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Résumé de l'article

Cet article souligne la controverse reliée aux droits des femmes au Cameroun, les femmes y étant perçues comme la propriété des hommes en vertu du droit coutumier. Cet article indique la position des femmes en vertu du droit statutaire. Il compare les deux règles sans toutefois trancher pour l'une ou pour l'autre. Les deux règles tirent leur source du droit camerounais et sont administrées concurremment par les cours. De plus, cet article témoigne de la conscience qu'ont démontrée les femmes en défiant la position selon laquelle, en droit coutumier, on considère la femme comme un objet. Finalement, cet article tranche en faveur de la codification des lois nonobstant les difficultés occasionnées lors d'un tel exercice, particulièrement dans un État bi-juridique tel que le Cameroun.

Customary Law, Women's Rights and Traditional Courts in Cameroon

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ABSTRACT

This article highlights the controversy over Women's Rights in Cameroon given that women are regarded as a man's property under customary law. The article points out the position of women's rights under statutory law. It compares both rules without settling for either of them. Both rules are sources of Cameroonian law and are administered concurrently by the courts. Again, this article shows the awareness women have demonstrated by challenging the customary law position which considers a woman as an object. Finally, the article settles for the codification of laws notwithstanding the difficulties involved in this exercise, especially in a bi-jural state like Cameroon.*

RÉSUMÉ

Cet article souligne la controverse reliée aux droits des femmes au Cameroun, les femmes y étant perçues comme la propriété des hommes en vertu du droit coutumier. Cet article indique la position des femmes en vertu du droit statutaire. Il compare les deux règles sans toutefois trancher pour l'une ou pour l'autre. Les deux règles tirent leur source du droit camerounais et sont administrées concurremment par les cours. De plus, cet article témoigne de la conscience qu'ont démontrée les femmes en défiant la position selon laquelle, en droit coutumier, on considère la femme comme un objet. Finalement, cet article tranche en faveur de la codification des lois nonobstant les difficultés occasionnées lors d'un tel exercice, particulièrement dans un État bi-juridique tel que le Cameroun.

* Editor's note : In Canadian legal English we normally use the expression bi-juridical. We are respecting the author's terminology.

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The debate about women's rights in general and widows' particularly, has been of much concern to women, policy makers and international organisations alike. In a typical traditional African milieu, the woman virtually finds herself in an essentially male-dominated environment. The various customs that obtain in most African countries, the institutions that regulate day to day life are controlled by the men-folk. In this way, women have very limited rights. Upon the breakdown of a customary law marriage through death, the widow suddenly finds herself as an object of inheritance.[1] Notwithstanding that this practice is contrary to the law[2] cases abound which show that this practice is instead gaining ground.[3] Indeed upon divorce the woman has little or no rights over property. In *Achu* v. *Achu*,[4] Inglis, J., posited that :

> [...] 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 [...]

Customary law is silent on women rights and our courts seem to apply and follow these practices. However, the case of *Alice Fodje* v. *Ndansi Kette*[5] seems to suggest the contrary view. In this case, the parties were married in 1952 according to the native laws and customs of the people of Bali. The marriage was blessed with eight children. In 1981, the appellant left the matrimonial home. The respondent took a second wife. In 1983, the respondent petitioned for divorce in the Bali cus-

1. See *Eko* v. *Serah Imbole Ngoma*, suit N° 28/86-87 C.R. BK. 1/86-87, p. 55 (unreported), Bonjongo Customary Court.

2. *Law 81-02 of 29 June 1981 on Civil Status Registration in Cameroon*, s. 77(2) of which provides that : "In the event of death of the husband, his heirs shall have no right over the widow nor over her freedom or the share of property belonging to her [...]".

3. *Christian Taboti* v. *Mbiekwe Kiembo*, Appeal N° BCA/61/86 (unreported); *Japhet Nchanji* v. *Tanto Gwei*, Appeal N° BCA/11/85 (unreported).

4. Appeal N° BCA/62/86 (unreported).

5. Appeal N° BCA/45/86 (unreported).

tomary court. His prayer was granted. No order as to property adjustment was made. As a result, the appellant appealed. Justice Arrey in a dramatic manner held that the appellant should occupy one of the three houses, and also collect rents from the other two. But the decision seems to be an isolated authority on its own merit.

