PART I

Essays

Customary Law in Anglophone Cameroon and the Repugnancy Doctrine: An Insufficient Complement to Human Rights

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Abstract

This paper examines the application of the repugnancy doctrine in the administration of customary law in Anglophone Cameroon and unravels the relationship it fosters with human rights. The paper adopts a qualitative methodology grounded in doctrinal research and argues that state courts of Anglophone Cameroon have shown an exaggerated reliance on the doctrine and have readily invoked it as an alternative measure to incorporate human rights norms in their jurisprudence. The inference to be drawn from this development is that state courts are employing the repugnancy doctrine as a medium to engage with human rights in the enforcement of customary law. This is an unfortunate development given that, in the absence of clear standards of application, the repugnancy doctrine provides wide discretionary latitude to judges who, as case law reveals, may deflect interest in the enforcement of human rights. Consequently, the doctrine has been relied upon to justify standards that are contrary to those professed by human rights principles. The paper asserts forcefully that, irrespective of its nexus with human rights, the doctrine remains an unreliable alternative to human rights. It advocates for the repeal of the doctrine and equally encourages state courts to engage more with human rights, as enshrined in Cameroon's 1996 constitution, which, unlike the repugnancy doctrine, provides precise and unambiguous standards.

Keywords: Customary Law, Repugnancy Doctrine, Anglophone Cameroon, Human Rights

Although the future of customary law as a normative order is secured in the Cameroonian legal system by virtue of its recognition, in reality, customary law plays only a subsidiary role as a

forgotten source of law. This conclusion is not difficult to reach considering that the application of customary law is qualified by its fulfilling certain requirements, not least the repugnancy and incompatibility doctrines. These doctrines, which are employed at the discretion of state courts, act as necessary and unavoidable filters in determining the substance of applicable customary law.

The repugnancy doctrine is a legacy of British colonialism in sub-Saharan Africa and remains a cardinal principle in the administration of customary law by state courts of Anglophone Cameroon.[1] According to the doctrine, a custom can only be admissible in the state legal system provided it is not repugnant to natural justice, equity and good conscience. The repugnancy doctrine evokes mixed reactions from scholars; some have applauded its contribution to fine-tuning customary law to changing circumstances (and the dictates of contemporary human rights standards),[2] whereas others criticized the clause as expressing cultural imperialism and as a mechanism for subverting traditional African values to imperial liberal hegemony.[3]

Recourse by state courts of Anglophone Cameroon to the repugnancy doctrine is at an unprecedented level, and the main argument often advanced in support of the doctrine is that it provides the courts with the opportunity to contribute to the development of customary law.[4] Over-reliance on the doctrine has come at a high price; it has, to a large extent, supplemented recourse to human rights[5] by state courts of Anglophone Cameroon as the doctrine has become synonymous with these values.[6] Indeed, the repugnancy clause has become a viable alternative to human rights values, a development which does not augur well for the promotion of human rights in Cameroon. This paper argues forcefully against the use of the repugnancy doctrine as an alternative to human rights values and asserts, through case law examples, that the doctrine, in the absence of clear standards, is liable to endanger the enforcement of human rights by state courts in Cameroon. It adds to the growing volume of literature that advocates for the doctrine to be repealed in Anglophone Cameroon.

The paper consists of two parts. Part 1 examines customary law and the foundation of the repugnancy doctrine in Anglophone Cameroon. Part 2 discusses the uncertainty inherent in the application of the doctrine and argues that the doctrine remains an

insufficient measure to complement the language of human rights in state courts.

Part 1: Customary Law and the Repugnancy Doctrine

Customary law developed prior to colonialism and was influenced by developments within the agrarian economy, based essentially on subsistence agriculture and trade by barter. Although custom is evolutionary, interdependent, continually negotiated, and internally contested, it is still interpreted with an essentialist flavor in rural communities of Anglophone Cameroon. In this connection, custom is mostly regarded as part of a cultural package, legitimated by practices of the past, that has been handed down from one generation to another. Unsurprisingly, some of these values do not reflect contemporary standards of human rights and are, therefore, subjected to the repugnancy doctrine. The doctrine affords the court with the opportunity to enforce customary law in conformity with changed societal circumstances.

a. Customary Law in the State Legal System

Customary law consists of customs, habits, and behavioral patterns of the people in a particular community which, through continuous practice, have become binding on them and have acquired the force of law. Like elsewhere in sub-Saharan Africa, Cameroonian customary law represents a fragmentary regime of diverse and conflicting rules applicable by the various ethnic groups. These rules originated in precolonial Africa and were influenced by developments within the agrarian economy based essentially on subsistence farming and trade by barter. These rules represented the dominant views of the time, at a period when values such as communalism, male chauvinism, magico-religious beliefs, collective ownership of property, and restorative justice were fashionable and predominant in traditional societies.[7]

As a process, custom is said to be historically produced, interconnected, and internally contested.[8] It is also described as heterogeneous, fluid, shifting, emergent, contradictory, processual, and other such descriptions which aim to capture indeterminateness about the idea.[9] In spite of these views, unfortunately, in rural communities of Anglophone Cameroon, custom is imbued

with an essentialism, as it is portrayed as a bounded and homogenous package devoid of any outside influences.[10] Therefore, in Anglophone Cameroon, attempts at reforming traditional values in conformity with changed circumstances are often resisted by conservative forces, as such reform would necessitate a departure from the ways of the past. Thus, in spite of some cosmetic changes that have occurred in customary law over time, the bulk of the substance of customary law, especially in the domains of succession and inheritance, has rarely changed and continues to exhibit abhorrent features of gender inequality and discrimination. Other criticized features of collective responsibility in attributing guilt[11] and the reliance on magico-religious beliefs in the determination of disputes[12] are also evident in contemporary customary law.

