

# The condition of foreigners in the family law of Cameroon

Senior lecturer **Valeri Lesmont BAHOKEN**<sup>1</sup>

## **Abstract**

*The preamble of the constitution of Cameroon enshrines the principle of assimilation of foreigners into nationals through the Family law. However in concrete terms, this constitutional provision is undermined (limited, hindered) by a number of political and sociological constraints. The foreigner faces limitations in enjoying the said rights as well as in creating them. It is therefore necessary to amend the Cameroonian legislation so that it complies fully with the exigencies (requirements, needs) of fundamental rights, the construction of the universal human being (man in general), who will be governed by the same rules everywhere.*

**Keywords:** *foreigner; national; constitution; infra-constitutional norms; public order; enjoyment of rights; creation of rights.*

**JEL Classification:** K36

## **1. Introduction**

Generally, it should be recalled that there are three methods through which governments regulate international private relations: the first consists in applying directly to the contentious situation irrespective of the existing foreign element, substantial or material rules of the domestic law; the second, to be designed besides the domestic law is a substantive law 'specially fitted to situations having the same foreign element affecting them' and the third, the classic confrontational method<sup>2</sup>. In view of regulating the status of foreigners, Cameroon like most of the countries chose the first method the status of foreigners depends on a material and national rule unilaterally adopted by the legislator.<sup>3</sup>

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<sup>1</sup> Valeri Lesmont Bahoken, Faculty of Law and Political Science, University of Douala, Cameroon, lesmontv@yahoo.fr .

<sup>2</sup> Boye A. K., 'Le statut personnel dans le droit des pays africains', RCADI, 1993,1, pp. 251-419, spec. p.290.

<sup>3</sup> The following texts regulate the status of foreigners in Cameroon:

- Law n°97/012 of 10 January 1997 relative to the conditions for foreigners to enter, stay and leave Cameroon;
- Law n°2005/006 on the status of refugees in Cameroon dated from 27 July 2005 ;
- Law n°2007/001 of 19 April 2007 appointing the judge of legal department to carry out and set in Cameroon terms of action, legal decisions and foreign public actions as well as foreign arbitration of sentences.
- Decree n°2007/255/PM of 4 September 2007 fixing detailed rules for the application of the law n°97/01 of 10 January 1997 relative to the conditions for foreigners to enter, stay and leave Cameroon.
- Decree n°2008/052 of 30 January 2008 amending and completing some provisions of decree n°2007/255 of 4 September 2007 fixing detailed rules for the application of the law n°97/012 of 10 January 1997 relative to the conditions for foreigners to enter, stay and leave Cameroon;
- Decree n°2011/389 of 28 November 2011 on the Organization and Functioning of the Management Body of the Status of Refugees in Cameroon.

Yet, as Professor Bernard Audit pointed out, ‘a well organised international society should enact the status of foreigners applicable in all countries, without prejudice of a more favourable arrangement by agreement, or even by voluntary concession of the host country’<sup>4</sup>. But, looking at it on one hand, the rise of nationalism is greatly due to migratory phenomena and on the other hand, regarding economic considerations, we can assert without doubt that concerning this matter, we are not drawing close to a universal agreement.

According to Article 2 of law n°97/012 of 10 January 1997 in relation to the entry, sojourn and exit conditions for foreigners in Cameroon, ‘...a foreigner is anyone:

- without a Cameroonian nationality;
- with a foreign nationality;
- Or, with no nationality’

In Cameroon law, a foreigner is that individual with a foreign nationality or still, without any nationality. Nationality, it should be recalled, ‘is the political and legal link that unites individuals to a state that constitutes the national community and gives to the subjects the status of being members of the state’<sup>5</sup>. Finally, two categories of people are concerned with the status of foreigners in Cameroon: holders of foreign passports and stateless persons.

It is generally admitted that whatever be the societal forms, the foreigner is always treated differently from the national. Foreigners do not enjoy the same rights as the nationals, and are not assigned either to the same task<sup>6</sup>. Cheikh Anta Diop demonstrated in his book, *L’Afrique noire précoloniale*, that this distinction in treatment dates back from the ancient city. Indeed, it reads thus that, ‘patriotism, so characteristic of ancient Rome and Greece, is understandable because the society had not made provisions for foreigners who, because of this was the n°1 enemy, without rights, who could have been killed with impunity, whose look only, soiled liturgical objects’<sup>7</sup>. The foreigner, culturally different from the national, is seen as an enigma and so making it sometimes difficult to predict their behaviour. In modern societies, this feeling of strangeness grew with security constraints in spite of the influence of fundamental rights.<sup>8</sup>

Beyond these considerations, the status of foreigners today meets a ‘minimum standard’; for, as the International Court of Justice pointed out in the Barcelona Traction, Light and Power Company Limited Case, ‘from the time a State admits on its territory (...) foreign nationals, (...) it has the duty to grant them the protection of the law and assume certain obligations as to their treatment’.<sup>9</sup>

<sup>4</sup> Audit B., *Droit international privé*, Paris, 6<sup>th</sup> ed., Economica 2010, n°1048, p. 884.

<sup>5</sup> Loussouarn Y. et Bourel P., *Droit international privé*, 2<sup>nd</sup> éd., Dalloz, 1980, n°704, P. 788.

<sup>6</sup> About the historic background of the status of foreigners, read for example, Loussouarn Y. and Bourel P., *op. cit.*, p.754 and s.

<sup>7</sup> Cheikh Anta Diop, *L’Afrique noire précoloniale*, Présence Africaine, Second ed., 1987, p. 26.

<sup>8</sup> *Ibid.*, n°1049.

<sup>9</sup> Order, C.I.J. Rec. 1970, p.3; On the protection of the foreigners’ properties, v. CPJI avis n°7, prec. Bindschedler, *La protection de la propriété privée en droit international public*, RCADI, 1956, 1.173; Petré, *La confiscation des bien étrangers et les réclamations internationales auxquelles elle peut donner lieu*, RCADI, 1963, 11. 847.

Based on family law, one can question the impact of the Cameroon Government's obligations towards foreigners in this domain; in other words, do we witness a complete assimilation of a foreigner into a national in Cameroon?

