The place of Muslim law in Cameroon's legal system

By *Joseph Nzalie Ebi*, Dschang*

1. Introduction

Trade contacts and the Islamic Jihads were responsible for the introduction of Islam into Cameroon through Northern Nigeria at about 1715.[1] The faith spread down South so that, by the time German colonial administrators penetrated the country,[2] it was already firmly installed in some of the communities, controlled from Sokoto (Nigeria), its headquarters. The Bamoun tribe of the western highlands had, for example, already adopted the Arabic title of *Sultan* for its King, which signifies "empowerment" or "clear authority"[3] and used for rulers of Muslim states. With Islam came the law derived from the faith, which is a consequence of regarding the divine revelations as constituting both religion and law binding on those who profess the faith.

1.1. The Sources

The Quran embodying the revelations of God as recited by Prophet Mohammed and the Sunnah consisting of the practices of the Prophet in line with the Quran and his verbal interpretations[4] of its provisions constitute the principal sources of the law.[5] These are followed by the Ijma and Qiyas which, because based on human analysis of the primary sources, are classified as secondary sources. They are accretions and not part of the Shari'a.[6] The Ijma represents the consensus of scholars and jurists of a given generation on a particular legal principle. It involves the application of human reasoning to the Quran and Sunnah, with a view to bringing in new situations within the existing principles. The principle of the infallibility of consensus of Muslim scholars shields an established Ijma from being revisited by future gen-

* *Joseph Nzalie Ebi*, License en Droit, Maitrise, D.E.A. (Yaoundé) Doctorat 3eme Cycle (Yaoundé II, Soa) Ph. D. (Birm-UK), Senior Lecturer in Law, University of Dschang. E-mail: nzaliejoseph@yahoo.fr.

1 Dame Dada Balkissou v. Abdoul Karim Mohamed, Arrêt No. 2/L du 10 Octobre 1985, Juridis info, No.8, 1991, p.53.

2 Germany was the first colonial power in the country following the Germano-Douala Treaty of annexation in July 1884, but was forced out after the First World War by Great Britain and France.

3 See *Ruqaiyyah*, A basic dictionary of Islam, New Delhi, Goodword Books, 2006, 206.

4 The divine revelations recognise in him a good example to follow. "You have indeed in the Messenger of Allah a beautiful pattern (of conduct) for anyone whose hope is in Allah and the Final day, and who engages much in the praise of Allah." (Holy Quran, Surah 33 (21.)).

5 *Ajijola*, A.D. Introduction to Islamic Law, New Delhi, International Islamic Pictures, 1989, pp. 59-63.

6 See *Muhammad Yusuf Guraya*, Islamic Jurisprudence in the modern world, Lahore – Pakistan, SH Muhammad Ashraf Publishers, 1993, preface.

erations of scholars.[7] Rather, the approbation or disapprobation of an established Ijma gives rise to a new Ijma.[8] "The Ijma constitutes a criterion for validity" writes Imam Doctor Anazetpouo "on condition that it limits itself to the scriptures. That is to say that the Ijma is not interpretation but faithful comprehension and submission to the Coran and Sunna".[9] The task of interpretation and adaptation is that of the Qiyas, which constitutes the expansion of the law through analogical reasoning.[10] The principle that a judge might err in his judgment or interpretation of the Quranic or Sunni prescriptions permits the rejection of the Qiyas of one generation by another.[11]

1.2. The problem of a name.

One notices much confusion about the name by which the law derived from Islam should be referred. Should it be Islamic law, Muslim law, or simply, the Shari'a? As the expressions are used interchangeably with no reasons advanced for the choice of one or the other, it is assumed, albeit erroneously, that they all are synonymous. The fact is that the whole body of law derived from Islam is referred to as the Shari'a; defined as "The way of Islam" or "the clear path" based on the prescription in the Holy scriptures which reads: "This is my straight path so follow it and do not follow the paths which will separate you form this path"[12] It is the code of behaviour for a Muslim that determines whether any action or detail of life is *halal* (right and allowed) or *haram* (wrong and forbidden).[13] Unfortunately the public perception of the term Shari'a is negative, taken to signify intolerance and cruelty, because emphasis is placed on its prescribed punishments for certain crimes,[14] than on the fact that it is a system of law like any other, which subject- matter covers every aspect of life.

7 *David Pearl*, A Textbook on Muslim Law, London, Groom helm, 1979, p. 69.

8 See *Aliyu Hamidu Alkali/ Ahmadu Hammawa Song*, "The relevance of Ijma in solving jurisprudential problems in Islamic Law", (2006) 14 International Islamic University of Malaysia Law Journal, 1-14, 3.

9 *Zakari Anazetpouo*, L'Islam et le pouvoir politique, Dschang University Press, (Cameroon) 2006, 37.

10 See *Amadou Monkaree*, "The place of Islamic law in the Cameroon legal system: A case study of Anglophone Cameroon," (2010) 14 Annals of the Faculty of Law and Political Science, University of Dschang, 43-59, 50.

11 *Ajijola*, supra, 78.

12 See surats or chapters 6 (153) and 57 (28).

13 *Ruqaiyyah Waris Maqsood*, ibid, 199. Another classifications divides conduct in Muslim jurisprudence into: required; right and enjoined; neutral or permitted: *makruh* (detested or discouraged but not forbidden, such as divorce) and haram, the first four of which could come under Halal since they are not forbidden.

14 The *Hadd* or fixed sentences are: Adulteress or adulterer- whipped or stoned; Apostasy- death; Drinking wine- eighty lashes; Theft- cutting of the right hand; Highway robbery- death or cutting of the limbs. Unlisted crimes are punishable by the Judge under the *Tazir* or discretional sentence. (Source: *Ajijiola*, supra, 128).

