

# The Domination of the Repugnancy and Incompatibility Tests on Customary Law in Anglophone Cameroon

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## Abstract

*This piece has as objectives to examine the recognition of customary law in Cameroon, on the one hand and on the other hand it will belabor on the Repugnancy and Incompatibility Tests (The Duality Tests) and its impacts on customary law in Cameroon. The early contacts of the colonial masters which constitute the modern Cameroon were in the early 19<sup>th</sup> century. During the colonial period, the British introduced the 1955 Southern Cameroon High Court law which in its Section 27 (1) lay down the repugnancy and incompatibility tests (duality tests). As per this section, the court will only apply a rule of customary law if it is not repugnant to natural justice, equity and good conscience or incompatible with laid down laws. In this light, adopting an in-depth content analysis based on primary and secondary sources of data collection and data analysis is imperative. The research concludes that the duality tests have both negative and positive consequences on customary law in Anglophone Cameroon; it has led to the uncertainty in the application of customary law and on the positive side, it has helped to upgrade the status of customary law.*

**Keywords:** repugnancy test, incompatibility test, customary law, natural justice, equity.

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## INTRODUCTION

The early contacts of the colonial masters which constitute the modern Cameroon were in the early 19<sup>th</sup> century. Before the coming of the colonial masters into Cameroon, there was an already existing legal system which was based on the customs and habits of the people; giving birth to customary law. Customary law refers to custom, local usage, and beliefs of a particular community considered as binding on the people. Most of these customs are said to have developed from time immemorial and has been handed down to the people from generation to generation [1]. Customary law also represents a collection of precedents and decisions of the by-gone chiefs [2].

According to Bronstein, culture is a critical part of the lived reality of people's lives. It gives meaning to all our lives and is fundamental to our identities [3]. Thus, customs and culture are valuable and

important parts of people's lives. The term custom does not imply that there exist a single uniform set of rules which govern all the different tribes in Cameroon. On the contrary, the Cameroon legal system has countless legal systems, each developed by and applicable to a particular ethnic group. For example, the Bulu have a separate set of rules which govern them same as the Wibum in the Northwest part of Cameroon.

Before colonization, customary laws were applicable in the local courts throughout Cameroon under the supervision of traditional leaders. With the coming of the colonial masters; British and French, foreign laws were introduced in the territory. In Anglophone Cameroon, one of the most influential pieces of legislation enacted by the British was the Southern Cameroon High Court law [4]. This law governed the administration of justice by the Colonial High

Court of Southern Cameroon. Despite being a foreign legislation, the law has had a great impact on the justice system of Cameroon till date. Thus, when one hears of the duality tests, one thinks of section 27(1) of the SCHCL. This article however shall inhabit on the recognition of customary law in Cameroon, on the one hand and on the other hand will belabor the Repugnancy and Incompatibility Tests (The Duality Tests) and its impacts on customary law in Cameroon.

### **The Acknowledgement of Customary Law in Cameroon**

Customary law in contemporary Cameroon is a form of law just like the common law and the French law which were all introduced in Cameroon after colonization. Though a number of post independent legislations recognize custom as a form of law, Cameroon since its independence in 1960 is yet to enact a legislation which expressly recognizes custom as a form of law [5]. A number of legislations only make implicit recognition of custom without out rightly making provisions for custom as a form of law.

As per Article 2 paragraph 1 of the 1996 Constitution as amended, the state shall recognize and protect traditional values that conform to democratic principles, human rights and law [6]. Traditional values under this article can be interpreted to mean customs; which means that the constitution which is the highest law of the land recognizes customs though not very express. Also, from the above provision, any custom which is contrary to law, human rights and democratic principles shall be deemed to be repugnant and incompatible to the statutory laws and thus will not be applied by the Cameroonian courts from the lowest right up to the highest court.

Article 3 of the Judicial Organization Ordinance 2006 [7] recognizes customary law courts in the Cameroonian judicial system which is competent to settle disputes using indigenous laws and customs. By recognizing customary courts, this law implicitly recognizes customary law in Cameroon as courts cannot apply a law which is not in

existence. Although some scholars have argued that customs are not laws because there remain unwritten, there are yet a form of law recognized by the people and the state which makes it an existing body of law.

The customary courts ordinance cap 142 of 1948 applicable to Anglophone Cameroon defines customary law as:

*The native law and custom prevailing in the areas of the jurisdiction of the court so far as it is not repugnant to natural justices, equity and good conscience, nor incompatible either directly or by natural implication with the written law for the time being in force.*

In addition to the above, section 27 (1) [8] is the most authoritative provision which expressly recognizes customary law in Anglophone Cameroon [9]. The section is to the effect that the High Court shall only apply customary law if it is not repugnant to natural justice, equity and good conscience or incompatible to any law (the duality tests). The High Court as provided for under this section did not only refer to the High Court per se but to all courts in the judicial system such the magistrate court, the court of first instance, the high court, the court of appeal and the supreme court which is the highest court in the land. Section 27 is looked upon as the law which lays down the determinants of customs or customary law. Thus, for any custom to be admitted as customary law, it must pass the duality tests.