According to the law of Cameroon, the question may seem complicated in the absence of a clear definition of the concept *family*. Generally, African legal institutions seem to be noted for their silence about the concept of family. Though 'what we might hear as silence, are in reality caused by ambiguities and misunderstandings arising from real false evidences'<sup>10</sup>. This complexity might as well be emphasized in the mixed legal systems, this is what Francescakis highlights in '*le droit de la diversité du droit*' like in the case of Cameroon.<sup>11</sup>

As a matter of fact, looking at these systems, the definition of the concept of family vacillates between two concepts: 'the extended family' and 'the nuclear family'<sup>12</sup>. However, without splitting hairs, we must admit that the most complete definition, which is closest to African traditions, and that will guide our study is given by Article 2 in the draft project of the Cameroon Code on people and the family: 'the family is a group of persons of common ancestry or united by marriage or filiation'. Marriage, according to the aforementioned code is the union between a man and a woman.<sup>13</sup>

The world has become a global village. Nowadays, no corporate population in a State can be restricted and completely self-sufficient in her territory<sup>14</sup>, men establish family relations across borders, reunite and migrate within the country etc. On the different family relations, particularly in the case of Cameroon, be it within or requiring an alien status, the effects of fundamental rights are felt, for according to article 16 section 3 of the Universal Declarations of Human Rights, 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.'

As Professor Alain-Didier Olinga emphasised in Africa, 'the family has to socialise, instil communitarian values (...) generally having a sacred dimension and a religious foundation, the family carries a moralising mystery. It contributes to the world social stability and the internal stability of the individual'<sup>15</sup>, anything that accounts for its exaltation in the African states. Concerning these rights, especially in Cameroon, in the absence of a universal agreement on family law it is important to verify the state grants protection to foreigners. Actually, looking at the existing law in Cameroon, one can notice that, in one of the fundamental rights, there is a

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<sup>10</sup> Olinga A-D., *La famille en droit international africain des droits de l'homme* in, *Les défis des droits fondamentaux*, Actes des deuxiemes journées scientifiques du Réseau *Droits fondamentaux* de l'Agence Universitaire de la Francophonie tenues a Québec du 29 septembre au 2 octobre 1999, Bruylant /AUF,2000,p153 and s., spec., p.155.

<sup>11</sup> Francescakis, *Droit international prive de l'Afrique noire*, RCADI,1961,II, p. 281.

<sup>12</sup> The debate seems not to be important because as written by OLINGA A-D., (*Op.cit.*, p. 155), *African charters seem to recognize the family institution, no matter its state: nuclear family, extended family, legitimate family, biological family, adopted family etc.*

<sup>13</sup> See Article 271 and s.

<sup>14</sup> Audit B., *Droit international privé*, *Op. cit.*, n°7, p. 4.

<sup>15</sup> Olinga A-D., *La famille en droit international africain des droits de l'homme*, *Op. cit.*, p. 162.

principle of assimilation of foreigners into nationals (2), but however a large number of limitations impede the implementation of this principle (3).

## 2. The principle governing the assimilation of foreigners into nationals in the Cameroon family law

In Cameroon, the family is perceived as ‘one of the main pillars of social order’<sup>16</sup>. It is therefore a basic element in the social order of the country. The recognition of assimilation of foreigners into nationals within the family is drawn from the Cameroon constitution (2.1.) passed on by the infra-constitutional norms dedicated specifically to the status of foreigners (2.2.).

### 2.1. *The constitutional foundations regulating the assimilation of foreigners to nationals in family law*

Constitutions in general are the fundamental norms aimed at organising the political and legal affairs of states, governing the devolution, the implementation as well as the restriction of power within them. A Constitution is therefore the supreme standard in the legal structure of a country; that is to say, the positive standard which regulates the creation of the entire legal rule<sup>17</sup>. Thus, ‘everything depends on the constitution, in accordance with an authorisation, capacitation and conformity dialectics’<sup>18</sup>. Yet, it is henceforth assumed that, ‘it is an element of modernity for a State to take into consideration the international law into her constitution’<sup>19</sup>; the Cameroon constitution now consecrates the principles of the International law of human rights, while giving them some credit.

#### 2.1.1. *The constitutional declaration of the principles of the international law of human rights*

The preamble of law n°96/06 of 18 January 1996 on the revision of the constitution specifies that: ‘the people of Cameroon certifies her commitment to the fundamental freedom inscribed in the Universal Declaration of Human Rights, the United Nations Charter, the African Charter of Human Rights and of the people and of all international conventions related and duly ratified...’. The aforementioned preamble continues thus: ‘The nation protects and encourages the family, the natural base of the human society’.

The Cameroon constitution applies the principles of the United Nations Charter, the Universal Declaration of Human Rights (UDHR), the African Charter

<sup>16</sup> Bokongou J.B., *La vie familiale comme lieu d'exercice des droits fondamentaux : lecture des pratiques africaines*, in MORIN J.Y.(dir.), *Les défis des droits fondamentaux*, Bruxelles, Bruylant/AUF, 2000, p. 133.

<sup>17</sup> Kelsen H., *Théorie Pure du Droit*, Dalloz, Paris, 1962, p. 300.

<sup>18</sup> Nguete Abada M., *Le controle de la constitutionnalite des lois au Cameroun*, in ONDOUA A., (dir.), *La constitution camerounaise du 18 janvier 1996, bilan et perspectives*, Afrédit, 2007, p. 45.

<sup>19</sup> Kam Yogo E., *L'influence du droit international des droits de l'homme sur la loi constitutionnelle du 18 janvier 1996*, in *La constitution camerounaise du 18 janvier 1996, bilan et perspectives*, *Op. cit.*, p. 167.

of Human Rights (ACHR) and several international conventions ratified by Cameroon.

All these texts maintain in many respects an equal treatment to both foreigners and nationals. As proof, in the preamble of the United Nations Charter, the resolution of the member States reads thus 'to promote social progress and better standards of life in larger freedom', UDHR protects the family, the foundation of the society, as it emphasises that, 'Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Not only that, in using the aforementioned rights, 'no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs'<sup>20</sup>. UDHR thus recognizes total equality between the foreigner and the national.