During Franco-British administration of Cameroon, custom was tolerated to the extent that it was only enforceable provided it was either not "contrary to the principles of French civilization"[13] or not "repugnant to natural justice, equity and good conscience, nor incompatible with any law for the time being in force".[14] Upon achieving independence,[15] customary law was recognized, alongside received colonial laws, as a constituent norm in the state legal system. Article 1(2) of the 1996 Constitution (hereinafter referred to as the Constitution),[16] mandates that the state "recognize and protect traditional values that conform to democratic principles, human rights and the law," a proviso that establishes the yardstick for the admissibility of 'traditional values' in the state legal system.

This constitutional proviso is not to be read in isolation. Indeed, in Anglophone Cameroon, it is complemented by numerous legislative provisions of colonial flavor establishing similar standards of admissibility of customary law in the state legal system. The responsibility of ensuring that customary law complies with those standards falls on state courts. State courts of Anglophone Cameroon interpret these standards, specifically those enshrined in the repugnancy doctrine, as synonymous with human rights standards.

b. Repugnancy Doctrine and Human Rights

One of the farthest-reaching legacies of British colonial rule in the domain of law in sub-Saharan Africa was the importation of the common law, the doctrines of equity, and various statutes of

general application into their respective colonies. In Anglophone Cameroon, common law remains the primary source of law, applicable alongside customary law, international law, and an increasing volume of harmonized national legislation emanating from the legislature. The repugnancy doctrine is enshrined in several colonial statutes, some of which are still applicable in Anglophone Cameroon. Among these statutes are the Magistrate's Court (Southern Cameroons) Law 1955,[17] Southern Cameroons High Court Law 1955, (hereafter referred to as SCHL 1955),[18] Evidence Ordinance Cap. 62 of the Laws of the Federation of Nigeria 1956,[19] and the Customary Court Ordinance Cap. 142 of the revised laws of the Federation of Nigeria.[20] The doctrine, which regulates the relationship between common law and customary law, establishes a hierarchy of norms in favor of the former. The doctrine is grounded on the premise that for a custom to be enforced in the state legal system, it must be consistent with the tenets of justice as espoused by common law. Indeed, under the doctrine, only customs deemed equitable are enforceable—in other words, such customs must not be inconsistent with natural justice, equity, and good conscience. Most of the clauses underlying the doctrine incorporate yet another doctrine, that of incompatibility, which is based on two main precepts: (1) once statute has made provision on a subject matter, custom will be inapplicable on that subject matter, and (2) where there is a conflict between statute and custom, the former will prevail.

Although the repugnancy doctrine has no defined scope or clear standards, Anglophone Cameroonian courts have often construed the clauses within the prism of human rights standards. There is a well-founded basis for this assumption. The phraseology of the various clauses underlying the doctrine includes measuring parameters such as "natural justice," "equity," and "good conscience," which have their foundation in—and draw heavily from—human rights principles. Conceptually, in its traditional and literal meaning, "natural justice" includes principles, procedures, or treatment felt instinctively to be morally right and fair. It derives from the "natural" characteristics of man, whereas "equity" refers to the quality of being fair and impartial. For its part, "good conscience," when contrasted with bad or guilty conscience, refers to good motives untainted by bias. Sometimes the clauses refer to "public policy" as a criterion of repugnancy. "Public policy"

denotes acting on behalf of the common good. Thus, any customary law that offends the public good, either by being inconsistent with best practices of the state or by contradicting principles of law, violates the repugnancy (and by extension the incompatibility) doctrine. The words underlying the clauses are synonymous in meaning and practical application. Although the phraseology of the clauses underlying the doctrine does not make express reference to human rights, its relationship with human rights values cannot be overemphasized. In this context, the various parameters of the doctrine such as "natural justice," "equity," "good conscience," and "public policy" can simply be expressed in the human rights terms of equality, non-discrimination, and the right to justice and fair trial, etc., thereby establishing a nexus between the doctrine and standards of human rights.

It is therefore not surprising that, in its application by state courts of Anglophone Cameroon, the doctrine is used synonymously with human rights standards, offering a window of opportunity for the introduction of the broader language of human rights in the court's jurisprudence. Thus, in *Nyanja Keyi Theresia & 4 Ors. v. Nkwingah Francis Njanga and Keyim – administrators of the estate of Keyi Peter*[21] the High Court of Fako Division of the South West Region invoked the doctrine and rejected a custom for being patriarchal—inconsistent with gender equality—for denying daughters the right to inherit on the intestacy of their deceased father and, instead, transferring such right to the deceased's brother and cousin. Similarly, in *Chibikom Peter Fru & 4 Ors v. Zamcho Florence Lum*,[22] the Supreme Court of Cameroon, sitting in Yaoundé, invoked the doctrine and refused to apply a patriarchal and discriminatory custom that denies a married daughter the right to succeed on the intestacy of her deceased father in favor of male children. In *Chamju Wembong Joseph v. Chamju Munkam Abel*[23] the High Court of Fako Dvision, in the South West Region, upheld the human rights principle of non-discrimination when it invoked the doctrine and refused to grant letters of administration to a defendant who professes the patriarchal and discriminatory ideal of customary law.

