives of the adherents and which they accept as binding. The customs, rules, traditions, ethos and cultures which governs the relationship of members of a given community are generally regarded as customary law of the people.[11] The British overlords recognized these customary laws and referred to them as Native laws and Customs and so establishedNative Authority Courts.[12]In further recognition of Native laws and customs, Courts are to apply customary laws in matters of chieftaincy, marriages, family inheritance and succession to customary property[13].

In this work, the term "[14]Customary Law" is used advisedly in blanket form and should not be taken to indicate that there is a single uniform set of customs prevailing throughout Cameroon. Customary law varies from community to community within a country, there are variations based on cultural differences. The term customary law is therefore used generally to cover diverse customs and cultures.

The term "repugnancy Clause" has not been defined in any Cameroonian Statutes, and also Cameroonian courts have not explained in detail, its meaning.[15]According to Lord Wright, the clause was intended to invalidate "barbaric" customs.[16] Justice Nana JCA Buea, as he then was, explained that a barbarous custom must be rejected on the ground of being repugnant to natural justice, equity and good conscience.[17] In the same vein, the phrase "natural justice, equity and good conscience" defies precise

[8]In*Teuto Victor C/ Mme Teuto ne/e Njounkwa Philomene,* Bafousam Court of Appeal Arret No. 43 Court of 25th July 1996, the husband assaulted his wife when she was pregnant causing a miscarriage. Her medical certificate of 10th May 1996 showed that the miscarriage was due to trauma. The court of Appeal Bafousam upheld the Bamilike Custom which forbids a man to beat wife when she is pregnant and granted divorce holding the husband in constructive desertion. This case shows that assault of woman was rampant in the Bamilike Culture, reason why the culture only forbids a man to beat the wife when pregnant. Despite the principle of equality enshrined in both international and domestic instruments, there are still customs which are completely at variance with such instruments, in few extreme cases the courts have had the occasion the check the exercise of such customs. In *Ngoe Theresia Ngosong Alemkeng v. Bezakeng Alemkeng John*, Suit Nº HCK/8/94/28M/94 the husband abandoned his wife with six children in their matrimonial home for another woman. Later, he got into debt and pledged the house. When he was about to sell it, she got a court order restraining the husband from selling the house. The husband had taken steps to sell the house on the believe of male dominance in the Bangwa culture.

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

[10](Ninth Ed.) Edited by Bryan A. Garner. 442

[11] F.F. Odibei., *Practice notes for trial advocates 2nd ed.* (Port Harcourt: Pearl Publishers, 2012) p. 179

[12]Established under the Native Courts Ordinance No. 5 of 1918, there were in 1933 sixty-four native Courts in Southern Cameroon classified as either grade B, C, or D courts. These courts exercised limited civil and criminal jurisdiction over natives, applying native laws and customs. Grade B courts were native appeal courts. Decisions of native courts were subject to review by the local administrative officers. A review fee used to be payable, but it was abolished in 1932. Although no lawyer was allowed to appear before a native court, the relative of a litigant could represent him in certain cases. See C. Anyangwe., *The Cameroonian Judicial System* (Yaoundé: Publishing and Production centre for Teaching and Research, 1987) p.71

[13]Ibid

[14]C. Anyangwe., *The Cameroonian Judicial System* (Yaoundé: Publishing and production centre for Teaching and Research, 1987) p. 10.

[15]*David Tchakokam v. Keuo Magdaliein* (HCK/AE/K.38/97/92) Unreported

[16]*Laoyer v. Oyetunde* [1944] AC 170.

[17]*Elive Njie Francis v. Hannah Efeti Manga* [1999] Suit No CASWP/CC/12/98 unreported

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definition. Controversies and uncertainties surround its exact meaning.[18] Speed, Ag CJ expressed the difficulties thus:

"I am not sure that i know what the term "natural justice and good conscience" mean. They are high sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the term."[19]

It is observed[20] that the phrase has three elements and Allot submits that the three elements in the phrase are overlapping and indistinguishable. He opines that the expression simply means "fairness".[21] Similarly, Derrett submits that the phrase should be interpreted to simply mean "natural justice" while the words; "equity and good conscience" are to be treated as superfluous.[22]Fabunmi[23] equally posits that an attempt to split the expression into its three component parts may lead to importing the technical meanings of the term "equity" into the validity of customary law.[24] He submits that if the technical rules of English equity were the means by which the validity of the rules of customary law were to be tested, every rule of customary law that differs from the English rules of equity would automatically be rejected.[25] He submits further that this approach portends the risk of eliminating the rules of customary law rather than preserving them as intended by the statute.[26]

