ENGAGING WITH THE PLURALISTIC NATURE OF AFRICAN SOCIETIES: A CRITICAL EXAMINATION OF THE CUSTOMARY LEGAL SYSTEM IN CAMEROON

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Table of Contents

ABSTRACT

Customary law and traditional institutions once constituted the comprehensive legal system regulating a wide spectrum of activities in Cameroon. However, this system of law which now exists in the context of legal pluralism has presented great challenges as the Cameroonian legal system has failed to find an appropriate and efficient way of negotiating with the co-existence of multiple legal orders. There are several factors which can be used to explain why customary law as an institution is continuously taking steps backward. This is especially the case in Cameroon with a colonial history where the creation of state structures, laws and regulations did not evolve indigenously, but instead arrived through colonization. These processes created tension between socially accepted practices and the new, formal legal systems which are highly reflective of the modernizing ambition of the post-colonial state. The thesis explores both the formal and informal processes of judicial adjudication of customary disputes with the aim of highlighting important avenues for understanding the relationship between the state and indigenous Cameroonians. It also engages with the theoretical analysis of the effects of current institutionalization of customary rules by the state legal system. This will be done in light of current efforts and challenges to ascertain and codify this system of law. This is because, an overview of current jurisprudence of formal courts in Cameroon reveals that much of the disputes that have arisen in these courts have a lot to do with questions linked to social realities of people, in terms of their cultural beliefs and practices. As such it becomes necessary to understand customary law adjudication, explore its relevance, its rules and evolution to ensure that this system contributes to addressing needs of the Cameroonian state.

EXTRAIT

Le droit coutumier et les institutions traditionnelles constituaient auparavant l'ensemble du système judiciaire Camerounais. Ce système régulait un vaste champ d'activités au Cameroun. Pourtant, ce système de droit qui existe dorénavant dans le contexte du pluralisme légal est confronté à plusieurs défis, vu que le système judiciaire Camerounais peine à trouver un équilibre approprié dans la mise en pratique des différents ordres légaux coexistant. Plusieurs facteurs peuvent expliquer les raisons d'une régression du droit coutumier en tant qu'institution. Ceci est certainement le cas du Cameroun dont l'histoire coloniale démontre une absence de l'indigène dans la création et l'évolution des appareils d'État, du droit et de la règlementation. Ce procédé ne pouvait que créer des tensions sociales entre les pratiques socialement acceptables et ce nouveau système formel du droit. Ce dernier reflète acerbement les ambitions modernisatrices de l'état postcoloniale. Se focaliser sur les procédés formel et informel de l'adjudication de disputes coutumiers est une voie pertinente dans la compréhension des rapports entre les indigènes Camerounais et l'État du Cameroun. Suivant cette voie, nous allons aussi faire une analyse théorique des effets de l'institutionnalisation actuelle du droit coutumier par le système judiciaire publique tout en tenant compte des efforts consenties pour codifier ce système de droit, vu que la jurisprudence des tribunaux formels au Cameroun aujourd'hui révèle que la plupart des disputes faisant l'objet de délibérations ont trait aux questions liées au réalités sociales, aux croyances du peuple et leur pratique. Cela devient donc vitale, que de comprendre l'adjudication du droit coutumier, d'examiner sa pertinence, ces règles et son évolution pour s'assurer que ce système puisse efficacement adresser les besoins du peuple Camerounais.

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CHAPTER 1

INTRODUCTION

1.1 Background to Research Question

There is no single established definition of customary law agreed upon by lawyers, anthropologists or jurists.[1] The idea of "custom" and "law" has been used and understood in a variety of ways depending on the specific approach adopted by the writer.[2] This form of law has also been accorded specific definition by different states. For example, in Uganda, customary law is defined as "a rule or set of rules, established, accepted and binding on the members of a given society in their social relations".[3] In terms of the Recognition of Customary Marriages Act in South Africa, customary law is understood to be "the customs and usages traditionally observed among indigenous African peoples of South Africa and form part of the culture of those peoples".[4] In the Nigerian case of Oyewumi v Ogunsesan, Obaseki J.S.C defines customary law as " the organic or living law of indigenous people regulating their lives and transactions…it is organic in that it is not static, and regulatory in that it controls the lives and transactions of the community subject to it".[5] The fact that the terms, custom and law, denote different meanings to different people or states in different contexts is not in itself significant to the subject of this thesis.[6] What forms the subject of this thesis is the place of

[1] CMN White, "African Customary Law: The Problem of Concept and Definition" (1965) 9:2 J. Afri. L. 86.

[2] *Ibid* at 86.

[3] Ben K Twinomugisha, "African Customary Law and Women's Human Rights in Uganda" in Jeanmarie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011) 448.

[4] *The Recognition of Customary Marriages Act* 120, 1998.

[5] Ese Malemi, *The Nigerian Legal Method* (Ikeja: Princeton Pub. Co., 2010).

[6] White, *supra* note 1 at 86.

customary law within developing legal systems of post-colonial African states. In general, the concept of customary law expressed here encompasses ideas surrounding rules derived from the morals, values, and traditions of indigenous ethnic groups.[7] It will be understood to be an expression of a long-standing and homogenous value system expressive of communal life within indigenous communities, passed on from one generation to another.[8]

The legal and normative framework existing within most pre-colonial African societies was essentially customary in character, having its substance in the practices and customs of people.[9] Its traditional institutions constituted the comprehensive legal system regulating a wide spectrum of activities from birth to death.[10] It was and is in most cases, still the law under which a majority of people regulate marriage, succession, land tenure, divorce, amongst others.[11] Customary law in this sense embodies law that originates with people in the most direct sense, with its validity highly dependent on questions of social practice tested against

[7] Twinomugisha, *supra* note 3 at 448.

[8] Note that in the context of this thesis, the terms "customary law", "customary system", "customary normative order", "customary norms", "informal system" or "non-state institutions" will be used interchangeably to describe an array of customary practices/beliefs all existing within disparate contexts. Although this thesis recognizes the problems inherent with such categorization, it will however not engage in a theoretical analysis of the various meanings attached to these terms. Neither of these phrases have a generally accepted meaning which can diversely be applied to the social reality of indigenous peoples. It should also be noted that the terms "norms and customs" in the context of this thesis carry the same effect. Despite literature suggesting difference in meaning and application, this thesis applies the same meaning to both. See John Miles, "Customary and Islamic Law and its Development in Africa" (2006) 1 Afr.Dev.Bank.L.Dev.Rev 102.

[9] Muna Ndulo "African Customary Law, Customs and Women's Rights" (2011) 18:1 Indiana Journal of Global Legal Studies 88.

[10] Jeanmarie Enrich et al, *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011).

[11] Miles, *supra* note 8 at 103.

social observation .[12] This forms the basis on which this normative order reinforces its system of meaning while mediating social life, disputes, and relations of power.[13] The social structures within customary systems although different depending on context are largely characterised by their continuously changing and shifting nature, coupled with the fact that they are frequently reinvented internally.[14] It should however be noted that the use of the term "African customary law" in this thesis does not in any way suggest the existence of a single uniform set of customs prevalent in any given country. It is instead used as a "blanket term" covering numerous legal systems.[15] There are local disparities within such areas, but the broad principles in all the various systems are largely the same.[16]

1.1.1 The Development of Customary Law in Africa

Although in origin all law in Africa was customary in nature, the advent of colonialism created a framework for the politics of legal dualism, though the specific outcomes and patterns varied form one region to another. The dualism in these colonially administered territories reflected two distinct forms of power, the centralising national government functioning under European law, and locally organized native authority subject to customary law principles.[17] The end of colonialism left most African states with a legacy of plural legal orders, comprising of African

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[12] Twinomugisha, *supra* note 3 at 448.

[13] Leila Chirayath, Caroline Sage & Michael Woolcock "Customary Law and Policy Reform: Engaging with the Plurality of the Justice System" (2005) World Development Report 2006: Equity and Development 1.

[14] *Ibid* at 2.

[15] Customary institutions, also referred to as, informal or non-state mechanisms exists in a majority of states across the globe. These systems which are mostly ethnic in origin, function within the area occupied by the ethnic group and cover disputes in which at least one of the parties is a member of the ethnic group. See Ndulo, *supra* note 9 at 88; Chirayath, et al, *supra* note 13 at 2.

[16] Ndulo, *supra* note 9 at 88.

[17] Martin Chanock, "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform" (1989) 3 International Journal of Law and the Family 73.

customary law, religious law, received law in the form of either common law or civil, depending on the specific colonial history.[18] The nature of legal pluralism expressed within pre-colonial African political systems presented a wide range of patterns. It is however not necessary here to reflect on each typology expressed within individual states. It suffices to note that the rules expressed within the centralised system of governance and the so called "stateless societies" primarily existed to define appropriate reciprocal behaviour of individuals, and establish machineries to be used in preserving the social order.[19] The nature of customary law existing within these states is largely dependent on the political history and nature of local traditions existing within a specific context.[20] However, a majority of these customary systems tend to operate outside of the state legal framework and are often the prevailing form of regulation and dispute resolution, covering up to 90% of the population in Africa.[21] In other jurisdictions within Africa as well as other regions such as Latin America and South East Asia, the state has made attempts at integrating customary systems into the wider legal and regulatory framework of the state, often with very little success.[22] The latter case forms the subject of this thesis.

Due to the globalizing pressures Africa has faced, ranging from colonialism, slavery, imperialism to neocolonialism, the character of legal pluralism in contemporary African

[18] Ndulo, *supra* note 9 at 87.

[19] White, *supra* note 1 at 86.

[20] *Ibid* at 87.

[21] For example, "in Sierra Leone approximately 85% of the population falls under the jurisdiction of customary law. Also customary tenure covers 75% of land in most African states, affecting 90% of land transactions in countries like Mozambique and Ghana" See Chirayath et al, *supra* note 13 at 3.

[22] *Ibid* at 3.

societies has been described as being more complex than ever before.[23] A combination of these factors has led to a process of transformation and shift in the nature of structures and practices of states. Under colonial law, the process of identifying legal orders and their spheres of action and regulating the relationship between them was relatively easy to do.[24] However, in present day African societies, the plurality of legal orders and interaction between them is much more extensive.[25] As such, these newly independent states are constantly trying to identify ways to sustain the cultural heritage reflected in indigenous laws and institutions, as they attempt to also function as modern democratic states.[26] Due to the varying degrees of political, cultural and economic development, the process of integrating customary systems within the state legal framework differs locally depending on context.[27] Although the level at which customary law is relevant differs significantly country by country, the broad principles underlying the various systems remain the same.[28] The nature of legal pluralism permeating these legal systems is that which recognizes all other normative orders within the state but regards statutory law as the most appropriate form of law determining the conditions in which all other orders are said to exist.[29] The integration of any other normative system within the structure of the state is largely dependent on state recognition for its validity and will only be law to the extent they are

[23] Boaventura de Sousa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique" (2006) 40:1 Law & Society Review 44.

[24] *Ibid* at 45.

[25] *Ibid* at 45.

[26] David Pimentel, "Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique" (2014) 14 Yale human Rights and Development Journal 59.

[27] Olawale T Elias, *Nature of African Customary Law* (Manchester: Manchester University Press, 1956).

[28] *Ibid* at 8.

[29] Ann Whitehead & Dzodzi Tsikata, "Policy Discourses on Women's Land rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary" (2003) 3:1 Journal of Agrarian Change 74.

recognized by the state.[30] These governments have made attempts at engaging with the customary normative order in one way or the other, with varying results. A common dialogue emerging within states was the need for practices of "indigenous communities" to be officially incorporated within the national legal framework.[31] The presumed significance of incorporating indigenous customs within state law is that it will necessitate a shift in the political and legal context of most African states, from their peculiar status as colonial states to democratic African states.[32] This advocacy for legal recognition led to a transformative legal project under way to ensure a gradual incorporation of customary practices within the systematized and regulatory framework of state law.[33] As such, many of their constitutions incline towards acknowledging the inevitability of legal pluralism by either preserving a role for custom or according formal statutory recognition to specific customary practices.[34] Recognition in this sense results in custom being regarded as a system of actual rules having its own rational coherence and backed up with the relevant legal machinery of the state.[35]

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[30] Anne Griffiths, "Anthropological Perspectives on Legal Pluralism and Governance in a Transnational World" in Michael Freeman et al, eds, *Law and Anthropology: Current Legal Issues* (Oxford, Oxford University Press, 2009) 167 – 8.

[31] The term "indigenous communities" is somewhat problematic in the African context. This is so because colonists used the term very differently from its present use in the international movement of indigenous peoples. According to Niezen, currently, those who refer to themselves as indigenous peoples share significant similarities in their colonial and post-colonial experiences, such as "loss of land and subsistence, abrogation of treaties and the imposition of psychological and socially destructive assimilation policies". See Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (London: University of California Press, 2003).

[32] Pimentel, *supra* note 26 at 59.

[33] *Ibid* at 59.

[34] *Ibid* at 59.

[35] Marianne Constable, *The Law of the Other: A mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (Chicago: The University of Chicago Press, 1994).

Legal recognition of certain aspects of custom has been valuable and effective in some contexts. For example, in South Africa, the conclusion and dissolution of customary marriages was in the past regulated by informal social orders. However, the enactment of the Recognition of Customary Marriages Act has brought customary marriages on par with the common law marriages.[36] Moseneke DCJ in *Gumede v President of the Republic of South Africa and Others* states that the enactment of this legislation reflects an "effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with culture of indigenous African people".[37] He further asserts that previous courts and legislation only afforded marriages under indigenous law very limited recognition under the "lowly rubric of a customary union".[38] In this sense, it would appear that legislation has served as a valuable "norm manager" which not only strengthens the existence of custom but also operates as a mechanism to ensure and maintain its proper application.[39]

However, customary law which now exists in the context of legal pluralism still presents great challenges. The nature and structure of customary courts within most African states has undergone severe transformation. Their distinctive structures, procedures, rules and jurisdiction that differentiates them from formal courts have been significantly altered. In most cases, this was done in order to ensure a swift integration of the customary normative order into the state legal framework. Its administrative procedures have been greatly standardized and it has been made to adopt a strictly legal approach, with its previous moral and ritual

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[36] *The Recognition of Customary Marriages Act* 120, 1998.

[37] *Gumede v President of the Republic of South Africa and Others,* 2009 (3) SA 152 (CC) at para 16.

[38] *Ibid* at para 16.

[39] Elizabeth Scott, "Social Norms and the Legal Regulation of Marriage" (2000) 86:8 Virginia Law Review 267-696.

considerations having a limited role to play in the administration of justice.[40] This harmonisation of the court structure prompted the enactment of numerous uniform laws and codes pertaining to criminal law, labour law, land tenure laws and other specific laws regulating certain aspects of marriage. As such, a rising number of states in Africa are currently in the process of embodying unwritten customary law in either authoritative written statements or in codes.[41] When viewed against a modern state's need for a single uniform system of law, this process of codifying customary law is not necessarily undesirable.[42] However, when examined from an insider's perspective, this step denotes a stage in the development of legal systems in which customary law eventually ceases to be customary.[43] For example, a number of countries within Africa provide legislation establishing customary courts vested with power to adjudicate disputes arising from custom. However, the competence of these courts are usually limited due to the restrictive jurisdiction on the type of cases to be heard.[44] These jurisdictional issues ultimately result in a majority of customary disputes inevitably ending up being adjudicated by state courts. In adjudicating these disputes, decisions made by state courts take the form of authoritative writing. On the one hand, these writings establish certainty in the application of customary law but on the other hand they fail to account for the implications of the unwritten nature of customary law that is largely resolved through action.[45] Therefore, while these

[40] Laura Grenfel, *Promoting the Rule of Law in Post-Conflict States* (New York: Cambridge University Press, 2013) 136.

[41] White, *supra* note 1 at 88.

[42] *Ibid* at 88.

[43] *Ibid* at 88.

[44] See for example the case of Nigeria, where customary courts may adjudicate cases on land matters but subject the the Land Use Act. Also see Cameroon where in instances where the cause of action falls within the jurisdiction of a customary court, such court may still be unable to hear such cases in so far as the case exceeds the financial jurisdiction of the court. Customary courts have been ousted from exercising criminal jurisdiction and their civil jurisdiction is restricted within the realm of family law.

[45] Constable, *supra* note 35 at 84.

writings seemingly stay the same, the practical nature of custom evolves over time through changes in action. Practices gradually change to fit new conditions in society, social arrangements are adjusted, certain words become outdated as they stop being spoken and their meanings change to fit changes in society.[46] In contrast, decisions made by formal courts become precedents, resulting in a gradual codification and reform of custom. Customary law in this sense becomes a different kind of legal system carrying out many of the same functions as formal law.[47] As remarked by Lloyd "customary law needs no lawyers since all know the law, and since it has no lawyers it does not develop into an esoteric science- until of course it is written and one can begin to quibble over the meaning of words".[48] Once the customary develops into written law, it will then attain features of any other written law and the flexibility required in its adjudication gradually disappears.[49]

In legal systems like Cameroon, the repugnancy clause contained in statute and applied by statutory courts in adjudicating customary disputes is used as a mechanism for controlling aspects of indigenous culture considered to be unacceptable- and from which recognition would normally been withheld.[50] This clause, previously contained in colonial legislation and

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[46] *Ibid* at 84.

[47] *Ibid* at 84.

[48] Peter Cutt Lloyd, *Yoruba Land Law* (Ibadan: Oxford university Press, 1962).

[49] White, *supra* note 1 at 89. Also Gluckman's study of the Barotse reveals the equivalence of lawyers in the customary system, whom he refers to as "champions at law". His description of the legal framework in Brotse goes beyond the few generalised normative rules usually presented as the substantive law of tribal societies. The fact that the Barotse although "primitive" and "non-literate" had a well-developed legal system within tribal structures shows the current redundancy in modern states need to embody customary law within formal law. See Max Gluckman, *The Ideas in Barotse Jurisprudence* (New Haven: Yale University Press, 1965).

[50] Leon Shellef, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (New York: Routledge, 1999).

now reiterated in statutory law of most African states, provides that courts may only recognise customary law in so far as it complies with "natural justice and is compatible with written law".[51] The idea is that the customary rule in question should, according to western ideologies, not be contrary to civilized rules of conduct or legislation. As such, in most cases, courts are justified by legislation in finding that long-standing indigenous traditions and institutions are primitive and should be eradicated.[52] Other challenges can be found in the case of South Africa where the Recognition of Customary Marriages Act[53] while giving full recognition to customary marriages also aims at dissolving such marriage in the exact terms the Divorce Act dissolves a civil marriage. Statutory legislation in this case fails to account for the significant differences in conclusion and dissolution of customary and civil marriages.[54] Therefore, the codification and adjudication of aspects of custom although beneficial in certain contexts creates a great deal of disparity in its application.