ACHR moves in the same direction, when she certifies her commitment of party States to freedom and human rights and the people included in the declarations, conventions and other instruments adopted in the framework of the Organization of African Unity<sup>21</sup>, the Nonaligned Countries Movement and the United Nations Organization<sup>22</sup>. ACHR reminds us that, 'the family is the natural and fundamental group unit of society and is entitled to protection by the state family which ensures its physical and moral well-being'<sup>23</sup>. In addition, the State must help them preserve the traditional values accepted by the community.

Cameroon, apart from joining the United Nations system, has ratified various conventions that promote the assimilation of foreigners into nationals through family law<sup>24</sup>. For instance, the convention relating to the rights of a child, ratified by Cameroon on 11 January 1993, the Geneva Convention of 18 July 1951 relating to the status of refugees as well as its protocol, which Cameroon joined since 23 October 1961, and to its protocol on 19 September 1967, the International Convention on the rights of migrant workers and their family members, came into force on 01 July 2003 among others.

The Cameroon fundamental law thus certifies the nation's commitment to the United Nation's instruments on human rights and the various texts relating to it have been duly ratified.<sup>25</sup> Hereafter, details need to be given on the legal value of terms consecrated by the preamble of the Cameroon constitution.

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<sup>20</sup> Article 2 of UDHR.

<sup>21</sup> In 2002, during the Durban Summit in South Africa, the Organization of African Unity was replaced by African Union.

<sup>22</sup> The preamble of ACHR adopted by the eighteenth conference of Heads of States and Governments on June 26 1981 at Nairobi (Kenya), came into force on October 1986.

<sup>23</sup> Art. 27 of ACHR.

<sup>24</sup> Art. 45 of the Cameroon constitution: '*International treaties or agreements regularly approved or ratified, have a higher authority over laws on reservation for each agreement or treaty from its application by the other party, as soon as they are published*'.

<sup>25</sup> The procedure of ratification is set by title V of the Cameroon constitution.

### *2.1.2. The binding values of the principles of the international law on human rights*

Article 65 of the constitution is unequivocal 'The preamble is an integral part of the constitution'. The preamble thus fits in the constitutionality bloc and is established like every other provision stated by the constitution to infra-constitutional norms.

Contrary to the former constitutions where there was no details<sup>26</sup> on the legal value in the preamble of the constitution; and consequently on laws that were stated, the existing Cameroon constitution dispels any doubts. By so doing, it strengthens the incoming culture of UDHR and in general, the internal legal order of other international instruments of human rights<sup>27</sup>.

Stronger than the previous, those of low standards must be submitted to the constitutionality bloc the constitutional council ensures the constitutionality of the infra-constitutional norms of the fundamental law<sup>28</sup>. It proves at the same time the supremacy of the constitution and the modernisation of the law.<sup>29</sup>

Concerning family law, the assimilation of foreigners into nationals is constitutionally grounded since the constitution takes into account, the principles of fundamental rights which protects without distinction both the foreigner and the national. This assimilation is reflected by the infra-constitutional norms which are especially dedicated to it

## *2.2 The contribution of infra-constitutional norms*

Hans Kelsen wrote that: 'The legal order is not a system of legal standards placed on the same rank, but a building with many floors, one on top of the other, a pyramid or formed hierarchy (so to say) a certain number of floors or layers of the legal standards'<sup>30</sup>. The constitutional norm is at the peak of this pyramid. Every resulting norm must conform to the supreme norm. Here, we are interested in two main infra-constitutional norms: the legal provisions on the status of a foreigner and jurisprudence.

### *2.2.1 Legislative provisions regulating the status of foreigners*

In Cameroon, legislative provisions, which are reserved exclusively for the status of foreigners, protect families. With close consideration, as concerns this

<sup>26</sup> About doubts arising from the preceding Constitutions as regards the legal value/validity of the preamble of the constitution and the enshrined laws, read: OLINGA A-D., 'La Déclaration Universelle des Droits de l'Homme et la Constitution camerounaise', in Bulletin de l'Apdhac, n°2, nov.-dec 1998, p.4 et s.

<sup>27</sup> Kam Yogo E., "L'influence du droit international des droits de l'homme sur la loi constitutionnelle du 18 janvier 1996", *Op.cit* p.172.

<sup>28</sup> In Cameroon, the Organization and the Functioning of the Constitutionnal Council is governed by law n°2004/004 of 21 April 2004.

<sup>29</sup> Nguele Abada M., " Le controle de la constitutionnalite des lois au Cameroun", *Op.cit.*, p. 45.

<sup>30</sup> Théorie pure du droit, *Op.cit.*, p. 299.

matter, they provide equal treatment to foreigners and nationals. Here, the law recognizes family reunion and grants various privileges to foreigners depending on their status, be they residents<sup>31</sup> or refugees<sup>32</sup>.

As for refugees precisely, Article 5 (1) of law n°2005/006 of 27 July 2005<sup>33</sup> on the status of refugees in Cameroon stipulates that: 'the family members who are accompanying or meeting a refugee are equally considered refugees, except when they are of a different nationality other than the refugee's, and are under the protection of their country of origin.' Family cohesion is only ended by a divorce, judicial separation or by death.

Every person considered a refugee enjoys all rights inherent to the dignity of the human person, such as non-discrimination, the right to property, the right to join associations, the right to appear in court, the right to work, etc.

These privileges granted to the refugee's family are also granted to foreigners living in Cameroon. The foreigner's family enjoys the same privileges and rights in question as well. All they need is a Resident Permit. However, this card is issued by right 'to the foreigner, who has been married for at least eighteen (18) months to a person of Cameroonian nationality, or who is not of Cameroonian nationality, but justifying his regular residence in Cameroon'<sup>34</sup>. The Resident Permit is rightfully issued on a twofold condition: the spouses must be together when the card is issued; one of the partners must be of Cameroonian nationality. In case the marriage is celebrated abroad, it should first of all be recorded in the Civil Status registers.

It is asserted that the principle governing the assimilation of foreigners to nationals on family rights is found in various legislative texts dedicated to the status of foreigners. There is no discrimination when it comes to protecting the family of a citizen or a foreigner. All families enjoy the rights stated by the International law on Human Rights.