Impact Of Repugnancy Clause On Procedural Law

Repugnancy doctrine has played an important role in watering down hash rules of procedure in customary law. In adjudication, the courts are required to abide by the two-fundamental principle of natural justice namely; *nemo judex in causa sue* (no one shall be a judge in his own cause) and *audi alteram paetem* (no one shall be condemned unheard)[27]. In its original form, customary law rules do not recognise the modern concept of division or separation of powers. Natives/customary courts are at times constituted by traditional chiefs and elders in the community. In the traditional sense, however, they are the law givers, the interpreters and the executors of the laws at the same time. Having this as the background, it was not strange to have the same person acting in different capacities which modern concept of justice may not agree with. It was not equally strange under customary law system to have the accuser participating in the trial of the person(s) he accused. Modern concept of presumption of innocence[28], burden of proof and proof beyond reasonable doubt[29] are equally not well grounded in customary administration of justice. Thus, most trial before the native courts were ultimately found violating most of these modern requirements of a fair trial.

[18]For example, in *Abott v. Sullivan* (1952) 1 KB 189 at 195, Lord Evershed expressed this difficulty and mentioned that "the principles of natural justice are easy to proclaim, but their extent is far less easy to ascertain."
[19]*Lewis v. Bankole* (1908) 1 NLR 83 at 84.
[20]A.N. Allot., *New essay in African law* (London: Cambridge University Press, 1970) p.44
[21]Ibid
[22]J.D.M. Derrett., *Introduction to modern Hindu law* (London: Oxford University Press,1963) p.150
[23]J.O. Fabunmi., *Equity and Trust in Nigeria* (Ife: University of Ife Press Ltd, 1969). 40-41
[24]Ibid
[25] Ibid
[26]Ibid
[27]These twin pillars of natural justice are however so interwoven that one cannot exist without the other. These principles of natural justice which have unarguably transcended it pristine common law origin enjoy constitutional protection in Cameroon by virtue of its incorporation in the preamble of the 1996 constitution as amended which by section 65 is part and parcel of the constitution. The section secures the idea of fair hearing by providing that the law shall ensure the right of every person to fair hearing before the courts.
[28] Section 8 of Law Nº 2005 of 27 June on the Criminal Procedure Code prescribes that anyone suspected of having committed an offence shall be presumed innocent until his guilt has been legally established in the course of a trial where he shall be given all necessary guarantees for his defense.
[29] The expression, burden of proof, may be used in two senses and these two senses are, unfortunately, often confused. In the first sense, it means the courts or tribunal, whether on a preponderance of evidence (in civil Cases) or beyond doubt in criminal cases), as to the truth of some proposition or fact which are in issue and vital to his case. In this sense, burden of proof refers to the ultimate burden of establishing a case. This burden is otherwise known as "general burden" or "Persuasive burden of proof. (See J.A. Dada., The Law of Evidence in Nigeria (Calabar: Optimist Press Nigeria company, 2004) P 349.

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In *Jonas Diange v. David Besingi*[30]the court allowed the appeal of the appellant whose case was tried in his absence in total violation of the principle of fair hearing. The appellant through a motion on notice prayed the court for an order directing the clerk of the Kombone Customary Court in Meme Judicial Division, to issue to the appellant herein the conditions of appeal.[31] At the hearing of the Motion, the appellant through counsel wondered aloud how, the clerk of the Kombone Customary Court who had received the notice and grounds of appeal could again issue a certificate of non-appeal to the opponent when no conditions of appeal were ever issued and served on the appellant. It was argued on behalf of the appellant that the court should in the interest of justice order the said Clerk of court to issue the said conditions of appeal and serve them on the applicant/appellant. Although it was argued on behalf of the respondent that the application made by the applicant/appellant was made way out of time and without leave of court, the court rather on this, choose to be guided by the twin pillar principle of natural justice and ordered the Clerk of Kombone Customary Court to issue and serve conditions of appeal on the applicant/appellant herein with regard to the notice and grounds of appeal filed and received by him in suit No 19/2007/2008 between the parties herein.

This decision is sound in that to have decided otherwise would mean preventing or denying a party to a suit the right to question or defend himself or make any attempt to exonerate himself before the law court. A denial of access to justice may cause litigants to resort to self-help which may not be healthy to the society.