The term Shari'a having thus been compromised, by its association with aspects of its subject-matter (crime prevention), led naturally to the search for an alternative name. The choice fell on the expression Islamic law, which has since become stylish and generally preferred by Muslim scholars and the public. Both Shari'a and Islamic Law signify the law derived from the Islamic religion as embedded in the Quran and Sunnah.[15] The two are therefore synonymous and can be used interchangeably, even though one often encounters books bearing both names, such as Abdar Rahnman I. Doi's, *Shari'ah: Islamic Law*.[16]

The expression Muslim law does not have the same significance. Coined from the word "Muslim" used to describe adherents of the Islamic faith, "Muslim law" is a result of the spread of the faith from its place of origin to other parts of the globe. And so represents the law binding on those who embrace the faith, in conditions that do not warrant the full application of the law in its original form. Because even when the Government of a state decrees that it forms part of the laws of the country, this is always subject to qualifications intended to make it adaptable in the new environment. The resultant is generally a mixture of the divine sources and the outcome of the application of the secondary sources. Muslim law could thus be said to constitute the diluted version of Islamic law or Shari'a, similar to the Common or Civil law when adapted to the local conditions of the places to where it spread as a result of colonialism or the customary law when it succumbs to the imperatives of the repugnancy or public policy doctrines. Writing on the law in India and Pakistan, David Pearl, adopted the appellation "Muslim law" instead of Islamic law because:

The term 'Islamic law' is inappropriate because it implies a complete acceptance of the *Fiqh* (jurisprudence) of *Hanafi* Islam. This has never been the case in India, and so one would wish to distinguish between the Islamic law (Shari'a) and the system of personal law peculiar to the Muslims of India and Pakistan..... For these reasons the title Muslim law is adopted in this article.[17]

Clearly, therefore, the context should dictate the appropriate expression. Islamic law or Shari'a would be appropriate in situations where the law is applied as it is, uninfluenced by local conditions, and is of general application in terms of *ratione personae and ratione materiae* jurisdiction; while Muslim law is suitable where the law coexists with other systems of law, is influenced by them, and vice versa, and is of limited application. For this reason it is not duplication when section 29 (3) of the Kano State Shariah Penal Code of 2000, for example, provides that: "*Islamic and Muslim laws* shall be deemed to be statutory laws in all existing laws in the state." The use of the conjunction "and" instead of "or" between Islamic and Muslim laws is not a drafting error, it simply means that Islamic and Muslim law are not used alternatively, but rather as representing different situations, some in which the law applies undiluted and others in which it applies diluted. Pearl's explanation is an apt reflection of the situation in Cameroon where the law coexists with customary, English and French laws by

15 See *A. Hussain,* The Islamic Law of Succession, Riyadh, Darussalam, 2005, 27.

16 London, TA-HA Publishers Ltd., 2009.

17 "Muslim marriages in English Law" [1972A] C. L. J. 120-143, 121.

which it is influenced and vice versa. Hence my choice of the expression "Muslim law", contrary to the known scholars of the law in Cameroon, who employ the term Islamic law;[18] and it would appear that I am not the only persons to have been thus influenced. One of the books I have come across bearing the expression "Muslim law" is Dr. Mahdi's *Muslim Personal Law* and the author echoes Pearl, by saying that the book is intended for countries with a Muslim minority,[19] to be seen soon.

2. The status of the law according to the doctrines of state law

The status of Muslim law in Africa varies from one country or community to another. In some, such as Northern Sudan, Somaliland and parts of Northern Nigeria where its application *per se* has been expressly decreed, it constitutes the fundamental or main law with respect to the matters for which its application is decreed. It is there not applied as customary law no matter how fused it must have become with the latter. Instead it is customary law whose exceptional application is expressly or tacitly authorised.[20]

In others, as in Central and parts of Northern Nigeria and parts of French West and Central Africa,[21] it is applied as the dominant law. Because as a result of the presence of a Muslim majority its treatment as "the native law and custom prevailing in the area of the jurisdiction" of a customary court is justified.[22] Assisted by assessors, Muslim courts exercise jurisdiction over persons still subject to customary law. A third category has been identified in East Africa and parts of the Democratic Republic of Congo[23] where Muslim law is only a particular law, attaching to greater or lesser extent to some group, family or individual.[24] It there constitutes the minority but its adherents are granted certain privileges in regard to its application and administration within their own communities. In the fourth and last category, Muslim law is recognised although its application is ensured by the ordinary courts subject to the rules that govern persons whose personal laws differ from the local customary law.[25] As a secular state[26] all the religions in Cameroon have equal status, and so even though Islam comes second after Christianity, Muslim law has no pride of place and applies only within the third and

18 *Amadou Monkaree*, supra. *Danpullo Rabiatou Hamisu*, "Islamic Law and the Education of the girl child in Cameroon: bringing the right to life", (2000) 4 Annals of the Faculty of law and Political Science, University of Dschang, 155-160, 156-158.

19 Muslim Personal Law, London, TA-HA Publishers Ltd., 2009, 5.

20 See *J.N.D. Anderson*, Islamic Law in Africa, London, Her Majesty's Stationery Office, 1954, pp. 5-6.

21 See *Arthur Philips*, A Survey of African Marriage and Family Life, Oxford University Press, 1953, 233.

22 See *Park*, The sources of Nigerian Law, London, Sweet & Maxwell, 1963, 180.

23 *Phillips*, supra.

24 *Anderson*, supra.

25 Ibid.

26 See Article 1(2) of the 1961 Constitution, and the preamble of the 1972 and 1996 Constitutions.

fourth categories. It is neither a fundamental law on any subject nor the dominant law of any given community, notwithstanding the existence of large Muslim communities in the north of the country and part of the Western Highlands.