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[51] *South Cameroon's High Court Law*, 1955, S27(1); Reference can also be made to the repugnancy clause as applied in the Nigerian legal system. See *Supreme Court Act of Nigeria*, 2004, s15 LFN. In Ghana, section 49 and 50 contain the repugnancy clause and rules for the application of custom. In Nigeria, the Constitution, the High court laws of the State, District Court Laws in the North, Magistrate Court Laws and other Customary Court Laws. In Sierra Leone, it is S76 of the *Local Courts Act* 20 of 1963. In Swazi, it is S11 of the *Swazi Courts Act*, 1950. In Tanzania, it is the *Magistrates Courts Act* of 1984. In Zimbabwe, it is S3 of the *Customary Courts Act*, 1981. In Botswana, S2 of *Customary Law (Application and Ascertainment) Act* 51 of 1969. See Charles Mwalimu, *The Nigerian Legal System* (Germany: Peter Lang, 2005) 132.

[52] JC Bekker & IA Van der Merwe, "Proof and Ascertainment of Customary Law" (2011) 26 SAPL 116.

[53] Section 8 of the *Recognition of Customary Marriages Act* 120, 1998.

[54] *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at para 18 - where the court held that "in our precolonial past, customary marriage was...a bond between families and not individual spouses…whilst the two parties to the marriage were not unimportant, their marriage relationship had a collective or communal substance. Procreation and survival were important goals of this type of marriage and indispensable for the well-being of a larger group…"; Also see *Mabena v Letsoalo,* 19998 (2) SA 1068 (T) at para 1072C-D. Also, legislation primarily enacted to ensure the dissolution of civil marriages based on 'individualistic principles' can therefore not be applied to customary marriages having a 'communal substance'. See Thulani Nkosi, "The Ending of a Customary Marriage: What Happens to the Ilobolo" (2013) 36 DeRebus 3.

This thesis posits that the current approach adopted by states in their attempts at regulating customary law has been primarily aimed at transformation, which in most cases cannot be justified by corresponding social practices. Therefore, by focusing on a specific jurisdiction in Africa where the structure of customary law and its mechanisms have been shaped to fit within constructions of state law, this thesis will show that the current legalistic doctrine adopted by states is largely misleading and detrimental to the development of customary systems. The argument is that the juristic view embraced by modern leaders who perceive modernisation and nation-building as requiring a unified system of law fails to account for the disparity and multiplicity of legal orders simultaneously existing within the legal system.[55]

1.2 Research Problem

Notwithstanding the prevalence and significance of customary law in Africa and in other regions, this thesis will limit its analysis to the situation in Cameroon. It is the broad outline of the problem in Cameroon that informs the content of this thesis and provides a normative base to draw from. This is because, although the government has tried to engage with the customary system in one way or the other way, evidence suggests that despite these efforts, the state still fails to appreciate the fact that a successful judicial reform requires a proper engagement with the various legal traditions existing within the state. [56] In its attempt at reforming its judicial system, post-colonial Cameroon considered the customary system to be regressive, primitive

[55] Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Society Review 871.

[56] Within the Cameroonian system, the customary normative order has been subject to neglect by the government and the international community in its development efforts. Although beyond the scope of this thesis, within the international development community, the World Bank although increasing its efforts at reforming the justice sector in developing countries, none of its projects have expressed the need to pay attention to customary systems despite their prevalence within many of the countries involved. Chirayath, *supra* 13 note 6 at 3.

and not amenable to development goals and the modernizing ambitions of the state.[57] The diversity of its internal structures, overly localized and complex institutions made it all the more difficult for the state to accomplish its universalizing initiatives.[58] This system is often described as being unconstitutional, lacking essential accountability mechanisms and legal legitimacy to induce any form of change. As such, the relative lack of attention being paid to the workings and effects of the customary system has created gaps in post-colonial Cameroon's regulatory and governance framework.

The importance of developing effective legal and regulatory systems that account for the nature of indigenous communities within Cameroon has been recognized by most development professionals.[59] Yet the current approach being adopted by the state in ensuring a successful engagement with normative systems is somewhat astounding. A key reason is that such efforts, more often than not, consists of a top-down approach that consistently fails to appreciate the complexity of customary systems, and more specifically, the social and cultural reality of indigenous Cameroonians. Therefore, whatever initiative adopted by the state will continuously fail to translate into sustained policy success.[60] More specifically, justice sector reforms of the customary judicial system has commonly been centred on "institutional transplants" wherein reputed legal codes, such as the constitution, contract law, and institutions such as the courts, other legal mechanisms of the dominant legal system have been transposed almost verbatim into the customary normative order.[61] These judicial reforms reflect a failure

[57] Mick Moore, "Societies, Polities and Capitalists in Developing Countries: A Literature Survey" (1997) 33:1 Journal of Development Studies 287-363.

[58] Chirayath, *supra* note 13 at 4.

[59] *Ibid* at 1.

[60] *Ibid* at 1.

[61] *Ibid* at 1.

to carefully consider any clear theory about the roles and functions of justice systems or how pre-existing traditional systems were constructed, including how they gained authority and legitimacy.[62] As such, community level context and dispute resolution mechanisms operating within these contexts have largely been ignored.[63] In understanding this problem, there will be no reason to undertake extensive consideration of the specific customary norms affected by state regulation, such as family, marriage, succession or land tenure. No one is likely to refute the fact that the current way in which the customary system is being regulated, in many ways is likely to set in motion forces that have the effect of undermining various beliefs and practices as understood within indigenous communities. What is required is an examination of a specific context in order to establish and provide evidence required to justify the proposition that the customary system if properly regulated could be used to address the needs of the state. As in numerous jurisdictions, the problem lies in the fact that the state's modernising ambition and its attempts at creating a unified system of law does not account for the fact that there are numerous tribes and traditions each having its own set of customs and forms of dispute resolution.

The context and implications of state attempts at reform will be evidenced in succeeding chapters. It will be shown that although much has changed since colonization, current steps taken, which focus on the formal system and ways in which customary law can be shaped to fit within the state legal framework in some ways assumes that state legal and regulatory institutions will gain authority within the customary system. This top-down approach fails to account for the fact that government institutions lack the capacity and legitimacy to fill the

[62] *Ibid* at 1.

[63] *Ibid* at 1.

gaps in social ordering and conflict resolution when local level systems are undermined.[64] These justice sector reforms do not concede or grasp how the systems operating in local communities are predominantly distinctive to particular sub-regional and cultural contexts.[65] Taking account of the current failures of state legal mechanisms in Cameroon, there is ample evidence to show that when neither formal or informal mechanisms are effective, human rights abuses and serious conflicts are more likely to occur.[66] Therefore, Cameroon's failure to properly engage with customary mechanisms of dispute resolution and social organization reflects a lack of zeal to effectively tap into non-state machineries that could prove beneficial in resolving current issues underlying the legal system. The states focus has been on either stamping out or taking control of the customary system in its entirety. This results in numerous practices being forced underground or alternatively being significantly modified, in turn undermining the legitimacy of the system.[67]

A number of authors have identified and established useful frames of reference in asserting that the principal issue in multicultural societies is not the existence of contradictory legal traditions but instead how functional the current legal system is in providing a space for conversation as opposed to an imposition of beliefs on the minority.[68] Working substantially with material of recent history and current state practice reflected in a vast array of cases, it becomes inevitable to find that if significant changes are not implemented, the customary system will gradually arrive at a stage of total disappearance. Beyond the survival of tradition,

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[64] *Ibid* at 6.

[65] *Ibid* at 1.

[66] *Ibid* at 6.

[67] *Ibid* at 7.

[68] Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law* (New York: Oxford University Press, 2010).

a greater and more nuanced attention will need to be paid to customary law in order for the wider legal system to work. This is so because the customary system if properly regulated could be used to fill the current gaps existing within African legal systems.

1.3 Research Question

Can the Customary normative order be used to fill the current gap existing within the regulatory and governance framework of post-colonial Cameroon?

1.4 Hypothesis

This thesis posits that if the customary normative order is properly regulated, it could serve an appropriate mechanism to be used in filling the current regulatory and governance gaps existing in Cameroon. By paying attention to this system of law and its methods of adjudication, it can be used to address numerous issues ranging from human rights, access to courts, governance, self-determination of peoples, violence against women and other cultural practices predominantly happening within homes and rural societies.

Drawing on Glenn, this thesis proposes that for customary law to be effectively used as a mechanism for addressing these issues, the current legal framework needs to move beyond the idea of recognition and tolerance to one that reconciles the complexities of the Cameroonian legal tradition.[69] As a starting point, it will be essential to look at a series of theoretical oppositions to the idea of the state having power over all other normative orderings. The main objective is not merely to reject the state as a mechanism of power or domination but also to constitute the customary system as a fundamental mechanism capable of self-regulation.

[69] *Ibid* at 373.

Relying on Povinelli's theory on the "cunning of recognition" the thesis shows that to understand this form of state power, is to understand how the idea of legal recognition of customary law is a formal misunderstanding of a group's existence. That is, of it being worthy of national recognition and a formal moment of being inspected, examined and investigated by the state system.[70] Recognition gradually moves towards ensuring greater control of customary institutions.[71] This control is reflected in its process of determining what rules should govern the normative order and what aspects of custom it chooses to acknowledge or eradicate. The process fails to account for the nature and structure of the normative order and how a major aspect of this community tends to be excluded as a result of an implementation of such laws. This has not only undermined traditional systems but at the same time fails to provide adequate alternatives for the indigenous community, leaving them with no clear or legitimate system of governance.[72] Therefore, although the idea of recognition may look like a step in the right direction, the institutionalized processes amounting from this does not capture its effects on the customary system.

Relying on these theories, I intend to show that the top-down approach adopted by post-colonial Cameroon in administering customary systems is fundamentally incompatible with the inner dynamics of indigenous communities.[73] This is so despite the recognition afforded to customary courts by the Constitution and other legislative enactments. These recognitions coupled with additional mandates to courts, were implemented with the intention of restructuring the customary system in a way that reflects the modernising ambition of the state.

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[70] Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002).

[71] *Ibid* at 8.

[72] *Ibid* at 16.

[73] Chirayath, *supra* note 13 at 15.

While it could be essential to use modern ideas to draw attention to the inconsistencies within customary law, it is also important to realize that the theory and practice underlying the customary system, although influenced by disparate factors, are deep-rooted within the African way of life.[74] Therefore, in order to address the defects of the customary system, it is not necessary to transform all people into westerners.[75] State initiated attempts at reforming aspects of custom can be easily construed as a form of imposition of westernized values on indigenous African societies. Like Moore, I am of the view that these alterations are fundamentally hypocritical.[76] On the one hand, they seek to sustain custom by recognizing customary systems, while on the other, new procedures and practices are inserted into the customary system with the primary aim of remolding the customary system in its entirety, into lines consonant with western beliefs and perceived higher standards.[77]

1.5 Significance of the Research

The questions posed in this thesis are distinctive, in that they have not been posed elsewhere in this manner. They seek to apply the relevant theories to the specific situation in Cameroon as no in-depth legal analysis has been done on Cameroon in this field. Also, the applicability of this study is not only limited to the Cameroonian context, in that the current legal situation in Cameroon is similar to ongoing efforts in other developing African countries where similar issues are being addressed. Furthermore, the development of "political consciousness" among indigenous peoples in various parts of Africa, their "aspirations towards recognition in various

[74] Josiah A Cobbah, "African Values and the Human Rights Debate: An African Perspective" (1987) 9 Hum Rts Q 328-9.

[75] *Ibid* at 328.

[76] Sally Falk Moore, "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running Their Own Native Courts" (1992) 26:16 Law and Society Review 16.

[77] *Ibid* at 16.

fields of human endeavour" and more generally the growing "economic and social importance" of the continent, makes it all the more crucial that an effort be made to give expression to the inherent ideas of the African peoples in the rapidly fluctuating conditions of their modern life.[78] There are current and ongoing law reform initiatives in these countries and in this way the study will be relevant to these efforts in the region.

The problems associated with pluralism and custom are not unique to the African setting. Although colonialism has overlaid the problem in Africa so that the law of the state appears to be white law and the law of African people, the various inconsistencies and conceivable conflicts between dissimilar kinds of law in society are not exclusive to Africa, nor to colonialism, foreign rule or cultural conflict.[79] How prevalent the unwillingness is to accept the legitimacy of minority traditions by the dominant legal system is a problem arising out of the growth of the state and its modes of regulation, both where communities are relatively harmonized and where they are culturally and religiously varied.[80] The situation is striking where the pace of economic change is rapid and where there is extensive diversity between regions and classes, but existent even where this is not the case.[81] Therefore, the conflicts and

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[78] Elias, *supra* note 27 at 4.

[79] Chanock, *supra* note 17 at 73.

[80] *Ibid* at 73. To emphasize the fact that that this disparity is not only limited to colonization or to states with racial, cultural or economic differences, an example can be taken from the interactions between Canada's legal traditions and the various imbalances between these traditions in Canadian public life. See John Burrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

[81] Chanock, *supra* note 17 at 73. One could also take a more specific example of the law relating to child custody after divorce in Australia. Statute dictates that the welfare of the child is the sole factor to be taken into account in custody cases. See *Family Law Act*, 1975, s64(1) (a) (as amended). Although this provision constitutes the law of the state, it is however by no means the way people structure their lives within the society. Since societal practice reflects that 90% of custody cases are settled out of court, with specific preference given to maternal custody, one could rightly regard this as the customary law in Australia. See Chanock, *supra* note 17 at 74. Similar points can be made in the case of criminalization of penile

inconsistencies between legal traditions are not to be approached simply in the context of the aftermath of "white colonialism" in Africa.[82] In numerous countries, people live with more than one law, expressive of diverse parts of culture, legal and social developments.[83] Therefore, the reasoning adopted in this thesis will not only be important in the context of Cameroon or Africa but relevant to other contexts.

1.6 Research Methodology

The thesis will primarily include desk research. The main sources of evidence to be used in this study includes information acquired from relevant historical documents. Chapter 2 relies heavily on historical sources. The aim is to establish how pre-colonial customary societies in Cameroon were composed and regulated. Relying on these historical studies, the chapter will also show how significant changes were made as a result of colonization. Secondary data in the form of books, journals, scholarly articles as well as internet sources will be consulted.

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circumcision in Germany. Circumcision in this case is best viewed as a clash of legal traditions, that is, between the shared understanding of circumcision in the Jewish and Islamic communities within the German legal system.

[82] Chanock, *supra* note 17 at 73.

[83] *Ibid* at 74.

CHAPTER 2

A HISTORICAL ANALYSIS OF THE NATURE OF CUSTOMARY LAW IN CAMEROON

2.1 Introduction

In understanding legal history, our first question should be about how to constitute this field of study, and what we hope to develop from it.[84] In the context of customary law in Cameroon, a range of choices exists on whether to focus on state regulation or on conflicts between people, on rules, actions or ideas. On the basis of a limited range of materials drawn mainly from Cameroon, my inquiry into history is primarily aimed at understanding the context and conditions that has led to the reform and development of this area of law. The increased importance ascribed to social and economic factors, the emergence of political consciousness among indigenous peoples in Cameroon and their aspirations towards recognition in various fields, makes it necessary for an attempt to be made to give expression and understanding to the nature and character of customary law as a phenomenon that has a significant history.

This chapter aims at identifying and understanding several factors that have influence the current state of customary law. These include the pre-colonial political and administrative organizations of different regions, the German approach to administration of its territories, the British policy of native administration and the administration of regions by the French authorities. The section doesn't answer the question of whether these conditions have led to positive or negative reform and development of this system of law. It will only delve into

[84] Martin Chanock "A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa" (1991) 32 Journal of African History 65-88.

Cameroonian history to determine circumstances that prompted development of this normative order. It will stimulate thought on ways in which thinking about the customary normative order might provide access to certain fundamental sets of conceptions about social relations in pre-colonial and post-colonial Cameroon. This analysis will provide insight on questions such as: How did the Cameroonian society conceptualize relationships between people?[85] How were these conceptions changed during the significant transformations of the state and the economy in the colonial period?[86] These broad questions can only be answered with reference to specific historical patterns. The objective is to use the findings from legal history to elucidate important areas of ideology about the social order in Cameroon and to look at the impact of other factors on the normative content of customary law.

2.2 Pre-colonial Regulation of Customary Law

Over the past twenty years, many anthropological and historical studies have helped clarify how pre-colonial societies of Cameroon were composed. The law in this era was fundamentally customary in character, having its bases in the general practices and traditions of people.[87] The normative force and legitimacy of custom derived from the idea that it is ancient, mystical, unchanging and has been passed on from generations to generation.[88] The divine character of these norms impelled customary law to address almost all aspects of life and human behaviour ranging from family, succession, property, obligations and crime. Its sources were rich and varied.[89] In this way, law was virtually everywhere, both in relations between man and god and in relations between a person and others. In the absence of a single unified system of custom,

[85] *Ibid* at 3.

[86] *Ibid* at 3.

[87] Ndulo, *supra* note 9 at 94.

[88] *Ibid* at 94.

[89] *Ibid* at 94.

pre-colonial political, legal and administrative customary framework of Cameroon differed by region. Despite this plurality, the systems operating in the various regions although dissimilar in certain aspects bore remarkable structural similarities. Focusing on certain parts of Bamenda, Mamfe, Wum and Nkambe divisions, the ensuing section will highlight the structural organisation of units within villages in order to provide a sense of dimension and context to the social and legal questions central to these pre-colonial societies. It will also underline the nature of beliefs that sustained and afforded credibility to the various institutions established to regulate custom within societies.

2.2.1 The Structural Organisation of Units

Pre-colonial villages, in some areas of Mamfe, Wum, Bamenda and Nkambe divisions, were normally federations of several clan sections, referred to as *fondoms*, under a single political leadership.[90] The village government in the Bangwa area of the Mamfe division was highly representative as it was jointly led by hereditary heads of principal clan sections, the *kum si,* also known as village notables.[91] While all members of this group based their authority on the possession of mystical powers, the role of one was highly elaborated in its symbolism, and was accorded greater prestige and prerogatives.[92] This distinguished *kum si* was referred to as the *Fon* or king, and his office provided the focus of a centralized village-level legal and political structure.[93] The nature of the power ascribed to these authorities had a highly mystical connotation, emanating from a supreme god, and transcending down to the people through the

[90] Richard G Dillon, *Ranking and Resistance: A Precolonial Cameroonian Polity in Regional Perspective* (California: Stanford University Press, 1990).