Another area of positive influence of the repugnancy doctrine is on the abolition of jungle justice and trial by ordeal.[32] Whenever there is any doubt during trial, customary law allows the use of trial by ordeal to resolve issues or to ascertain the truth. The use of ordeal had its root in the belief in supernatural force to secure a confession whenever a traditional court encounter difficulty. Under the system, parties are subjected to some form of ordeal and who ever survives the ordeal is regarded as innocent.[33] In *Margaret AsohoNchinjie& 3 others v. The People of Cameroon and 2 others*[34], one Tazisong Theresia was very sick, the family suspected that the illness was man-made. The family members reported their suspicion to the chief of small Ekombe where they resided, and it was decided at the Chief's Palace that the family members would swear to an oath which would expose the person responsible for Theresia's illness. The next day the 1st accused (2nd Respondent) and the 6th Accused (3rd Respondent) whom he had recruited to assist him, went to the family house of the sick lady where they met a crowd of 23 made up of all Appellants and the prosecution and defence witnesses. The witch Doctor then performed his rites and it resulted in the death of two persons. The appellants were then charged for murder. The trial court convicted them, and they appealed. The issue for determination before the court was whether apart from the witch doctor, the 2nd, 3rd, 4th and 5th convicts were accessories to the offence of capital murder when all that these convicts did was eating with 23 persons, including the two deceased persons, of the concoction prepared by the 1st convict (the Witch Doctor) out of the duck meat provided by the first prosecution witness. The court was equally called upon to determine the probative value of the medical report which stated that the deceased persons died of poison whereas the concoction eaten by them was also eaten by 21 other persons at the same time and place.

On when a person can become an accessory and the effect of presence at the scene of a crime, the court held that to qualify as accessory the two ingredients of an offence that is *actus reus and mens rea*, must be established by the prosecution. In the instant case the Appellants did not take part in the preparation of the concoction and administration of it to the deceased. They were however present where the two acts were done. Could their presence be construed as abating, aiding and facilitating the commission of the

[30]Suit No CASWR/CC/2M/2009 Unreported
[31] In suit No. 19/2007/2008 determined on the 14th day of July 2008.
[32] The experience in the days of jungle justice was not palatable and eradication of this practice by means of repugnancy doctrine is worth praising. In a typical customary law sense of justice, you need to shout thief at least three times and in the twinkling of an eye you will have human being roasted or bleeding to death before your eyes. That was a jungle justice that does not recognize presumption of innocence and fair hearing. Yet, in the eyes of customary law, it was a good justice. See sections 275, 276, 277 and 278 of the Cameroonian Penal code which forbid trial by ordeal.
[33]*Margaret Asoho Nchinjie & 3 others v. The People of Cameroon and 2 others*.
[34] Suit No CASWR/22C/2010

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offence? It was held that the mere presence is not enough. A person must be purposely facilitating or aiding the commission of a crime by his presence, before he can be regarded as an accomplice. Quite apart from this, the witch doctor was convicted for Capital Murder. Our Penal Code recognises the existence of witchcraft, magic and divination and punishes same under Section 251 where the act committed by using any of them is liable to disturb public peace or tranquillity, or to harm another in his person, property or substance.

The repugnancy doctrine also operates in the area of punishment, and it has outlawed inhuman punishment of brutal use of force. The prohibition against subjecting a person to any punishment of an inhumane nature has now received constitutional approval. The preamble of the 1996 constitution as amended which by section 65 of same is made part and parcel of the constitution prohibits inhumane punishment and it provides: "every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances. Under no circumstances shall any person be subjected to torture, cruel, inhumane or degrading treatment." Thus, Cameroonian courts will apply customary law only if it passes repugnancy test and if it does not offend the English sense of justice and fairness. Although this researcher is not advocating for the enforcement of barbarism, it is expected that for such change to be effective, the community through their traditional elites should be made assessors in all customary matters adjudicated before the High Court of Justice.

Impact Of Repugnancy Clause On Substantive Law

In the substantive law, Cameroonian courts have equally applied the doctrine on numerous cases, and this impacted greatly on the rules of customary law. Many of the customary law rules which offended the clause were either modified or completely jettisoned. The modifications are in the view of this researcher case law modification which do not alter the practice of the custom by the people.

The issue of non-payment of dowry and Paternity of a child

The case of *EkpenyongEdet v. Young Uyo Essien*[35]is quite illustrative on this point. In that case, the appellant had paid the dowry in respect of a woman when she was a child. Later, the respondent also paid dowry in respect of the same woman to the woman's parents and took her as wife. The appellant, though not the biological father, claimed custody of the children of the marriage on grounds that under the customary law, he was the husband of the wife until the dowry paid by him was refunded. The court ruled that any customary law rule which has the effect of giving the paternity of a child to a person other than his natural father is barbaric and should be rejected as repugnant to natural justice, equity and good conscience.

Similarly, in *Buma v. Buma*[36] the court did not only denounce this same custom of the Baba II people in the North West Region of Cameroon, but also showed much surprise that the bride-price had to be refunded in the event of a divorce notwithstanding the duration of the marriage and the services that the wife had rendered in the course of the marriage.