In Anglophone Cameroon the interpretation section of the Southern Cameroons High Court Law 1955 states that "native law and custom includes Moslem law." A similar classification obtains in Francophone Cameroon where Colonial Orders of 26th December 1922, and 26th May 1934 distinguished between customary and Muslim law by codifying some of their rules relating to marriage. While the colonial statutes maintained the distinct identity of Muslim law, Law No. 79-4 of 29 June 1979 attaching the Customary and Alkali Courts[27] to the Ministry of Justice is ambiguous. Section 2 reads: "The Customary and Alkali Courts apply customs of the parties which are not contrary to law and public policy." Implying that even the Alkali Courts apply only the custom of the parties or that Muslim law actually constitutes the customs of the parties. This could just be an instance of muddled drafting characteristic in Cameroon. For the fact is that Muslim law maintains its identity in both parts of the country. In *Dame Dada Balkissou,*[28] the Supreme Court appeared to posit that it is not part of the Cameroonian judicial system when it said that "Muslim law is not a Cameroonian institution or a custom." This, we submit must have been purely circumstantial, for the case concerned a Cameroonian and a Sudanese and the court was intent on seeing the customary law prevail, on the ground that the Muslim law on the point in issue[29] was contrary to public policy.[30] This same court had only four years before, recognised Muslim law in *Affaire Saoudatou Marka v. Mohamet Ousmanou*[31] and could not suddenly turn around to deny its existence. The decision of the Court of Appeal was overruled, not because based on Muslim law, but because the lower court failed to state the content of the Muslim law as required by law. Cameroonian Muslims are Sunnis of the Maliki School.[32] Monkaree asserts that "Islamic law is independent, autonomous, sovereign and therefore not subject to any external tests",[33] although there appears to be a consensus amongst scholars, that where there is no derogation from the basic tenets of the law adumbrated in the principal sources,[34] Islamic law could be modified by local circumstances through its secondary sources. Being the results of scholastic adaptations of Quranic or Sunni provisions to the specific circumstances of their time and localities, the secondary sources constitute the agents of the modification or adaptation of the law in the various places where it spread. What obtains as Muslim law in

27 Named after the Judge known as Alkali.

28 Arrêt No. 2/L du 10 Octobre 1985, in Juridis info. No.8, 1991, p.54.

29 This was custody of children after divorce.

30 While Muslim law grants this to the man customary law grants it to the woman.

31 Arrêt No. 18/L du 24 Décembre 1981(unreported.).

32 *C. Anyangwe*, The Cameroonian Judicial, System, Yaoundé, Cameroon, CEPER, 1987, 249.

33 "The place of Islamic law in the Cameroon legal system: A case study of Anglophone Cameroon," (2010) 14 Annals of the Faculty of Law and Political Science, University of Dschang, 43-59, 55.

34 See *Ajijiola*, supra.

Cameroon is thus the adaptation of Quranic and Sunna prescriptions to the customary laws of Saudi Arabia, Syria, Turkey, Egypt, India and Pakistan,[35] and I stand vindicated by the Muslim scholar Dr. Hashim Mahdi, who concludes his account on the evolution of Muslim personal law with the statement:

This is the law we have selected for presentation to all Islamic minorities of non-Muslim states, acting in accordance with the efficiency demanded of us. We have selected this law because its preparation matured for nine years at the hands of eminent scholars and committees, first in Egypt and then in Damascus, and because it has dealt with all that needs to be dealt with in the present day.[36] The possibility cannot, therefore, be excluded that local customary laws would exert some influence and lend colour to Muslim law. In a statement that is true of all Muslim communities in Cameroon, Professor Anyangwe states: "Given the interaction over the years with the local natives and their customs, Islamic law which obtains in the Northern part of Cameroon has become diluted."[37]

3. The application of Muslim law

The immediate effect of affiliating Muslim law to customary law is its administration in virtually the same courts, and subjection to the grounds of exclusion applicable to customary law namely, the repugnancy, public policy doctrines, as spelt out in the statutes governing the application customary law.

3.1. Administration in the same courts

Muslim law in Anglophone Cameroon is administered by the Alkali or Customary Courts depending on the circumstances. The North West Region has a large Muslim population dominated by the nomadic Fulani or Bororo tribe which has necessitated the establishment of Alkali Courts therein, the first of which was established in Ndop, North West Region, by the Alkali of Yola (Nigeria) in 1946.[38] With only a scattering of Muslim converts and immigrants, the South-West Region has no Alkali Courts. Disputes involving Muslims are determined in the ordinary Customary Courts, which, with the assistance of Muslim assessors apply Muslim law as "the law binding between the parties,"[39] as against the predominant law of the locality.[40] Alternatively, the matters are submitted to the local Muslim chief or Ardo in Fulani who attempts conciliation and when this fails transmits the matter to the Chief Alkali for hearing during the "assizes".

35 See *François Anoukaha*, Juridis info. No.8, 1991, pp. 53-59, 56,.

36 Muslim Personal Law, London, TA-HA Publishers Ltd., 2009, 5.

37 Supra, 13.

38 Information provided by Chief Alkali Mallam Muhamadou Bello.

39 Section 18(1) of the Customary Courts Ordinance, 1948.

40 See Alhaji Garuba v. Next of Kin, C/S 29/84-85 (unreported), Limbe Customary Court.

In Francophone Cameroon, Muslim law is administered in the *Tribunaux de Premier Degré* (equivalents of customary courts). Thus, the rule that the courts apply the customs of the parties[41] reduces the law to an insignificant position. Notwithstanding the existence in the North and part of the Western Region, of a dominant Muslim population; since the tendency, very often, is to disregard Muslim law as constituting the personal law of the parties. A case in point is *Gboron Yaccouba & Anemena Suzanne v. Mbombo Asang & Ndam Emile,*[42] a succession case in which the deceased was a Bamoun from Noun Division, one of the communities in Cameroon with a predominant Muslim population. The widow sought for the estate to be distributed in accordance Muslim law which accords women succession rights. This was rejected at the trial level and confirmed at appeal, as the court based its decision on the local customary law rule that *"en coutume Bamoun, la femme n'hérite pas,"*[43] implying that although the deceased was a Muslim, priority is given to his personal law by birth. In one isolated case, probably on grounds of public policy, Muslim law was given priority over customary law. This was in *Affaire Baba Iyayi,*[44] where the Yaoundé Court of Appeal upheld a decision of the *Tribunal de Premier Degré* distributing property in accordance with Muslim law, in which all female children were made to receive half the share of their male counterparts; against the wishes of the eldest son who advocated the application of the Hausa customary law which makes him the sole heir. Like the customary law, the application of Muslim law is limited primarily to matters relating to the personal status, such as marriage, divorce, adoption, filiations, succession[45] and actions for the collection of debts, contract and torts, the amount and damages of which must not exceed sixty-nine thousand CFA Francs.[46] Muslim law is not, therefore, applicable in criminal matters.