[91] *Ibid* at 117.

[92] *Ibid* at 117.

[93] *Ibid* at 117.

intercession of ancestors.[94] It was believed that a mystical bond existed between the authority exercised and the human agents of such authority.[95] Ruling in this instance derived its legitimacy through ritual rites which were believed to be controlled by forces beyond human control. As such, persons in command or in authority were alleged to be morally and spiritually impaired from manipulating established norms for fear of the wrath of the gods.[96]

The internal organisation of a village was expressed in two principal ways. First, the entire village co-operated in specific activities that were designed to secure common interests. For example, the *fon* and the notables of each village operated a complex conflict-management system in order to ensure the promotion and protection of persons and property.[97] The second expression of the internal structure of the village was through what Ruel refers to as 'constitutional ordering'.[98] Most villages had a judiciously worked out constitutional structure based on the allocation of specific public rights and privileges among its leaders.[99] Authority was decentralised into three classes of notables. The first class consists of persons vested with the power to command moral authority as spokesmen of tradition and public opinion.[100] Their primary function was to maintain the unity and morality of the society. The second class

[94] Bongfen Chem-Langhee, "The Origin of Southern Cameroons House of Chiefs" (1983) 16 International Journal of African Historical Studies 653.

[95] *Ibid* at 653.

[96] *Ibid* at 653.

[97] Dillon, *supra* note 90 at 118.

[98] Ruel Malcolm, *Constitutional Politics among a Cross River People* (London: Tavistock Publications, 1969).

[99] *Ibid* at 60.

[100] Cyprian Fonyuy Fiiy, "Colonial and Religious Influences on Customary Law: The Cameroonian Experience" (1988) 43 Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente 262-275.

consists of persons entrusted with the ability to wield ritual authority.[101] This class includes medicine men, diviners and priests of traditional cults. They acted as mediators of the supernatural forces as their pronouncement were believed to be derived from supernaturally-supported traditions.[102] The third class of notables exercised legal authority and were empowered to employ the use of force. They were members of regulatory or secret societies acting as both the legislative and executive arm of the administration to ensure the implementation of policy.[103] It should however be noted that there was no strict separation of functions of the various classes as attempted above. In most cases, these agents acted in all three capacities by exerting moral, ritual and legal authority. Local institutions were integrated with the central political authority and the decision making process during this period although primarily administered by customary authorities was very complex and largely based on consensus.[104] The *Fon* was under an imperative to discuss matters and issues concerning the welfare of his people with council members comprising of various classes of notables, the village and family heads.[105] Although allowed to deviate from findings of the council on matters regulating his personal/family interests, he was not allowed to do so in matters involving the interests of the whole community.[106] Decisions arrived at in this council reached the majority of his subjects mainly through the village heads and leaders of the society and were pronounced as personal edicts of the ruler having the force of law.[107]

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[101] *Ibid* at 264.

[102] *Ibid* at 264.

[103] *Ibid* at 264.

[104] Devon Golaszewski, *A Question of Fulbe Power: Social Change, the State and Ethnic Relations in Northern Cameroon* (*Honors Theses - All.* Paper 76, 2008), online: http://wesscholar.wesleyan.edu/etd_hon_theses/76

[105] Chem Langhee, *supra* note 94 at 655.

[106] Golaszemski, *supra* note 94 at 29.

[107] Fonyuy Fiiy, *supra* note 100 at 265.

2.2.2 Traditional Justice and Conflict Resolution

Legal regulation in pre-colonial Wum and Nkambe divisions could be understood from an inquiry into how order and authority were maintained within villages, and how ordinary citizens utilized various legal and non-legal institutions in conducting and resolving conflicts.[108] In an attempt at reinforcing social order within communities, the very nature of the sanctions imposed suggests that their origins and guided growth are strongly rooted in the spiritual aspects of legal and political authority. Village leaders were believed to use mystical powers of sanctions unknown to offenders to prohibit specific behaviour. Each sanction had a two-part consequence, supernatural punishment and social ridicule or ostracism in serious cases. Social ostracism was in the form of expulsion from the specific society the accused lived.[109] Subjection to humour and mockery from the society for minor misdemeanors and to be completely ostracised for major offences were appalling punishments.[110] The ritual aspect to sanctions was premised on the idea that certain crimes are reckoned as sins, in essence, regarded as offence against the unseen powers of the universe resulting in punishment irrespective of secular agency.[111] Such sanctions are believed to originate from a supreme being through intercession of the ancestors, the 'living dead' to those living on earth.[112] For example, in murder cases, since all persons within the village group are regarded as brothers, any person who killed a fellow villager was an anomaly.[113] It was viewed as a moral violation of an extreme sort having the ability to cause personal affliction on the perpetrator and his entire

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[108] Dillon, *supra* note 90 at 120.

[109] Charles Clifton Roberts, *Tangled Justice: Some Reasons for a Change of Policy in Africa* (London: Macmillan, 1937).

[110] *Ibid* at 63-4.

[111] *Ibid* at 63-4.

[112] John S. Mbiti, *African Religions and Philosophy* (London: Heinemann, 1969).

[113] Dillon, *supra* note 90 at 196.

clan.[114] Sanctions in this instance typically involved a strict and lengthy ceremonial procedure of atonement.[115] The complex process of ritual resolution involved in such cases was believed to serve as a means of overwhelming the perpetrator and his kin group with fears of mystical danger coupled with demands of costly fees to the notables.[116]

The nature of these sanctions points towards a system used primarily as a means of social control within local communities. It draws attention to a structure that relies on exemplary punishment in administering justice. Research indicates that rarely did authorities suggest that an increase in the severity of punishment would better maintain order. As such, it could be assumed that since the nature of each sanction and decision embodied both social ideals and religious intensity, it was sufficient to operate as an intentional feature of this normative order. The effectiveness of every sanction rested not only upon its ability to intimidate the guilty but also implicate their clan and deter potential violators.[117] Compliance was therefore automatic and instinctive.

2.2.3 Custom, the Individual and Change

Within Nso, Kom, Bali Nyonga and Bum, a system of rigid rules and flexible application was necessary if the legal administration was to reflect ideas of socio-centric individuals, defining

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[114] *Ibid* at 196.

[115] Also, for the offence of theft, ritual acts were performed to inflict illness and misfortune on thieves. These rites were not only believed to mobilize supernatural forces but also effectively deterred potential deviants by imposing psychosocial pressures. See Dillon, *supra* note 90 at 196.

[116] Jean Philip Nguemegne, "Histoire des Institutions et des Faits Sociaux du Cameroun (Des Origines à 1800)" (1997) 1 Dschang PUD.

[117] This is illustrated in instances where formal oath taking was employed as a means of resolving disputes over land. It was believed that anyone making a false oath will be inflicted with a disease which would spread to the dependants of the perjurer. Pressure was then placed on the alleged perpetrator from their relatives who feared being affected by the disease arriving from false statements. Refer Dillon, *supra* note 90 at 96.

precise obligations of the parties rather than creating or defining rights. Custom was not respected because it was backed by powerful individuals or institutions, but instead because each individual in the society recognized the benefits of behaving in accordance with other member's expectations.[118] Reciprocity was a vital element in the recognition of duty to obey customary rules and of law enforcement. The significance of the flexibility in application is that it could be assumed that law in this era was not the creation of a logically consistent body of legal doctrine.[119] The procedural and adjudicative structure was open, having no formal barriers or obstacles to limit access to officials of the law.[120] Likewise in Meta, Fungom, Bafut and Mbembe, the law as applied was substantive as opposed to procedural. Its aim was to resist individual powers or entitlements in the form of rights because of the higher form of obligation owed to the society.[121] This understanding of the law is adequately reflected in the nature of property rights. Perhaps because it lacked tradable commercial value or because mobility was constrained to foot or domesticated animals, land was rarely the subject of dispute. It was seen as a source of socio-cultural well-being of a people, a deity and a spiritual link between a people and their god.[122] As the burial place for generations of ancestors, land constituted the vital link and the primary means of communication with ancestors. As such, it was regarded as an ancestral gift creating an obligation for members of the community to protect and pass it on to subsequent generations.[123] Land was owned communally by families or whole villages with

[118] Lotsmart N. Fonjong, *Issues in Women's Land Rights in Cameroon* (Bamenda: Langaa Research & Publishing Common Initiative Group, 2012).

[119] Glenn, *supra* note 68 at 145.

[120] *Ibid* at 145.

[121] *Ibid* at 156.

[122] *Ibid* at 156.

[123] *Ibid* at 156.

traditional leaders taking trusteeship.[124] Any member in need of land for farming or cultivation was allowed to approach the traditional head who would then allocate a share of the communal land to the individual and his generation to come.[125]

An analysis of the nature of dispute resolution in land disputes reveals the great mental agility required for customary reasoning. All the opinions of the council members have to be dealt with and all the potential cases and variations have to be considered.[126] This leaves no time to retreat and write down as tradition was applied most frequently in oral study and debate.[127] An interesting aspect to the oral nature of these decisions is that customary adjudication left a clear track. Much of what has gone before was still recoverable in the minds of the indigenes and consequently passed down to succeeding generations.[128] It could therefore be argued that the particular style of rationality that emerges within the customary adjudication is one that is not necessarily methodical in nature. [129] It is not fully reliant on the existence of legal texts or written precedents, instead the mystical inspiration and the disparate forms of life in which

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[124] Sandra Belaunde et al, *Land Legitimacy and Governance in Cameroon* (Institute of Research and Debate on Governance and Columbia University School of International and Public Affairs, 2010), online: http://www.institutgouvernance.org/IMG/pdf/sipa_cameroon_land_legitimacy_governance-2010.pdf.

[125] *Ibid* at 18.

[126] *Ibid* at 18.

[127] However, despite the role that oral tradition plays in the Cameroonian culture, a few societies had a form of record keeping that afforded guidance to authorities in arriving at decisions. As such, the critic that customary law in this era was characterised by an absence of record keeping can be challenged. The oldest form of writing and recording keeping in Cameroon is the Nsibidi writing, also known as Nsibiri, originating from the Ejagham people of South-West Cameroon. This form of record keeping is also found among similar cultures in Nigeria called Ekoi, Efik and the Igbo. The primary use of Nsibidi was by members of the secret society, known as the Ngbe or Ekpo, vested with legislative, judicial and executive powers in this era. See Philip Efiong, *Nsibidi: Indigenous African Inscription* (2013) online: http://www.philip-effiong.com/Nsibidi.pdf

[128] Dillon, *supra* note 90 at 196.

[129] Glenn, *supra* note 68 at 5.

tradition regulates resists this systematizing impulse. [130] This form of reasoning hinges on the idea of change and evolution of tradition.[131] Although the divine inspiration of tradition was believed to be somewhat fixed, specific changes in the social circumstances of the local communities play a significant role in the development of tradition.[132] As such it could be assumed that customary law involved a combination of two attitudes; the revered nature of the supernatural aspect and the evolving nature of its normative content. So, the form of change that occurred was at the level of relations of humans with one another and with the world and not at the level of human relations with god. It should however be noted that change and significant difference did not instantly appear, this only happened as soon as consensus on the new practice has resulted in general acceptance by the society.[133] This process appears to normally take a long time and traditional authorities play a significant role during this period to ensure coherence within tradition.[134] The particularity of customary law in this era is not so much in its substance but in its procedures as emphasis is placed on supernatural entities participating in some way in the legal order and on the importance of social and political groups and communities.

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[130] *Ibid* at 5.

[131] *Ibid* at 5.

[132] For example, the advent of slave trade posed a significant threat to the orderly relations within most villages as people were sold into slavery under several circumstances. Traditional authorities in this instance regulated slave transactions by requiring that local chiefs be notified when sales to non-villagers occurred. The slave traders were required to leave a length of cloth at the entrance of the chief's compound. This served to assure the public that no villager would arbitrarily be sold to slavery. Once accepted by general consensus, this became accepted as practice in most regions. See Dillon, *supra* note 90 at 196.

[133] Dillon, *supra* note 90 at 196.

[134] Dillon, *supra* note 90 at 196.

2.3 The Colonial Regulation of Customary Law

In the context of Cameroon, it is difficult to think of a development that had a more decisive impact on the customary normative order than the establishment of colonial rule at the end of the nineteenth and the beginning of the twentieth centuries.[135] This rule not only interrupted the pre-colonial path highlighted above but also shaped the nature of the post-colonial Cameroonian society and polity in more ways than one.[136] Cameroon experienced three divergent colonial regimes, German, French and British, inheriting triple colonial legacies that conditioned its post-colonial experience. The German colonial rule was from 1884 to 1914 and the joint Anglo-French administration from 1914 until independence in 1960.[137] With the defeat of the Germans in the First World War, the British and the French formally took over Cameroon after the Anglo-French declaration of July 10, 1919 as a mandate territory of the League of Nations.[138] The British ruled one-fourth of the territory of Cameroon as an integral part of Western Nigeria until independence in 1961, while French Cameroon was administrated as a separate French colony.[139]

When we look at the changes in the legal administration and development in this era, it does seem that development of the law must have been shaped in part by the colonial government's effort to address an assumed "crisis of disorder" in pre-colonial administrations.[140] The following sections will highlight the major structural innovations that developed in the

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[135] Bahru Zewde, *Society, State and identity in African History* (Addis Ababa: African Books Collective, 2008).

[136] Sean Hawkins, "Disguising Chiefs and Gods as History: Questions on the Acephalousness of Lodagaa Politics and Religion" (1996) 66 Journal of International African Institute 202-247.

[137] *Ibid* at 210.

[138] *Ibid* at 210.

[139] *Ibid* at 210.

[140] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (United Kingdom: Cambridge University Press, 2002).

German, French and British era eventually transforming the administration of justice in Cameroon. In looking at the involvement of the colonial government and the influence of colonial ideas, one is forced to consider whether the historical processes at work were something considerably more complex. The bonds of older forms of social organization remained relatively strong. Consequently, what we are looking at is not simply the exploitation of colonial governance but also the endurance of a normative order based on ties of obligations and collective responsibility.[141] I intend to show that colonial authorities who often appeared as comprehensive political powers were more internally fragmented entities that needed to insert themselves within local power structures.[142] An analysis of the different regimes allows us to identify transformative moments with greater precision.[143] A significant part of the succeeding discussions on colonial administration will also focus largely on structural modifications and boundaries. This is because these boundaries and their representations on law become struggles over the nature and structure of political and legal authority.[144] Ways of defining and ordering regions are not just materials from which political institutions "construct legitimacy and shape hegemony".[145] They are institutional elements on their own, "simultaneously focusing colonial practice and constituting structural representations of authority".[146] As such, distinctions among groups attain an importance that reflects the colonial governments certain knowledge that they were struggling not just over "symbolic markers" but over the very structure of rule.[147]

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[141] *Ibid* at 2.

[142] *Ibid* at 2.

[143] *Ibid* at 2.

[144] Benton, *supra* note 140 at 3.

[145] *Ibid* at 3.

[146] *Ibid* at 4.

[147] *Ibid* at 4.

2.3.1 Emergence of Legal Dualism

The advent of colonialism in Cameroon created a framework for the politics of legal dualism, though the particular patterns and outcomes varied in different regions. Whenever a colonial government imposed law on a newly acquired territory or subordinated groups, calculated decisions were made about the extent and nature of legal control.[148] These strategies of rule included aggressive attempts to impose legal systems, combined with a conscious effort to preserve elements of pre-colonial institutions and limit legal change as a way of sustaining social order within regions.[149] The dualism in all colonially administered regions reflects two distinct forms of power, the centrally located modern state and the locally organized native authority.[150]

The framework for legal dualism was introduced through colonial authorities claim to bring civilization to Cameroon; civilization in this instance meant the rule of law.[151] The "torch bearers" of this civilization in all colonially administered regions was primarily supposed to be colonial courts.[152] These courts were not only intended to serve as sites where disputes are resolved or simply as evidence to effective imperial control; instead, they were to shine as beacons of western civilization.[153] Being unable to immediately abolish the customary institutions in place in the pre-colonial era, the new rulers of Cameroon formed a system of judicial dualism. At one end there existed traditional tribunals, courts of first instance to which natives had ready and easy access, courts that dispensed justice according to pre-colonial

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[148] *Ibid* at 2.

[149] *Ibid* at 2.

[150] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (New Jersey: Princeton University Press, 1996).

[151] *Ibid* at 109.

[152] *Ibid* at 109.

[153] *Ibid* at 109.

customary law.[154] At the opposite end existed a hierarchy of courts designed to administer modern Western based laws for Europeans and those with similar status.[155] These courts were composed mainly of white officials, referred to as commissioners in British administered regions and commanders in French regions. Officials listened to appeals from the traditional courts and were charged with the general administration of the native population.[156]

From its inception, there was a strict differentiation between Europeans and Africans, leading to the division of the state into categories of citizen and subject.[157] The lives of the citizens were regulated by modern law in the language of rights, whereas the lives of the subjects were regulated by chiefs under customary law on the basis of ethnic identity.[158] The hallmark of the modern state was civil law, in regions administered by the French, and common law, in regions administered by the British.[159] As will be discussed below, there was a significant difference between the British and French administered regions to the extent that British indirect rule left more place for the use of pre-existing local power structures to control its regions. By this system, the government and its general administration of all areas was left in the hands of traditional leaders, who in turn gained prestige, stability and protection afforded by the British colonial government.[160] This multisided dualist nature of legal contests in Cameroon flourished until the advent of independence. It was fundamental to the construction of colonial rule and

[154] Moise Timtchueng, *The Gradual Disappearance of the Particularities of Traditional Courts in Cameroon* (Open Society Institute- Africa Governance Monitoring & Advocacy Project, 2005), online: http://www.afrimap.org/english/images/paper/Timtchueng_Cameroon_ENfin.pdf.

[155] *Ibid* at 2.

[156] *Ibid* at 2.

[157] Mamdani, *supra* note 150 at 110.

[158] *Ibid* at 110.

[159] *Ibid* at 110.