Besides these legislative provisions, Decree n°81/002 of 29 June 1981 on the management of the civil status in Cameroon can also be quoted as well as various provisions on the state of persons. According to this decree, Any Cameroonian residing in Cameroon must register at competent civil status offices, births, marriages and deaths which concern him, so long as they occur within the territory. This text also applies to foreigners residing in Cameroon, 'who are expected to record or register at civil status registration offices available in their

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<sup>31</sup> According to Article 20 of Law n°97/012 of 10 January 1997 pertaining to the entry and staying conditions for foreigners in Cameroon, a resident is that foreigner who has been living for at least six months in Cameroon, without leaving.

<sup>32</sup> Concerning the definition of the aforementioned term 'refugee', see Article 2 of law n°2005/006 of 27 July 2005.

<sup>33</sup> According to Article 5 (3) of the law mentioned above, 'the family members of a person considered a refugee could be the partner(s), underage children, and any other family members are in the refugee's care.'

<sup>34</sup> Article 21 of law n°97/012 of 10 January 1997 quoted above.

vicinity, births, deaths and marriages concerning them, and which occur or is celebrated in Cameroon.<sup>35</sup>

### 2.2.2 Case law contribution

Generally, as concerns civil rights, the principle regulating the assimilation of foreigners into nationals has been strengthened by case law. Actually, case law consolidates this principle by modernising rules to which it is referred to, making rules pertaining to international public order more flexible or even by directly applying international conventions linked to family rights.

#### a) Modernising rules of rights inherent in the status of foreigners

The judge's main role is to keep the law enacted during its implementation. Within this context, Boulanger insisted on the judge's authority<sup>36</sup> to modernise power. With the judge applying the law in conformity with the context; 'modernising rules consists in implementing them to meet the requirements of the present time. The aging of laws, which strengthens their authority, could render them powerless and useless in an evolving society'<sup>37</sup>. Refer to Section 11 of the Cameroon civil code on the status of foreigners.

Indeed, according to this provision, 'the foreigner in Cameroon shall enjoy the same civil rights which are, or shall be granted to Cameroonians through a treaty by the foreigner's nation.'

Literally speaking, the rule denies foreigners who are non-beneficiaries of treaties the right to enjoy all civil rights. Thus, 'the foreigner is deprived of any societal life if there is no treaty with his country of origin'<sup>38</sup>. This rule laid down by the civil code led to different interpretations<sup>39</sup>, of which one of the most remarkable is that of Demelombe. According to the latter, all rights recognised by civil laws are denied a foreigner, who is not benefitting from any treaty<sup>40</sup>.

The formula proposed by the civil code seems to be both excessive and unacceptable. According to this civil Code, in the absence of a diplomatic agreement, the foreigner cannot enjoy any private law in Cameroon. This provision however goes against the laws in the Cameroon constitution, which encourages equal treatment for the foreigner and the national.

In fact, it is worth noting that the civil code applied in Cameroon is just the resulting extension of colonial Cameroon, inherited from French laws during France's domination over Cameroon. This code is merely a reflection of France's

<sup>35</sup> Article 4 (2).

<sup>36</sup> Boulanger, the method used since the 1804 Code from a legal interpretation point of view, 1952 (in relation to the public rights international week of 1952), cited by RIPERT G., *Les forces créatrices du Droit*, Paris, LGDJ, 1955, pp-393-394.

<sup>37</sup> Ripert G., *Les forces créatrices du Droit*, *Op. cit.*, p.394.

<sup>38</sup> Ancel B., et Lequette Y., commentary in the *Lefait C/ Société des Galeries de Saint-Denis*, GA, n° 20, p.182.

<sup>39</sup> To be more ample, these striking diverse interprétations, V. Loussouarn Y., and Bourel P., *Droit International Privé*, *Op. cit.*, p.787 and s.

<sup>40</sup> *Ibid.*



option in a country where laws are drawn from the French laws, during the ‘whole integration’<sup>41</sup> period. However, decades after independence, the code is still implemented vigorously despite the known void nature of some of its provisions. Hence, modernising rules recognised by the common law is therefore fundamental. Beyond that, ‘the non-functioning of the classical principles of preserving unity and legal order was criticised’<sup>42</sup>, for fear of bringing about so many incoherencies in the order of state law.

The provision mentioned above, transposed in Cameroon's civil code was re-emphasised by the French Court of appeal since its decree *Lefait c/ Société des Galeries de Saint-Denis*<sup>43</sup>. In the court above, ‘it is provisional for foreigners in France to enjoy rights which are not denied them categorically’. In the absence of a special text, foreigners are assimilated with citizens, who then enjoy private rights with them. Judges in Cameroon and in all likelihood have not yet had the opportunity to pass such verdict. Nevertheless, this common law will be considered a source of inspiration when the time comes.

#### **b) The calming effect of the public law and order**

Due to its bilateral nature, conflict rule can designate as applicable law during a conflict, a foreign law or the law of *for*. Sometimes, the foreign law designated to govern the relation in question have provisions which seem to be incompatible with the fundamental principle of ‘for.’ By virtue of the conflict rule, the judge shall replace<sup>44</sup> the foreign law which is all the same effective, for a national law, respectful of his public order<sup>45</sup>. That is; in conformity with ‘the principles of universal justice’<sup>46</sup> ratified by its legal order. It is with the exception of the international public law and order which case laws render more important, through the calming effect of public law and order.

The calming effect of public law and order was highlighted, regarding case law of the issue *Rivière*<sup>47</sup>. Firstly, in response to the question on divorce laws and secondly, that of conformity with the French international public law and order, of a divorce by mutual agreement delivered abroad, the French Court of appeal stated a principle whereby, ‘(...) reacting against a provision contrary to public law and order is not the same, given that it is an obstacle to procuring a right in France, or given that it entails letting rights acquired honestly, abroad take effect in France,

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<sup>41</sup> Ondou A M., *Introduction historique au Droit camerounais: la formation initiale. Eléments pour une théorie de l'autonomie des droits africains*, Les éditions le Kilimandjaro, 2013, p. 109.