In the cited cases, as in many others, the various courts refrained from engaging with the language of human rights despite the saliency of human rights issues revealed from the facts. Nonetheless, in invoking the repugnancy doctrine, the courts utilized

norms of human rights such as gender equality and non-discrimination in the determination of the various suits. State courts of Anglophone Cameroon have therefore shown an exaggerated reliance on the repugnancy doctrine which, has arguably been used to supplement, and perhaps complement, the language of human rights. In this connection, in cases where human rights issues abound, rather than relying on the human rights provisions of the Constitution, state courts often invoke the doctrine and implicitly interpret it along human rights terms. This is as illogical as it is unfortunate because human rights values are justiciable in Cameroon and are recognized as founding principles of the Republic, enshrined in the Preamble to the Constitution[24] and incorporated as superior norms in the legal system by virtue of article 45 of the same Constitution.[25] Since the repugnancy doctrine provides only an implicit connection to human rights, ideally one would have expected the courts to actively engage with human rights itself in the administration of customary law as they are based on defined scope and standards.

Part 2: Can the Repugnancy Doctrine Act as Alternative to Human Rights?

The impact of the repugnancy doctrine on customary law in Anglophone Cameroon cannot be overemphasized. Among the acknowledged benefits of the doctrine is its ability to initiate reforms in customary law that respond to contemporary exigencies including human rights values.[26] This assertion, though supported by empirical evidence, should not be validated at face value. This is because there is growing evidence to suggest that, due to the absence of clear standards and the wide discretion available to judges in applying the doctrine, it has led to judicial lawmaking that has, in turn, endangered rather than enhanced the protection of human rights in state courts. Thus, in a number of occasions, the doctrine has become counterproductive to the enforcement of human rights.

a. Repugnancy Doctrine and Judicial Lawmaking

Although the repugnancy doctrine is usually interpreted according to human rights terms, and has become synonymous with

human rights, its application by state courts suggests the absence of clear standards. Seemingly, in applying the doctrine, judges are inspired by their consciences, (and perhaps the law), giving them wide discretionary latitude. And since the conscience of one judge is different from another, state courts of Anglophone Cameroon have failed to establish a coherent precedent in the administration of customary law through the doctrine, ushering in an unavoidable era of judicial lawmaking. Generally, while this development has rarely produced inconsistent precedents on a large scale, unfortunately, such precedents have occurred on a number of occasions: the consequence being the emergence of divergent and conflicting precedents. This has produced uncertainty in both the doctrine and customary law.

A classic illustration of this phenomenon is the conflicting decisions arrived at in the cases of *David Tchakokam v. Keou Magdaleine,*[27] a Cameroonian case, and *The Estate of Agboruja,*[28] a Nigerian case, where two courts arrived at contrasting conclusions on the contentious issue of levirate marriage (or widow inheritance)[29] under customary law. Even though the cases are derived from two different jurisdictions, it should be emphasized that there are similarities in the applicable rules as Anglophone Cameroon and Nigeria share the same legal tradition, both having been administered as a single entity by the British after World War I.[30]

In *David Tchakokam v. Keou Magdaleine,* the High Court of Meme Division of the South West Region, Cameroon, invoked the repugnancy (and incompatibility) doctrine to invalidate a levirate marriage on the ground that it was discriminatory to the widow (the respondent), as it was based on the notion that women were equivalent to chattel and could be inherited alongside other chattel upon the demise of their husbands. The facts of the case reveal that upon the death of the widow's husband, she was married through levirate to the nephew of her deceased husband. The new 'husband' asserted claims over the properties left behind by the widow's deceased husband. He averred that, being an object of inheritance under customary law, the widow was not entitled to inherit her deceased husband's property. The court, invoking Section 27 of the SCHL 1955, ruled in favor of the widow, granted her title over the contested properties, and pronounced their levirate marriage invalid. The judge wrote:

> All in all, I am unable to find that there was ever a customary levirate marriage between plaintiff and defendant, and even if there were, the law will not give its blessing to a marriage that is not only obnoxious and repugnant to natural justice but obviously against the written law ... Section 27 of the SCHL clearly does not permit this court to enforce a marriage which is liable to be voided under our law.[31]

Contrarily, in the Nigerian case of *The Estate of Agboruja,* the court recognized the practice of levirate as widespread and not being repugnant to natural justice, equity, and good conscience. The court wrote: …

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

In upholding the system valid, it concluded in these words:

> … 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.