[160] *Ibid* at 110.

key to the formation of larger patterns of local structuring.[161] The succeeding sections will reveal the colonial order that was far more complex and institutionally less stable than many approaches to Cameroonian history have suggested. Studying the political and legal regimes in all colonially administered territories in Cameroon leads toward an enhanced understanding of Cameroonian history and toward a more nuanced view of cultural interactions in particular colonial encounters.[162] The remainder of this chapter will discuss three points of entry for studying the different colonial regimes- jurisdictional politics, cultural and legal intermediaries, and changes in customary law regulation with specific reference to criminal law and the law of property. These three facets emerge out of contests over the shape of colonial legal order and help illustrate processes shared across diverse colonial settings and to investigate the interrelation in particular regional contexts of institutional change.[163]

2.3.2 Jurisdictional and Cultural Boundaries

The comparative and interpretive study of the different processes in the different colonial governments is on a level synonymous with Benton's idea of "jurisdictional politics" which encompasses conflicts over preservation and creation of different legal forums and authorities.[164] This involves the location of political and legal authority in each colonial administration, the internal dynamics of challenges to legal authority and changing political schemes to craft a stable plural legal order.[165] These were critical in shaping the character and reach of legal and political authority in all three colonial regimes.

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[161] *Ibid* at 110.

[162] Benton, *supra* note 140 at 9.

[163] *Ibid* at 10.

[164] Benton, *supra* note 140 at 10.

[165] *Ibid* at 10.

Although the Germans in Southern Cameroon did very little to alter the political and administrative organisation that existed in the pre-colonial era, the Anglo-French rule did more than just the marking of new jurisdictional boundaries. "Jurisdictional jockeying" by Anglo-French colonial authorities was a universal feature of their administrations.[166] The most significant modification introduced by the Germans in the traditional system was dividing southern Cameroon into different administrative districts, each of which had little to do with each other. The division, although somewhat insignificant as compared to the French and British rule, created a clear cultural boundary between colonizers and the colonized by casting only one as the possessor of law and civility.[167] Jurisdictional complexity was more evident in the legal order of the Anglo-French administered regions. Both legal orders not only contained overlapping authorities and forums but the scope and precise nature of claims to legal control were continuously in dispute.[168] One prominent set of tension focused on the boundary between local and centralised law. This division between colonial and customary law was particularly important in setting the terms of jurisdictional conflicts of all sorts.

The structural and administrative legitimacy of pre-colonial Cameroonian societies was substantially altered during the period of French rule. These changes were not due to flaws in the customary system but rather intentional modifications rooted in colonial ideology.[169] The

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[166] *Ibid* at 10.

[167] This resulted in the appointment of district officers, certain village heads and chieftains as local authorities. The district officer who in most cases was a pre-existing traditional leader of a group within the district dealt directly with the German administrator in performing his duties. He was in charge of specific divisions and empowered to apply German laws which existed in his district or, in the absence of such laws, to apply the native laws and customs of the people provided such laws or customs didn't contradict European standards. See Chem-Langhee, *supra* note 94 at 657.

[168] *Ibid* at 657.

[169] *Ibid* at 657.

multiple ways in which colonial administrators could and did shape the customary normative order for their own purposes indicates a struggle of power in the colonial authority's relationship with traditional authority. Pre-colonial powers of the king became restricted and modified as the king now assumed a dual role, as a representative of the population in the French government and as a representative of the French government to the population.[170] Unlike the pre-colonial era where administrative and family units were primarily based on lineage ties, each unit became linked to a specific village or region in order to facilitate the collection of taxes and labor.[171] The *conseils des notables* composed of village and district level chiefs and representatives of different ethnic groups continued to exist but assumed different responsibilities with their primary task being to limit the power of the kings.[172] This council served as a link between Kings and the French government and also operated as another means by which the French could control the independence of traditional authorities.[173] In 1949, the need to create a non-homogenous unified system of administration led to the replacement of the council of nobles with regional councils who were tasked with duty of participating more actively in regional administration.[174] This decision was largely based on the necessity to avoid an over reliance on traditional authorities and to ensure the administration of indigenous Cameroonians and French citizens who were not organized by ethnic groups as in the pre-colonial era.[175] Kings still retained and preserved a certain measure of their pre-colonial power and influence as they were still able to oversee development projects, collect taxes and

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[170] *Ibid* at 657.

[171] Golaszewski, *supra* note 104 at 66.

[172] *Ibid* at 66.

[173] Alice L Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa* (California: Standford University Press, 1997) 192; Victor T Le Vine, *The Cameroons: From Mandate to Independence* (California: California University Press, 1964).

[174] Conklin, *supra* note 173 at 90-91.

[175] Le Vine, *supra* note 173 at 92-97.

adjudicate customary cases primarily concerned with issues of inheritance, domestic issues like abuse and divorce and the status of former slaves.[176]

The British colonial rule provides an adequate example of what Benton describes as "the creation of orderly disorder".[177] At the outset, the colonial government made aggressive claims that the British authority superseded all other customary authorities. Jurisdictional disputes and modifications became not just common place but a defining feature of this legal order. As will be seen in the succeeding section on post-colonial Cameroon, this ideology has assisted in shaping current discourse about cultural and ethnic differences in the Cameroonian society. The British introduced a new system of administration called Native Administration which involved the carving up of regions into separate administration sub-units, represented in general by Native Court Areas.[178] These native court areas corresponding to previously existing pre-colonial fondoms was governed by a native authority, which in most cases was a pre-colonial traditional authority, a *Fon*.[179] Each native authority performed both executive and judicial functions of native administration while being assisted by an advisory council composed of the *Fon* and some village or family heads within their jurisdiction.[180] These initial arrangements ascribed full local power to the traditional leaders, giving village heads who were presidents of the courts greater influence within their communities.[181] However, these

[176] Golaszewski, *supra* note 104 at 72.

[177] Benton, *supra* note 140 at 125.

[178] David E Gardinier, "The British in the Cameroons 1919-1938" in P. Gifford and Wm. Roger Louis, eds, *Britain and German in Africa: Imperial Rivalry and Colonial Rule* (New Haven and London: Yale University Press, 1967) 545-546.

[179] *Ibid* at 547.

[180] Chem-Langhee, *supra* note 94 at 658.

[181] *Ibid* at 658.

arrangements underwent significant modifications between 1923 and 1927.[182] The various divisions were retained but several villages and chiefdoms were reassigned from one division and sometimes national court area to another. The aim was to place people of the same clan or ethnic group with the same group. The majority of the clan and ethnic groups within each division became native authority areas as native court areas were renamed.[183] Each pre-colonial political entity within the native authority areas had a lower court, also referred to as village courts, and presided over by the village head. The higher courts, known as clan courts, comprised the traditional leaders of the pre-colonial political and administrative entities within the jurisdiction of the particular native authority areas.[184] Lower and higher courts heard specific cases according to native laws and customs, with the former serving as a court of first instance and the latter acting as an appeal court.[185] In 1949, another major reorganization was made with the primary aim of including western-educated elites whom British colonialism had produced but ignored in the development of native administration. These Western educated elites either wanted the illiterate traditional authorities to have a hands off approach in native administration or have the system of native administration totally abolished.[186] In response to these demands, the British government introduced various administrative reforms. The different divisions were now referred to as provinces, the native authority areas were amalgamated into larger administrative sub-units in the form of federations.[187] Each sub-unit had a central court, an appeal court and a central council, the policy making body of the sub-unit. The previous clan councils and courts were not recognized in this new set up as they were

[182] *Ibid* at 659.

[183] *Ibid* at 659.

[184] *Ibid* at 659.

[185] Chem-Langhee, *supra* note 94 at 661.

[186] *Ibid* at 661.

[187] *Ibid* at 662.

replaced by the central organs.[188] The previous village court and council were retained but only to address local issues and to implement the policies laid down by the central body. These new arrangements restricted the role and power of traditional leaders to mere executors of general policy, while only very few of them had legislative powers in the central administrative organs.

The continuous change and reorganisation of regional boundaries coupled with the restructuring of local administrative organs reflects a gradual process of systematic and persistent elevation of state law to an authoritative position in colonial Cameroon.[189] Local authorities were used by the colonial government not only to move strategically through an already established legal order but also instrumental in legitimising the authority of the colonial government in indigenous societies. Through this, the state came to be vested with a special authority, one that can not only be exercised through the subsuming of all alternative forms of authority but also establishing a monopoly claim to definition of political and legal identity in Cameroon.[190] Upon closer analysis, it can be seen that the different changes in rules structuring the legal order were not merely "procedural conveniences or tactical weapons".[191] They become "symbolic markers", as the different regional boundaries signified colonial judgement on the different character and qualities that separated each customary group from the other.[192] As such jurisdictional politics arguably constructed current cultural and ethnical discourse on difference in Cameroon.

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[188] *Ibid* at 662.

[189] Lauren Benton "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State" (1999) 41 Comparative Studies in Society and History 563-588.

[190] *Ibid* at 564.

[191] *Ibid* at 564.

[192] *Ibid* at 564.

2.3.3 Cultural and Legal Intermediaries

The burden of translating was present in the first moments of colonial encounter in Cameroon. As such, individuals and groups were identified right away to act as interlocutors or intermediaries.[193] As already highlighted above, the mere act of claiming legal jurisdiction led to a demand for rules about the sorts of people who would be permitted to serve as witnesses, advocates and judges.[194] Research reveals that in most regions, colonial penetration was sometimes obstructed by the strongly segmented structure of the society. These societies were not accustomed to any form of formal central authority as people resided in small autonomous family villages under authority of family elders and village heads. In this way, a major problem for colonial authorities was the need to find indigenous auxiliaries with requisite authority to assist in pacifying these areas and mobilise labour for the colonial economy.[195] To all colonial rulers in Cameroon, the French and the Germans as well as the British, it soon became a matter of policy to rule the new subjects through the invention of new *chef coutumiers,* also known as indigenous chiefs.[196] There are a few variations in the roles of chiefs in formerly British south-west Cameroon and formerly French south-east Cameroon. However, in many respects the local forms of organisations in these areas are similar. The title 'chief' applied to both newly created positions and to pre-existing kings and leaders including the *conseils des notables,* who were co-opted into the French political system.[197] The actions of these intermediaries influenced the standing of customary courts, procedures and sources in the legal order and also changed the perceptions of the legitimacy of colonial rule.[198] The chiefs' role was important

[193] Benton, *supra* note 140 at 16.

[194] *Ibid* at 16.

[195] Peter Geschiere, "Chiefs and Colonial Rule in Cameroon: Inventing Chieftaincy, French and British Style" (1993) 63 Journal of the International African Institute 151-175.

[196] *Ibid* at 153.

[197] Golaszewski, *supra* note 104 at 42.

[198] *Ibid* at 42.

and complex from the point of view of the colonial administrators. They were viewed as being essential to rule but at the same time dangerous and an affront to cultural divisions that the colonial government was struggling to uphold.[199] Overtime, the authority of these traditional rulers became severely limited and defined by the colonial authority. These invented chiefs enjoyed the recognition of the colonial state but lacked the right to rule in the eyes of the people.[200] Given that these chiefs owed their positions mainly to recognition bestowed upon them by the colonial state, and were now less dependent on traditional bases of legitimacy, their decision making became more and more autocratic in the eyes of their subjects.[201]

2.3.4 Establishing and Defining the Domain of Customary Law in a Changing Context

This section aims at establishing the process through which customary law in this era came to be re-defined, specifically in a context marked with such rapid change in both perspectives of colonial powers and the situation of different groups among the colonized. Defining the domain of the customary and determining those to which this form of justice applied became more complicated in colonial Cameroon. The need to maintain existing colonial power relations in the society dominated the idea of tolerance of any multi-cultural diversity.[202] As already established, colonial pluralism in this context was principally dual in nature. On one end existed customs and practices considered to be the domain of customary law, and the other end comprised of the modern, imported law of colonial authorities. In an attempt at defining customary law, colonial Cameroon comprised of at least three sets of contenders, the central state, the officials of the local state and other non-state interests.[203] Despite the range of

[199] Benton, *supra* note 140 at 17.

[200] Golaszewski, *supra* note 104 at 42.

[201] *Ibid* at 42.

[202] Mamdani, *supra* note 150 at 111.

[203] *Ibid* at 111.

contenders, the central state set the limits for the application of customary law. This was in the form of a repugnancy clause.[204] In all colonially administered regions, the standard requirement was that native law and custom was to be enforced to extent that they are not repugnant to principles of equity, natural justice and morality, or incompatible with written law.[205]

A further distinction was made between the criminal and civil aspects of customary law. At the outset, the idea was that criminal law regulation was to be removed from the jurisdiction of customary courts. As opposed to civil claims primarily addressing relationships between individuals, criminalities were considered to be wrongs against the administration and the community. [206] Therefore, once colonial rule in Cameroon became stabilized and the question of law and order settled, customary courts were afforded limited jurisdiction to hear civil cases relating to matrimonial offences and land disputes.[207] Attempts were also made to place restrictions on the performance of certain customary practices such as, polygamy, payment of bride price, slavery and mutilation.[208] However limitation of these aspects of culture was subordinate to local political considerations, and for this reason remained highly negotiable.[209]

It seems reasonable to assume that the distortions introduced into custom by the colonial regimes' monopoly of criminal law and punishment had their counterparts when colonialism stiffened particular procedures of land distribution and patterns of land use existing in the pre-colonial era. The fluidity of jurisdictions in the plural legal order of colonial Cameroon assisted

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[204] *Ibid* at 111.

[205] *Southern Cameroons High Court Law*, 1955.

[206] Mamdani, *supra* note 150 at 116.

[207] *Ibid* at 116.

[208] *Ibid* at 116.

[209] *Ibid* at 116.

in restructuring the distribution and definition of property, in turn constituting a framework for the articulation of different ways of organizing labour and property.[210] The communal system existing in pre-colonial Cameroon was largely subsumed into a formalized land ownership system in all colonially administered regions.[211] A distinction was made between property disputes that were central to colonial interests and thus to be heard by colonial courts and other property transfers that were regarded as being familial, religious or culturally specific and could safely be relegated to customary courts.[212] However, in instances where these seemingly irrelevant cases of inheritance or marriage property were deemed significant to the production of labor and revenue collection, such cases fell under the jurisdiction of central courts.[213] As a result, a majority of land became property of the government except those effectively occupied by the chiefs or communities. The concept of land register, for land registration against a fee was also introduced.[214] With this established supremacy over land, fertile land which was primarily used for food production was adapted into plantations for the production of cash crops.[215] As such, all lands except those registered and recognized by the British was put under the control and disposition of the Prime Minister who was vested with the power to hold and administer such land on behalf of the natives.[216] This resulted in a translation of native's rights to ownership of ancestral land into customary rights of occupancy and use.[217]

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[210] Benton, *supra* note 140 at 22.

[211] During the period of German rule, the colonial government enacted *German Kronland Act* of July 15, 1986.

[212] Benton, *supra* note 140 at 22.

[213] *Ibid* at 22.

[214] *Cameroon Ordinance* No. 1 927.

[215] Fonjong, *supra* note 118 at 159.

[216] Article 2 of *Ordinance No*. 1 927.

[217] *Ibid* at para 2.

From this, it is evident that colonial rule in Cameroon resulted in a total dismantling of fundamental ideas regulating the customary normative system. The redistribution of geographic regions, limitation of customary court jurisdictions and the introduction of specific laws were primarily aimed at limiting the authority of traditional leaders while expanding the exertion of power by colonial authorities.

2.4 Conclusion

This chapter has highlighted a general historical framework which is necessary for understanding the character of customary law in ensuing chapters. It has identified and discussed several factors that has influenced the current state of customary law in Cameroon. These include the pre-colonial political and administrative organizations of different regions, the German approach to administration of its territories, the British policy of native administration and the administration of regions by the French authorities. It also highlighted the process through which the domain of the customary law came to be re-defined and how determining those to which this form of justice applied became more complicated. An analysis of both pre-colonial and colonial era was done to understand how both periods may provide insight into the current ideas about customary law regulation in Cameroon. The objective is to use the findings from legal history to elucidate important areas of ideology about the social order in Cameroon and to look at the impact of other factors on the normative content of customary law. Succeeding chapters will show that although context has changed there is clear continuity in the ways in which the current regime has upheld the colonial legacy of a

customary "decentralized despotism".[218] The multiple ways in which the post-colonial state could and did shape the customary normative order for their purposes indicates a similar struggle for power in the colonial state's relationship with the traditional systems.

[218] Mamdani, *supra* note 150 at 111.

CHAPTER 3

THE CHARACTER OF CUSTOMARY LAW IN CAMEROON

3.1 Introduction

Post-colonial Cameroon represents an era of democratisation in the 1980s where the post-independence constitution was developed.[219] Although the Cameroonian government experienced profound changes due to the advent of colonialism, independence did not result in an absolute break with the colonial past.[220] Cameroon retained the legal traditions introduced by its colonial administrators with the English common law operating in the West and French civil law operating in the East, co-existing in one legal system.[221] Further changes are also reflected in the varying methods of judicial reforms which have been instituted, some with the primary aim of incorporating the various court systems and the removal of cultural bias in the general administration of justice. Others with the aim of ensuring a separation of statutory law and customary law, with customary courts applying indigenous law while state courts applied western laws.[222] Although the bi-jural nature of the colonial system was maintained by the first post-independence constitution, the enactment of subsequent legislation led to a harmonisation

[219] Zewde, *supra note* 135 at 6.

[220] *Ibid* at 6.

[221] Charles Manga Fombad, "Protecting Constitutional Values in Africa: A Comparison of Botswana and Cameroon" (2003) 36:1 Comp. & Int'l L.J S Afr 90.

[222] For example, in Ghana, all native courts were abolished in 1960 as all courts were now required to apply western law. On the other hand, South Africa upon independence preferred a "parallel court system". See Digby Sqhelo Koyana, "Traditional Courts in South Africa in the Twenty-First Century" in Jeanmarie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011) 245.

of the court system.[223] The civilian- style court structure was retained and became the centralised judicial structure to be applied to all provinces in Cameroon.[224] This harmonisation of the court structure in turn led to the enactment of numerous uniform laws and codes pertaining to criminal law, labour law, land tenure laws and other specific laws regulating the structure of customary courts and the regulation of certain aspects of marriage.[225] The judicial organisation ordinance which arguably commenced a state process of unification of the myriad of laws co-existing in Cameroon, together with the wider goal of economic development, led to a perceived dominance of the formal legal system which was highly reflective of laws adopted by colonial administrators.[226] As a result, African traditional authorities and institutions gradually lost their power to the growing idea of a nation-state that developed as a consequence of colonialism.

Besides the numerous legal alterations that occurred, subsequent social, political and economic changes that occurred in Cameroon also had an enormous influence on the nature of customary law.[227] Therefore, in an overall analysis concerned not just with the colonial legacy, but also post-colonial attempts at reform, the shift in regimes necessitates placing the inquiry into the

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[223] *Constitution of the Republic of Cameroon*, 1972*; Ordinance* 72/4 of 26 August 1972 (the Judicial Organisation Ordinance); Refer Art 68 of *Amended Constitution of the Republic of Cameroon,* Law No.96-06, 1996.