<sup>42</sup> *Ibid.*, p. 45.

<sup>43</sup> See GA, *Op. cit.* N°20; Rev.crit.1949.75, note BATTIFOL, D.535.

<sup>44</sup> Due to the substitution in the implementation of international public law and order, see for example Loussouarn Y., et Bourel P., *Op. cit.* n°255.

<sup>45</sup> On International Public Order, see for example, Bartin, *Études de droit international privé*, 1899, p.209 et 235; Lagarde P., *Recherches sur l'ordre public en droit international privé*, Paris 1959 ; Maury, *l'éviction de la loi normalement compétente : l'ordre public et la fraude à la loi*, Valladolid, 1952.

<sup>46</sup> See *Lautour c. veuve Guiraud*, *Les grands arrêts de la jurisprudence française de droit international privé*, *Op. Cit.*, n°19.

<sup>47</sup> GA, *Op. cit.*, n°26; Rev. crit .1953.412, note Batiffol; Clunet 1953.860, note Plaisant ; J.C.P.1953.II.7863, note Buchet.

and in conformity with the law being efficient, by virtue of the French public international law<sup>7</sup>.

The calming effect of public law and order expresses the fact that the intensity of international public law and order depends on whether one is faced with a situation coming from abroad, or is simply created in the legal order of the judge. When it entails recognising rights acquired abroad honestly, international public law and order is less severe in its intervention, with some extra flexibility, 'because the disruptive effect for the legal order of the *for* is objectively lesser'.<sup>48</sup>

The concept calming effect of public law and order particularly manifests itself in French laws in issues concerning divorces; the effects of polygamous marriages contracted abroad<sup>49</sup>, or even repudiation<sup>50</sup>.

### c) Direct application of international conventional standards.

Case laws are not limited to emphasising legislative provisions, modernising them, or softening international public law and order. Sometimes, the judge directly applies international conventional standards from the moment they contradict domestic standards.

A concrete example is that of the Nguoghia née Ngoune Jeannette affair, in relation to the right of succession for a child born of adultery<sup>51</sup>. The Yaoundé-Ekounou Court of First Instance's ruling on the local law issue stated the principle of direct application of the United Nations convention on children's rights, signed on 25 September 1990 in New York, and ratified by Cameroon on 18 October 1991. For the court, '(...) in the light of this convention and to the decree ratifying it, the state of Cameroon must protect children from all forms of discrimination; that henceforth, the concept of child born of adultery is nullified, given that the child did not choose to be born (...) That thanks to these legal instruments in favour of children's rights, the child Nguoguia Loic, alongside his brothers, is declared a co-heir of the late Nguoguia Etienne'.

For a judge to recognise the effects of the standard, the provisions of the convention in question must be sufficiently precise, both in objective and form, so that they can be applied in domestic law without further complementary execution measures. That is the case with most of the provisions of this convention. A foreigner can then legitimately appeal that human rights international standard be applied, from the moment it can be directly applied. This possibility is open to any foreigner who intends to take his case to a Cameroonian court.

The Cameroonian legal order is resolutely geared at completely assimilating foreigners into nationals. The values stated by the constitution are carried on by infra constitutional standards Case law in particular, they contribute to the edification of this principle. But are we really taking part in full scale

<sup>48</sup> Audit B., *Op. cit.*, n°316.

<sup>49</sup> Civ.28 janvier 1958, *Chemouny*, D.58.265 n. Loan, JCP 58.II.10488 n. Louis-Lucas, GA, n°30 (octroi d'aliments à la seconde épouse); 3 janvier 1980, *Bendeddouche*, D. 80.549, n. Poisson-Drocourt, GA n°30.

<sup>50</sup> Civ.I, 3 novembre 1983, *Rohbi*, RC 84.325, 1er esp., note Fadlallah.

<sup>51</sup> Judgment n°105/TPD of 29 November 2006, unpublished; Arrêt n°162/DL of 27 September 2007, unpublished.

assimilation? It seems important to note that internal resistance persists in its goal to curb it.

### **3. Setbacks of the principle regulating the assimilation of foreigners to nationals in family laws**

This principle is experiencing considerable setbacks in Cameroon's laws. This report is not a unique peculiarity of the Cameroon legal order. When laws are compared, it is clear that the French Court of Appeal stated in the aforementioned Lefait decree reads 'foreigners in France enjoy rights which are not denied them categorically'.

It is but normal in Cameroon, for the assimilation of foreigners to nationals to have set backs, due to the diversity in its laws, and sociological considerations in family law. These setbacks concern enjoyment of laws (3.1.) as well as the creation of the laws (3.2.).

#### ***3.1 Setbacks in the enjoyment of laws***

Enjoying a law can be understood as benefitting from the advantages of that law, and yielding from it. In the law of property, enjoyment can be defined as using a thing, yielding from a thing, conserving, or consuming it<sup>52</sup>. When it is transposed to private international law, especially on the status of foreigners, enjoying a law is then seen as vindicating the law and benefitting from that law in a foreign legal system.

The principle of assimilating foreigners into nationals had considerable setbacks linked to the ban on homosexual marriages, acknowledgement and the exequatur of foreign decisions and public documents.

##### ***3.1.1 Ban on homosexual marriages***

The Cameroon legal system recognises only marriages of biologically different people. This means the only marriage recognised in Cameroon is that union between a man and a woman. Homosexual and even transsexual marriages are therefore banned. On this matter, the civil code is very suggestive about the authority and conditions required to contract a marriage, when it states that 'the man under eighteen and a woman under fifteen cannot contract a marriage'<sup>53</sup>.

In fact, it appears that, if homosexual marriages are admitted by some legislations<sup>54</sup>, others on the other hand, are not yet ready to admit them<sup>55</sup>. The

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<sup>52</sup> *Lexique des termes juridiques*, 23<sup>rd</sup> éd., Dalloz, 2015, p. 594.

<sup>53</sup> See article 144 of the civil code.

<sup>54</sup> As from 22 February 2016, twenty-one countries legalized homosexual marriages. *Wikipedia, l'encyclopédie Libre, consulté le 22 février 2016*.