These judgments addressed the same subject matter and were influenced, to a large extent, by the consciences of the judges, which produced conflicting outcomes. This lack of clear standards inherent in the application of the doctrine has engendered judicial creativity and adventurism which have produced far-reaching consequences for the enforcement of human rights by state courts. Unsurprisingly, judicial lawmaking has paved the path for judges to unscrupulously invoke the doctrine to justify conduct that infringes on, rather than enhances, human rights values.

b. Repugnancy Doctrine: An Insufficient Alternative to Human Rights — Case Law Analysis

In subjecting the admissibility of customary law to the repugnancy doctrine, state courts have attempted to be precise, systematic, logical, and consistent. Most of the existing jurisprudence suggests the courts have been largely successful in these respects and have established a compelling and authoritative precedent founded on the ideals of non-discrimination and gender equality in the enforcement of customary law. However, on a few occasions, state courts have departed from this position and have instead employed the doctrine to inadvertently sanction discrimination. Through an analysis of two case studies, this section highlights the controversy in the application of the doctrine that renders it an insufficient alternative to human rights. The cases are discussed with reference to the reasons advanced by the courts in justifying their judgments and not to the rationality of the judgments themselves.

Under Cameroonian law, for a judgment to be valid and enforceable it must be supported by an expeditious and reasoned decision.[32] Thus, where the reason advanced to support a judgment is porous, flawed, or lacking in judicial merit, or where there is no reasoning at all, the judgment is doomed to be declared a nullity and, therefore, unenforceable. The fact that such a judgment is not considered worth the paper on which it is inscribed is also applicable to decisions of customary courts, which are obliged to state the customs on which their decisions are founded.[33] Failure to do so would render the judgment a nullity.[34] One reason for the principle of reasoned judgments is to provide a safeguard against judicial arbitrariness. The principle also provides a means by which the superior courts are enabled to control decisions of inferior courts. In a few recorded cases, state courts have grounded their judgments on discriminatory reasons, as I will now document.

The case of *Abi Zacharia Ajong v. Nji Micheal Ajong*[35] was an appeal against the judgment of the Widikum[36] Customary Court dividing equally the property of the deceased, late Enwebadang, consisting of four farms, between the appellant and the respondent. The facts reveal that the deceased died intestate leaving three daughters but no male child to inherit his estate in accordance with the custom of the area. None of the daughters

contested the ownership of the property. Upon the death of the deceased, a family meeting appointed the respondent next of kin to his estate. At the trial court, the four farms belonging to the deceased were equally distributed between the parties; two went to the respondent and the other two to the appellant. The trial court grounded its decision on the basis that since both parties organized the deceased's funeral, each was entitled to a share of the estate. The court made no mention of the three daughters of the deceased in the administration of the estate, perhaps in conformity with the custom that prevents female children from inheriting on the intestacy of their deceased father in the presence of suitable male heirs.

Aggrieved by the decision of the trial court, the appellant appealed to the North West Court of Appeal, sitting in Bamenda.[37] The appellate court dismissed his appeal and relied on the strength of the family council meeting that appointed the respondent as next of kin. With respect to the exclusion of the deceased's daughters by the trial court, the Court of Appeal opined that either the issue was not mentioned at the trial court or the daughters were deliberately excluded. Nonetheless, the appellate court justified their exclusion with these words:

> The Widikum Customary Court is grounded on patrilineal succession. The question of palm trees and raffia mats is a male affair and that is why, apparently, none of late Enwebadang's three daughters are interested in the matter. The circumstances are not contrary to natural justice.

One of the reasons advanced by the appellate court to justify the exclusion of the daughters from the administration of their deceased father's estate in favor of male relatives is problematic. The court's judgment was premised on two grounds: first, the daughters of the deceased were either not interested, or were deliberately excluded, in the administration of their deceased father's estate; and second, the property, which was the object of inheritance, was strictly within a male's domain, and the custom of the locality advocated in favor of patrilineal succession. The first argument behind the first reasoning is grounded under Cameroonian law. It is a fundamental principle of justice that a court may only grant a remedy provided if it is requested by the party. Thus, where an aggrieved party fails to request remedy, a court

will not take upon itself to do so. The fact that the daughters of the deceased failed to show any interest in the proceedings and made no request to be considered as administrators of the estate prevented the court from being able to consider their interest. It is inconceivable for a court to award remedy to a party who has shown no interest in it. Even though the facts of the case suggested that the daughters of the deceased did not show any interest in the estate, the appellate court, in its reasoned decision, failed to enunciate this legitimate line of reasoning, inferring that this rationale was never contemplated in disregarding the interests of the daughters. Consequently, the basis of the court's decision was informed by other considerations, most of them highly controversial.

The second argument to buttress the first reasoning of the appellate court is to the effect that the interests of the daughters were deliberately ignored by the trial court. If that was truly the case, then for the purpose of justice, the appellate court was not precluded from considering the interests of the daughters on its own motion as dictated by equity and public policy. Indeed, a beauty of the repugnancy doctrine as applicable in Anglophone Cameroon is that it provides the court with the authority to invoke it voluntarily, even in the absence of solicitation from the parties to the dispute, provided it is justified by the requirements of justice. This was a clear situation where the appellate court could have used its good judgment to consider the interests of the daughters in order to fulfill a public policy concern. Contrarily, and against equity, the court relied on the criterion of "natural justice" to justify the dismissal of the interests of the daughters.