[224] Fombad, *supra* note 221 at 90.

[225] *Ibid* at 90.

[226] *Ibid* at 90.

[227] For instance, the "free mobility and urbanization" which typifies the modern era has rendered traditional sanction and means of social control- such as ostracism, shame and exile, obsolete. Also, western education, religion and other scientific advancements contributed to the dismissal of certain superstitious and mystical aspect of custom. See Abdulmumini A Oba, "The Future of Customary Law in Africa" in Jeanmarie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011) 79.

character of customary law in the context of a broader problematic question.[228] This chapter will not only focus on legal changes but also certain political changes that have played an important role in constructing the current structure of customary law in Cameroon. This is why central to the understanding of customary law regulation is the question of current political constitution of native authorities within the central government.[229] The argument is that because the native authorities in the various customary systems lack "a strategic perspective on their standing, the partial and unstable nature" of the legal reform that took place after colonialism has influenced the current state of customary adjudication in Cameroon.[230] As such emphasis will also be placed on contextualizing customary adjudication within the politics of the Cameroonian system.

3.2 The Place of Customary Law in the Legal System

In modern day Cameroon, although the domain of the customary has been conceptualised as a small portion of a wider legal system, customary courts still form an important part of the administration of justice in rural societies.[231] In choosing to recognise customary law within its legal system, the state adopted an approach which seeks to include customary norms or at least a portion of such norms into the state's body of law.[232] This inclusion does not result in any form of contraction in content or scope of formal state law but instead encourages amendment to the content of state law in a way that makes it possible for certain elements of customary law to be added or substituted to existing elements of state law.[233] This would appear to mean

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[228] Mamdani, *supra* note 150 at 287.

[229] *Ibid* at 213.

[230] *Ibid* at 213.

[231] Bradford W Morse &Gordon R Woodman, *Indigenous Law and the State* (Holland: Foris Publications, 1987).

[232] *Ibid* at 10.

[233] *Ibid* at 14.

that certain specified acts performed within the customary normative order, such as marriage or transfer of property, are deemed to have the legal effect and validity in state law as they do in customary law.[234] Incorporation of customary law in this instance, however is not carried out in a way that requires an explicit spelling out of the various customary norms. Instead it allows them to be ascertained elsewhere. The process of ascertainment is usually carried out by state courts as they are instructed by legislation to generally administer disputes arising from custom but also requires them to adopt certain prescribed measures in the process of ascertaining such custom.

The extent to which recognition is afforded to customary law and to the basic rights of tribal communities is a consequence of a range of factors, none of which is determinative, and all of which, to some degree or another, have an effect.[235] In the Cameroonian context, the most prominent factor is formal acknowledgement in a legal document, specifically where legislation is enacted with the primary aim of laying down in a uniform manner the boundaries within which customs may continue to be practiced, or stating their subordination to the state legal system, or in extreme instances their total elimination.[236] Recognition of customary law and the customary courts began as early as 1955 with the Southern Cameroons High Court Law (SCHL).[237] This legislation governed the administration of justice by colonial high courts of Southern Cameroon and paved way for current state recognized judicial activity by

[234] *Ibid* at 14.

[235] Shellef, *supra* note 50 at 121.

[236] *Ibid* at 121.

[237] *The Southern Cameroons High Court Law* was a colonial legislation introduced by the British in Southern Cameroon. Despite being a product of colonialism, its impact is still felt within the administration of justice in Cameroon. See Mikano E Kiye, "Repugnancy and Incompatibility Test in Cameroon" (2015) 15 African Studies Quarterly 86.

customary courts from whose judgements appeals are made to formal courts.[238] Section 27(1) of the SCHL is the most authoritative text providing for the recognition and enforcement of customary law in Anglophone regions in Cameroon while article 7(1) and 8(1) of the Law of 1979 provides same for the francophone region. [239] Implicit references on the recognition of custom have been made by the Constitution which affirms the need to protect traditional values, cultural diversity, minorities and preservation of the rights of indigenous populations in accordance with the law.[240] Also, various legislative enactments contain provisions reflecting the intention of the legislature to formally acknowledge the validity of customary institutions such as the judicial organization ordinance, a post-independence legislation explicitly recognizing the role and function of customary courts within the Cameroonian judicial system.[241]

3.2.1 The Nature, Composition and Judicial Functions of Customary Courts

The English and French systems of courts as established in the colonial period served as models for the establishment of a full range of courts.[242] However, judicial reforms have been instituted in Cameroon with the primary aim of integrating the court system and removing cultural bias

[238] Koyana, supra note 222 at 227.

[239] Kiye, *supra* note 237 at 86.

[240] Preamble of the *Constitution of the Republic of Cameroon*, 1996.

[241] Section 3 of *Judicial Organization Ordinance*, Law No. 2006/015 of 29 December 2006, Section 1 of Ordinance No.72/4 of 26 August 1972 on Judicial Organization of the State, as amended provides "justice shall be administered in the name of the people of Cameroon by: Customary Court; Courts of First Instance; High Courts; Military Tribunal; Courts of Appeal; the State Security Court; the Supreme Court." and Preamble of the 1996 Constitution, Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972, which recognizes and confirms the need to protect traditional values, cultural diversity, minorities and preservation of the rights of indigenous populations in accordance with the law.

[242] Ndulo, *supra* note 9 at 97.

in the general administration of justice.[243] In an attempt at ensuring a proper supervision and alignment with constitutional values, the rule of law as expressed in modern day democratic Cameroon requires all courts to fit within the state's court hierarchy.[244] As such, the nature and structure of customary courts underwent radical transformations. Their new structures, procedures, rules and jurisdiction enables them to fit within the remainder of Cameroon's formal court system. It was done in order to ensure a swift integration of the customary normative order into Cameroon's new legal order. Its administrative procedures have been greatly standardized and it has been made to adopt a strictly legal approach, with its previous moral and ritual considerations having a limited role to play in the administration of justice.[245]

One of the principal reasons for setting up customary courts within the various regions in Cameroon was to guarantee access to justice to people within the society in the absence of the demanding, inflexible and technical procedures associated with state courts. As such, the proceedings within customary courts were made such that it retains its simple and uncomplicated procedural elements. For example, parties who rely on traditional history in a dispute may not be required to plead particulars of it as is usually required in most state courts.[246] Its simplicity is also made visible within the various modes and forms of evidence admitted by the courts. Primary emphasis is placed on the fact that unlike state courts, these

[243] *Ibid* at 97.

[244] *Ibid* at 138.

[245] To illustrate this point further, despite the fact that most marriages are still concluded under native law and custom, state law still insists, under the pain of penalties, that all marriages be recorded in Civil Status register. This procedural requirement in turn renders customary marriages without legal effect unless registered in the appropriate civil status register. Ndulo, *supra* note 9 at 138.

[246] Chigozie Nwagbara, "The Nature, Types and Jurisdiction of Customary Courts in the Nigerian Legal System" (2014) 25 Journal of Law, Policy and Globalization 3.

courts are not required to adhere strictly to general rules of legal practice and procedure.[247] Proceedings are conducted informally in the local languages without a need for legal representation, in turn resulting in decisions being rendered speedily.[248] The resolution of disputes usually takes a "restorative approach" which addresses grievances in the form of harm committed against the society and places emphasis on compromise, restoring and strengthening kin relations, rather than a "retributive" approach adopted by state mechanisms.[249] These elements of customary adjudication contribute in ensuring its legitimacy within indigenous societies.

Decree n° 69 sets out the composition of customary courts as consisting of a "presiding officer, a civil servant or dignitary with a reasonable knowledge of customary law, and assessors who also have voting powers".[250] These assessors usually consist of village elders, chosen by the ministry of justice, residing within the jurisdiction of the customary court and generally believed to posses moral integrity and a profound understanding regarding the operation of customary law.[251] Despite the somewhat unconventional manner in which these courts are composed, Article 9 provides the minister of justice with power to "attach the presidency of a traditional court to that of a court of first instance in the area".[252] In this way, the magistrate

[247] *Ibid* at 3.

[248] Mary Hallward-Driemeier & Tazeen Hasan, *Empowering Women: Legal Rights and Economic Opportunities in Africa* (Washington: International Bank for Reconstruction and Development, 2013) 106.

[249] *Ibid* at 106.

[250] Articles 7(1) and 8(1) of *Decree* n° 69/DF/544 of 19 December 1969 appointing the organization and procedure before the traditional courts of Eastern Cameroon, modified *by Decree* n° 71/DF/607 of 3 December 1971.

[251] Timtchueng, *supra* note 154 at 2.

[252] *Law* n° 79/4 of 29 June 1979 attaching the Customary Courts and the Alkali Courts of the former Western Cameroon to the Ministry of Justice. See Timtcheung, *supra* note 154 at 2.

court oversees the functioning of the traditional court within its jurisdiction. The excess association with magistrate courts has resulted in there being very few customary courts fully administered by traditional authorities.[253] This situation is so widespread and has resulted in traditional hearings being systematically monopolized by lawyers.[254] The individuals appearing in these cases are now largely comprised of legal professionals rather than ordinary members of the community seeking to resolve disputes.[255] The presence of both magistrates and lawyers in traditional trials has diminished the informal nature of customary courts. Purely customary rules are no longer being applied as they have now been substituted by formal law.[256] The speed, simplicity and low cost of proceedings has attracted all types of litigations that are not customary in nature, such as debt recovery for a bad cheque, a claim for damages resulting from a traffic accident.[257] This situation has resulted in customary courts being the preferred framework for resolution of civil disputes.

3.2.2 Traditional Authorities and the Politics of Modern-State Cameroon

Within the customary context in Cameroon, a combination of historical, political and societal factors creates an environment whereby the legitimacy of judicial adjudication by customary courts is continuously enhanced. The strong dynamics between the judiciary and the political branch of governance affords validity to customary adjudication. As such, it becomes imperative to understand the current role ascribed to traditional authorities in modern democratic Cameroon. The question is, what is it about the political system that may create

[253] Timtchueng, *supra* note 154 at 2.

[254] *Ibid* at 3.

[255] *Ibid* at 3.

[256] *Ibid* at 3.

[257] *Ibid* at 4.

challenges to the legitimacy of customary adjudication? Certain institutional arrangements and political practices in Cameroon contribute to the weakening of the customary normative order, such that, despite the states efforts at recognition, the customary system will continuously be undermined. This section will therefore situate the role of traditional authorities in customary adjudication in a wider context of the Cameroonian socio-political framework. It suggests that due to certain features of the Cameroonian political system, traditional authorities are situated in an institutional model that tends to encourage the dilution of customary law.

3.2.2.1 Setting the Context of the Current Political Regime in Cameroon

Colonialism brought about disparate regimes in Africa, one radical and the other conservative.[258] The conservative regime upheld certain features of colonial administration by acknowledging indigenous societies as nothing more than a collection of tribes with varying customary law.[259] For the radicals, it was believed that in order to ensure the equality of all person before the law, all law must be modern.[260] Therefore, just as they proclaimed a unified society, in the form of " a single party, a single trade union", this regime declared a single source of substantive law.[261] Conservative states like Cameroon were satisfied in continuing the colonial tradition of "decentralized despotism".[262] The preceding chapter reflected how the colonial administration used indirect rule to establish and sustain dualism in the structure of the society. This dualism led to the establishment of what has been described as "decentralized despotism", that is a "two-tier society" where a few people were classified as citizens and

[258] Mamdani, *supra* note 150 at 135.

[259] *Ibid* at 135.

[260] *Ibid* at 135.

[261] *Ibid* at 135.

[262] *Ibid* at 135.

others subjects.[263] Upon attaining independence and subsequent democracy, the state has succeeded in maintaining the two-tier system.[264] Although in the formal sense, all Cameroonians are now regarded as citizens, a majority of citizens are still relegated a "second-class status and treated as subjects".[265] As such, it has been argued that post-colonial Cameroon not only maintained a social and economically divided society but also relegated members of indigenous community as the "other".[266]

Colonialism undoubtedly left a lasting impact on the Cameroonian society. However, independence created room for the emergence of a new form of power in Cameroon.[267] This doesn't imply that significant development did not take place at independence but that the focus of such reform was not primarily on democratization but de-racialization. This is the foundation for a majority of the issues faced by the customary system.[268] The primary aim of reform was to remove ethnic barriers in order to enable the formal equality of all citizens. This led to the legal reform of customary law being primarily structured around questions of access to justice, emphasizing the need to maintain the system of indirect rule.[269] Formal equality in this way implied that the "social boundary between modern and customary justice" was to be amended, the former being accessible by all, not just non-natives and the latter limited to governing the

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[263] Elias K Bongmba, *The dialects of Transformation in Africa* (New York: Macmillan, 2006).

[264] In the Anglophone provinces, magistrate courts operate under a constitutional and legal code, while customary law is governed by the native authority courts. In areas where French style municipal councils were initiated, these councils were largely structured on the basis of ethnicity. Also, In the Wibum Area, three municipal councils and customary courts were created and divided up according to the main family groups of the Wimbum people: The Warr, the Witang and the Wiya. Refer Bongmba, *supra* note 263 at 41.

[265] Ibid at 41.

[266] Mamdani, *supra* note 150 at 137

[267] *Ibid* at 137.

[268] *Ibid* at 137.

[269] *Ibid* at 137.

lives of natives for whom modern law was beyond reach".[270] It could rightly be argued that independence in Cameroon did not dismantle the duality in how the state was structured, both as "a modern power regulating the lives of citizens and as a despotic power that governed the lives of peasant subjects".[271]

Further evidence of the way in which the current state structure has sought to undermine the role of customary law within the legal system is found in the way the state has consistently sought to undermine the institution of the chief. As a form of social organization within the customary normative order, traditional authorities in the form of chieftaincy or the position of the *fon* remain strongly embedded in most regions in Cameroon.[272] In virtually all cultures, the chief/fon still retains an authoritative position with the primary duty of safeguarding the interests of the community. Due to the intrinsic value of the institution of chiefs, the post-colonial state, like the colonial administration, has sought to maintain this institution by applying principles of indirect administration which involves the use of traditional authorities to implement state policies within indigenous societies.[273]

Parallel to the development of customary law, attempts were made to incorporate local traditional authorities within the political system. This was done in light of the historical legitimacy traditional authorities enjoyed within local communities, especially in respect of the performance of customary practices. While the colonial state strived to obtain legitimacy from

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[270] *Ibid* at 137.

[271] *Ibid* at 137.

[272] Cassandra Rachel Veney, *African Democracy and Development: Challenges for Post-Conflict African Nations* (Lanham: Lexington Books, 2013) 157.

[273] Nantang Ben Jua, "Indirect Rule in Colonial and Post-Colonial Cameroon" (1995) 41 Paideuma: Mitteilungen zur Kulturkundepp 39-47.

traditional authorities, post-colonial Cameroon through statutory provisions eventually reversed this order.[274] Although as native chiefs, their power stemmed from the local forms of organisation, the current situation is significantly different as their powers are now largely dependent on the modern state.[275] On the face of it, they seem to represent tradition but at the same time they are being used by the state to further modern projects.[276] This is reflected in Decree no. 77/245 which defines the roles of chiefs as "auxiliaries of the administration".[277] Traditional authorities are required to act as "intermediaries" between the state and the indigenous community by assisting in the "execution of government directives" and implementation of policy.[278] On the one hand, this provision is somewhat significant in the sense that it affirms the states commitment towards extending the government's authority and reach into local communities.[279] Although these traditional authorities may have had some form legitimacy within their communities, their roles and perceived functions were de-facto, but by virtue of this provision, traditional authorities became formally acknowledged and accountable to the state for their actions.[280] On the other hand, by recognizing traditional heads as auxiliaries to the government making them accountable to state institutions, this provision has encountered enormous resistance from local chiefs.[281] The resistance arises from the way in which the state through this legislation purports to control and exploit the institution of chiefs. This provision not only reflects a three-fold classification of chiefs based on economic importance and demographic factors, but also, the position of chiefs has been salaried, made

[274] *Ibid* at 42.

[275] Geschiere, *supra* note 195 at 152.

[276] *Ibid* at 152.

[277] Article 21 of *Decree No*. 77/245 of 15 July 1977.

[278] *Ibid* at para 21.

[279] Lukemann, *supra* note 38 at 45.

[280] *Ibid* at 45.

[281] *Ibid* at 45.

subject to appointment, transfer and dismissal. It has also reverted the position of chiefs to one that is primarily elective not hereditary, thereby reducing their individual autonomy to a minimum in comparison to the state.[282] It also goes on to establish various means by which chiefs can be sanctioned for failure to comply with directives of the government.[283]

The content of this legislation can be criticized as serving as means by which traditional authorities can be controlled and manipulated by the state. Despite the decentralized nature of administration, the state regardless of tradition has reserved the right to appoint, dismiss and regulate virtually all aspect of the customary system. Ben Jua refers to the current relations between the state and chiefs as one taking "the semblance of parasitism, rather than symbiosis, as was the case in the colonial state".[284] Traditionally the function of the chiefs/fon is to serve as link between the people and the state, with the primary aim being to ensure and protect the best interests of the native people. However, through the enactment of statute, the state has effectively created a political space within which the powers of these traditional rulers can be curtailed in order to maintain state control over the people and their resources. The need for control, a strong feature of the colonial government, has in turn led to the bureaucratization of traditional leadership. A consequence of this on the normative order is that fons who traditionally play their role as guardians of the community are likely to be sanctioned, especially in instances where such protection conflicts with the interests of the state.[285] This relation between the state and chiefs has had a weakening effect on the customary normative

[282] Article 2 *Decree* No. 77/245 of 15 July 1977.

[283] *Ibid* at para 2.

[284] Ben Jua, *supra* note 273 at 43.

[285] For example, "in Bui, a prefectural order was signed forbidding the Fon of Nso' from leaving his palace following support for his subjects in their refusal to pay water bills to a parastatal that had taken over their supply system". See Ben Jua, *supra* note 273 at 43.

system, as traditional authorities have always had a strong role and influence on the maintenance of order within the society. The marginalization and limitation of the powers of the fon and other traditional authorities within indigenous societies fails to indicate any sort hope for the customary normative order.[286] Although the decree still permits these authorities to settle disputes emanating from custom, current "divestment of their powers" no longer allows them to readily perform this duty.[287] "The politicization of the role of the chief by the state has led to a breakdown of the consensus on the structured principle on which traditional authority was predicated".[288] The identification of chiefs with the state has contributed to the current diminishing state of customary law within societies, leaving a void unable to be filled by the state.[289]

3.3 Between Repugnancy and Recognition in State Courts

In light of Cameroon's historical circumstances, a formal decision was made as to what the status of customary law would be after independence and what would need to be done in the event of conflict with other legislative pronouncements. Where such conflict arise, legislation affords judges a wide discretion on determining the extent to which recognition is to be afforded to custom.[290] Therefore, the more substantive rules governing the application of customary law in Cameroon can be found within case law jurisprudence.