<sup>55</sup> Mbida Balla P., *La volonté des parties et la détermination de la applicable aux contrats internationaux, Mémoire de Master II*, Université de Douala, Faculté des Sciences Juridiques et Politiques, année académique 2012-2013, p. 81.

Cameroonian legal system does not tolerate homosexual marriages. There is no loophole for that in the Cameroonian constitution, and the Penal code severely punishes homosexual activities<sup>56</sup>.

No evolution is noticeable in the draft project of Cameroon's code of persons and families, even though it is stated here that foreigners are submitted to the laws of their country of origin, in relation to their personal status. But at an early stage, the draft project states that 'on condition that this is neither against good morals nor against the Cameroonian public law'<sup>57</sup> and the text clearly underlines that 'marriages are prohibited between people of the same sex (...)'<sup>58</sup>. This difference in sex must exist at the moment when the marriage is celebrated.

Foreigners cannot therefore take advantage of marriages celebrated abroad with partners of the same sex. This marriage goes against good morals and against the international public order of Cameroon.

The law maker does not define the notion of good morals. All the same, it is attributed a sociological connotation since it is generally understood as 'a set of behavioural rules based on the considered rights of feelings, communally accepted by citizens, whatever be their options (...) in the social relations domain'.<sup>59</sup>

This type of union is against the Cameroonian international public order. That is; against the universal ethical code, recognised especially by the preamble of the Constitution of Cameroon<sup>60</sup>. Therefore, homosexuals could be refused entry visas into Cameroon, and even repatriation in the case of a fraudulent entry into the country. Beyond that, one can then imagine that refugees and asylum beneficiaries are forbidden from carrying out such practices in Cameroon. The setbacks which affect foreigners, as concerns their enjoyment of family laws go as far as recognizing and acknowledging foreign public documents and foreign decisions.

### *3.1.2 Control by the exequatur judge of foreign decisions and the recognition of foreign public law*

According to Article 5 of law n°2007/001 of 19 April 2007 appointing the litigation judge and fixing (establishing) conditions for the execution of legal decisions and foreign public laws in Cameroon, as well as external arbitral sentences: 'The (presiding judge) of the Court of first instance or the judge appointed by him is the litigation judge in charge of executing legal decisions and foreign public laws, as well as foreign arbitral sentences'.

<sup>56</sup> Article 347 bis - 'Homosexuality: any person who have sex with a person of the same sex is given a 6-months to 5-years imprisonment and a fine of 20 to 200,000 CFAF.'

<sup>57</sup> Article 13 of the draft of Cameroon Code on people and the family.

<sup>58</sup> Article 290 of the Draft project.

<sup>59</sup> See *Dictionnaire encyclopédique de théorie de sociologie du droit*, dir, André-Jean Arnaud, L. G. D.J., 2<sup>ème</sup> éd., p. 280.

<sup>60</sup> Since Order *Lautour*, (Cass. Civ.1<sup>ère</sup>, 25 mai 1948, *Rev.crit.* 1949, note Battifol, D. 1948.357, note, P. L.P., S.1949.1.21, note Niboyet, J.C.P.1948.II.4532, note Vasseur; GA n°19) la jurisprudence française définit l'ordre public international comme, '*des principes de justices universelles considérés dans l'opinion française comme doués de valeur internationale absolue*'.

In the case of foreign public law the litigation judge in charge of executing legal decisions, 'makes sure that the said laws meet the necessary conditions for their authenticity in their country of origin, and which are not contrary to Cameroonian social order'.<sup>61</sup>

The litigation judge would therefore make sure that in accordance with the *la locus regit actum*, foreign public law (marriage settlement, will, etc.), whose recognition and execution is required, is authentic. He will also ensure that the above-mentioned law conforms to Cameroonian social order.

Exemption from a judge's authority can only follow the principle of hierarchy standards outlined by the Constitution of Cameroon as mentioned by the court in the Michel Zouhair Fadoul C/ Omais Kassim, Omais Kassim Selecta Sarl case.<sup>62</sup>

As a matter of fact, considering the applicability of the General Convention of Cooperation in relation to justice in Antananarivo<sup>63</sup>, the Supreme Court, after referring to the provisions of the above mentioned Article 10 of law n°2007/001, stressed that, 'although its items from the principle of hierarchy standards is asserted by article 45 of the Constitution, this domestic law establishing additional formalities to enforce notarial acts between the Republic of Benin (former Dahomey) and the Republic of Cameroon should be excluded from this option. *With the view that in order to avoid a direct contradiction with stakeholders of the valid notarial act[...]article 10 of the national law was applied to the contested order, contrary to the agreement, thus violating Article 45 of the Constitution and Article 29 of the above mentioned agreement; 'From what follows, the means is founded and the above mentioned order incurs annulment.'*

The conditions for the exequatur of foreign decisions are established by Article 7 of the above mentioned law. According to this clause, the litigation judge 'limits himself to making sure' that the decision comes from a competent court in his/her country of origin; that the parties are constantly summoned or represented; that the decision is likely to be executed in his/her country of origin, and finally, that the decision is neither contrary to Cameroonian social order nor to a permanent decision taken in Cameroon.

The litigation judge is not required to revise foreign decisions which are submitted to him. His authority is restricted to the international audit regularity of the above mentioned decision<sup>64</sup>. In regulating the authority of the litigation judge, the Cameroonian legislator shares the idea of a number of legal systems to whom, 'the authority of an internationally constant, of a foreign judgment, is a vested right

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<sup>61</sup> Article 10 of the above law.

<sup>62</sup> S.C., Judiciary Chamber, civil section, decision n°21/Civ of 15 July 2010, file n°117/Civ/09, Appeal n°20 of 02 February 2009, unpublished.

<sup>63</sup> The convention was signed in Antananarivo on 12 September and implemented on 30 January 1962. The signatories Countries are Cameroon, the Central African Republic, the Congo, Cote d'Ivoire, Dahomey (Benin), Gabon, Upper Volta (Burkina-Faso), Madagascar, Mauritania, Niger and Chad.