I. WRITTEN LAW VERSUS CUSTOMARY LAW

Following Justice Arrey's judgment above,[6] the question that easily springs to mind is as follows : which is superior, written law or customary law? Both written and customary law are sources of law in Cameroon and it will be wrong, or perhaps out of context to settle either for the superiority of written law because it defines the quantum of admissible customary law or the customary law rules simply because most of the cases are hardly brought to court. Nevertheless, the people do accept the customs as binding, notwithstanding legislative enactments to the contrary.

II. THE APPLICABLE QUANTUM OF BOTH WRITTEN AND CUSTOMARY LAW

Both written law and rules of customary law are binding on our courts. But what is the applicable quantum of both?

III. WRITTEN LAW

Written law consists of all laws enacted by the legislative arm of our State which are binding as soon as they have been promulgated by the Executive arm of the State. And of course, mindful of the bi-jural nature of the Cameroonian State, all constitutional enactments have alluded to, and accepted foreign law : namely English and French laws. Of particular interest to us is English received law which consists of :

> [...] (a) the Common law
>
> (b) the doctrines of equity, and
>
> (c) statutes of general application which were in force in England on the 1st day of January 1900 [...][7]

Indeed, Inglis, J., in the famous case of *Enongenekang* v. *Enongenekang*[8] has re-emphasised the bi-jural nature of the Cameroonian state in the following words :

> Now there are two systems of law in this Country. In the North West and South West Provinces, it is the common law, English legislation of general application which were in force on 1st January 1900 and any particular legislation made applicable by any other law in force.

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6. *Ibid.*
7. S.11 of the *Southern Cameroons High Court Law, 1955.*
8. Suit N° HCSW/28MC/82 (unreported).

In application of the principles above, the Cameroonian legislature expressly enacted Ordinance No. 81-02 of 29 June 1981 which deals partially amongst other matters with the question of property. This piece of legislation has failed both in its intent and spirit to give guidelines to this disturbing issue of property adjustments between husband and wife upon the breakdown of marriage. As a result, recourse is made to foreign or foreign inspired laws. In the Anglophone provinces of Cameroon, all Acts pursuant to s. 11 of the *Southern Cameroons High Court Law 1955* are applicable.[9] In this respect, the *Married Women's Property Act 1882* is instructive. It provides in section 1(1) that :

> A married woman shall [...] be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

The recent decision of Lord Denning in *Midland Bank Trust Co. and Another* v. *Green and Another* (No.3)[10] throws a lot of insight on this matter. This is what Lord Denning says :

> Nowadays, both in law and in fact, husband and wife are two persons, not one. They are partners-equal partners-in a joint enterprise, the enterprise of maintaining a home and bringing up children. Outside that joint enterprise they live their own lives and go their own ways [...]

The dictum above is reinforced by the position that English law knows no community of property[11] and the famous dictum of Romer, L.J. in the case of *Cobb* v. *Cobb* in reference to section 17 of the *Married Women's Property Act 1882*[12] when he said that :

> [...] I know of no power that the Court has under section 17 to vary agreed or established titles to property. It has the power to ascertain the respective rights of husband and wife to disputed property, and frequently has to do so on very little material, but where as here, the original rights to property are established by evidence and those rights have not been varied by subsequent agreements, the court cannot in my opinion under section 17 vary those rights [...][13]

Section 17 would have been redundant after the divorce had been pronounced since its provisions would have ceased to apply because it refers to "husband" and "wife". To cure these maladies, the *Matrimonial Proceedings and Property Act 1970* in its section 39 allows an application within the period of three years to be made by either party notwithstanding that their marriage has been dissolved or annulled.

Cameroonian courts are content with applying the principles adumbrated above with caution. In the various local cases, effect has been given to local

9. S.11 guarantees the application of foreign law in Anglophone Cameroon.
10. [1982] Ch. 529, p. 539.
11. *Pettitt* v. *Pettitt*, [1969] 2 All E.R. 385, H.L.
12. Section 17 provides that :
    In any question between husband and wife as to the title or possession of property, either of them may apply to the High Court or to a County Court and the Judge may make such order with respect to the property in dispute [...] as he thinks fit.
13. *Cobb* v. *Cobb*, [1955] 2 All E.R., p. 700.

statutory enactments particularly the 1981 Ordinance. In substance, it provides that a married woman can exercise a trade different from that of her husband[14] and can operate a separate bank account.[15] Indeed, if the woman purchases property with her income or sums from her account, ownership and title rest in her name. Consequently, in *Moussi* v. *Moussi*[16] the court ordered that items of moveable property bought by the wife but still in custody of the husband be handed over to her. In the same strand of reasoning the High Court of Buea held in *Body Lawson* v. *Body Lawson*[17] that each spouse should continue to have ownership of property purchased in their respective names.