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[286] *Ibid* at 46.

[287] *Ibid* at 46.

[288] *Ibid* at 46.

[289] *Ibid* at 46.

[290] Research reveals that due to a number of factors, very little of these choice of law conflict has reached higher levels of the judicial hierarchy, so that for the most part such disputes have remained localized, preventing a proper examination of the full meaning and ultimate consequences of such cultural norms. See Shellef, *supra* note 50 at 122.

A majority of disputes arising from custom typically revolve around the application of the repugnancy clause contained in S27(1) of SCHL. It provides that native law and custom of any ethnic group in Cameroon should be recognised and enforced as law governing such disputes in so far as such custom is not contrary to standards of "natural justice, equity and good conscience" and must not be "incompatible with any law" adopted by legislation.[291] In French speaking provinces, exclusion of custom is on the basis of "*ordre public*" capturing ideas of repugnancy and public policy, while exclusion on the basis of incompatibility with legislation is done on the basis of *"raison ecrite*". [292] The idea is that the specific customary rule being applied to a dispute should according to western conceptions not be contrary to what can be regarded as "civilised general rules of conduct and/or legal norms".[293] As such, courts frequently find themselves bound to justify the fact that in accordance with existing legislation or other principles, they are forced to find that certain age-old traditions and institutions are uncivilised and hence inapplicable.[294] It has been argued that since repugnancy clauses primarily served as "the vehicles by which the dominant culture" condemned and rejected African norms, it would have been ideal for such rules to be repealed promptly upon attaining independence.[295] However, there could also be a possibility that newly independent African states may have had policy orientations and objectives that would not have been well-served by an uncritical acceptance and implementation of the wide variety of customary practices and

[291] *South Cameroons High Court Law*, 1955, S27(1).

[292] In the French administered regions, statutory provisions directing courts to apply custom subject to the repugnancy test also includes adherence to principles of "French civilization" See Kiye, *supra* note 237 at 89.

[293] Bekker, *supra* note 52 at 116.

[294] *Ibid* at 116.

[295] William Burnett Harvey, *Introduction to the Legal System in East Africa* (Kampala: East African Literature, 1975).

norms existing within their communities.[296] While a few African states have decided to reject the repugnancy clause or the total application of customary law altogether, the Cameroonian state has decided to retain its application. The succeeding discussion will therefore establish the impact of its application on the nature of customary law.

In Cameroon, the application and enforcement of the repugnancy clause is a matter only deliberated upon by state courts. When a custom is deemed repugnant to natural justice, equity and good conscience, it is not only interpreted to mean repugnant to substantive law, but also, repugnant to procedure, and repugnant in relation to the degree of punishment.[297] Therefore, in procedural matters where there has been a defect in the manner in which such trial was carried out in customary courts, for example not applying the principle of *audi alteram*, such a case will be subject to the repugnancy clause.[298] Over time, the application of this clause by state courts has led to the prohibition of certain customary practices in both French and English regions in Cameroon. From customary burial practices, ostracization, to the performance of certain ritual rites, this clause has somewhat provided a potentially useful theoretical and practical framework for what Shellef describes as a "deep moral and intellectual consideration".[299] In adjudicating customary disputes, the courts have never fully attempted to provide an appropriate explanation of the meaning of the clause. However, the views expressed by judges in a variety of cases provide insight on the purpose and meaning of this clause. Precisely how much contemplation of both "social control" and indoctrination of new moral

[296] *Ibid* at 524.

[297] Derek Asiedu-Akrofi "Judicial Recognition and Adoption of Customary Law in Nigeria" (1989) 37 The American Journal of Comparative Law 581.

[298] Shellef, *supra* note 50 at 128.

[299] *Ibid* at 123.

system is principal in the minds of the judges in applying this clause can be noted in the instructive reasoning adopted by Justice Nwokedi in *Agbai v Okogbue*.[300] The court reasoned that since there is currently no established forum for repealing or amending customary practices, the repugnancy clause provides the opportunity to assess and adapt customary laws to meet the changing social conditions of the society.[301] He further states that the courts role in adjudicating such disputes should not be carried out with the primary intention of "enacting new customary laws but instead to devise appropriate means of applying such practices under the existing social environment".[302] A similar position was held by the court in *Ngeh v Ngome* which involved a determination on the validity of the cultural practice of dowry payment.[303] Despite the customary courts stance on the validity of this practice, the high court on appeal applying the repugnancy test found such custom to be outdated and contrary to the principles of natural justice, equity and good conscience.[304]

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[300] *Agbai v Okogbe,* N. W. L. R. Part 204, 391 at 417.

[301] *Ibid* at para 417.

[302] *Ibid* at para 417.

[303] In *Ngeh v Ngome* the court addressed the issue of bride price or dowry payment and its associated consequences which involve the presumption that upon dissolution of a customary marriage, the wife who fails to refund the bride price still remains property of the husband. As such, any child conceived with a third party after such divorce but before repayment of the dowry is deemed to be the child of the first husband.

[304] See also in *David Tchakokam v Keou Magdaleine*, the court had to establish the validity of the customary practice of levirate marriage whereby the wife of a deceased family member could be married off to an another family member of the deceased. Upon death of the widow's husband, she was obligated under customary law to be remarried to her deceased husband's nephew. The new husband asserted claims over the property of the deceased husband and argued that being an object of inheritance under customary law, the widow was not allowed to inherit from her deceased husband's estate. Applying the repugnancy clause, the court arrived at the decision that the custom was "obnoxious" and repugnant to natural justice, equity and good conscience. See Kiye, *supra* note 237 at 92.

Although the list of state courts that have strictly adhered to this principle is quite long, case law on this matter is by no means uniform. An analysis of case law jurisprudence in Cameroon reflects that there exists no rule to determine the process a court must take for the application of the repugnancy clause, but rather an arbitrary sets of procedures adopted by courts in arriving at decisions. A simple analysis reflects an absence of clear standards to be used by courts in exercising the wide discretion and flexibility afforded them by legislation. This has led to an increased pattern of disparity in application of the clause and in most instances produces contradictory precedents. This is evident in the case of *Nanje Bokwe v Margaret Akwo*. In determining whether a married woman was permitted to inherit from the estate of her deceased father in the presence of suitable male heirs, the Kumba customary court held that the applicant was allowed such inheritance, but on appeal, the Appeal court set aside aside the judgment and held that a married woman was not allowed to inherit from her father's estate unless expressly stated in a will.[305] The court concluded that the respondent had no *locus standi* in such a case. This decision contradicts the position of the court in the cases of *Elive Njie Francis v Hannah Efeti Manga and Nyanja Keyi Theresia & 4 Ors. v Nkwingah Francis Njanga and Keyim* where the court used the repugnancy test to reject the enforcement of discriminatory succession and inheritance customary rules against women.[306]

This gap provides cogency to arguments indicating that the entire statutory provision and procedures adopted by courts in arriving at these decisions seems to be flawed because judges

[305] *Nanje Bokwe v Margaret Akwo*. See, amongst others, Rule 21(1) and (2) of the Non Contentious Probate Rules, 1954.

[306] *Elive Njie Francis v Hannah Efeti Manga,* CASWP/CC/12/98 (unreported); *Nyanja Keyi Theresia & 4 Ors. v Nkwingah Francis Njanga and Keyim - administrators of the estate of Keyi Peter,* HCF/AE57/97-98 (unreported) and *Chibikom Peter Fru & 4 Ors. v Zamcho Florence Lu*m, SCJ 14L [1993].

either choose to ignore, or neglect to perceive the necessity of incorporating certain customary standards in their proposed repugnancy inquiry. Therefore, despite the presumed positive effects of applying the repugnancy clause, the concern with its application within the Cameroonian system is premised on the fact that in assessing customary claims, courts rely on basic notions of justice reflected in a legal system adopted from values instilled by colonial administrators. As such, the probability of a court accepting the applicability of a customary norm accessed in light of English and French inspired laws, are very few. Determining the validity of custom by relying on "exotic standards" leads to the impression that the standards of justice contained in "imposed laws" are superior to those of customary law.[307]

In the context of Cameroon reflecting a substantial disparity in the outcome of the cases adjudicated by state courts, it becomes necessary to question the aim of the judicial process in its attempts at establishing the validity of custom. Courts have been criticized for seeing through the eyes of the dominant culture in arriving at decisions that declare certain customary practices as uncivilized or barbaric.[308] Their decisions are usually argued to have neglected the "unworkable conditions" in which they have to be enforced in localized context.[309] The various factors taken into account by these courts in adjudicating customary disputes on appeal, reflects a certain lack of zeal to make use of the wide discretion and liberty afforded to judges by legislature.[310] It suggests a lack of expertise in adjudicating customary law disputes and a failure to enhance the judicial and educational obligations of a court. In the current context of Cameroon, it is not clear that all those entrusted with formal judicial capacity, more often than

[307] Kiye, *supra* note 237 at 92.

[308] Shellef, *supra* note 50 at 132.

[309] The *Margaret Akwo* case reflects an instance where the decision of a customary court could have potentially led to the development/reform of a customary norm. The discriminatory customary practice initially set aside by a customary court was upheld and declared valid on appeal by a state court.

[310] Shellef, *supra* note 50 at 132.

not trained in foreign universities, certainly far more exposed in terms of professional training and experience, are personally geared to such an undertaking having enormous effects on the customary normative order.[311] The argument here is that, without a commitment to the culture per se, the consequences of judicial intervention could be disastrous.[312] As will be seen in succeeding sections, a large variety of the cases sent on appeal to formal courts become a basis for the creation of statute prohibiting such customary practice.[313] Therefore, every decision a state court makes becomes precedent greatly influencing the development or lack thereof of customary law.

An analysis of case law jurisprudence leads one to assume that the problem may not lie in the mere existence of an imposed repugnancy clause. The problem lies in the question of "how to recognize a custom in general, while still retaining the right to selectively reject aspects of the body of custom and how modern democratic African states can best deal with these conflicts without being overly bound by the terminology and perceptions of the colonial administrators?[314] This is premised on the fact that the repugnancy clause without the overtones of the value-system of the dominant culture, may actually be implemented in a far more neutral framework, one that can be used by judges in creatively interpreting the law with specific reference to the workable conditions of the indigenous people affected by the custom in dispute.[315] In this way, every judges' approach to judicial reasoning in such matters could

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[311] On the failure of the foreign legal systems to do more for African students, see L C B Gower, *Independent Africa- The Challenge to the Legal profession* (Cambridge, MA: Harvard University Press, 1967).

[312] Shellef, *supra* note 50 at 132.

[313] See for example, the case of *Ngeh v Ngome* which led to enactment of Section 72 of the *Civil Ordinance Act*, 1981.

[314] Shellef, *supra* note 50 at 131.

[315] *Ibid* at 129.

greatly influence the development of the customary normative order.

3.4 The Incompatibility Test

Recognition of customary law in Cameroon also strongly involves the application of the "incompatibility test" by courts, which presumes that the enactment of legislation addressing a specific issue automatically guarantees the setting aside of such practices by courts. Section 27(1) of the SCHL directs courts to enforce customary norms that are not "incompatible with any law for the time being in force".[316] The nature of the phrase "for the time being in force" raises questions as to what form of law must not be incompatible with custom. Should this be construed to include customary law or should it be limited to received law, that is, either French or English law.[317] A strict understanding of this phrase could lead to the conclusion that law in this instance would include customary law. However, judicial decisions on this issue seem to reflect the view that the meaning attached to "law" is restricted to those enacted by national legislature.[318] In recent times, its applicability has also been extended to encompass international treaties ratified by the government.[319]

The incompatibility clause has a different applicability and effect on judicial adjudication of customary disputes, in that, unlike the repugnancy clause, judges have little to no discretion in considering whether a specific norm should be set aside. The fact that legislation has been

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[316] *South Cameroon's High Court Law*, 1955, S (27) (1).

[317] Asiedu- Akrofi, *supra* note 297 at 580.

[318] *Ibid* at 580.

[319] *Constitution of the Republic of Cameroon*, 1996, S45 states that international agreements following their publication overrides national legislation.

enacted inevitably implies that there is no room for minimum accommodation with the social reality of the parties in disputes and, since statutory law basically governs every aspect of life of the society, a direct consequence will be the restrictive application of customary law in numerous cases. This has had far reaching consequences on custom, as legislative enactments are not only limited to substantive law, but also encompasses procedural law and the nature of sanctions being imposed. A customary norm is also automatically deemed incompatible in instances where a statute manifestly intends to govern a specific subject matter to the exclusion of custom.[320] This case of direct incompatibility would arise where the manifest intention of the legislature, as indicated by its express terms, is to modify or abolish a specific customary practice.[321]

A further consequence of the incompatibility test is its inevitable effect on the current jurisdiction of customary courts. Besides the ousting of customary law from exercising criminal jurisdiction *in toto*, the jurisdiction of customary courts in civil cases has been drastically limited.[322] Legislation prescribes that they are only permitted to handle disputes with awards not exceeding 69.200 franc CFA, that is approximately 105 euros.[323] Due to the fact that most civil suits attract awards exceeding this amount, customary courts have been limited to adjudicating small claims. Although they are afforded jurisdiction over marital

[320] AO Obilade, *Nigerian Legal System* (Michigan: Sweet & Maxwell, 1979) 108.

[321] *Ibid* at 108.

[322] As seen in previous chapter, the ousting of criminal jurisdiction from customary courts was a consequence of colonial policies. The argument is that limiting the criminal jurisdiction of these courts is somewhat problematic as customary law does not make a clear distinction between civil and criminal cases. Therefore, the total removal of criminal law from the purview of these courts is to force customary law into the "prism of state law which makes this distinction". See Grenfel, *supra* note 40 at 141.

[323] Kiye, *supra* note 237 at 90.

disputes, it remains contentious as to whether they have the competence to hear incidental matters arising from such disputes, such as divorce and custody issues.[324] This uncertainty arises due to the fact that monetary allotments in such issues tend to exceed the financial jurisdiction of the court. Also, in other instances, legislation and practice of courts reflects that in certain disputes, such as those involving polygamous marriages, the high court and customary court share concurrent jurisdiction in such matters.[325]

The legislature and courts by adopting this test fail to approach it as some sort of compromise between the specific conflicting value system and their normative rulings.[326] Instead it is construed as an imposition of minimum standards to be applied "as qualification to the toleration being accorded by recognition to the basically unacceptable norms of backward communities".[327] This critique levelled by Shellef is reflective of the relation between the application of repugnancy test and enactment of incompatible legislation. For example, in the context of Cameroon, the repugnancy test has had a significant influence on the development

[324] Some judges have held that they do not have such competence. See, for example, the judgment in the cases of *Mosima Elizabeth v Mosima Simon Ngeke,* CASWP/CC/95: reported in Ngassa and Time [1999] 1 at para 43 and *Aboh Lucy v Kang Sume David,* HCF/38/96, reported in Ngassa and Time [1999] 1 at para 75. However, in the case of *Fomara Regina Akwa v Fomara Henry Che,* BCA/11CC/97: reported in CCLR [2002] para 32, the North West Court of Appeal, Bamenda, disagreed and held that Section 16 of Law No. 89/017 of 29 July 1989 as amended by Law No. 90/12/90 organizing the judiciary makes provisions for customary courts to have competence in some of the matters relating to the status of persons. This view was further re-affirmed in the case of *Abi Zacharia Ajong v Nji Micheal Ajong,* 2000 BCA/4CC, CCLR [2002] 9 at para 67 where the court held that although matters of succession fall within the jurisdiction of the High Court, however, by virtue of Section 27(1) of the SCHL, 1955 the jurisdiction of customary court is not ousted. Kiye, *supra* note 237 at 90.

[325] See the case of *Christiana Etombi v Ndive Woka John*, 2001 CASWP/CC/09 [2001].

[326] Shellef, *supra* note 50 at 123.

[327] *Ibid* at 123.

of statutory law. The precedents established by formal courts in applying the repugnancy test have in most cases resulted in the legislature enacting statute specifically prohibiting such customary practice. This is illustrated by specific provisions contained in the Civil Status Ordinance.[328] For example, in the previously discussed case of *Ngeh v Ngome* the high courts decision that certain consequence of the application of the customary practice of dowry payment was repugnant to natural justice led to the legislative enactment of section 72 of the Civil Status Ordinance Act outlawing this practice.[329] Due to these limitations on the jurisdiction and competence of customary courts, a majority of disputes arising from custom have ended up being adjudicated by state courts either by way of appeal or exclusive/concurrent jurisdiction. At the appeal level, where a majority of these cases are heard, aware of its role in establishing precedent and potentially influencing the subsequent enactment of legislation, judges tends to concentrate on the larger theoretical issues, that certain cultural factors which could possibly work in favour of the parties are not taken into account. Emphasis is placed on the need to lay down rules for the society at large. This raises the question of whether there could be an adequate administration of justice where there is clearly a form of hierarchy between two legal traditions.

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[328] Sections 72 and 77(2) of the *Civil Status Ordinance*, 1981 are illustrative. These provisions outlawed some of the consequences associated with the payment of dowry under customary law, frequently declared repugnant by the courts.

[329] S72 provides that "the total or partial payment of a dowry shall under no circumstances give rise to natural paternity which can only result from the existence of blood relations between the child and his father". Also see section 77(2) which prohibits the practice of levirate marriage and ensures that widows who are customarily deemed to be property of the deceased and thus incapable of inheriting, are now allowed to inherit. It states that "in the event of death of the husband, his heir shall have no right over the widow, nor over her freedom or the share of the property belonging to her. She may, provided she observes the period of widowhood of 180 days from the date of the death of her husband, freely remarry without any one laying claim whatsoever to her or any compensation or material benefit for dowry or otherwise received, either at the time of engagement, during marriage or after marriage".