3.2. Subjection to the same rules of exclusion

The application of customary law is regulated by the Customary Courts Ordinance Cap 142 of the 1948 Laws of Nigeria, the Southern Cameroons High Court law of 1955, Law No. 79-4 of 29 June 1979 attaching the Customary and Alkali Courts to the Ministry of Justice[47] and French Colonial Decree of 21 July 1927 organising the traditional law jurisdictions. Section 18(1) (a) of the Customary Courts Ordinance Cap 142 of the 1948 Laws of Nigeria provides:

41 Article 51 (1) of the French colonial decree of 21 July 1927 on Judicial Organisation, which provides that traditional law jurisdictions are to administer "exclusively the customs of the parties.".

42 Cour d'Appel de l'Ouest, Bafoussam, Arrêt No.001/C du 23 Octobre 1997 (unreported.).

43 "In Bamoun custom a woman does not inherit.".

44 Arrêt No. 083 of 32 March 2000 (unreported.).

45 See section 16 of the Customary Courts Ordinance Cap 142 of the 1948 Laws of Nigeria see also article 16(c) Judicail Organisation Law No. 89/019 of 29 December 1989.

46 Schedule to section 16 of the Customary Courts Ordinance.

47 Prior to this Law the customary and Alkali courts were under the supervision of the Ministry of Territorial Administration and were therefore not part of the mainstream of courts.

> *Subject to the provisions of this law a customary court shall administer the native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties, such as it is not repugnant to natural justice, equity and good conscience nor incompatible directly or by natural implication with any written law for the time being in force.*

In a similar vein section 27 of the Southern Cameroons High Court Law of 1955 stipulates 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 written 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.*

Both provisions enshrine the requirements of natural justice equity and good conscience. The need for conformity with public policy in Anglophone Cameroon was introduced by Law No. 79-4 of 29 June 1979 attaching the Customary and Alkali Courts to the Ministry of Justice, article 2 of which echoes article 51 (1) of the French colonial decree of 1927, enjoining the courts to apply "the customs of the parties not contrary to law and public policy".

3.2.1. Initial preference for the repugnancy doctrine in Anglophone Cameroon

Since the early 1960 s courts in Francophone Cameroon had on the basis of the *ordre public* (Public policy) relied on the constitution which enshrines basic fundamental rights to establish the doctrine of *coutumes évolués*[48] to exclude abhorrent rules of customary law. On the contrary their counterparts in Anglophone Cameroon are only recently realising the importance of public policy, the initial tendency having been to invoke the repugnancy doctrine for which a precise definition has remained elusive. This difficulty was admitted by acting Chief Justice Speed in *Lewis v. Bankole*, where he described the phrase as "high sounding", for which "it would not be easy to offer a strict and accurate definition."[49] It was conceded, however, that the terms could be separated and construed individually to see if a rule of custom is repugnant to any of them. Equity was thus taken in its technical meaning to hold that "rules of equity are or ought to be known to this Court, and if a native law or custom is found to be repugnant to the fundamental rules of equity it is absolutely the duty of the Court to ignore it." However, while this approach is possible for equity to which a restricted meaning can be ascribed, the same is not true for "natural justice" and "good conscience", which like equity in its broad

48 Supreme Court, arrêt No. 15/C du 22 Janvier, 1963, Bull. No. 8, 572. « Attendu que le caractère essentiel de la coutume est d'être évolutive; que dans le domaine qui lui est réservé par le législateur, elle est élaborée, décidée, et mis en oeuvre par les organes institutionelles du groupe social qu'elle concerne, et anisi se développe, se modifie et se' renouvelle d'une manière autonome et par ses propres voies en vue de son adaptation continue aux conditions et aux exigences nouvelles de la vie sociale.».

49 (1908) 1 N.L.R. 81, 83.

meaning are incapable of definition. Hence the second and obviously reasonable approach will be to construe the phrase as one whole. Here "equity" in its general meaning takes the same significance as "natural justice" and "good conscience", and this might lead to the question whether the additional words are not superfluous[50] or simply hyperbolic. This approach is, however, beset by divergences on the appropriate standard of justice to be followed by the courts. For what may be deemed contrary to natural justice equity and good conscience in one community might not necessarily be so in another. The choice is between the English, African or some neutral standard of justice. But the discretion which the judge enjoys in the matter is highly qualified. Going by the words of Lord Mansfield, "Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague or fanciful; but legal and regular."[51] This strict requirement would be met by section 27 (4) of the Southern Cameroons High Court Law 1955, which provides: "Where no express rules are applicable to the matter in controversy, the courts shall be governed by the principles of justice, equity and good conscience".

English law having evolved a standard of justice based on equity is considered the best example to follow.[52] It was invoked in *David Tchakokam v. Keou Magdaleine*[53] to invalidate a levirate marriage. It provides for uniformity as any other standards could throw open the floodgates, giving room to standards tailored on the basis of communities. Advocates of an African standard argue that a rule of custom that has been observed for many years should not suddenly become unenforceable on grounds of repugnancy. The application of the test should take cognisance of the values of the people to whom the rule is applicable. A judge confronted with the question of the repugnancy of a rule of customary law should first consider the essential philosophy behind that rule before pronouncing on it.[54] In the Southern Rhodesian (Zimbabwe) case of *Tabitha Chiduku v. Chidano*[55] Tredgold J, held: "Native customs should not be interfered with unless they impress us with some abhorrence or are obviously immoral in their incidence."

Another school of thought advocates a completely neutral standard. Park proposes a standard based on "some less specific factor, which is not derived from any legal or social system, but rather from general notions of what is just and proper."[56] Woodman thinks that, "if the repugnancy clause was to have any effect, the standard was to be external…. ideally it should be an absolute universal standard".[57] Such a standard, we think derives from natural law and

50 *W.C. Daniels Ekow*, The Common Law in West Africa, London, Butterworth, 1964, pp.268-271.

