The myth of 'Judicial customary law': Reflections from Anglophone Cameroon

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Abstract

This paper unravels the origins of the concept of 'judicial customary law', a variant of customary law, acknowledged and recognised in some common law jurisdictions of sub-Saharan Africa. It adopts qualitative research methodology based on doctrinal and content analyses of primary and secondary data. It documents some of the arguments underlying the emergence of judicial customary law as the inadvertent product of state courts in the exercise of the crucial prerogative of judicial establishment of customary law. The paper argues that the notion of judicial customary law, as divorced from social practices of the people, represents a controversial affront to our traditional understanding of customary law, which is associated with the aspirations of the community. Through a critical evaluation of the laws in force, and complemented by the jurisprudence of state courts of Anglophone Cameroon in the administration of the twin processes of judicial establishment, as complemented by the process of adjudging the equitability of customary law, the paper acknowledges the conceptual feasibility of judicial customary law in the territory, as opposed to its practical applicability. The absence of professionalisation in the delivery of customary justice and the essentialist articulation of customary law are factors, among others, that forcefully militate against the realistic existence of this notion in Anglophone Cameroon.

Keywords: Anglophone Cameroon, customary law, judicial customary law, judicial establishment.

Introduction

Customary law plays an important, albeit negligible, role in the Cameroonian legal system. Unlike other legislative sources, it is basically unwritten and presents a herculean task to proof to a party who wishes to rely upon it in judicial proceedings in state courts. Admissibility of a customary rule does not depend on its self-sufficiency as a norm recognised by the community. Rather, it is dependent on the norm not only of being notorious to state courts but also equitable, the latter criterion often being adjudged on parameters which, in most instances, are extraneous to customary law itself (Kiye 2015a: 92). There is the contention that the processes employed to determine the notoriety of customary law in state courts in some common law jurisdictions, and perhaps beyond, have led to the fragmentation of the substance of customary law, and have thus created a new version whose origins are divorced from social practices (Woodman 1985: 153-156; 1988: 181-220; 1994: 673; and 1995:145-169).

Customary law is a system of rules developed in traditional societies of sub-Saharan Africa prior to Western penetration, as a mechanism to regulate inter-personal relations. As informal rules that developed within the primitive agrarian economy, their validity rests on the assent of the people. This is a fundamental characteristic of customary law that sets it off from other

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legislative sources. Indeed, unlike our contemporary understanding of Western-inspired laws as emanating from a constituted authority, customary law evolves unconsciously in society from practices observed by the people and generally acknowledged to be binding on them (Anyangwe 1987: 139-140; Ngwafor 1993: 7-9).

The association of customary law with the aspirations of society is being challenged by legislative endeavours, as complemented by practices that obtain in state courts, in some common law jurisdictions. It has been argued by Woodman (1985:148) that these practices, although based on convenience, have inadvertently divorced the substance of customary law from social practices and have, instead, led to the creation of a new version of norms that are fundamentally different from those that regulate social relations. This bastardised version of customary law, the so-called creation of state courts, is referred to variously as "official customary law" (Diala 2017: 144), "lawyer's customary law"[1] or "judicial customary law".[2] Like elsewhere in sub-Saharan Africa, the administration of customary law by state courts of Anglophone Cameroon poses numerous challenges. Some intractable problems include its unwritten nature, and the conflict between some of its values and those of received laws.[3] Because of these, and other, challenges, the legislature has enacted peculiar rules for the admissibility of customary law in Anglophone Cameroon, the province of sections 14(1) and (2) of the Evidence Ordinance, 1958, and section 27(1) of the Southern Cameroons High Court Law, 1955, the former provision often being blamed for its bastardisation in the state legal system.