According to the second reason advanced to justify the judgment, the appellate court averred that the custom of the parties supported patrilineal succession, which gave priority to male heirs over females. Further, the crop, raffia palm, which was the object of inheritance in the contested farms, was exclusively farmed by men and was therefore within their domain to the exclusion of women. These arguments are controversial and imply that even if the daughters had shown interest in the estate, it would have been disregarded given that raffia palms were exclusively farmed by men and the custom of the parties supported patrilineal succession, which gives priority to male heirs as opposed to females. These arguments depart from the conventional position and foster

gender inequality by implicitly endorsing patriarchy under customary law. In other words, the court asserted that it was irrelevant to consider the interests of the daughters because custom advocates for patrilineal succession and does not permit women to indulge in raffia farming, a stance which suggests the tacit approval of a discriminatory custom that has been notoriously adjudged as such by other state courts. Regrettably, the court was blind in asserting that its endorsement of patriarchy was not inconsistent with natural justice, an argument which falls flat in the face of available evidence. Even though the daughters were truly not parties to the case, one would have expected the appellate court to request the contesting parties to take into consideration their interests since they remain beneficiaries of the estate irrespective of who is the administrator. Even if the transaction in question was said to be male-inclined, it should not prevent the daughters from enjoying some of the benefits that may accrue from the administration of their deceased father's estate. By implicitly endorsing patriarchy, the appellate court failed to exercise the public policy option of fairness and equity which it could have invoked *suo moto,* an opportunity that was deliberately missed.

The case of *Nanje Bokwe v. Margaret Akwo*[38] was an appeal against the decision of the Kumba[39] Central Customary Court whereby title to a piece of land was declared to belong to the respondent (Margaret Akwo). The facts reveal that the respondent's father, G. I. Mbongo, gave a piece of land behind his compound to the appellant (Nanje Bokwe), where the latter built a house. On completion of the house, the appellant invited the respondent's father to give a traditional blessing to the newly erected property, which he did. Thereafter, the respondent's father died. Upon his death, his son and next of kin, Alfred Mbongo, inherited the estate. Alfred then invited the appellant for a family meeting in his house where they discussed the land matter. This meeting was also attended by Alfred's sister (who is the respondent), her mother, and one other person. It was agreed in that meeting that the appellant should pay the Mbongo family the sum of 100,000 francs CFA for the plot offered to her by their deceased father. She made part payments and receipts were issued. Thereafter Alfred died, and his sister, the respondent, asserted at the customary court that the appellant was simply a tenant at will and that the land was not given to her as a gift either by her

deceased's father or her deceased's brother. The court ruled in favor of the respondent.

On appeal, the South West Court of Appeal, sitting in Buea,[40] allowed the appeal, ruled against the respondent, and held that the gesture made by her late father amounted to a gift of land under customary law, which was enforceable. In rejecting the respondent's contention as heir to his deceased's father, the appellate court advanced the following argument:

> The respondent is a married woman. She cannot unless so given by a will inherit from her father let alone be his next of kin. Alfred Mbongo was his father's next of kin. Alfred Mbongo is dead and has left a male heir. In fact, the respondent has no *locus standi*.

This judgment was grounded on two arguments: first, the land in dispute was a gift made under customary law by the respondent's deceased father to the appellant; second, the respondent had no *locus standi* in the dispute since she was female and was not and could not be the heir to her father's estate in the presence of a suitable male heir—in this case, her deceased brother's son. The first argument advanced by the appellate court is grounded on facts as the land was indeed a gift made under customary law. Part of the second argument is also grounded on the facts. According to the court, the respondent was not a suitable party to sue since she was not her father's next of kin, who was the respondent's deceased elder brother. The court's argument then took a dramatic turn. It declared that even with the death of her brother, the respondent could neither sue nor become next of kin of her deceased father's estate given that her deceased brother left behind a male child in the line of succession. This argument is as controversial as it is baseless. The appellate court insinuated that a woman cannot be appointed next of kin so long as there are suitable male children in the line of succession, a position which is at odds with established jurisprudence. The court also ridiculously and falsely asserted that a daughter could only inherit from her deceased father's estate on the basis of a will nominating her as such (or through testate succession), the absence of which, in cases of intestacy succession, she has no chance to be nominated next of kin in the presence of suitable male children or relatives.

The argument also contradicts the provisions of written law, specifically, the Non-Contentious Probate Rules, 1954. This Act gives more priority to children (sons and daughters) and widows than to all others in the administration of the deceased's estate.[41] Stating that the respondent could not be next of kin to her deceased father's estate in the presence of her deceased brother's son is unjustified and contradicts the applicable legislation. This conclusion could have been justified had the court been dealing with Alfred's estate, in which case his son would have gotten priority over the respondent. However, the estate in contention belonged to the respondent's deceased father and, as the only surviving child, she ranks higher than any other person in contention, not least, her deceased brother's son, who is a grandchild. Sadly, the court relied on a custom that had been notoriously held to be repugnant and discriminatory against women, denying as it does their right to intestacy succession in the presence of male heirs. The argument defeats the established rationale in a host of cases, most prominent of which is the precedent established by the Supreme Court in the *Chibikom case*[42] discussed above. Evidently, although the argument raises a public policy concern of repugnancy, the court deliberately did not mention the doctrine, as this could have defeated the rationale of its judgment. Rather, the appellate court, in deliberately ignoring the doctrine, nourished an uncompelling and discriminatory argument which the doctrine has regularly and repeatedly invalidated. The logical inference to be drawn from the circumstances indicates that the court may disregard the doctrine for its own convenience and to propagate arguments that may be anathema to the enforcement of human rights values.