It is doubtful whether section 27(1) of the Southern Cameroon High Courts Laws 1955 has actually solve this problem of customs that our courts consider to be repugnant to natural justice, equity and good conscience. The fact remains that this repugnancy is tested only during litigation. But how many of these cases go to court? The people in most cases accept the custom as such. Although we seem to consider it a problem, these villages have lives up with this custom for long time now. This persistent approach can be seen from the fact that their outlook to the problem has not changed even after legislative intervention. Section 72 of the Civil Status Registration Ordinance[37] expressly condemns this custom.

Another custom that our non-customary courts would condemn is that which concerns the inheritance of widows. This condemnation notwithstanding the practice still prevails in our customary societies. And this is even so, unmindful of the fact that Section 77(2) of the Civil Status Registration Ordinance has pronounced against this custom. The section provides:

In the event of death of the husband, his heirs shall have no right over the widow, nor over her freedom or share of property belonging to her. She may, provided that she observes the period of widowhood of 180

[35] (1935) 12 NLR 4
[36]Appeal No BCA/20/81 (Unreported)
[37] Law No 81/02 of 29th June 1981 as amended

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days from the date of the death of her husband, freely remarry without anyone laying claim whatsoever to any compensation or material benefit for dowry or otherwise received, either at the time of engagement, during marriage or after marriage"

In fact, some scholars write that in Nigeria some courts "have declared the inheritance of widow not to be repugnant to natural justice.[38] See the contrasting decisions reached in the cases of *The Estate of Agboruja*, Yakuba 2002 a Nigerian case, and *David Tchakokam v. KeouMagdaleine*[39], a Cameroonian case. In both instances, the courts were called upon to determine whether the system of levirate marriage under customary law (by which the wife of a deceased member of the family could be given to or married by another member of the family) offended natural justice, equity, or good conscience. In the *Estate of Agboruja,* the court approved the system of levirate marriage by holding that there can be nothing intrinsically unfair or inequitable even in the inheritance of widows, where those who follow the custom are pagans and not Mohammedans or Christians. The custom is based on what might be called the economics of one kind of African social system, in which the family is regarded as a composite unit.

On the contrary, the court arrived at a different conclusion in *David Tchakokam's*case and rejected the practice as not only being repugnant but also contrary to written law. Although the cases are derived from two different jurisdictions, it is important to note that the applicable rules are similar as Anglophone Cameroon and Nigeria share similar legal traditions and legal systems. Nonetheless, the judges arrived at different conclusions. Whereas the Nigerian judge saw the practice as not being repugnant because of the benefits it confers to the family, his Cameroonian counterpart disapproved of it as repugnant. It is the view of this researcher that the principle of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted, should not, in a matter of succession and distribution of an intestate's estate be readily equated with those applicable to a community governed rules of monogamy. In all cases the consent of the women should guide the court in any such decision.

What is however certain, and which today has been accepted as a limitation on customary law, is that in the event of any conflict between customary law and any legislative enactment, the latter will prevail. At least, this is the decision that any court would arrive at. For instance, under customary law an infant could be given to marriage. This practice is being regulated by section 52(1) of the 1981 ordinance as amended. It provides that a girl must be at least 15 years old and the boy 18 years old before they could get married otherwise a fiat must be gotten from the president of the republic.

Succession and primogeniture rule

Another impact of the repugnancy doctrine is apparent in the customary rules of succession and administration of estate. Courts now hold the view that for a rule of customary law of succession to be held valid, the rule must be fair and non-discriminatory on account of sex or any other prohibited grounds. The concept of equality and non-discrimination have been given recognition in national and international human rights instrument.[40] It would appear Cameroon is engaged in the promotion, protection and respect of the principle of equality which is the core value of international human right.[41] This view apparently results from the fact that in addition to the various international treaties, conventions and declarations, ratified by the country, the country has enacted local legislations protecting these basic rights.[42] Besides, the country's constitution has in the opinion of the researcher expanded the scope of human rights. The preamble of the constitution has incorporated these instruments into the countries legal regime, when it categorically affirmed our "attachment to the fundamental freedoms, enshrine in the universal Declaration of human rights, the Charter of the United Nations and the African Charter on Human and Peoples' Right and all duly ratified International Conventions. The Preamble specifically insists that all persons shall have equal rights and obligations before concluding that: the state shall provide all its citizens with the condition necessary for

[38]Kasunmu and Salacuse., *Nigerian Family Law (*London: Butterworths, 1966) P. 19
[39]Suit No HCK/AE/K.38/97 unreported,
[40]The United Nation Charter and the Universal Declaration of Human Rights was adopted by the state of Cameroon by state succession on the 20th September 1960; the International Covenant on Civil and Political Rights and International Covenant on the Elimination of all forms of Racial Discrimination was adhered to by the state of Cameroon on the 27 June 1984.
[41]Indeed Article 1(3) and 55 of charter both make reference to the notion of equality as an inherent attribute to human rights.
[42]Law No 2004/016 of 22 July 2004 to set up the National Commission on Human Rights and Freedom (NCHRF). Amended and supplemented by Law No 2010/4 of 13 April 2010

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their development; every person shall have the right to settle in any place and to move about freely, subject to the statutory provisions concerning public law and order, security and tranquility. Apart from these formidable protections, the constitution as well ensures the right of every person to fair hearing before the courts.