<sup>64</sup> On the attributes of the Judge of the Exequatur, read Loussouran Y., and Bourel P., *Op. cit.*, p. 622.

that commands universal respect'<sup>65</sup>. Thus, States have the mutual duty to respect on a regular basis, external authority of judgment passed abroad.

Actually, this position of the Cameroon legislator is in line with the French law disclosed by the Court of Appeal in the Munzer Order<sup>66</sup>. The assignment of the Litigation judge in Cameroon is not required to defend Cameroon's sovereignty, which will lead him to 'consider the value of the device on the double report of the evaluation of facts and the implementation of the rule of law'<sup>67</sup>, he only has to verify the regularity of the above mentioned law.

In the process, three conditions are required, namely: the enforcement of the Foreign Court which rendered the decision, respecting defence rights by the foreign decision, and its application in their country.

Substantially, the legislator insists on respect for Cameroonian international social order and the absence of a contradiction to the decision submitted to the litigation judge with a judgment passed in Cameroon.

Therefore, there is no de plano foreign decision or foreign public acts recognition in the Cameroonian legal order. This different acts and decisions are submitted to the litigation judge. A foreigner here again, encounters considerable restriction in the enjoyment of his/her regular rights.

### ***3.2 Limitations in creating rights***

The principle regulating the assimilation of foreigners to citizens also has some limitations as concerns the creation of laws. Many obstacles arise when foreigners seek for justice or real estate properties.

#### *3.2.1 Access to justice*

According to the Cameroon constitution's preamble, law ensures a right to justice for all human beings'. So, fundamental law treats nationals and foreigners indiscriminately.

As clearly defined by Professor Marie-Anne Frison-Roche, 'access to justice allows anybody who finds in it a legitimate interest and who eventually has requirements to access a jurisdiction so that it could eventually decide on his case'<sup>68</sup>. So access to justice is this right earned by anybody who thinks he has been abused in his relation with another person, morally or privately, to call on a judge

<sup>65</sup> *Ibid.* .

<sup>66</sup> Cass. Civ.1<sup>ère</sup>, 7 janvier 1964, GA, n°41 ; *Rev.crit.*, 344, note Battifol, *Clunet*, 1964.302, note Goldman, J.C.P., 1964.II.13590, note Ancel. Pour la Cour de Cassation française, 'to express the right to *exequatur*, the French judge must ensure the fulfilment of five conditions; notably the competency of the jurisdiction that made the decision, the frequency of proceedings before the jurisdiction, the implementation of the competent law according to French rules of conflict and compliance with the international public order in absence of any fraud of the law'. (our translation).

<sup>67</sup> Bartin, sur Aubry et Rau, t. XII, 5<sup>ème</sup> éd., n°69, ter, p.487.

<sup>68</sup> Frison Roche M-A, "Le Droit d'Accès à la Justice et au Droit", in Cabrillac R., Frison-Roche M-A, Revet T. (dir.), *Libertés et Droits Fondamentaux*, 18<sup>ème</sup> éd., 2012, p. 539, n°641.

in order to have his rights restored. Access to justice thus enables the implementation of the law, and in this view, the right to access justice is very close to access to rights.

Thus, the right to access justice is a fundamental right and it is consubstantial to the state of law. In fact, no one can be exempted from it and nobody can talk of the state of the law without this right given to every man to reach a judge. This judge will then do justice using law texts.

The civil code clearly introduced a caution to be paid by foreigners. So, for the said code: 'Subject to regulating accords and international conventions, all foreigners, prime plaintiff or intervener will be responsible if the defendant demands before all derogation, to pay a deposit, to pay fees and damages which they could be demanded'<sup>69</sup>. The judge reserves the right to determine the amount of the caution and a foreign plaintiff can be exempted from this caution if he is able to justify that his real properties in Cameroon are sufficient.

Truly speaking, the *judicatum solvi* caution<sup>70</sup> also called condemnation caution to be paid is not exclusive to Cameroon. This article, aimed at protecting nationals from foreigners who could escape from a condemnation by going back to their country of origin, is also found in many legislations.

Beyond the protection of national's interests, this caution can in different situations infringe upon the right to get access to justice. So a destitute foreigner abused by a national can hesitate to take his case to court for fear of being asked to pay this caution. With the increase of exchanges and the reinforcement of legal governance, the disposition seems very excessive; the international effect of judgments playing an important role in various legislations.

The *judicatum solvi* caution is therefore an obstacle for foreigners to reach the judge and so, to be recognised as having rights. When transposed to family laws, one can therefore see a serious obstacle for foreign couples to carry out actions against someone especially because the judge is the only one who determines the amount to be paid as caution. These limitations for foreigners when defining rights, affect their access to real estate property.

### 3.2.2 Access to real estates

According to Article 9 of Decree n°76/165 of 27 April 1976 defining conditions to obtain a land certificate, modified and completed by decree n°2005/481 of 16 December 2005, 'they can subscribe to a land certificate'<sup>71</sup> on a part of the national territory which they occupy or exploit:

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<sup>69</sup> Article 73 of CPCC.

<sup>70</sup> On this sujet, we have as example, Pont P., 'De l'action civile intentée par un étranger [caution *judicatum solvi*]', *Revue de législation et de jurisprudence*, 12<sup>ème</sup> année, nouvelle série, 2, mai-août 1846, pp. 87-100; Simon-Depitre M., « Les étrangers dispensés par traité de la caution *judicatum solvi* », *Recueil général des lois, décrets et arrêtés*, première partie, comm. et revues de jurisprudence, t.85, pp. 429-436.

<sup>71</sup> In accordance with the first article of the said decree, 'land certificate is the official attestation of the real estate'.

a) *Customary communities, their members or any other person of Cameroonian nationality [...].*

b) *People deprived of their rights [...].*

In Cameroon, a foreigner has no right to direct matriculation<sup>72</sup>. The latter been sanctioned by land certificate delivery can be effective only on a first category dependence of national domain<sup>73</sup>.

Foreigners can benefit only from indirect matriculation which means that it is possible only, after many investigations on domains totally unoccupied. In fact, following Article 10 section 1 in the edict n°74-1 of 06 July, 1974 determining land tenure: 'Natural or legal person having a foreign nationality willing to invest in Cameroon like diplomatic missions, consular and international organism can sign lease or buy real estate property except in border areas'.