51 R v. Wilkes (1770) 4 Burr. 2527, 253.

52 See *Allott*, Essays in African Law, p. 200.

53 (1999) G.L.R, p. 111 (Gender Law Report).

54 See *Benjamin N. Cardozo*, The growth of the Law, London, Humphrey Milford, 1934, p.62.

55 (1922) S.R.L.R. 55.

56 *A. E. W. Park*, Supra.

57 "How State Courts Create Customary Law in Ghana and Nigeria", Bradford W. Morse and G.R. Woodman,(eds), Indigenous Law and the State, Foris Publications Dordrech-Holland/Providence RI-USA, 1988, p.181-215,193.

does not assume the colouring of any particular, legal system, political organisation, tribe or religion. In the absence of a generally accepted standard of repugnancy the courts cannot but vacillate between the different standards, so that what is repugnant to natural justice, equity and good conscience tends to be subjective and liable be vary with the length of the Judge's foot. Since such factors as gender, cultural background, education, religion and the Judge's conception of morality tend to influence his or her judgment.

The first judgment awarding property to a divorced wife in this part of the country was by a woman, Justice Frida Arrey in *Alice Fodje v. Ndansi Kette,*[58] a case in which the Customary Court issued a decree of divorce without reference to the property adjustments since the rule in customary law was that "a woman cannot own property."[59] But on appeal she ruled that of the three houses owned by the man, the woman was to occupy one of them and collect rents from a second. This judgement was roundly criticised by Professor Ngwafor[60] (male) who argued that she erred in law by granting property to a woman against customary law, and even English law. Relying on the long abandoned principle of English law stated in *Pettitt v. Pettitt*[61] that English law knows of community property; and maintaining that the judge would, like Epuli J. (male) in *BodyLawson v BodyLawson,*[62] have upheld the English position. The high mark of gender bias which even borders on the absurd was in *Ndumu v. Ndumu (No. 2.)*[63] An American woman and a Cameroonian contracted a marriage in the United States of America before coming to settle in Cameroon. Matrimonial problems soon caused the woman to sue for divorce, which was granted in application of English law. But when it came to property adjustments Justice Inglis (male) invoked section 27 of the Southern Cameroons High Court Law 1955 to apply customary law, implying thereby that the woman remained the husband's property, and that it would be repugnant to natural justice, equity and good conscience to hold otherwise.[64]

3.2.2. Repugnancy and public policy employed interchangeably

The second tendency in Anglophone Cameroon consists in treating the repugnancy and public policy doctrines as synonyms, apparently because their primary objective is to ensure that justice is done to the parties, on the basis of the principles of equity or natural justice. Professor Anyangwe writes: "The repugnancy test is synonymous with public policy. If a rule of customary law is repugnant to natural justice, equity and good conscience then it necessarily

58 Appeal No. BCA/45/1986 (unreported).

59 See *E. Ngwafor*, Family Law in Anglophone Cameroon, University of Regina Press, Sascatchewan, Canada, 1993,205.

60 Ibid, 208.

61 [1969] 2 All E. R. 385, H.L.

62 Suit No. HCF/128MC/86 (unreported).

63 Suit No. HCB/97MC/86 (unreported).

64 This case raises the question of change of personal law which is not within the scope of this article.

offends against public policy."[65] Similarly, Professor Enonchong is of the view that that: "The term 'public policy'… adds nothing to the common law requirements of 'natural justice, equity and good conscience."[66] On the same strand of reasoning, the Judge in *David Tchakokam v. Keou Magdaleine*[67] after invoking the repugnancy doctrine to invalidate a levirate marriage, proceeded to justify her position as follows:

> *[E]ven in French speaking Cameroon where both plaintiff and defendant come from it is settled law that any customary law which is contrary to the notion of 'ordre publique' or 'bonnes moeurs et ordre publique [public policy]' should not be applied.*[68]

We humbly submit that it is wrong to treat the concepts as synonyms, for a rule of customary law might pass the repugnancy but not necessarily the public policy test. There is at least an accepted definition for public policy proffered by Sir Percy Winfield, to whom "[Public policy] is a principle of judicial legislation or interpretation founded on the current needs of the community."[69] The significance of which is that legal rules are built upon certain implicit moral and social assumptions which cannot be readily or precisely formulated in advance and which may change fundamentally from time to time.[70] Public policy thus encapsulates the values which the legal system is designed to serve and according to Lord Macclesfield in *Mitchell v. Reynolds,*[71] a rule is against public policy if it is "a general mischief to the public." Public policy looks at the position of government with respect to the rule in question, as ascertained from legislative enactments and in default, whenever considerations of the public interest so desire.[72] Public policy therefore eschews the weaknesses of the repugnancy doctrine. Its public interest goal distinguishes it from the repugnancy doctrine, the standard of which is mainly subjective. The point was made by Lord Atkin in *Fender v. St John Mildmay* that public policy "should be invoked in clear cases in which harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds."[73] Of course, public policy was at one time described by Justice Burrough in *Richardson v. Mellish,* as an "unruly horse," which "when once you get astride it you never know where it will carry you" [74] thus casting doubts on its efficacy to produce desired results. But

65 The Cameroonian Judicial System, supra, 243.

66 "Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon" (1993) 5 R.A.D.I.C. 503-524, 505.

67 [1999] Gender Law Report, 111, 117.

68 Per Justice Mrs Ngassa.

69 In "Public Policy in English Common Law" (1928) 42 H.L.R., 76-101, 92.

70 *John Bell*, "Conceptions of Public Policy", in Cane, Peter and Stapleton, Jane (ed) Essays for Patrick Atiyah, Oxford, Clarendon Press, 1991. p.90.

71 *W.S.M Knight*, "Public Policy in English Law" (1922) L.Q.R., pp.207-219, 208.

72 Ibid, 212.

73 [1938] A.C. 1, 12.