According to Kerr, the two basic principles of succession in customary law are primogeniture of males through male and universal succession.[43] The rule of primogeniture permits only male issues to inherit the property of a person who dies intestate.[44] Under the rule, on the death of a native, his estate devolves on his eldest son, or his elders son's eldest male descendant. If the eldest son has died leaving no male issue, the next son or his eldest male descendant inherits, and so on through the sons respectively. No female child is permitted to inherit under this customary law rule.[45] Also, a widow is equally excluded from the succession.[46] If a man dies without a son, his property is inherited by his nearest male relative in the collateral line, usually his brother or his brother's male descendant.[47] This rule has been in existence in Africa since the early times as part of the African culture. The concept of universal succession entails that under the customary law, when a man dies his heir takes his [deceased] position as the head of the family and stands in *loco parentis* to the other members of the family.

Kaganas and Murray adequately expressed the position of African women under the customary law in the following words:

> *Under customary law, women are always subjected to the authority of a patriarchy, moving from the control of their guardians to that of their husbands. The male head of the household represents the family and a woman cannot generally contract or litigate without assistance. Husbands control virtually all the family's property while wives' rights are confined to things such as items of a personal nature. Women cannot initiate the divorce process but must enlist the help of the bride-wealth holder, who may have a vested interest in the continued existence of the marriage. Husbands, on the other hand, may simply unilaterally repudiate their wives or, if they wish to retain the bride-wealth, can rely on specified grounds. Finally, on divorce, the children 'belong' to the husband's family.*[48]

Delivering the judgment of the Supreme Appeal in *Mthembu v. Letsela,*[49]Mpati AJA said of the South African Customary Law of succession thus:

> *The customary law of succession in South Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family is heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head leaving male issue, the second son became heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue, his father succeeds … Women generally do not inherit in customary law.*

The Nigerian case of*Ogunbowale v. Layiwola,*[50]States the position under the Yoruba customary law.[51] In that case, the deceased was survived by three wives and three children, one from each wife. The deceased also had two houses. The second defendant who was the mother of one of the children sold and conveyed in fee simple, one of the two houses left by the deceased, claiming that she sold the property under the authority of the paper signed by the two daughters of the deceased and another relation of the latter. The question that came for determination in the case was "what is the position of the wife or children of a Yoruba man in relation to his real property after his death intestate?"

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[43]A.J. Kerr., *The Native Law of succession in South Africa*(London: Butter-worths (African Series No. 3, 1961) p. 127
[44]Ibid
[45]S*ee Mahashe v. Hahashe* 1955 NAC 149 (S) 153;
[46]Ibid
[47] A. J. Kerr., *The customary law of immovable property and succession in South Africa*(Grahamstown: Grocott &Sherry, 1990) p. 99
[48] T. W. Bennett., *Human rights and African Customary Law under the South African Constitution* (Cape Town: Juta & Co., 1999) p 80-81
[49]2000 3 SA 867 (SCA) 876.
[50](1975) 3 CCHCJ/HC 323 of 19 March 1975.
[51]Yoruba is one of the major tribes in Nigeria. The Yorubas occupy the Western part of the Country

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The court, setting aside the sale of the property held that nothing by the way of property devolves on the wife/wives of a Yoruba man under customary law. It held that under customary law, a wife who had children for the deceased could continue to live in the home of the deceased with her children. A wife without any issue for the deceased if she desires to stay on with the family of the deceased would appear to have a right of occupation only. The court concluded that the second defendant has sold the property involved in this case as her own property and conveyed same to the first defendant in fee simple. She inherited no property of her husband except the right to live there as a widow, therefore, she had no interest in the property that she could convey. What is more, she herself is an object of inheritance.