Families with foreign nationality living in Cameroon will have access to real estate property only after an estimation of non-exploited or unoccupied land<sup>74</sup>. Any acquisition of land in border areas is forbidden<sup>75</sup>.

As regards land ownership, the principle of indiscriminate assimilation of foreigners into nationals is undermined by serious restrictions as far as the civil rights is concerned. This limitation can be explained by the fact that the 1974 Land Reform in Cameroon<sup>76</sup> aimed at fostering the economic and social development of the entire country. Faced with local oppositions, 'the State finally had to choose between a rational use of vast domains which it endows, to boost the economic development of the country through effective exploitation'<sup>77</sup>. Practically, the foreigner is considered by this reform as a booster of development. To own a piece of land, he must follow lengthy and restrictive procedures of indirect registration characterised by two key steps: temporary concession and final concession<sup>78</sup>. From the foregoing, there is an actual discrimination between foreigners and nationals.

<sup>72</sup> Refer to CS/AP, Appeal n°6/A of 27 August 1992, *Eyango Martin c/ État du Cameroun*, unpublished.

<sup>73</sup> Article 15 of Ordinance n°74-1 of 6 July 1974 to establish rules governing land tenure, 'National lands shall be divided into 2 categories:

1. *Lands occupied with houses, farms and plantations and grazing lands manifesting human presence and development;*

2. *Lands free of any effective occupation'.*

<sup>74</sup> On acquisition of land by foreigners, read NYAMA J-M., *Régime foncier et domanialité publique au Cameroun*, Presses de l'UCAC, 2012 ed, p.124.

<sup>75</sup> This measure can be understood, for it ends at preserving Cameroon territorial integrity considering approximate border inherited from colonization.

<sup>76</sup> The most important land reform during postcolonial Cameroon is that of 1974. The President of the Republic had the right by -law n°73-3 of 9 July, 1973 to lay down land reforms by Ordinance. The latter will consider the following orders:

-Ordinance n°74-1 of 6 July 1974 to establish rules governing land tenure;

-Ordinance n°74-2 of 6 July 1974 to establish rules governing state lands;

-Ordinance n°74-3 of 6 July 1974 concerning expropriation for a public purpose.

<sup>77</sup> Tjouen A-D., *Droits domaniaux et techniques foncières en droit camerounais*, Economica, Paris, 1982, p. 7.

<sup>78</sup> On indirect registration procedure, specified by decree n° 76/166 of 27 April 1976 to establish the terms and conditions of management of national lands.



However, the latter is allowed to obtain a land certificate either by direct registration or by indirect registration.

#### 4. Conclusion

The principle regulating the assimilation of foreigners to nationals is effective in Cameroon; however, it requires consistent readjustments for full implementation. It is a *sine qua non* for the reinforcement of legal governance.

While under the French Law, no rule regulating the condition of foreigners has been underscored in private law because the dispositions of the civil law related to this matter<sup>79</sup> have finally been interpreted as 'laying down a general principle of assimilating foreigners to nationals'<sup>80</sup>.

Under the Cameroonian law, highly influenced by the French law and merely a transposition of the latter, this principle is still spotted with significant limitations. In fact, while being drawn from the fundamental texts of the international law and highly established by the preamble of the Cameroonian constitution, some dispositions relentlessly undermine it with limitations (constraints, bottlenecks); limitations which are palpable in both the area of enjoyment and law creation.

UDHR first article reads thus 'All human beings are born free and equal in dignity and rights'. To Professor Frédéric Sudre, some conception of human beings is thereto underscored. '*Human beings*' here refers to people anywhere and who are subjected to the same regulations<sup>81</sup>. Nonetheless, the same UDHR states that the family is the base (nucleus) of the society. It therefore results that universal fundamental rights per se must be expressed within a family, at least for legal systems that implement them. The social order would profoundly be grounded with these rights.

Concerning the private international Law in particular, it is obvious that there is need for coordination of systems, at least as regards family law, so as to prevent discontinuities in international relations. We underline that also at European Union level is considered that through the interpretation of corresponding provisions of the Treaty on the Functioning of the European Union and the Treaty on European Union, the area of substantive family law is not under the competence of the European Union, but the nation states, since the appropriate authority has not been delegated to the Union in this area<sup>82</sup>. Fundamental laws are therefore considered as unifying factors for modern legal systems.

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<sup>79</sup> See Article 11 of Civil Code.

<sup>80</sup> Mayer P., and Heuze V., *Droit international privé*, Montchrestien, 10th ed., 2010, p. 735.

<sup>81</sup> Sudre F., *La dimension internationale et européenne des libertés et droits fondamentaux*, in *Libertés et Droits Fondamentaux*, *Op.cit.*, n°86, p. 38.

<sup>82</sup> Simovic I, Curic I., *European Union and family law international private law, procedural and substantive aspects*, „Ljetopis Socijalnog Rada” (« Annual of social work »), Vol. 22, Issue 2, 2015, p. 15.

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### II. Texts and Codes

1. Civil Code applicable in Cameroon;
2. Civil Procedure Code;
3. Law N° 97 / 012 of 10 January 1997 relative to the conditions for foreigners to enter, stay and leave Cameroon;
4. Law N° 2005 / 006 on the status of refugees in Cameroon dated from 27 July 2005;
5. Law N° 2007 / 001 of 19 April 2007 appointing the judge of legal department to carry out and set in Cameroon terms of action, legal decisions and foreign public actions as well as foreign arbitration of sentences;

6. Decree n°2007/255/PM of 4 September 2007 fixing detailed rules for the application of law n°97/01 of 10 January 1997 relative to the conditions for foreigners to enter, stay and leave Cameroon;
7. Decree n°2008/052 of 30 January 2008 amending and completing some provisions of decree n°2007/255 of September 4 2007 fixing detailed rules for the application of the law n°97/012 of 10 January 10 1997 relative to the conditions for foreigners to enter, stay and leave Cameroon;
8. Decree n°2011/389 of 18 November 2011 on the Organization and Functioning of the Management Body of the Status of Refugees in Cameroon.