c. General Discussion: Lessons from the Cases

Irrespective of the isolated nature of the cases discussed above, they seem to establish an uncomfortable pattern from which a disturbing analogy can be drawn with respect to the application of the repugnancy doctrine by state courts. It is evident that a doctrine that relies essentially on the personal standards of judges, as opposed to established and defined parameters, is too subjective a requirement to be able to effectively act as control mechanism either for reshaping customary law or for stimulating human

rights consciousness in state courts. Indeed, the wide latitude provided to judges in applying the doctrine enables controversial outcomes that call into question the doctrine's credibility as a viable tool for engaging with human rights in state courts. The case of *Abi Zacharia Ajong v. Nji Micheal Ajong* confirms that without defined parameters, the criteria underlying the repugnancy doctrine are subject to diverse interpretations. The court, in justifying the exclusion of the daughters in the administration of the deceased's estate, opined that the circumstance did not violate "natural justice," a proposition that inadvertently disengages the notion of human rights from the dispute, given the close nexus between the criterion of "natural justice" and the enforcement of human rights standards. It suffices to conclude that, for the sake of natural justice, or, in other words, fairness, the interests of the daughters of the deceased should have been considered in the administration of the estate. To think otherwise, and to invoke the countervailing argument of patriarchy, is in itself a banalization of the notion of "natural justice."

The cases further reveal that the doctrine of repugnancy is a discretionary option that state courts may or may not invoke depending on the convenience of the moment; the doctrine is therefore subject to abuse. The case of *Nanje Bokwe v. Margaret Akwo* provides a classical illustration of a situation where the doctrine is obviously disregarded by a state court in order to further a controversial argument—an argument that the doctrine was established to counteract in the first place. Thus, the court, in using its discretion to ignore the doctrine, advocated a position that challenges the object and purpose of the doctrine itself. Imperatively, the court felt emboldened to profess gender discrimination, albeit implicitly, since it was not obliged to invoke the doctrine. In other words, it was not understood to be mandatory. The essence of providing courts with the authority to invoke the doctrine on their own motions, even without express request from parties to the dispute, acts as a measure to protect the individual from abuse, thereby upholding the common good. Unfortunately, the case of *Nanje Bokwe v. Margaret Akwo* reveals that the court is capable of manipulating this discretionary option to serve its own purposes and the convenience of the moment, instead of protecting the interests of the individual.

It is abundantly evident that the rationality of some of the arguments advanced in the cases discussed above, although in conformity with section 7 of the Judicial Organization Ordinance of 2006 (as amended), which requires courts to set out the reasons upon which their decisions are based in fact and in law, does not meet the standard of reasoned decisions articulated in the said provision. Some of the arguments are as porous as they are baseless and are susceptible to be overruled had the cases gone on further appeal to the Supreme Court. Thus, inasmuch as the doctrine may complement human rights in some respects, it also has the potential to, if not properly addressed, disengage with the language of human rights and instead propagate discrimination. On those bases, the repugnancy doctrine cannot and should never be an alternative to the rhetoric of human rights in state courts of Anglophone Cameroon.

Conclusion: More Reliance on Human Rights

The repugnancy doctrine plays an essential role in the admissibility of customary law in Anglophone Cameroon and has largely been interpreted according to human rights terms.[43] State courts have relied exaggeratedly on the doctrine even in cases where the saliency of human rights issues abound and have therefore undermined the human rights corpus itself, despite its being justiciable in Cameroon. Indeed, state courts often interpreted the doctrine as synonymous with human rights standards, making it a window of opportunity for the introduction of human rights into the jurisprudence of the courts. Due to the absence of clear standards, judges employ the doctrine based on their consciences, a development that has encouraged judicial lawmaking in the administration of customary law by state courts. Judicial lawmaking has produced negative repercussions in the enforcement of human rights: In some occasions, the doctrine has either been invoked or ignored to negate human rights norms, making it an insufficient alternative to human rights.

The colonially inherited doctrine has served its purpose and should now expressly give way to human rights standards in the administration of customary law by state courts. In the case of the failure of the legislature to repeal the doctrine, Anglophone Cameroonian courts should engage more with human rights, which

provide universal standards that are precise and unambiguous. Engaging more with human rights requires state courts to employ the emancipatory rhetoric of human rights standards in the administration of customary law without making any implicit or express references to the repugnancy doctrine. The current practice in which state courts mostly rely on the repugnancy doctrine in the administration of customary law is not sustainable. State courts are endowed with the legislative tools to project the virtues of human rights as expressed in human rights treaties ratified by Cameroon, most of which are less ambiguous, and more objective in standards, than the repugnancy doctrine. This will help increase the appeal of human rights in state courts while at the same time expressly incorporating them into the emerging jurisprudence of the court in its administration of customary law.