Cameroonian customary law follows both patriarchal and matrilineal system.[52] The patriarchal system does not allow woman to inherit real property. As regards her husband family, the fact that she is not a blood descendant of her husband family deprived her of succession rights in that family. As regards her father's place, a woman by cultures is never allowed to come from the husband's house to inherit her father's property. In both cases, female loses, as she cannot inherit in either side. Duncan captured this when states: "traditionally the position of women, throughout their lives, is that of minor children. Before they are married, they are the children of their father; after their marriage, they are children of their husbands; and during widowhood, they are the children of their heirs.[53]

No doubt, gender discrimination cannot pass the repugnancy test if challenged in court. However, the position is now changing for better in view of the constitutional and human rights instruments[54] which emphasise equality of all persons. The preamble of the 1996 constitution of Cameroon of the Constitution prohibit discrimination on account of sex. It provides

"*all persons shall have equal rights and obligations; the state shall provide all its citizens with the condition necessary for their development"*

Cameroon is also a signatory to the Convention on the Elimination of all forms of Discrimination against Women which emphasises the universality of the rights between men and women and makes provisions for measures to ensure equality of rights for women throughout the world.[55] In terms of article 2 of the convention, State Parties condemn discrimination against women in all form, and degree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women. The State Parties equally undertake *inter alia* to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.[56] State parties are obliged to take appropriate measures to modify the social and cultural patterns of the conduct of men and women, with a view of achieving the elimination of prejudices and customary practices and all other practices which are based on idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[57]

That these convention rights have been domesticated by Cameroon was judicially affirmed in the case of *Dr. Luma& 18 others v. The People of Cameroon*[58]where Justice BEA Abednego Kalla held that the constitution in its preamble affirms the country's attachment to the fundamental freedoms in the Universal Declaration of Human Rights … while noting that "every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the right of defense"

[52]The Kom people of the North West Region of Cameroon follows the matrilineal succession. The son of a female member of the family is entitled to inherit from the mother's lineage.
[53] P. Duncan., Sotho laws and custom (Cape Town: Oxford University Press, 1960) p.4
[54]United Nation Charter signed at San Francisco on the 6 June 1945 entry into force: 24 October 1945 and adopted by the State of Cameroon on 20 September 1960; Universal Declaration of Human Rights adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, adopted by the State of Cameroon by State Succession on 20 September 1960; International Covenant on Civil and Political Rights and International convention on the Elimination of all forms of Racial Discrimination adopted and opened for signature and ratification by General assembly resolution 2106 A (XX) of 21 December 1965, entry into force: 4 January 1969, in accordance with Article 19, adhesion by the State of Cameroon on 27 June 1984
[55]Cameroon is bound by the provisions of this convention. The convention was adopted and opened for signature, ratification and accession by general Assembly resolution 34/180 of 18 December 1979. Entry into force on the 3 September 1981 in accordance with Article 27(1). Ratified by the State of Cameroon on 23 August 1994.
[56]See article 2(f) of the Convention on the Elimination of all forms of Discrimination against Women
[57]See article 5(b) of the Convention on the Elimination of all forms of Discrimination against Women
[58]Suit No BCA/13M/01-02 reported at CCLR Part 9, Page 6 (2002)

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Furthermore, article 10 of the Universal Declaration of Human Rights which the country has affirmed as shown above, provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". This thesis reviews how this had been achieved and the difficulties involved in doing so.

The Cameroonian Court of Appeal decision in *Famara Regina Akwa v. Famara Henry Nche*[59]supports the changing attitude towards securing equality of men and women in the society. Delivery the judgment of the Court of Appeal, the court affirms the Universal Declaration of Human Rights 1948 is part of our laws. After this, the judge frowned at the submission of counsel who tried to rely on the primitive idea that a wife (a human being) is part of her husband's estate.

Relying on article 1 of the Universal Declaration of Human Rights which states that all human beings are free and equal in dignity and rights and are endowed with reasons and conscience, the court castigated the lawyer for the barbarity of his argument. The court in fact insisted that it will rather apply the principle in the preamble requiring all human beings to act towards one another in a spirit of brotherhood. Equality[60] is the core of international human rights. Both the American declaration of independence 1776 and the French Declaration of Independence 1879 recognized by many as the providing the immediate inspiration for the 19th century resurgence of human rights culminating in the formation of the United Nation in 1945 made reference to the inherent equality of all men.

The United Nation Charter 1945 which was formed basically in response to the massive and barbaric violations of human rights during the course of the world war places equality at the centre of International human rights law. Indeed Article 1(3) and 55 of the Charter both make reference to the notion of equality as an inherent attribute of human rights. This thesis reviews the judicial mechanism for the enforcement of this principle from a variety of perspective. It examines the declaration in the preamble of the 1996 constitution of Cameroon as amended that "all persons shall have equal rights and obligation".

It may be observed that the above constitutional declaration was judicially recognized in the landmark case of *Zamcho Florence Lum v. Chibikom Peter Fru*[61]. Here, the Supreme Court dealt a blow on the customary practice embedded in discrimination called patriarchy. The Supreme Court held that any law that says a woman cannot administer or own property was a bad law which is repugnant to natural justice, equity and good conscience. This is change of law by way of caselaw. This decision as good as it is has not changed the customary practice. This is because it was not a change of custom by a community, but it was caselaw imposed.