The above has been the statutory view. Now, I shall examine the customary law area of the debate.

IV. CUSTOMARY LAW

Section 2 of the Evidence Ordinance, Cap. 62 of the *Laws of the Federation of Nigeria 1958* provides that : "Custom is a rule which, in a particular district, has, from long usage, obtained the force of law".

These rules were applicable in the various ethnic groups before the advent of the European colonizers and were enforced by traditional courts presided over by local chiefs[18] and elders. In the British Cameroons for example, the various Orders-in-Council that set up the British Administration provided for the respect of native laws and customs.[19]

Section 27(1) of the *Southern Cameroon's High Court Law, 1955* gives judicial backing to the continuous application of customary law rules as well as its applicable quantum. It provides in whole that :

> 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.

From the provisions of s. 27(1) above, it can be asserted that our customary law must be enforceable by our non-customary courts, (the courts of First Instance, the High Court, the Court of Appeal and the Supreme Court). Even the provisions of section 2 of the *Evidence Act* alludes to the role of courts in enforcing customs. Again section 18(1)(a) of the Customary Courts *Ordinance Cap.142 of the Laws of the Federation of Nigeria 1948*, customary law shall be :

> The native law and custom prevailing in the area of jurisdiction of the court so far 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.

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14. S. 74(1) of the 1981 Ordinance.
15. See *Enie* v. *Enie*, suit N° HCSW/65MC/83 (unreported); *Body Lawson* v. *Body Lawson*, suit N° HCF/128Mc/86 (unreported); *Jones* v. *Maynard*, [1952] 1 All E.R. 802.
16. Suit N° NCF/115MC/87 (unreported).
17. *Supra*, note 14.
18. E.N. NGWAFOR, *Family Law in Anglophone Cameroon*, University of Regina Press, Saskatchewan, 1993, p. 7.
19. See article 6, Northern Nigeria Order-in-Council 1899.

In the light of the authorities above, whenever there is a conflict between any written law and custom, the former shall prevail.[20] In order to arrive at this, certain conditions must be met. First of all, the custom must be reasonable and must have been practised from time immemorial.[21] Secondly, the customs must pass two tests, namely, the repugnancy and incompatibility tests. That is to say for the custom to be applicable it must not be :

i) repugnant to natural justice, equity and good conscience or
ii) incompatible either directly or by natural implication with any written law for the time being in force.

The controversy as to the application of customary law has been resolved by subjecting the validity of customary law to decisions of non-customary courts. In the Nigerian case of *Liadi Giwa* v. *Bisiriyu Erinmilukon*,[22] Taylor, F.J. pointed out that :

> It is a well established principle of law that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such notoriety and has been frequently followed by the courts that judicial notice would be taken of it without evidence required in proof.[23]

Section 73(1)(2) of the *Evidence Ordinance* directs the courts to take judicial notice of all general customs, rules and principles which have been held to have the force of law in or by any superior courts, all customs which have been duly certified to and recorded in any such court.[24]

In the light of the above, customary law shall apply as long as it fulfils the conditions laid down by law. Thus, the courts are bound to uphold customs that follow the provisions of the law. In this respect, the case of *Ngeh* v. *Ngome*[25] is helpful. The court in that case rejected a plea of customary law basing paternity on bride-price. On the contrary, a custom forbidding the sending away of a nursing mother from the matrimonial home was enforced.[26]

The various customs command respect in their areas of jurisdiction. Members of that given ethnic group may not feel bound by the various qualifications on customary law. In this case, it applies to its adherents as long as it has not been submitted to the various tests.[27] In *Agbortar & Oben* v. *Chief Bessong*,[28] Endeley, J. pointed out that :

> The custom that every chief in his state (and in particular those of the forest areas) rules through a traditional council is so notorious that this court is bound to take judicial notice of it.