For state courts to effectively replace their reliance on the repugnancy doctrine with human rights values, as expressed in treaties, a repeal of the repugnancy doctrine would be a prelude to developing a human rights culture in state courts. Judges should be well-versed in human rights so that they are able to identify human rights concerns in the administration of customary law and interpret customary law within the prism of human rights law. The repugnancy doctrine has failed to live up to its billing as a stimulus for human rights consciousness and may, contrarily, act against the virtues of human rights.

Notes

[1] Anglophone Cameroon (or the former Southern Cameroons) is the portion of Cameroon that came under British administration after Germany was defeated in World War I. The formerly German territory was divided into two portions; the lion's share fell under French administration and the other portion was administered by the British as an integral part of Nigeria.

[2] See Bethel Chuks Uweru, "Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism," *African Research Review* 2, no. 2 (2008): 286-95; E. A. Taiwo "Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions - Some Lessons for Nigeria," *Journal for Juridical Science* 34, no. 1 (2009): 89-115.

[3] See Mikano E. Kiye, "The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon," *African Studies Quarterly* 15, no. 2

(2015): 90-98; Carlson Anyangwe, *The Cameroonian Judicial Sys*tem (Yaoundé: CEPER, 1987), 243; Lakshman Marasinghe, "Customary Law as an Aspect of Legal Pluralism: With Particular Reference to British Colonial Policy," *Journal of Malaysian and Comparative Law* 25 (1998):7-14; Nonso Okereazofeke. "Judging the Enforceability of Nigeria's Native Laws, Customs, and Traditions in the Face of Official Controls." (Paper presented at East Carolina University-Greenville at the Southeastern Regional Seminar in African Studies, Greenville, South Carolina, 2001).

[4] See the dictum of Justice Nwokedi in the Nigerian case of *Agbai v. Okogbue,* (7 N.W.L.R. Part 204, 391 at 417), where the judge reaffirmed the role of the doctrine with these words: "Customary laws are formulated from time immemorial. As our society advances, they are more removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root. The doctrine of repugnancy in my view affords the courts the opportunity for fine-tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the Courts are there to enact customary laws. When however customary law is confronted by a novel situation, the Courts have to consider its application under existing social environment." Derived from Emeka Iheme, "Freedom of Association in a Nigerian Community—Old Usages, New Rules," *International Journal of Not-for-Profit Law* 4, no. 2-3 (2002).

[5] Human rights are used in the broad traditional context to refer to legal and moral entitlements attributed to human beings by virtue of their humanity. Although these entitlements are protected as natural rights, they are also regulated and enshrined both in municipal and international law. These rights are classified into categories of civil and political, social and economic, and group-oriented rights which are said to be inalienable, indivisible, universal, interrelated, and interdependent.

[6] See Mikano E. Kiye, "Conflict Between Customary Law and Human Rights in Cameroon: The Role of the Courts in Fostering an Equitably Gendered Society," *African Study Monographs* 36, no. 2 (2015): 95 - 96.

[7] These are some of the distinctive features of Cameroonian customary law that set it apart from other legislative sources, including statutory law.

[8] Sally Engle Merry, "Changing Rights Changing Culture," in *Culture and Rights: Anthropological Perspectives,* eds. J. A. Cowan, M.-B. Dembour & R.A. Wilson (Cambridge: Cambridge University Press, 2001), 41; Bonny, Ibhawoh, "Cultural Tradition and National Human Rights Standards in Conflict," in *Legal Cultures and Human Rights: The Challenge of Diversity,* ed. Kirsten Hastrup (The Hague: Kluwer Law International, 2001), 88.

[9] Dianna J. Fox, "Women's Human Rights in Africa: Beyond the Debate over the Universality and Relativity of Human Rights," *African Studies Quarterly* 2, no. 3 (1998): 3-16.

[10] Customary courts often apply custom based on essentialist assumptions as illustrated in the case of the *chief of Besonabang v. Agbor Neba & Lucas Ndip.* In its judgment, a Customary Court advised the defendant, whom it was alleged had violated a custom, to henceforth follow "the old tradition of their forefathers in performing [the] traditional rites of 'Etak', the subject matter of the dispute. According to the court, only a strict compliance with the custom, as practiced in the past, could vitiate the defendant from civil liability. See Mikano Emmanuel Kiye, "The Importance of Customary Law in Africa: A Cameroonian Case Study," (PhD Dissertation, Vrije Universiteit Brussel, 2007), 66-70.

[11] Elias Olawale, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956), 87.

[12] Chukwuemeka Ebo, "Indigenous Law and Justice: Some Major Concepts and Practices," in *African law and legal theory,* eds. Gordon R Woodman & A. O. Obilade (Aldershot: Dartmouth Publishing Company Ltd, 1995), 38-42.

[13] This was the standard established in French-administered Cameroon for the admissibility of customary law in the state legal system. See Jeswald Salacuse, *An Introduction to Law in French speaking Africa: Africa south of the Sahara* (Charlottesville: Mitchie Publishers, 1969), 60.

[14] This was the standard of admissibility of custom in British-administered Cameroon provided under Section 27(1) of the Southern Cameroons High Court Law 1955.

[15] French-administered Cameroon gained independence on January 1, 1960. Following a plebiscite which was conducted on February 11, 1961, British-administered Cameroon gained independence by reuniting with the independent Republic of Cameroon, hitherto known as French-administered Cameroon.