### **The Repugnancy and Incompatibility Tests (The Duality Tests)**

The duality tests were introduced in Cameroon in 1955 through the enactment of Section 27(1) of the SCHCL. According to this section:

*The high court shall observe and enforce the observation of every native law and custom which is not repugnant to natural justice, equity and good conscience or incompatible either directly or by implication with any law for the time being enforced. And nothing in this law shall deprive any person of the benefit from such native law and custom.*

Based on this section, there are two criteria employed by the court to regulate custom and determine its applicability in Anglophone Cameroon.

### **The Repugnancy Test**

The doctrine of repugnancy owes its origin to the medieval period and evolution of English equity [10]. The word repugnant means extremely distasteful, unacceptable, in conflict or incompatible with something. This term is generally used in describing the statutory limitation on the application of customary law [11]. The test has been described as a practice whereby the courts declare whether or not a custom is inconsistent or contradictory to natural justice or simply barbaric depending on the views of the presiding judge [12]. According to L.B. Curzon, repugnancy means an inconsistency of two or more provisions in a deed or other documents. The inconsistent provisions may be struck out by the court when no other method is possible to make effective the principal intention of the parties to the document.

From the provisions of section 27 (1) of the SCHCL, it is evident that the repugnancy test was introduced in Cameroon during the colonial period and has remain an important feature in the application of justice. According to Derrett [13] has suggested that the repugnancy test can be traced to the roman – canonical law which had been applied in most of the medieval European states, though he failed to explain how he arrived at that conclusion. The test was introduced into Africa and Cameroon by the end of the 19<sup>th</sup> century through the received English laws to test our customary law for acceptability [14].

It should be noted that although the test is being used in the application of justice in Cameroon, there is no clearly articulated value for determining repugnancy. Thus, what is repugnant depends on the whims and caprices of the judge in a particular case which has giving way for criticism over the application of the test. Indeed, once the statutory court has notoriously upheld a custom as repugnant, the legislator finds it relevant to enact laws outlawing such customs.

An example is the provisions of Section 72 of the Civil Status Ordinance [15] In the Cameroon case of Ngeh v. Ngome [16], the respondent Ngome and Paulina were married for 10years without an issue. Paulina then left the husband and went to live with Ngeh by whom she had twins. Ngome her husband then brought an action against Paulina and Ngeh claiming that the children were his given that Paulina did not refund the dowry he paid on her head. This view was based on the fact that under customary law if a woman leaves her home and has children with another man, the children will be that of her first husband if the dowry paid on her head was not refunded. The court held that such a custom was repugnant to natural justice, equity and good conscience and was also incompatible to national and international laws. For this reason, Mr. Ngome could not claim the children as his.

Thus, based on the court's decision in the above case, the legislator saw the need to enact Section 72 of the Civil Status Ordinance which states that:

*The total or partial settlement of dowry shall under no circumstances give rise to natural paternity which can only result from the existence of blood relations between the child and the father.*

The law therefore permits the courts to apply the customs which are good. Generally, the courts if satisfied that the custom is for general usage within a particular group will not hesitate to apply such a custom. This was the view adumbrated in the case of *Immaculate Vefonge Vs Samuel Lyonga Yokpe* where the courts of Appeal in Buea recognize and enforce the custom of the Bakweri people which forbid the husband to send away a nursing mother from matrimonial home or to institute divorce procedures against her. The courts are not prepared to apply a custom which is repugnant to natural justice as was the case in Ngeh & Ngome where Chief Justice Gordon frowned on the custom of the Bakossi people of claiming paternity of the child by the husband from the runaway wife simply because the woman has failed to pay back the

bride price. This child was a child the woman had with another man.

Monekosso J. did not only denounce this same custom of the Baba II people of the North West region of Cameroon but also showed much surprise that the bride price had to be refunded in the event of divorce notwithstanding the duration of the marriage and the services the wife had rendered in the course of the marriage. Another custom which had been vehemently condemned is that of widow's inheritance. The civil status registration ordinance of Cameroon frowns on widow's inheritance. The law forbids a man to take his brother's wife after his death without her consent [17].

### **The Incompatibility Test**

Like the repugnancy test, the incompatibility test stems from section 27(1) of the SCHCL OF 1955. This test outlines several rules which aim to ensure that no rule of customary law prevails over the provisions of statute. As per this test, once statute has provided over a particular area of law, customary law will no longer be applicable. Also, where there is a conflict between a rule of customary law and that of statute, the statutory law will prevail.

Furthermore, once statute states its intention to abolish a rule of customary law, such a rule is not going to be valid and will not be applicable. For example, under customary law, it is only upon refund of dowry paid on behalf of a woman that the marriage will be deemed to be dissolved. However, section 77(1) of the Civil Status Ordinance of 1981 reverts this customary rule by providing that a marriage is dissolved at the death of either of the spouses or divorce. This provision of statutory law which is a promulgated and published law therefore abolishes the customary rule which is to the effect that once the dowry has not been refunded to the family of the man, the marriage is still in existence and if the woman in question dies her corpse will be taken back to her husband compound for burial.