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20. C. ANYANGWE, *The Cameroonian Judicial System*, Yaounde : CEPER, 1987, p. 243.
21. J.N. TEMNGAH, *The Rights of Widowhood in Former West Cameroon*. A Case Study of the Fungom Area. (*maîtrise* dissertation), Faculty of Laws and Economics, Yaounde, 1990, p. 45.
22. [1961] 1 All N.L.R. 294.
23. *Ibid.*, p. 296.
24. See also section 58 of the *Evidence Ordinance*.
25. (1962-64) WCLR 321.
26. *Immaculate Vefonge* v. *Samuel Lyonga Yukpe*, Appeal N° CASWP/CC/21/81 (unreported).
27. J.N. TEMNGAH, *supra*, note 21, p. 17.
28. (1968) WCLR 43.

This means that if no appeal is filed, the party concerned would accept the custom as valid and binding. Ignorant parties are likely going to continue suffering this fate. In *Emmanuel Kengnjisu Mundi*, v. *Elizabeth Regina Mundi*[29] the respondent had been declared joint next of kin with the applicant over the estate of late Dr. Hosea Abongu Mundi, by the Tubah Customary Court. Giving effect to the declaratory judgement, Ndoping, J. excluded the applicant and held that the respondent was entitled as of right to Letters of Administration of the deceased (being his widow) since he had opted out of the traditional mode of life such that his estate could not be governed by customary law rules.

V. THE ATTITUDE OF TRADITIONAL COURTS

Although, traditional courts have jurisdiction over all matters other than landed property whose value does not exceed 69.000F CFA,[30] it is immaterial that the woman contributed to the acquisition of the property either directly or indirectly. The case of *Teneng Lucas* v. *Nchang Irene*[31] is authority for the view that customary courts rarely discuss the question of property rights. This is in line with the provision of section 8 of the *Customary Courts Ordinance*. The Appeal Court in *Ngnitedem Etienne* v. *Tashi Lydia Sinaga*[32] refused to enforce a woman's right over land and buildings. Inglis, J., delivering the judgement of the Court of Appeal rejected the plea on the basis that the woman had not tendered any independent evidence to support her claim.

The attitude of our traditional courts have been the same considering that its jurisdiction is limited. Thus, any claim over property can only be handled by non-traditional courts. Cases[33] abound to illustrate the view that our court decisions follow the same direction. The dictum of Inglis, J., in *Achu* v. *Achu*[34] remains valid and unchallenged.

VI. WRITTEN AND CUSTOMARY LAW : WHICH IS SUPERIOR?

A debate as to the superiority of written law and customary law is unnecessary. This is because a compromise between the two categories of rules have been set. In his authoritative document entitled : *The Cameroonian Judicial System*,[35] Anyangwe, C., has pointed out that since independence and reunification the official policy of the Cameroonian Legislature has been to harmonise and codify all the laws in force in the country.

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29. Bamenda High Court suit N° HCB/130M/88 (unreported).
30. Section 8, *Customary Court Ordinance, Cap. 142 of the Laws of the Federation of Nigeria, 1948.*
31. CS N° 257/85-86CRB 1/86-87, p. 37, Mankon Customary Court.
32. Appeal N° BCA/46/86 (unreported).
33. *Awah Patrick Chefor* v. *Siriwah Atanga Justine*, CS N° 82/86-87 CRB II, p. 58, Mankon Customary Court (unreported); *Ambache* v. *Ambache*, CS N° 192/85-86, p. 41, Mankon Customary Court (unreported) cited in E.N. NGWAFOR, *supra*, note 18, p. 204.
34. *Supra*, note 4.
35. *Supra*, note 18.

From this strand of reasoning, it can be concluded that although written law shall prevail over customary law, it must not be forgotten that customary law is a kind of gloss to law. This is so when the law is silent on certain aspects. Here, customary law would be admissible to fill in the gaps and complete the law in cases where no solution would have been obtained. There is a certain complementarity between law and customs. Although, some customary law practices which are repugnant and incompatible do persists, it can be asserted that as far as the rights of women are concerned, much has been achieved and a little more is desired to attain relative equality between the sexes.

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