This assumption, which has been documented in the common law jurisdictions of Ghana and Nigeria (Woodman 1985; 1988), fails to reflect the status quo in Anglophone Cameroon. Evidently, state courts of Anglophone Cameroon are not mandated to create customary law and, in the process of administering it, have not, even inadvertently, achieved that object as reflected in their emerging jurisprudence. Consequently, the notion of judicial customary law, though a reality in some jurisdictions, is a conceptual illusion in Anglophone Cameroon. This paper, while acknowledging the existence of the notion of judicial customary law in some common law jurisdictions, questions its practical applicability in Anglophone Cameroon. The paper consists of two parts. Part 1 discusses the notion of customary law in Anglophone Cameroon and unravels the close relationship it fosters with the society. It documents some of the arguments supportive of the existence of judicial customary law, and, by extension, the creative role of state courts, in the exercise of the function of judicial establishment.[4] Part 2 provides a critical reflection of the status quo that obtains in Anglophone Cameroon and asserts that the variations that have occurred in the substance of customary law in other common law jurisdictions is yet to materialise in Anglophone Cameroon. It concludes that, in the absence of judicial activism in the administration of customary law in state courts, the notion of judicial customary law will remain an unsubstantiated myth in Anglophone Cameroon.

1. Woodman (1985: 145, 1988: 181) uses this terminology to refer to customary law which is recognised by state courts and which may not correspond to existing social practices of the society. The terminology is used in contrast to "Sociologists' customary law" or "Living Customary Law" (Diala 2017: 144), which are norms recognised as customary law in society which are often different from the substance of "lawyer's customary law".
2. This is the terminology of choice of this author which, like 'lawyer's customary law' insinuates customary law developed by the court, the main arm of the judiciary, in its application of custom.
3. The administration of customary law, be it in most of sub-Saharan Africa or in the small island states of the South Pacific, has generated tensions in the legal systems due to the conflict it fosters with values of other legislative sources including human rights. This tension is evident in jurisdictions where the constitutional and legal frameworks have, at best, been ambiguous in outlining a concise relationship between customary law and human rights leading, on occasion to the exoneration of customary law from constitutional and human rights scrutiny. See, among others, Care 1999: 251; Bigge & Von Briesen 2000: 289-313; Kariuki 2005.
4. Judicial establishment is defined, within the context of this paper, as a process whereby state courts are able to incorporate rules of customary law into the state legal system by converting them into case law precedents which are then made available for use by other state courts. Judicial establishment restates customary law in a formal judicial pronouncement, upon the norm becoming notorious to the court. The process upgrades customary law to a status akin to common law.

Customary law: product of social relations and or creation of state courts?

Customary law exhibits unique features that distinguish it from other normative norms. These features are essential to its conceptualisation (Kiye 2007: 96-122); their negation liable to alter its substance forever. Amongst the features is the undetachable relationship that the law fosters with the aspirations of the people of the community. Customary law therefore represents a mirror of local usages of the community which have been repeatedly practised by the people and have acquired binding force. Notwithstanding this view, some authors, including Woodman (1985, 1988, 1995) argue that, based on practices by state courts in some common law jurisdictions, a variant of customary law has arisen, a creation of state courts, that is different from, and detached from, social practices.

Customary law as a mirror of communal practices

The foundational base of customary law is the society, a characteristic feature that sets it off from other legislative sources in Anglophone Cameroon.[1] African customary law developed in pre-colonial societies (Anyangwe 1987: 9; Woodman 1989: 274; Ngwafor 1993: 7-8), facilitated by the absence of organised state structures amid the prevailing agrarian economy, with its resultant practices. These local practices, customs, and usages mirror acceptable behaviours in the various communities, their repeated observance leading to standardised patterns of conduct that were eventually given legal force by the people. The absence of formal education in the pre-colonial era ensured that the developing values, as practised by the people, were undocumented and were ingrained in their consciousness. There was therefore a huge reliance on oral recollection for the transmission of customs from one generation to another, and this medium of transmission still obtains in contemporary Cameroonian society (Kiye 2007). There is no gainsaying that, as a living source of law, customary law, as distinct from other legislative sources, revolves essentially around the people: it originates from unconscious social practices of the people of the community; it regulates all conceivable relationships amongst the people; and it is only amended or repealed at the behest of the people upon a new practice superseding the old. In this connection, the foundation of customary law is based on societal consensus (Kiye 2007: 87; Anyangwe 1987: 139-140; Ngwafor 1993: 7-9).