[16] Law No. 96-6 of January 18, 1996, to amend the Constitution of June 2, 1972.

[17] Section 31(1) states: "A magistrate 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 either directly or by implication with any law for the time being in force, and nothing in this Law shall deprive any person of the benefit of such native law and custom."

[18] Section 27(1) provides: "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 either directly or by implication 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 and custom."

[19] Section 14(3) states: "Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them: provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience."

[20] Section 18(1) defines customary law as: "The native law and custom prevailing in the area of the 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."

[21] High Court of Fako Division, South West Region, Buea, Cameroon: Suit No. HCF/AE57/97–98: unreported.

[22] Supreme Court judgment No. 14L of February 14, 1993. In the South West Regional Court of Appeal, Buea, Cameroon, it was registered as Suit No. CASWP/17/931: reported in Cameroon Common Law Report (CCLR), 1997, 213–223.

[23] High Court of Fako Division, South West Region, Buea, Cameroon: Suit No. HCF/AE/77/95: unreported.

[24] Several Preambular provisions refer to human rights. For instance: "…We, the people of Cameroon, Declare that the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights; Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, The African Charter on Human and Peoples' Rights and all duly ratified International Conventions relating thereto, in particular, to the following principles: - all persons shall have equal rights and obligations…"

[25] The provision states: "Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement." Cameroon's constitution is available online at: http://www.assnat.cm/images/The_constitution.pdf (Accessed 30 April 2020). On the basis of this provision all the human rights treaties ratified by Cameroon rank higher than any municipal law in conflict with them.

[26] *Supra.,* note 2, 90-98.

[27] High Court of Meme Division, South West Region, Kumba, Cameroon: Suit No. HCK/AE/K.38/97/32/92: reported and cited in Gender Law Report, (GLR) 1999, 111–126

[28] See John Ademola Yakubu, "Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria." (Paper prepared for CODESRIA's 10th General Assembly on *Africa in the New Millennium*, Kampala, Uganda, 8-12 December 2002).

[29] Levirate is a form of marriage by which the wife of a deceased member of the family could be given to or married by another member of the family. Usually referred to as 'female inheritance,' it is widely recognized and upheld by several ethic communities in Cameroon.

[30] Consequently, some of the laws enacted by the British in Nigeria were extended to the territory of Southern Cameroons, and some remain applicable to this day.

[31] Page 119, Paragraph 1 of GLR 1999 vol 1, pp. 111-26.

[32] This is provided under section 7 of the Judicial Organization Ordinance, 2006 (Law No. 2006/015 of December 29, 2006, on Judicial Organization, as amended)

which states: "All judgments shall set out the reasons upon which they are based in fact and in law. Any breach of this provision shall render the judgment null and void."

[33] This is provided by Law No. 79/04 of June 29, 1979, which attached the Customary Court and the Alkali Court to the Ministry of Justice and stated in paragraph 2 that such courts must state clearly the customs that they apply.

[34] See the case of *Obi Francis Mbeng v. Florence Bessem Obi,* South West Regional Court of Appeal, Buea, Cameroon (Suit No. CASWP/CC/78/95: unreported), where the judgment of the Buea Customary Court granting divorce in a polygamous marriage was declared a nullity for the failure of the court to declare the custom to which its decision was founded and, more so, as both parties to the divorce had a different custom.

[35] North West Regional Court of Appeal, Bamenda, Cameroon: Suit No. BCA/4CC/2000: reported in CCLR, Part 9 (Limbe: Presbyterian Printing Press, 2002), 67-72.

[36] Widikum is small settlement located in Momo Division of the North West Region of Cameroon.

[37] Bamenda is the regional capital of the North West Region.

[38] South West Regional Court of Appeal, Buea, Cameroon: Suit No. CASWP/CC/22/82: unreported.

[39] Kumba is one of the major cities of the South West Region of Cameroon.

[40] Buea is the regional capital of the South West Region of Cameroon.

[41] This is the provision of Rule 21 (1) and (2) of the Non-Contentious Probate Rules.

[42] South West Regional Court of Appeal, Buea, Cameroon: Suit No. CASWP/17/931: reported in CCLR, Part 2 (Liberty Publications, 1997), 213-223.

[43] Several cases are illustrative. They include, among others, the case of *Elive Njie Francis v. Hannah Efeti Manga* (South West Regional Court of Appeal, Buea, Cameroon: Suit No. CASWP/CC/12/98: unreported), where a customary rule that gave priority of inheritance to the deceased husband's nephew instead of his wife was rejected; *Nyanja Keyi Theresia & 4 Others v. Nkwingah Francis Njanga & Keyim* (High Court of Fako Division, South West Region, Buea, Cameroon: Suit No. HCF/AE57/97-98: unreported), where letters of administration were revoked since the estate was being administered without taking into consideration the interests of the beneficiaries, who were all female; and *Ajietem Lydia v. Atebia Ncho* (South West Regional Court of Appeal, Buea, Cameroon: Suit No. CASWP/CC/9/99: unreported), where a customary rule that gave priority of inheritance to relatives as against the deceased's female children was rejected, etc.