74 (1824), 2 Bing, 229, 242-243.

the negative impact of this metaphor has since been diminished. Winfield extolled the potential virtue of public policy when he said:

> *"Some judges appear to have thought it more like a tiger, and have refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it as Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day has looked upon it as Pegasus that might soar beyond the momentary needs of the community."* [75]

In *Enderby Town Football Club v. Football Association Ltd*. Lord Denning intimated that with "a good man in the saddle"[76] even an "unruly horse" would be steered in the right path. Professor Enonchong is equally optimistic about the ability of public policy to remould Cameroonian customary law (Muslim law) when he writes:

> *"[Public policy] is not such a terrifying animal near which Anglophone judges may not approach. It is an animal which when guided correctly can pull down obsolete and unjust barriers and open the way to equality, freedom and justice based on equity and good conscience."* [77]

3.2.3. Public policy comes to life in Anglophone Cameroon

If the tendency in Anglophone has been to invoke the repugnancy doctrine, the subjectivity of its standard of which resulted in decisions considering women as property, the situation has evolved considerably in favour of public policy. In *Fomara Regina Akwa v. Fomara Henry Nche*[78] the court relied on Article 1 of the Universal Declaration of Human Rights which states that: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood', to jettison arguments that because a woman is property she has no property rights. The Preamble to the Cameroonian constitution which has the force of law enshrines the same ideal and thus makes gender equality a matter of public policy. In *the Estate of Bessingi Munyelle Christopher Ben,* Justice Ayah Paul invoked public policy directly. He said:

> *"...It is public policy currently worldwide, to grant equal rights to women. It follows that...any custom seeking to make of the widow part of the estate to be inherited would be nullified by the high court for being contrary to public policy. That, I think is the meaning of the preamble of our constitution."* [79]

75 Supra, 91.

76 [1971] Ch. 591, 606.

77 Supra, 524.

78 CCLR, Part 9, 32-39, (Cameroon Common Law Reports.).

79 Also known as Mrs Bessingi nee Eté Joan Itie v. James Malonga Bessingi (1996) Suit No. AP/1/93 (unreported).

Certainly every rule of law is a matter of public interest, for it is of general application, permanent, and not merely transient. Now it may be difficult to see how a law believed to be divine could be said to be repugnant on any of these grounds. But if we consider that Islamic law originates from the customary law of Saudi Arabia and had as objective to purge the latter of some aspects deemed to have been repugnant, it cannot be assumed that the law is without blemish[80] just because of its divine origin. Further, the religious origin of the law might require enshrining certain principles intended to uphold moral values,[81] but which may be at variance with public policy or the law; if not with natural justice, equity and good conscience, which as we noted, varies with the judge's foot.

4. Muslim personal law in conflict with other systems of personal law

Personal law is acquired by birth, descent, or naturalisation irrespective of whether it is modern or customary law. Pierre Bourel, cited with approval by Djuidje writes: "a person's attachment to a country by nationality prolongs in international conflict to attachment by the tribal community in internal law".[82] So, while the nation imparts its laws on the citizens and are applicable in case of conflict with laws of other nations, so too do tribal communities impart their laws on their members which become applicable in the case of conflict with the laws of other tribal communities. It is based on the conception of man as a social being, so that those transactions of his daily life which affect him personally, such as marriage, divorce, legitimacy, many kinds of capacity and succession may be governed universally by the law deemed most suitable and adequate for the purpose.[83] It is necessary to begin this section by considering when Muslim law becomes the personal law of a person professing the Islamic faith before proceeding to examine the rules of conflict.

4.1. When Muslim law becomes the personal law of Muslims

Given its close to 250 ethnic groups Cameroon abounds in personal laws. Every ethnic group is governed by its own personal law and because Islam and Muslim law go together, the followers of that faith also have Muslim law as their personal law. However, given that Islam is not indigenous to Cameroon and that every adherent of that faith today can have his or her roots traced from a local ethnic group, it becomes necessary to determine when Muslim law

80 The rule in succession that a male child obtains twice the portion of a female might put Muslim law ahead of customary law, but is against the notion of gender equality. Similarly, the rule that a testator is not to dispose of more than one-third of his estate is against the concept of testamentary freedom and was vehemently rejected by Justice Mbuagbaw in the Estate of Baba Nya. (See pp 25-26 of this article).

81 For example the position of the law towards illegitimate children and adoption.

82 Ordre Juridique Pluralist et Droit International Privé : Le Cas du Cameroun, Doctoral thesis, Université Paris X – Nanterre, 1997, 107.

83 See *P-F Gonidec*, Les Droits Africaines, Paris, Librairie Générale de Droit et de Jurisprudence, 1976, 266-270; Generally *G.W. Bartholomew*, «Private Interpersonal Law » [1952]1 I & CLJ, 325-344.

could be deemed to have become their personal laws, and applicable in litigation concerning them. A person could be Muslim by origin or by conversion. He or she must subscribe to the basic tenets of Islam, namely, the acceptance of the unity of the unity of God and of Muhammad as the Prophet of God. A person will be a Muslim by origin about whom it is not shown that he is a convert to Islam from any other religion or custom.[84] If a person is born of Muslim parents, he will be treated as a Muslim, and it is not necessary to establish that he or she observes any rites or ceremonies, such as the performance of five prayers or that he is an orthodox believer in Islam. Such a person will continue to be a Muslim and be subject to the law until he renounces Islam, by contracting a monogamous marriage or leaving a will in English or French form. Aditionally, in Francophone Cameroon, a Muslim could reject Muslim law by declining the jurisdiction of the *tribunal de premier degré*, in reliance on the *option de juridiction* principle. To this effect article 2 of Decree No.69/DF/544 of 19 December 1969 governing traditional law jurisdictions in that part of the country, stipulates: *"La compétence de ces juridictions est subordonnée à l'acceptation de toutes les parties en cause… la juridiction de droit moderne devient compétente dans le cas où l'une des partie décline la compétence d'une juridiction de droit traditionnel.»*[85]