The perception that customary law emanates from a consensus of views in the community should not be taken at face value. It has been extensively documented that dominant representations of custom in traditional African societies are rarely unanimously endorsed (Chanock 1995: 175; Snyder 1981: 49-90), as they are often challenged and contested. Contemporary customary law is said to be reflexive of power relations and it should always be understood as a matter of current politics, a way of making demands and mapping out political positions, rather than simply embodying cultural history (Benda-Beckman 1992: 307-324; Nyamu 2000: 405-406; Zorzi 2001).

Nonetheless, the importance of associating customary law with the mores of the community, rather than with a body or an institution of the state, is aptly illustrated by developments in Anglophone Cameroon where the legislature and the state courts have failed not only to influence the development of customary law but also to repeal specific provisions of it said to be anathema to the national consciousness. Customary practices that have been proscribed by legislation, and further declared to be ill-founded by the courts, have, nonetheless, been applicable in society in total disregard of the law and the jurisprudence of the courts. Despite the criminalisation of the practice of female genital mutilation under section 277-1 of the

1. In addition to customary law, the common law, civil law, international law, and a developing body of harmonised laws emanating from the national legislature are applicable in Cameroon.

Penal Code, 1967, and repeated disavowal of the custom of patriarchy by state courts, these practices are still rife in society because the basis of their legitimacy rests on the consent of the people and not on imposition from above. It should be surmised that, in view of the close relationship that customary law fosters with the society, attempts at addressing the rigours of customary law should include engaging with the people, otherwise changes dictated from above are liable to be circumvented as they may not reflect the prevailing ethos of the community. Unsurprisingly, customary law has demonstrated resilience to changes imposed from above (Kiye 2015b: 94).

A new era in the discourse of customary law came to fruition during colonialism. It is contended that colonialism destroyed the fabric of traditional societies and with it emerged a new order characterised, among others, by the transition from an agrarian to a capitalist-oriented economy and the institutionalisation of customary law in the colonies. Because of its peculiarities, including its differences from colonially received laws, legislative measures were adopted, among which the principle of judicial establishment, to govern the admissibility within the state legal system of customary law. There is the view that the process of admissibility of customary law, as dictated by the colonial state in some common law jurisdictions, are based on a series of measures that eventually detached customary law from the ethos of society. In other words, these measures might not have transformed the substance of customary law as a product of society. Rather, they led to the formulation of new norms, attributed the appellation (official, judicial or lawyer's) customary law, which are creations of state courts and are fundamentally different in character from norms that are socially recognised. These measures that characterise the process of judicial establishment of customary law are said to account for the origins of judicial customary law, the crux of the next section.

Revisiting judicial customary law: some arguments in support of the concept

Judicial customary law is said to be an inadvertent creation of state courts during the process of judicial establishment of customary law, a requirement under section 14(1) of the Evidence Ordinance, 1958, for its incorporation into the state justice system. A definitive hierarchy of norms exist in most legal systems, not least Cameroon. This hierarchy is embedded in constitutional and legal provisions that define the relationship between norms and, specifically, the relationship customary law fosters with colonially received laws. Articles 1(2) and 45 of the 1996 Constitution, (law no. 96-06 of 18 January 1996), complemented by section 27(1) of the Southern Cameroons High Court Law, 1955, (hereinafter referred to as SCHL), and section 31(1) of the Magistrate's Court (Southern Cameroons) Law, 1955, reinforced the inferiority of customary law among the corpus of legislative sources. The provision of the SCHL, among others, subjects customary law to duality tests as measures to ascertain its equitability prior to it being absorbed into the state justice system (Kiye 2015a). Ideally, as a prelude to it being adjudged to be equitable, the norm must be proved to exist as a matter of fact through, for example, the recollection of expert witnesses in the initial stage of judicial establishment.