The customary normative order has been described as a space where different elements meet and interact to form a society's value system, and it is within this framework that such society lays down the parameters of what is acceptable and unacceptable behaviour.[330] However, not all that maybe characterised as unacceptable conduct falls within the purview of legal regulation, for at issue is not just what is or what is not permissible conduct but also the extent of such society's tolerance.[331] These are factors that generally come into play when traditional authorities consider how customary law should be adjudicated and interpreted. The forms of behaviour established in these societies constitute a key aspect of any customary proceeding. It determines, the nature of evidence to be considered, the forms of defense or justification that could be raised for a proscribed act. The problem sometimes move from an ideological issue of turning a formal space into a governable space for adjudicating customary disputes to a more practical issue of the composition of judges with people who are not only attune with the realities of the customary normative order but also display an understanding of the cultural framework in which specific acts takes place and the pressures to which such individual maybe subjected to.[332] Beyond the facts of a dispute and sometimes the content of a specific cultural norm lie subtle nuances of what could be described as "societal wisdom, the capacity to see beyond consensual norms of conformist behaviour and to understand perhaps forgive".[333] In some cases, much more complex is the specific situational environment which could be a determining factor in how these issues are resolved.

From this, it becomes clear that given the cultural and societal difference between the numerous tribal societies and the state in Cameroon, these differences- corresponding to both normative

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[330] Shellef, *supra* note 50 at 262.

[331] *Ibid* at 262.

[332] *Ibid* at 269.

[333] *Ibid* at 262.

beliefs and everyday behaviour- will unavoidably lead to a variation in the application and process of the law as applied in statutory courts and customary courts. These variations inform the basis and process of ascertainment of culture during litigation, the status of custom and how courts take judicial notice and what must be proved in customary cases and on what basis.[334] An overview of cases reveal that the essentialisms embodied by the formal system has struggled to accommodate the relational nature of custom.[335] The contrast between the kind of rationality in which modern Cameroon is built and the logics involved in most cultural practices exposes the limits of state regulation of custom.[336] The argument here is, to what extent are state courts able to accommodate different cultural experiences?[337] To ensure a proper administration of justice, importance should be placed on approaching customary disputes on their own "sensory terms" which not only involves an ascertainment of general acceptance of a practice as culture but going beyond ascertainment to focusing on how "senses are valued and used, and how the sensations they deliver are invested with meaning" in such societies.[338] The approach adopted by legislation and courts, for example, applying the repugnancy and incompatibility test, reveals a conventional focus within judicial adjudication on "law as text" without seeing the need to uncover the "rootedness of law in the body".[339] The sensory aspects of cultural settings cannot be reduced to the facts adduced within the formal settings of state

[334] Bekker, *supra* note 52 at 115.

[335] David Howes, "Law's Sensorium: On the Media of Law and the Evidence of the Senses in Historical and Cross-Cultural Perspective" in Sheryl Hamilton et al, eds, *Sensing the Law* (Oxford University Press, 2015) 3.

[336] Peter Geschiere, *Witchcraft and the Limits of the Law: Cameroon and South Africa* (EBSCO Publishing: ebook collection, 2013) online: http://isites.harvard.edu/fs/docs/icb.topic1286816.files/Peter%20Geschiere.pdf 221.

[337] Howes, *supra* note 335 at 4.

[338] *Ibid* at 4.

[339] *Ibid* at 4.

courts.[340] The nature of these proceedings do not allow judges to immense themselves within cultural settings which inform the actions of indigenous people. Admitting cultural evidence, or referring to written text fails to account for the fact that the oral nature of culture places emphasis on face to face interaction and reliance on various other modes to emphasise meaning.[341] The current nature of these proceeding reflect a gradual disembodiment of custom.[342]

The argument here is that the aesthetics matter. The mere difference in physical organisation and structure of formal court rooms and customary courts creates a change in the meaning of justice, justice as an institution and justice as streamlined. Therefore, factors that would normally be regarded as extraneous to state courts in administering customary disputes, are considered to be "sensual" to customary courts.[343] This leads one to question whether within the framework of formal judicial confrontation of customary issues in Cameroon, it is possible to expect a comprehensive understanding of the totality of the problem being adjudicated.[344] Cameroonian courts have rigidly adhered to the letter of law, even in issues arising from custom, to the extent of complete disregard of prevailing beliefs among the indigenous population.[345]

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[340] *Ibid* at 4.

[341] *Ibid* at 4.

[342] *Ibid* at 4.

[343] *Ibid* at 4.

[344] Shellef, *supra* note 50 at 267.

[345] KS Chukkol, *Supernatural Beliefs and Criminal Law in Nigeria* (California: Ahmadu Bello University, 1981) 464.

3.5 Conclusion

This chapter has highlighted the current nature of customary law in post-colonial Cameroon. It has revealed the possible disparity in the varying outcomes of customary adjudication as carried out in both customary courts and state courts. It also addressed the issue in light the current socio-political status of traditional authorities within the Cameroonian government. From this analysis it is evident that despite recognition afforded to custom, the foundations which sustain the customary system has been significantly undermined and the social system within which the customary law operates has been greatly transformed. Although reform of customary law may have certain positive elements, the magnitude and manner in which the Cameroonian state has carried out such transformation has led to a crippling of traditional institutions which form the basis of the customary normative order.[346] This fails to account for the potentially useful role customary law could play in the socio-legal and political development of Cameroon. The next chapter will address the theoretical dimensions of the issues highlighted above. It will show that the current legal framework for customary law regulation, adopted by Cameroon, is based on a theoretical ideology which when properly examined proves to be highly defective.

[346] Asiedu- Akrofi, *supra* note 22 at 593.

CHAPTER 4

THE THEORETICAL DIMENSIONS OF STATE REGULATION OF CUSTOMARY LAW

4.1 Introduction

Traditionally, the idea of law is one that has been observed to be the property of superior "cultures and civilization" and often considered as non-existent within tribal societies.[347] This understanding of law currently manifested in Cameroon accords full proprietary rights to the state legal system. It regards law as either abstract rules expressed within legislative enactments or law as principles conceived and upheld by courts.[348] This has formed the underlying basis for current legal contestations against the authority and legitimacy of the customary normative order. Most criticisms levelled against this system highlights conceptual and practical weaknesses of its traditional doctrine.

The ambiguity created by the current legalistic doctrine adopted by Cameroon forms the basis of this chapter. The initial claim of an absence of law within customary normative societies is a consequence of modern-day attempts at ensuring uniformity of state laws. The state perceives modernization and nation building as necessitating a unified legal system which consolidates the various forms of law into a single centrally governed system. This has brought about a dualist distinction between the state legal system and the customary system, reflecting an attitude of tolerance which implies that in cases of conflict between the two traditions, there could be no middle ground.[349] As a starting point, this chapter will look at a series of theoretical

[347] Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Harper & Row, 1971).

[348] *Ibid* at 31.

[349] Glenn, *supra* note 68 at 373.

oppositions to the idea of the state having power over all other normative orderings. The main objective of the chapter is not merely to reject the state as a mechanism of power or domination but also to constitute the customary system as a fundamental mechanism of its own, capable of self-regulation. Such an outcome is only possible by first moving beyond the status quo where the state is seen to be a power organization that engages in a centralized and institutionalized regulation and domination of every aspect of society.[350] In the context of Cameroon this has meant privileging certain social groups and exercising direct control over all aspects of society by imposing its own systems of meaning and boundaries for acceptable behaviour.[351] As such, this chapter will highlight recent developments in legal and sociological studies that conceptualize law in relation to norms as they connect to broader processes of social orderings.[352] The aim is to offer an internal critique of the various assumptions and presuppositions currently underlying the legal culture in Cameroon. Existing scholarship which presumes that the "traditional image of lawyer's law" is only about those forms, processes and institutions that find their roots and legitimacy in the political state or its emanations, offers a satisfactory intellectual framework for inquiry.[353] The argument here is that, once customary law becomes accepted as a distinct system, it will become clear that its current character within the state legal system is in need of reform.

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[350] Joel Samuel Migdal, *State, Power and Social Forces: Domination and Transformation in the Third World* (Cambridge: Cambridge University Press, 1994).

[351] *Ibid* at 14.

[352] Kevin Walby, "Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as Governance and Legal pluralism" (2007) 16:4 Social & Legal Studies 552.

[353] Martha-Marie Kleinhans & Roderick A Macdonald, "What is *Critical* Legal Pluralism?" (1997) 12:2 CLJS/RCDS 27.

4.2 The Cunning of Recognition[354]

The initial claim of an absence of law within customary normative societies gave rise to modern-day attempts at ensuring the realization of certain objectives by the state. These include the statutory recognition and codification of aspects of customary law in Cameroon. This idea is a prevailing technique advocated by legal jurists in Africa as a means for dealing with the states prior failure to fully acknowledge the relevance of custom within indigenous communities. It is believed that legal recognition of custom serves as an official 'mark of authority' guaranteeing its existence within the state legal system.[355] This step is generally considered to be crucial in a bid to move from the pre-legal, which characterizes the customary normative order, to the legal, solely realisable within state law.[356] Only then would customary law be regarded as a system of actual rules having its own rational coherence, backed up with the relevant legal machinery of the state.[357] Non recognition by the state would thus imply a deliberate attempt at minimizing the relevance of custom. As such, the struggle for recognition has become the standardized state of legal and political affairs in Cameroon.

However, for many other observers, custom in this sense not only acquires a static and over systematic character but becomes an overly legal one.[358] Constable asserts that, customary law does not require formal acknowledgement to guarantee its proper regulation. Official recognition reveals a state of domination rather than a respect for the law of the other.[359] As such, the necessity for acknowledgement as a mark of authority of custom reflects an

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[354] Povinelli, *supra* note 70 at 1.

[355] Constable, *supra* note 35 at 75.

[356] *Ibid* at 75.

[357] *Ibid* at 75.

[358] *Ibid* at 75.

[359] *Ibid* at 84.

imposition of will, ultimately ending in the subjugation of a people.[360] I argue that the need for acceptance stems from a false assumption that the legitimacy of the customary normative order is contingent on recognition from state institutions or its absence thereof.[361] This is premised on the fact that struggles for recognition largely occur in a world of grave inequality of legal orders and to recognize is to accommodate and to accommodate implies a hierarchy.[362] In this way, state law emerges immediately as the principal and sometimes sole channel for understanding and defining the character of customary law. In chapter 3, we see that the relationship between both laws is of a nature that does not allow or provide for full acceptance of customary law principles within the wider legal framework of the Cameroonian state. As such, it becomes necessary to examine theoretical considerations of customary law that challenges its current association as a system conditional on legal recognition from state institutions. The argument here is that, before a proper reform of the customary system can take place, we need to better understand what Elizabeth Povinelli terms the "cunning of recognition" and its inter-relation with the politics of state power.[363] We need to puzzle over questions such as: What is the Cameroonian state recognizing, what are the courts trying to save when custom is recognized?

The basic premise for an acceptable theoretical conceptualization of law advanced here is one that aims at salvaging law from within its present context of modern mechanisms of power. This retrieval of law allows one to move past the way in which the state still functions as the

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[360] *Ibid* at 84.

[361] Nancy Fraser, "Rethinking Recognition" (2000) 3 New Left Review 1.

[362] *Ibid* at 1.

[363] By celebrating and requiring recognition, minority groups continue to remain conditional, that is, provided it is not repugnant or incompatible with statute and as long as a challenge to state power is not at stake. Therefore, understanding the failure of the customary system and its identity is to reflect on how national and state recognition of this system only supports and strengthens the states power and not indigenous people. In this way, recognition becomes problematic. See Povinelli, *supra* note 70 at 35.

ultimate signifier of sovereignty and constitutionalism.[364] Such a view of the law affirms modern Cameroon's aspirations of a centralized and unified body of law relying only on specific instruments, coupled with an established hierarchical application securing interests of a specific group or class among its citizens while ignoring other individuals.[365] In this way, the state is envisaged as a political power focusing on the interests of the totality of Cameroonians while at the same time affronting people within the indigenous community who adhere to different views on the nature of law. The point to be made here is that a state or a national legal system is merely an institutionalized acknowledgment of dominance of a specific tradition at a particular time, resulting in an elimination of competing traditions within its territory.[366] The state taking this form, expresses law in universal and "monological terms" resulting in the exclusion of other legal traditions it deems irrational.[367]

Reflecting on Twining, one can argue that the current nature of the Cameroonian society is governed by ideas that presume law to be an internally coherent legal system with the state having monopoly over the classification of law within its territory.[368] This view of law affirms ideas relating to monism, statism and positivism of outdated legal discourse overlooking the emergence and re-emergence of divergent forms of legal order. One theme that links the advent of these normative orders is the "disengagement of law and the state".[369] As such, the state as it exists in Cameroon, exists in a form separate from the majority of people who look to old

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[364] Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (Cambridge: Cambridge University Press, 1999).

[365] Michel Foucault, "The Subject and Power" (1982) 8:4 Critical Inquiry 777-795.

[366] Glenn, *supra* note 68 at 54.

[367] *Ibid* at 54.

[368] Twining William, *Globalisation and Legal Theory: Some Local Implications* (London: Butterworths, 2000).

[369] *Ibid* at 52.

ways as means of sustenance.[370] Focusing on the state as the principal site for legal regulation will continuously amount to a struggle to reckon with the interests of the indigenous community. Being theoretically informed and precise to the context of Cameroon reveals a historically specific treatment of power which indicates various patterns of state domination of the customary normative order.[371] The state has played a major role in the diffusion and imposition of law with disregard to the various ways in which legal rules tend to be understood and expressed within other legal cultures and systems.[372]

To understand this form of state power, is to understand how the idea of a need for legal recognition by the state is at once only a formal misunderstanding of a group's existence and of its being worthy of national recognition and at the same time, a formal moment of being inspected, examined and investigated by the state system.[373] In the Cameroonian context, this inspection and examination requires parties to such customary dispute to provide a comprehensive justification for the application of their tradition, its specific content and the force with which they identify themselves with it. Not only does this idea of recognition fail in its intention to provide individuals within the indigenous community an inviolable space, it also affords little space for the numerous cultures within the Cameroonian society whose ideas of freedom and justice deviate significantly from that of the state.[374]

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[370] Glenn, *supra* note 68 at 87.

[371] Migdal, *supra* note 350 at 14.

[372] Twining, *supra* note 368 at 52.

[373] Povinelli, *supra* note 70 at 39.

[374] Leon E Trakman & Sean M Gatien, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999).

On the other hand, it could be argued that the idea of recognition takes account of the cultural "otherness" of the indigenous community.[375] It recognizes that rights and responsibilities are owed to those whose interests were historically not adequately protected by the law.[376] It therefore limits the freedom of the state and its institution from ignoring the interests of the indigenous community. Recognition is also warranted in light of the threat that, by not according recognition to the cultural interests of the indigenous community, the liberty of the entire society could be significantly undermined.[377] Notwithstanding this, it also becomes necessary to take account of the fact that, at the very moment state law affords recognition to customary law, a naturalized hierarchy of moral and legal authority is established.[378] As highlighted in the previous chapter, this hierarchy is evidenced by the fact that "an invincible asterisk" or an express proviso continuously hovers above every enunciation of customary law.[379] Therefore, although legislation and courts mandate a "real" acknowledgment of customary law and "real" adherence of traditional customs as the basis of a successful customary claim, such "real" customary law must be free of any form of repugnancy that would undermine the current structure of state law.[380] Like Povinelli, I am of the view that the cunning of recognition lies exactly in this "play of the parentheticals: Be (not) Real: Be (not) Ulterior".[381] Accordingly, recognition demands that law be cautious and suspicious of every customary practice presented to it.[382] The law is being used as the main site by which ideas of

[375] *Ibid* at 166.

[376] *Ibid* at 166.

[377] *Ibid* at 166.

[378] Povinelli, *supra* note 70 at 176.

[379] *Ibid* at 176.

[380] *Ibid* at 176.

[381] *Ibid* at 176.

[382] As previously highlighted, this suspicion is manifestly engraved in the core of the laws form and purpose. To establish custom, the courts require claimants to face and speak to it, and the courts examine these claimants speaking to it, not speaking among themselves where their "true beliefs and feelings are imagined

recognition is used as a means by the state to not only build hopes of the indigenous and minority community but to shame them as well.[383]

4.3 A Search for Justice within Indigenous Communities in Cameroon

The previous section highlighted what is wrong with the current image of law advanced by the state. However, a concern for justice within indigenous communities in Cameroon requires this legal study to be more than just an analysis of the current legal doctrine and the various ways in which it has proved defective.[384] This is because, the disjuncture between the officially established legal systems, civil and common law, and the sociological plurality and fragmentation within the customary normative order is probably more visible in Cameroon than in other regions within Africa.[385] Thus, this section seeks to discuss an alternative view of law that could lead to a possible re-conception of law as understood within the Cameroonian society. It will look at the problem of the search for justice within indigenous Cameroonian societies and its relation to the idea of legal pluralism. The difficulty in the search for justice within the Cameroonian society lies in the co-existence of varying normative systems, with different ideologies.[386] In the past, the policy of indirect rule has been used as a means towards mitigating and ultimately eliminating the effects of legal pluralism. Indirect rule was an institutional device used by colonial administrators to handle this form of legal pluralism in

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to be expressed". Therefore, in a formal court setting, claimants disputing on the basis of cultural difference are not an objective representation of cultural difference, but instead "a membrane of difference, a membrane that could be hiding a fullness of difference or an absence thereof". Povinelli, *supra* note 70 at 180. Also, See S27(1) of *South Cameroons High Court Law,* 1955 containing the repugnancy and incompatibility test.

[383] Povinelli, *supra* note 70 at 180.

[384] Gordon R Woodman, "Legal Pluralism and the Search for Justice" (1996) 40:2 Journal of African Law 152.

[385] Boaventura de Sousa Santos, *supra* note 23 at 40.

[386] Woodman, *supra* note 384 at 15.

Cameroon. Although the policy of indirect rule is still being used by the state, there exists other types of institutionalized legal pluralism which could serve as an effective modern-day device in Cameroon. As such, the search for justice in the context of indirect rule can be replaced with a search for justice in the context of more modern judicial systems accommodating legal pluralism.[387] Since current understanding of pluralism adopted by the Cameroonian state reflects an over reliance on the colonial government's policy, the aim here will be to adopt a perspective of the actual subjects of the law.[388]

4.3.1 Legal pluralism: Ensuring a Cross-cultural Jurisprudence in the Search for Justice

Legal development associated with colonization in Cameroon gave rise to an issue which is classed today as legal pluralism. That is, the relationship between customary and state law which began in conflicting claims to legitimacy.[389] Legal pluralism is generally understood to be the co-existence of two or more legal systems in the same social field.[390] This idea not only notes the diversity of norms, processes and institutions that may exist within a legal order but also develops hypotheses concerning the relationships between them.[391] Therefore, the presence of legal pluralism itself is of less significance than the "dynamics of change and transformation" occurring within such legal orders.[392] In the context of Cameroon, there has been a shift in the ways in which the various legal orders interact. Emphasis has been placed

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[387] *Ibid* at 15.

[388] *Ibid* at 156.