Conversion could be through a ceremony in a mosque in which the person has to accept the principle of the unity of God, and of Muhammad as the Prophet of God. It could also be by a mere declaration or profession of the faith,[86] through a ceremony culminating in the convert taking a Muslim name. Whatever form conversion takes, the rule is that mere conversion does not automatically change a person's personal law.[87] For conversion to have that effect it must be shown that the convert intended Muslim law as his personal law. This would be established from the state of his knowledge at the time of conversion. If after being informed of the possible consequences of the act with respect to his property after death he still goes ahead with the conversion, then the personal law changes. In India, as an indication that the convert was duly informed, he is expected to sign a declaration that he desires to be governed by Muslim law. Many Cameroonians converted to the Muslim faith at a certain period in the history of the country. The pace has slowed down because of the change at the helm of the state, but what is clear is that conversion is always motivated by some advantage expected by the convert. Christian Cardinal Tumi writes of a certain Jean Akassou, a Protestant Christian who did not even take a Muslim name after conversion. When asked by the prelate why he converted to the Muslim faith, his response was that his protestant brothers and sisters accused

84 *Paras Diwan*, "Who is a Muslim" (1978) Indian Socio-Legal journal, Vol. IV, No.1, 75-85, 76.

85 "The competence of these jurisdiction is subject to acceptance by all the parties in dispute … the jurisdiction of modern law becomes competent in the case where one of the parties declines the competence of a traditional law jurisdiction".

86 This point was made by *Lord Macnaughten* in the Indian case of Barolo Razes v. Aga Mohamed. (1893) 21, I. 56 at 64. .

87 See *I. O. Agbede*, "Application of Islamic Law in Nigeria: A Reflection", (1971) 5 The Nigerian Law Journal, pp.119-128, 121.

him of having killed their pastor, an American and his wife over a piece of land.[88] There was the impression at the time that a Muslim could commit any crime and go unpunished. When such persons die the general trend is in favour of the personal law by birth. It may therefore, as in India, require some overt declaration for Muslim law to become the personal law of persons who undergo conversion.

Conversion to the Muslim faith will also occur when a non-Muslim goes through a marriage ceremony with a Muslim. Like other customary law marriages, such marriages must be recorded in the Civil Status Registers in their area of celebration, in accordance with section 81(1) of the Civil Status Registration Ordinance 1981, which provides that "Customary marriages shall be recorded in the civil status registers of the place of birth or residence of one of the spouses." The exercise only provides official evidence for the marriage and does not affect its validity. A Muslim marriage will certainly be recorded as polygamy in the space provided in the marriage certificate for the form of marriage chosen by the spouses, since the Ordinance only recognises monogamy and polygamy;[89] and Muslim law being affiliated to customary law, a marriage under it can not, but be polygamous. Obviously the word polygamy alone will not suffice to show that it is a Muslim marriage. Some additional thing needs to be done to bring out the fact. The marriage certificate makes no provision for this but a practice has been evolved whereby the spouses in polygamous marriages fill the space reserved for the system of property rights with the words "according to the native law and customs" of the man's tribe. Muslim spouses could in that space write the words "according to Muslim law," which would be understood to mean that they intended a Muslim marriage. *A fortiori*, the tendency is to construe even monogamous marriages followed by similar words as customary or polygamous marriages. In *Tufon v. Tufon*[90] the form of marriage was "monogamy" and the system of property rights was said to be "according to the native laws and customs of the Kom people." Asu, J, held that "The inference is that what the parties stated as the marriage, i.e. Native Laws and Customs of Kom people was what they intended. The insertion of the word 'monogamy' is therefore absurd."[91] If sacrosanct monogamy could be that easily discarded in favour of polygamy, on the basis of the insertions, then polygamy too could, without much ado, equally cede way to Muslim marriage on the basis of the suggested insertion.

4.2. Resolving conflicts between Muslim personal law and the other systems of personal law

At the trial level in Anglophone Cameroon decisions are liable to vary depending on whether the matter is determined in the Alkali or the customary courts. The customary courts would,

88 The political regimes of Ahmadou Ahidjo and Paul Biya and Christian Tumi, priest, supra, 17-20.

89 See section 49 of the Civil Status Registration Ordinance, 1981.

90 Suit No. HCB/59/MC/83. See also Kumbongsi v. Kumbongsi, Suit No. C.A.S.W.P/ 4/84, ibid; Lyonga v. Lyonga, Suit No. C.A.S.W.P/CC/5/94 (Unreported.).

91 It must be said that there is controversy about this position, but which is not relevant here since a Muslim marriage is *de jure* polygamous.

on the basis of the decision of West African Court of Appeal in the Ghanaian case of *Ghamson v. Wobill*,[92] be expected to apply Muslim law as the personal of the deceased and therefore the "law binding between the parties".

Instinctively the tendency, as was the case in *Alhaji Garuba v. Next-of-kin,*[93] would be for the customary courts to opt for the application of customary law. If on the other hand, the matter is tried by an Alkali court, the tendency is generally for Muslim law to be applied.[94] In *Ndjobdi v. Gabilla*,[95] the Ndop Alkali court was faced with a dispute involving a Muslim and a non-Muslim over the estate of deceased Muslim. Muslim law was held to be applicable on the grounds that the "plaintiff is a Muslim by faith and tradition while the defendant is a non-Muslim" and "the properties claimed are the properties of a Muslim." In Francophone Cameroon, conflict between Muslim and customary law would most certainly be resolved in favour of the latter, on the ground that Muslim law is not indigenous to Cameroon and that Cameroon being a secular state should not permit court decisions to be based on religious beliefs.[96] However, this is only as far as it will not be contrary to public policy to apply the rule of customary law with which Muslim law is in conflict. In *Affaire Baba Iyayi,*[97] the Yaoundé court of Appeal upheld a decision of the Tribunal de Premier Degré which had distributed the property in accordance with Muslim law, against the contention of the eldest son that the Hausa customary law should be applied to make him sole beneficiary and successor.