The plurality of systems of succession in Cameroon, to wit, the patrilineal, matrilineal and Muslim systems, all of which have different substantive rules makes the study of the customary law of succession a very complex exercise.[62] The rules for determining who the beneficiaries are vary, even though the procedure for designating the successors, administration and distribution are virtually the same.

The impression one gets from existing literature is that the Cameroonian customary law of succession could be subsumed under a single system where the man reigns supreme.[63] It is submitted that this is one of the areas in which the application of the *de minimis non curatlex* doctrine to arrive at such a conclusion would be inappropriate. For it would make a difference to know that there are tribes, however few, which recognize succession by women. While male supremacy might be the rule, the over two hundred ethnic groups that make up the country could be classified under different system of succession. The patrilineal, matrilineal, bilineal and Muslim rules of succession has been identified.

Most tribes are patrilineal. The common feature in all of them is the veneration of men seen as the source and originator of all property. Property must be preserved in the family to provide for prosperity and keep the veneration of its originator alive.[64] Allowing women to succeed would likely conflict with his gaol

[59]Appeal Nº. BCA/11cc/97 (2002) 1 CCLR part 9 at page 32
[60] Equality is the state of being equal, especially, in status, rights, or opportunities. See the preamble of the 1996 Constitution of Cameroon as amended.
[61]Supreme court Judgment Nº 14/L of 14th December 1993 Reported in CCLR
[62]Joseph Nzalie Ebi., *The Law on Succession to Property in Anglophone Cameroon* (Yaoundé: Erika Publication, 2011) 87
[63]Ibid at 88
[64]Ngongang- Ouandji., "*La devolution successorale au Cameroun"*, (1972) 26 Rev. Jur. Pol. Ind. Coop. 639-662, 642

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since upon marriage, their allegiance shifts to the husband's family, which is understandable given that her children are born therein. To attain the objective of keeping property in the family succession is either on the basis of male primogeniture[65]or ultimogeniture.

A few tribes, notably the Bakundu Balue in the South West Region, and Kom, Aghem, and Buh in the North West Region practice matrilineal succession. Matrilineal systems venerate the women and the reasons seem to be specific to each tribe.[66] A person's property passes on his death intestate not to his paternal family, which would include his own children, but to his maternal family. Hence women have succession rights therein which cannot be ignored, even if watered down in actual practice, due to interaction with the patrilineal system. The Bulu tribe of the South West region follows the classic pattern whereby succession is by the closest maternal relative.[67] In the neighbouring Mbonge tribe priority is given to the nieces of the deceased.[68] The matrilineal systems of the North West Region display patterns similar to the patrilineal systems. John Anthony Howard thus proposes the appellation "patrilineal tribes with matrilineal emphasis.[69] The belineal system of succession has elements of patrilineal and matrilineal succession.

Transformation/Modification of customary law rules

Under the Cameroonian legal system,[70]rules of customary law are treated as statements of facts and as such, they need to be proved to establish it existence and validity.[71] Because the procedure in the English established courts where the customary law rules are to be proved where based on different principles and ideas of law, the exercise is seen as subjecting the customary law to a second position in its own land. It is described as means of relegating the indigenous law to imperial law. It is asserted that one feature of the repugnancy clause is that it presents customary law as a system of law inferior to the received English law.[72] Thus, any rule of native law and custom which comes in conflict with the common law or any statutory law must give way.[73]

[65]See Joseph Nzalie Ebi., *The Law on Succession to Property in Anglophone Cameroon* (Yaoundé: Erika Publication, 2011) 88

[66]The Bulu tribe for example bases the system on a story that the founder of the tribe was accused of having committed an atrocity. To clear himself he had to swear in front of the oracles known as "beri." The accused was required to present a girl of ten years at the swearing and both of them were to die if the allegations turned out to be founded. Having no daughter of his own he decided to use one of his nieces, the daughter of his deceased brother, but the widow objected saying that the child did not belong to him. He then turned to his sister who offered her own child and so rescued the tribe from the wrath of the ancestors. As a sign of appreciation therefore, the sister was given succession rights over her brother's property. See Pascal Nanje "Theory and Practice of Succession in Matrilineal tribes"., term paper University of Dschang, 2004 (unpublished), See equally Joseph Nzalie Ebi., *The Law on Succession to Property in Anglophone Cameroon* (Yaoundé: Erika Publication, 2011) 88

[67]Anye Dieudonne., "Avoiding the effects of Matriliny in the Bulu Tribe in Ndian Division," term paper University of Dschang, 2004 (Unpublished). In the Kom tribe veneration of women is based on the belief that it is easier to established blood relationship between sister's children than one's own child who must have been conceived in an illicit relationship. Folklore has it that in the past there were periods when wives were allowed to go out and consort with other men. See Ache Nforba Jupiter, "Avoiding the effects of matriliny in Kom," term paper, University of Dschang 2004 reported in The Law of Succession to property in Anglophone Cameroon by Joseph Nzalie Ebi up cited.