The incompatibility test is western oriented and in contemporary Cameroon, the courts have extended the test not only to national

laws but to international treaties duly ratified by the state. Thus, customary law shall only be applicable by the courts as long as it is not incompatible with either national or international laws.

### **Impacts of the Duality Test on Customary Law in Anglophone Cameroon**

The duality tests have produced both positive and negative impacts on customary law in Cameroon.

#### **Negative impacts**

They include the following as seen below.

**The duality tests have reduced the scope of applicability of customary law.** The incompatibility test has been chiefly blamed for this. Prior to colonization, 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 [18]. The incompatibility test has stripped customary courts of criminal jurisdiction and has restricted the civil claim of customary courts. Under criminal law, there can be no crime without a legal foundation [19]; because customary law is not a promulgated and published law, it therefore lacks jurisdiction to hear criminal matters. Also, even in civil matters customary courts only have jurisdiction in matters whose claims do not exceed 69200 FRS [20]. These restrictions therefore limit the scope of applicability of customary law.

The application of the tests has led to the creation of two versions of customary law; the court's customary law which is otherwise referred to as lawyer's customary law and society's customary law also known as sociological customary law [21]. When a rule of customary law is rejected by the court, such rule remains applicable and binding in the society. Alternatively, in the application of the tests, the court is liable to apply a custom which has no sociological foundation. In both instances, a new version of customary law gains roots recognized by the court and rejected by the society thereby leading to a variant in the rules of customary law.

### **The Applications of the Tests have Hijacked the Process of Change in Customary Law**

Rules of customary law are based on the social habits of the people and one would expect that as a law that emanates from the people, it is the people's responsibility to alter changes in the law. However, the application of the repugnancy test has challenged these ideas and has taken the responsibility of the people and handed to the courts since it is the court to decide which customary rule is good and should be applied.

### **Uncertainty in the Application of Customary Law**

The repugnancy test has been blamed for this. The reason for this uncertainty is based on the fact that there are no standards for determining repugnancy thereby making the rules susceptible to the whims and caprices of each judge. Since each judge has his own standards, there is likely going to be uncertainty and high degree of flexibility in the application of the concept.

### **Positive Impacts**

Aside the above negative impacts of the Duality Test on Customary Law in Anglophone Cameroon; it has however generated some positive impacts as seen below.

### **The Repugnancy Test has Rid Customary Law of its Barbaric Values**

In adjudication, courts are required to abide by the two fundamental principles of natural justice namely; *nemo iudex in causa sua* (meaning that no one shall be a judge in his own cause) and *audi alteram partem* (meaning that no one shall be condemned un heard) [22]. In its original form, customary law rules do not recognize the modern concepts of division or separation of powers. Native courts are at times constituted by traditional chiefs and elders in the community [23]. In the traditional sense, however they are the law givers, the interpreters and executors of the laws at the same time. Having this as background, it was not strange to have the same persons acting in different capacities which modern concept of justice may not agree with. It was

equally not strange under customary law system to have the accuser participating in the trial of the persons he accused. Modern concepts of presumption of innocence, burden of proof and proof beyond reasonable doubt are equally not well grounded in customary administration of justice. Thus, most trials before native courts were found violating most of these modern requirements of fair trial reasons why the repugnancy test was introduced to eradicate these barbaric features of customary law [24].

The repugnancy test has also abolished the jungle justice and trial by ordeal practices [25]. Whenever there is any doubt during trial, customary law allows the use of trial by ordeal to resolve issues or to ascertain the truth. In most communities, the accused is made to swear by some sacred objects. In most serious disputes, however, appeals may also be made to the Gods of the land to rain down misfortune or calamity on a guilty party. All these rules and customary practices have been watered down by the repugnancy test.

The repugnancy test has also outlawed some brutal punishments and inhumane punishments.

### **It has Upgraded the Status of Customary Law**

Once a rule of customary law passes the duality tests, the rule is incorporated into the state's legal system and acquires a new character which is similar to that of common law, and becomes part of case law precedence. The rule is then made available for use by other state courts and becomes a tool of professional lawyers. Such a rule once incorporated in to the state legal system can only be amended by legislation or by a corresponding precedence of similar weight.

### **CONCLUSION**

The duality tests have had is having and will continue to have a grave impact on the application of customary law in Cameroon. As discussed above, the tests were introduced by section 27(1) of the SCHCL. As per this law, the high court shall only apply

customary law which is not repugnant to natural justice, equity and good conscience or incompatible with the national and international laws duly ratified by the state. The tests though have recorded some positive impacts; such as riding customary law of its barbaric values, it has been held that the tests have registered far more negative consequences such as limiting the scope of applicability of customary law in Anglophone Cameroon.

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