Conflicts between Muslim law and the received laws will be governed by the same rules as apply in conflict between customary and the received laws. It means that in Anglophone Cameroon, Muslim law will be excluded if the deceased contracted a Christian marriage. Of course, it will be apostasy on the part of the Muslim but it could occur in circumstances similar to *Asiata v. Goncallo*[98] where the parties who were both Muslims went through a Christian marriage in Brazil, in conformity with the laws of the country. When this happens, the question of the applicable law will have to be resolved by reference to the rules in *Cole v. Cole*[99] and *Asiata v. Goncallo.*[100] These are landmark cases in the resolution of conflict between English and customary law. The former established the "inherent incident" rule according to which English law follows inexorably upon the celebration of a Christian marriage. The same was

92 (1947)12 W.A.C.A.181.

93 Limbe Customary Court, Civil Suit No.29/84-85.

94 *J.O. Ijaodola*, "The proper Place of Islamic Law in Nigeria", (1969) 3 The Nigerian Law Journal, pp.129-140, 131.

95 Civil Suit No. 3/2002-2003.

96 See the unanimous decision of the Supreme Court in Dame Dada Balkissou v. Abdoul Karim Mohamed, Arrêt No. 2/L du 10 Octobre 1985, discussed earlier.

97 Arrêt No. 083 of 32 March 2000.

98 (1900) N.L.R. 41.

99 (1898) 1N.L.R. 15.

100 (1900) N.L.R. 41.

adopted by Epuli, J in *Nforba Aloysius & Bougnisiri Elizabeth v. Nchari Mary Kinyuy*,[101] although without reference to Cole's case. The latter established the "manner of life" rule which reduces *Cole v. Cole* to a mere presumption by maintaining that customary law remains applicable in the absence of a contrary intention. The position in Francophone is based on a 1929 decision of the French *Cour de Cassation* according to which the spouse of local status "by appearing before the civil status registrar had submitted himself to French law," and that "the union pronounced in the name of French law entails necessarily all the consequences that the common law.[102] This was followed in *affair Kouoh,*[103] the first case on the point to have come before the Supreme Court of East Cameroon (Francophone Cameroon).

5. Conclusion

Like many other countries in the world Cameroon is recipient of Muslim law, for having found itself on the path of the Islamic Jihads or Holy wars aimed at a worldwide spread of the religion. Clearly, therefore, Muslim law is part of Cameroon's legal system; its affiliation to customary law by no means diminishes its importance as a source of law.

It is subject to the repugnancy and public policy doctrines although it would be easier to exclude a rule on the basis of the latter than the former. It will be difficult, if not impossible for a Muslim to accept that any tenet of the law is repugnant to natural justice, equity or good conscience, whereas it might be contrary to public policy, the criteria of which is not limited to the appreciation of the judge, but rather, to the position of government on the issue embodied in the rule in question. The subjection of customary law to the repugnancy and public policy doctrines has not affected it negatively as a source of law; neither has Muslim law been thus affected. Rather, the requirements make both systems of law to be a true reflection of the changing times, "a mirror of accepted usage."[104]

It is clear that Muslim law does not automatically become the personal law of Muslim converts even though the general impression is that it does. The rules of conflict are fairly balanced. Muslim law is given the same chances as customary law when in conflict with any of the received laws; and when the conflict is with customary law, much will depend on the court in which the matter is tried initially.

It would be legitimate at this point to ponder on the future of the law in the country. Not only is there a lamentable dearth of literature, the only effort in the area made by Professor Mrs. Hamisu Rabiatou Danpulo,[105] tends to talk more of the substantive laws of fundamental

101 1999 G. L. R. 59.

102 When French law uses the term common law it is not in the same sense as English law. Rather it means it means the law which is applicable to every person, for even in France there were local customs limited in their application but the civil code was applicable to all persons.

103 Affaire Kouoh, C.S.C.O., Arrêt No. 29 du 23 Avril, 1963, Bull. P.293 (Cours Suprême Cameroun Orientale).

104 Owotoyin v. Onotosho (1961)1 All N.L.R. 304, 309, per Bairamian F.J..

105 "Women, Property and Inheritance – The Case of Cameroon", (2005) 2 Recht in Afrika, 143-161.

Muslim countries like Saudi Arabia which have nothing in common with Cameroon, and where Islamic and not Muslim law applies. Recently, Professor Amadou Monkaree published an article on the place of Islamic law in the country. But not only is the article limited to Anglophone Cameroon, he focuses on justifying why Muslim law should not be equated to customary law,[106] rather than elucidate rules of substantive law which would foster and entrench the law in the Cameroonian legal system. A decision such as the Supreme Court's in the *Dada Balkissou* case that for not being indigenous to Cameroon, Muslim law should not be the basis for any court decision could be a harbinger for tougher times to come. We have attempted our own interpretation of the ruling[107] which might not, of course, be acceptable to all; since great legal minds in the country, like Professor Françoise Anoukaha defend the position of the Supreme Court.[108] The Cameroonian Family Code is apparently still in gestation and for having had the privilege to conduct an in-depth study of its initial draft submitted to parliament,[109] this writer noticed that Muslim law has been ignored. Of course the draft purports to harmonise certain aspects of customary law but it must not be forgotten that Muslim law is only affiliated and not assimilated to customary law. Or is it the osmosis effect? But this is not the situation under the Senegalese Family Code by which ours is said to have been inspired; where, even though a secular state like Cameroon, seventy-two articles (572 to 644) are consecrated to succession in Muslim law, not to mention other areas of the personal law.

106 "The place of Islamic law in the Cameroon legal system: A case study of Anglophone Cameroon," supra, 43-59.

107 See 2.3 (supra.).

108 Commentary on Affaire Dame Dada Balkissou v. Abdoul Karim Mohamed, Cour Supreme, Arrêt No. 2/L du 10 Octobre 1985, in Juridis info. No.8, 1991, pp. 53-59, 56,.

109 See *Joseph Nzalie Ebi*, "The Structure of succession Law in Cameroon: Finding a balance between the needs and interests of different family members," Ph.D thesis, University of Birmingham-Uk, 2009.