[68]Ibid

[69] "Customary Law Marriages and Succession Among the Kom Cameroon," PhD Thesis, University of London, 1972, 16.

[70]Under the common law jurisdiction made up of the North West and South West Regions of the country

[71] By section 14(2) of the Evidence Ordinance, a custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or class of persons concern in that area look upon the same as binding in relation to the circumstances similar to those under consideration. Thus, where the conditions laid down in section are satisfied, a court may accept the existence of the custom in question without proof. These conditions are principally that: (a) the custom must have been acted upon by a court of superior or co-ordinate jurisdiction in the same area, (b) the court must have acted upon the custom so much and to the extent that it can be regarded as the relevant and prevailing custom applicable the area in respect of that transaction.

[72]G.J Koyana., "The Indomitable Repugnancy Clause" Obiter (2002) 98-115. The author shows that while at first colonial powers denied customary law all recognition because they wanted their legal system to be the single law of the conquered countries, they soon found themselves forced to give recognition to indigenous legal system. However, the author notes, that the recognition was unsatisfactory due to the recognition of the repugnancy clause.

[73]*Esugbayi Eleko v. officer Administering the Governor of Nigeria And Anor*[1931] Ac 662, the word "barbarous" was held to be synonymous with repugnancy by Lord Atkin when he stated that "the courts cannot itself transform the Barbarous into a milder one, if it still stands it still stand in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience."

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However, courts sometimes modify customary law rules in the process of judicial interpretation. The effect of such approach is that it transforms the customary law from what is generally acceptable as binding within the community to judicial perception of what is fair and just which is capable of distorting customary law rules.[74]This approach 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. It is in the view of this researcher an attempt to hijack the people's responsibility in ushering changes in customary law and instead handing it over to the court. Ideally, therefore a people's law should emanate from a broad spectrum of the people, rather than few. Also, courts have sometimes employed a more liberal approach whereby the good aspects of customary law rules are upheld while the offensive parts considered repugnant are eliminated. This liberal approach was adopted in *David Tchakokam v. KeuoMaagdalein*[75] and *EliveNjie Francis v. Hannah Efeti Manga*[76], in both cases the common law judges refused to apply customs which regarded women as properties and the custom that exclude women from inheriting properties on grounds that they were repugnant to natural justice, equity and good conscience. In Stella *Nunga& 5 others v. Clara Kumbongsi &others.*[77]A woman was granted letters of administration without going through the huddles of determining whether she could inherit such property as a woman. In this case the deceased died intestate leaving properties. He was survived by his widow and six children, appellants in this action. The widow, to whom letters of administration were granted, borrowed money from the first respondent, which she was then unable to repay. The first respondent, Clara Kumbongsi, brought a successful action at first instance to attach the property.
The protection and observation of customary law was further seen in a more recent case of *Obusez v. Obusez*[78] it was held by the court of appeal that:

> *"Succession to the estate of an intestate deceased person who is subjected to customary law and who marries under native law and custom or died unmarried is governed by customary law. However, where a person who is subjected to customary law contracts a marriage under the Marriage Act, there is a presumption that the succession to his intestate estate shall be regulated by the Marriage Act. This presumption may, however, be rebutted by the manner of life of the deceased suggestive that the deceased wanted customary law to apply"*

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

Conclusion

This article calls for an interpretative approach on customary law that ensures its survival and adaptation to the dictates of equality in an egalitarian society. It is argued that it will serve Cameroon real good if customary law is placed on the same pedestal and status as the English law. It is the further

[74]In the Nigerian case of *Agbai v. Okogbue;*7 N.W.L.R Part 204, 391 at 417. The judge apparently considered that the courts could contribute to the process of adopting customary usages to changing situations through the application of the repugnancy 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 of 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 situation, the courts have to consider its application under existing social environment."
[75](HCK/AK/K.38/97/92), 1999
[76]CASWP/CC/12/98 Unreported
[77]Reported in CCLR, Part 5, 189, 194
[78](2001) 15 N.W.L.R (Pt. 736) p. 377, See also the more recent case of *Salubi v. Nwariaku* (2003) 2 S.C. p. 161 at 169- 170

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contention of this researcher that considerable caution should be taken in the uncritical and contemporary use of the repugnancy doctrine and its precedents under Cameroonian law. Throughout Africa, post-colonial governments have paid close attention to customary law.[79]The position in South Africa presents a model for Cameroon to follow. Codification and recognition of customary law as justiciable rights in the constitution (as in the case with South Africa) will help in preserving Cameroonian customary law.

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