[389] *Ibid* at 156.

[390] Popsil Leopold, "Modern and Traditional Administration of Justice in New Guinea" (1981) 19 Journal of Legal pluralism 93.

[391] Macdonald, *supra* note 353 at 32.

[392] Merry, *supra* note 55 at 880.

on the power of both the civil and common law traditions to re-shape the nature and character of customary law, suggesting the dominance of state law over other forms of law.[393] The form of legal pluralism currently reflected in the Cameroonian state is state-law pluralism which involves a recognition and incorporation of specific aspects of customary law within the state legal system.[394] In this instance, the state legal system constitutes a multiplicity of laws with separate sources of legitimacy. This form of pluralism reflects some sort of unification of state laws, while at the same time emphasizing the need to ensure diversity within state legal norms.[395] It does not separate state law from other forms of law, instead it makes a distinction between laws as they exist within the body of state laws.[396] However, the advent of new jurisprudence has consistently placed emphasis on the need to ensure a "dialectic, mutually constitutive relation between state law and non-state law".[397] Merry asserts that this position suggests a new awareness to the inter-connectedness of various socio-legal orders within a state.[398] This ideological approach to legal pluralism challenges traditional ideas creating a hierarchy of normative orders based on legitimacy or source-based standards.[399]

In the context of Cameroon, the problem with implementing a subjective, dialogic and conversational form of legal pluralism is that it ultimately undermines the rule of law.[400] This is so because, in the absence of systematically enforced uniform set of laws, normative conflict is inescapable.[401] Therefore, it becomes necessary to ensure that although some form of

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[393] *Ibid* at 879.

[394] Woodman, *supra* note 384 at 158.

[395] *Ibid* at 162.

[396] *Ibid* at 159.

[397] *Ibid* at 879.

[398] *Ibid* at 879.

[399] Macdonald, *supra* note 353 at 34.

[400] Macdonald, *supra* note 353 at 32.

[401] *Ibid* at 32.

recognition of multiple normative orders within the state exists, statutory law will still be regarded as the most appropriate form of law determining the conditions in which all these other orders are said to exist.[402] As such, the integration of any other normative order within the structure of the state is largely dependent on state recognition for its validity and will only be law to the extent they are recognized by the state.[403] This state of affairs is largely premised on claims that particular kinds of laws and norms underlying the customary normative system are unjust. The contention here is that in most instances, customary law effects injustice by prompting a differential treatment of specific categories of its subject. Griffiths asserts that the tendency of individual rights to be highly dependant on status within the community has also been raised as an objection.[404] While these criticisms are somewhat legitimate, the concern lies in the fact that these arguments are not against customary law as such but instead against its specific content.[405] This position fails to account for the fact that deep legal pluralism also recognises the unjust nature of certain aspects of customary law and other legal orders within the state.[406] The more significant problem lies in the various ways in which such legal change are deliberately induced and brought about by legislative activity in the field of state law.[407]

It may then be asked why, after recognizing the legal character and social significance of customary law within the lives of the Cameroonian society, should we not consider the

[402] Whitehead et al, *supra* note 29 at 74.

[403] Griffiths, *supra* note 30 at 167 – 8.

[404] *Ibid* at 162.

[405] The same way the specific content of state law in Cameroon has in most cases been subject to much criticism due to its failure to meet certain human rights standards. Note that objections have also been raised against discriminatory provisions within state law. For example, Cameroon's rape law provisions have been argued to highly discriminatory.

[406] *Ibid* at 162.

[407] *Ibid* at 163.

possibility of effecting such legal change by action within the field of customary law itself. The argument here is that a failure to ensure the application of deep legal pluralism and encouraging its dialogic processes will inevitably result in an extinction of customary law and all other non-state normative orders while ensuring the exclusive hegemony of the state in the legal sphere.[408] It could also be argued that applying deep legal pluralism within the Cameroonian state will allow for greater attention to be paid to the rights of indigenous peoples and their claims to self-determination. The principle of self-determination goes against ideas surrounding cultural uniformity and against the "appropriation of indigenous people's sovereignty by states".[409] By usurping their system of justice and conflict resolution, educating their children in state schools and eliminating their languages, states are in turn imposing what Niezen describes as "gray uniformity on all humanity".[410] Therefore, social life needs to be organized in such a way as to encourage "collectivities" to adequately practice their culture.[411] This concern is one that has been addressed by the international community and has been included in various international documents leading to a commitment to "promote and protect the rights of the world's first peoples".[412] Emphasis needs to be placed on the need for the judicial system as a whole, with its pluralism and ramifying interconnections, to effectively and legitimately deliver justice.[413]

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[408] *Ibid* at 163.

[409] Niezen, *supra* note 31 at 2.

[410] *Ibid* at 2.

[411] Woodman, *supra* note 384 at 165.

[412] Article 27 *of United Nations General Assembly, International Covenant on Civil and Political Rights,* 1966 states that "In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion or to use their own language". This provision conveys this standard as a right for minorities. In Cameroon, as is the case for the rest of Africa, most customary groups are considered to be minorities within their states. As such, interference with or a failure to protect the rights of persons to practice culture will be deemed unjust according to this view.

[413] Niezen, *supra* note 31 at 2.

4.4 Effecting Change within Traditions

It is important to note that the above discussed theoretical framework for emancipation of the customary normative order from the grip of the state legal system is not oblivious to the fact that numerous justifications exist for current state resistance to full application and acknowledgment of custom. As such, it becomes necessary to address the basis of these justifiable resistance and how/if a solution can be achieved. The arguments put forward by observers outside of a specific culture is: Why does tradition have to be dealt with and why must a process for dealing with it have to be developed? The idea here is that although we could simply overlook and ignore culture or merely regard it as history as it exists in books, the primary reason we are constantly trying to understand and address tradition appears to be due to the fact that it imposes certain constraints on our lives.[414] As discussed above, indigenous Cameroonians are rightfully entitled to preserve and practice elements of tradition despite the fact that opposition to such traditions maybe justified. To them, custom offers lessons as to how they should act.[415] Therefore, even though a certain aspect of the Cameroonian society now view tradition as dispensable, there will always be a section that perceives the lessons provided by tradition and in most instance will be inclined to urge them upon us.[416] However, in an attempt at answering the question of how different societies accommodate the concept of change to themselves and to their identity, it should be noted that the answer to this question varies from one tradition to another. The solution largely depends on the specific tradition and the specific elements which arguably needs to be changed.[417] Consequently, it could be assumed that the current approach adopted by Cameroon in its efforts to eradicate certain cultural practices is somewhat defective. Change through external contact leading to a

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[414] Glenn, *supra* note 68 at 17.

[415] *Ibid* at 17.

[416] *Ibid* at 17.

[417] *Ibid* at 17.

significant alteration of the entire information base of a tradition will not be received as change, instead as an imposition.[418] As seen in Cameroon, in most cases such modification to custom may not even be acknowledged in any way.

For example, the preceding section highlighted that one of the main grounds for the opposition of custom in Cameroon is that it perpetuates inequality and injustice in its treatment of women. This ground of resistance to culture upon critical examination appears to be fundamental and convincing. However, focus shouldn't be placed on trying to oppose or resist the very nature of culture by advancing ideas of unification of the legal system but instead trying to adapt custom to ways that correspond to new circumstances when present rationality is applied.[419] In order to achieve this, an inquiry needs to be made as to what kind of information is relied upon when there is real opposition to custom?[420] This question is essential because change which needs to be effected, although within indigenous societies is internal to a specific tradition. Resistance in such instance is to a particular detail and consequence of a customary practice. Glenn argues that the tradition itself provides both the justification for opposition, as well as a justification for its defeat or accommodation.[421] Although the specific culture may not expressly state how or when to resist it, in most instances, it provides the requisite authority needed to ensure opposition.[422] The argument here is that, since tradition supplies justifications for resistance, any modification to be made must be conducted within the tradition itself, using both its language and its resources.[423] Therefore, in addressing the various reasons justifying

[418] *Ibid* at 40.

[419] *Ibid* at 40.

[420] *Ibid* at 40.

[421] *Ibid* at 18.

[422] *Ibid* at 18.

[423] KA El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: One World, 2001).

an opposition to custom in Cameroon, work needs to be done from within the tradition itself.[424] The originality of this attempt is likely to impact a change within such communities as the change will be confined to the context and resources within such tradition.[425]

The ideas enumerated above are more likely to be easily comprehended once the idea of culture in Cameroon is understood to be merely composed of information carried from the past to the present with no inherent elites or hierarchy.[426] Understanding tradition in this way emphasizes the fact that since culture in itself is a vague concept, if there is a conventional way of doing things, the tradition will be in the "way" and not in the "doing".[427] Acts or decisions once they take place disappear forever if they are not translated into communicable information.[428] Therefore, in the future, one may or may not act upon information received from tradition. This highlights the fact that the information base of customs is very significant in effecting change. Also, by reinforcing the theory of tradition being a dialogic process, a conversation with other traditions, it exposes the inherently unstable nature of custom, instability arising from both internal and external sources.[429] Therefore, if tradition is constituted as an exchange of information, it is in some ways open to further exchanges of information, notably with the civil and common law traditions also existing in Cameroon. Once this is done, it will become easier to unlink the idea of culture with stability. In this way, culture will instead be conceived as a

[424] Therefore, in dealing with the matter of gender inequality and other practices detrimental to women, change needs to be effected from within the relevant community attaching meaning to such traditions. In this case, the entire information base of such tradition will need to be called into play by both proponents and opponents of the culture.

[425] S Delany, *Counter-Tradition: A Reader in the Literature of Dissent and Alternatives* (New York: Basic Books, 1971) 3.

[426] Glenn, *supra* note 68 at 13.

[427] *Ibid* at 14.

[428] *Ibid* at 14.

[429] *Ibid* at 14.

resource from which reasons for change can be originated. Culture, in all its forms will become a means by which change can be formulated, a "modality of change",[430] a means by which a community "gradually transforms itself".[431]

4.5 Reconciling Legal Traditions in Cameroon: Sustainable Diversity in Law

The multivalent logic adopted by Glenn seems to be an interesting approach that could be used to advance the above highlighted theoretical appreciation of custom as a factor of change. This is welcome in the context of Cameroon, since it describes the hidden reality and encourages a wider acknowledgment of various normative orders within the state. This section seeks to understand how the numerous legal traditions in Cameroon can manage their relations with each other despite their complexities and individual claims of of universality.

An analysis of the current relationship between the various traditions in Cameroon reflects what Glenn describes as an attitude of toleration. Toleration applies to that which is "really external, different, strange, or even radically wrong or for some evil".[432] This idea of toleration is more reflected in the conflict between the customary law system as opposed to state legal system, comprising of the civil and common law traditions. Since the state regards various aspects of custom to be fundamentally wrong, primitive and sometimes evil, toleration implies that there are reasons for not stamping out the customary normative in its entirety. However, toleration fails to accept, despite difference.[433] It instead creates a relationship which condemns and excludes the customary law system as a major legal tradition in Cameroon.

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[430] Marilyn Robinson Waldman, "Tradition as Modality of Change: Islamic Examples" (1985-86) 25 History of Religions 326.

[431] Fernand Braudel, *A History of Civilizations* (New York: penguin, 1993) at 30.

[432] Glenn, *supra* note 68 at 372.

[433] *Ibid* at 372.

The multivalent logic proposed by Glenn seems more appropriate to the situation in Cameroon. This logic goes beyond tolerance to proposing an acceptance, despite difference. It refuses to condemn or exclude; instead it builds real bridges which serve as a middle ground for traditions, one which allows for an "ongoing reconciliation of its inconsistent poles".[434] This reflects a form of interdependence of traditions as opposed to the elevation of one belief, or tradition to an elite status with the aim of imposing it on others with subordinate status.[435] The adoption of this approach is necessary for the survival of customary law in Cameroon. Multivalence within Cameroon will provide general stability for all traditions existing within Cameroon. This approach allows for a dialogue within the legal system such that disapproval of an aspect of a specific tradition, does not automatically discredit the system in its entirety. According to Glenn, multivalent thinking tells us to keep in mind the various ways in which these traditions may conflict, that is, the inconsistent principles.[436] It will also tell you that the these inconsistencies within traditions only "define the field of play" by informing you on how and where to find a middle ground in case of conflict, as there is always a middle ground. To identify this middle ground, detailed information found within the conflicting traditions, which disintegrates boundaries is needed.[437]

4.6 Conclusion

Drawing on relevant theories, this chapter proposed that, for customary law to be effectively used as mechanism for legal regulation of contemporary Cameroonians, the current legal framework needs to move beyond the idea of recognition and tolerance to one that reconciles the complexities of the Cameroonian legal tradition. It highlighted the argument that

[434] *Ibid* at 372.

[435] *Ibid* at 375.

[436] *Ibid* at 378.

[437] *Ibid* at 378.

reconciliation surpasses mere co-existence of customary law with the civil and common law traditions currently existing in Cameroon. Instead, it accepts despite difference and constructs a middle ground for various legal traditions within the Cameroonian state, allowing for an ongoing conversation rather than a strict separation of legal boundaries.[438] The chapter also highlighted the fact that the idea of legal recognition of custom creates a platform for sustaining state machineries that put dominance in place. It also argued that if multiplicity in law, becomes the underlying concept being pushed and reinforced by the Cameroonian state on a large scale, then there may not be a need to put in so much effort in sustaining the customary legal system. It would almost automatically just happen. This would entail accepting and not merely tolerating the various legal traditions in Cameroon.

[438] *Ibid* at 373.

CHAPTER 5

CONCLUSION

The aim of this thesis has been to assess and critically examine the nature of customary systems and the specific issue of customary judicial adjudication as it applies to the Cameroonian context. Chapter 1 briefly introduced the nature of this problem and its prevalence in contemporary African societies. It highlighted the fact that due to the varying degrees of political history, social and economic development, the process of integrating customary systems within the state legal framework differs locally depending on context. However, an overview of literature and evidence reveals that although the level at which customary systems are relevant differs significantly from country to country, the broad principles underlying these systems remain the same. Therefore, a majority of African states are currently experiencing similar problems in their attempts at sustaining the cultural heritage reflected in indigenous laws and institutions while functioning as modern democratic societies.

Despite similarities and prevalence of this problem in Africa and in other regions, this thesis limited its analysis to the Cameroonian context. Focusing the problem on a specific jurisdiction was necessary to fully grasp the nature of the problem and provide a normative base to draw from. Relying on the Cameroonian context was significant due to the fact that despite the states numerous attempts at engaging with customary systems, the various approaches adopted consistently failed to appreciate the complexity of customary systems and more specifically the historical, social and cultural reality of indigenous Cameroonians.

To fully understand the context of Cameroon and more specifically, the nature of indigenous societies, the primary task was to engage in a historical analysis of the nature of customary law

in Cameroon. Chapter 2 focused on the pre-colonial and colonial societies in order to identify and understand several factors that have influenced the current state of customary systems in Cameroon. The chapter began by highlighting how pre-colonial societies in Cameroon were composed. Despite the absence of a single unified customary system, the political, legal and administrative customary framework operating in this era bore remarkable similarities. As such, with reference to specific indigenous societies, I was able to arrive at an understanding of how these societies were composed. Specific emphasis was placed on the internal organization of villages, traditional justice and conflict resolution, procedural and adjudicative structures and the values underlying the legal administration of customary systems. Since colonialism had a decisive impact on pre-colonial customary systems, it was necessary to highlight how the establishment of colonial rule deviated the pre-colonial path and shaped the current nature of post-colonial Cameroon. An analysis of colonial regulation of customary law revealed how the numerous structural modifications that took place in this era was more of a struggle for political and legal authority. The chapter also highlights the emergence of legal dualism, its particular patterns and outcomes in various regions. It also gave an in-depth examination on how the substance of customary law came to be re-defined and distorted by the various colonial regimes.

The study of Cameroon was not limited to a historical analysis. It was necessary to ascertain how customary systems currently function in post-colonial democratic Cameroon. Chapter 3 focused on establishing the place of customary law in the Cameroonian legal system and also to understand the nature of the relationship between indigenous societies and the state. It looked at the various structural, legislative and administrative mechanisms that have been put in place to ensue a proper regulation of customary law. It also identified the various steps taken by the state in its attempt at unifying multiple normative orders in an effort to fulfill its modernizing

ambitions. From this chapter I was able to conclude that although colonialism left a lasting impact on the Cameroonian society, the advent of democracy created room for the emergence of a new form of power. Cameroon's top-down approach to judicial reform has largely undermined customary systems, in turn creating a gap in its regulatory and governance framework. This is evident in the relations between the state and traditional authorities, the content of every legislation as regards customary systems predominantly serves as a means through which the customary structures and traditional institutions can be controlled and manipulated by the state. Therefore, despite the recognition afforded to customary law and the decentralized system of governance, the state has adopted various mechanisms through which it reserves the right to define, limit and restructure traditional institutions. The limitation and restructuring of the customary system is evidenced in the current composition and jurisdiction of customary courts and the application of the repugnancy and incompatibility tests by state courts adjudicating customary disputes.

Therefore, in a context like Cameroon, reflecting a substantial disparity in customary law as practiced and understood with indigenous societies and custom as contained in legislation and adjudicated by state courts, it becomes necessary to question the aim of the judicial process in its various attempts at recognizing and acknowledging customary law. Chapter 4 focused on theoretical dimensions of state regulation of customary law. The aim of this chapter was to arrive at an understanding of how the idea of recognition reflects a situation of tolerance, which assumes a hierarchy and creates a situation of dominance which privileges certain social groups and exercises control over all aspects of society by imposing its own systems of meaning and limitations. A critique of the internal assumptions and presuppositions currently underlying the legal culture in Cameroon was necessary to highlight the need to adopt necessary steps and suggests certain changes that would need to be made. Understanding the various theoretical

conceptions highlighted in this chapter is essential for whatever approach to be adopted by Cameroon, or any African state, in its attempts at reforming its judicial system. Applying these theories and changes almost guarantees the effectiveness of any approach in filling the current regulatory and governance gaps experienced by indigenous Cameroonians.

Overall, this thesis has argued that although much has changed since the advent of colonialism, the current steps adopted by Cameroon which tends to focus on the formal system and ways in which customary law can be shaped to fit within the state legal framework is highly flawed. Taking account of the current failures of state legal mechanisms, there is ample evidence to show that when neither formal or informal mechanisms are effective, numerous abuses and serious conflicts are likely to occur. As such, Cameroon's failure to properly engage with customary institutions is simply a state's failure to tap into non-state mechanisms that are likely to prove beneficial in resolving the numerous issues underlying the legal system.

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