The processes of determining the equitability of a norm and the subsequent restatement of it in an authoritative pronouncement by the courts are two sides of the same coin; a symbiotic relationship. Generally, in Anglophone Cameroon, before a customary norm is recorded and documented to be well founded through the process of judicial establishment, it must pass the dual tests of repugnancy and incompatibility. Conversely, if the custom has not been documented to be well established or notorious, it may still be applicable provided it is equitable, a precursor to its subsequent establishment in the state courts. The processes as outlined, especially the former, are blamed for fragmenting the substance of customary law or, better still, for creating a variant of customary law that is fundamentally different from social practices. Woodman (1985, 1988) is among the proponents of this view and couched his arguments on various premises with specific reference to the common law jurisdictions of Ghana and Nigeria. The principle of judicial

establishment is stated under Section 14(1) and (2) of the Evidence Ordinance, Cap. 68 of the Laws of the Federation of Nigeria, 1958, thus:

1. A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence; the burden of proving a custom shall lie upon the person alleging its existence.
2. A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

The principle was confirmed in the Nigeria case of *Liadi Giwa v. Bisiriyu Erinmilokun,* (1961), where Taylor F.J. said:

> *It is a well-established principle of law that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such notoriety and has been so frequently followed by the courts that judicial notice would be taken of it without evidence required in proof* (cited by Anyangwe 1987: 241).

The principle was also emphatically stated by the Privy Council in the celebrated case of *Angu v. Attah* (1916) thus:

> *'[A rule of customary law] has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them'* (cited by Woodman 1985:147; 1996: 40; Essien 1994: 174; Palmer & Poulter 1972: 110; Leon 2000: 381).

According to section 14(1) of the Evidence Ordinance, 1958, for customary law to be restated or established, it must be subjected to two qualifications: firstly, the factual existence of the custom must be proved; and secondly, the court has to take judicial notice of it after it has been frequently proved – that is, it has become notorious in the eyes of the court. The first part of the test requires substantive proof as to the existence of a custom. Modes of proof of customary law include, amongst others, calling expert witnesses, the use of authoritative textbooks, personal knowledge of the judges, use of expert assessors, and opinions of native courts. The second part of the rule, the province of Section 14(2) of the Evidence Ordinance, 1958, states that the custom should be notorious to the court and this requirement is fulfilled after the custom has been frequently proved to exist as a fact to the knowledge of the court.

Woodman (1985, 1988) argues that these qualifications are fulfilled through the employment of measures that are liable to alter the substance of customary law, creating a divergence between customary social norms in practice (which he refers to as "sociologists' customary law"), and norms enforced by state courts under the name of customary law (which he refers to as "lawyer's customary law"). He opines that each of these qualifications is liable to produce divergence in customary law. The first qualification to the rule may produce divergence in the following ways: divergence may arise from mistaken findings on the content of sociologists' customary law; further, even if such mistakes do occur, courts sometimes have to reach conclusions on the content of customary law when sociologists' customary law is in the mode of change. Furthermore, divergence occurs because of the very nature of state courts – they have a peculiar character, which demands in every case an answer to a question which sociologists' customary law has never had to answer and cannot answer. Therefore, sociologists' customary law never answers the question before the court, and hence lawyers' customary law which does, must have a different meaning.

Woodman (1985, 1988) further argues that the second qualification of the rule is liable to produce another divergence between the court's customary law and society's customary law. He states that there have been instances where controversial points of law were settled by referring to one or few decided cases that were in turn based on weak evidence. Moreover, because previous decisions may be treated as binding authority, there is a further possibility that the courts might disregard local variations in customary practice. Further, once a rule has been judicially recognised, it is liable to be applied to ethnic groups other than those whose customs were in issue in the decisive cases. To justify this argument, he states that the Nigerian courts have sometimes held themselves bound by Ghanaian decisions on customary law, although there is no significant ethnic group common to both countries (Woodman 1995:156).

Woodman (1995: 156) further blames the legislator for also creating divergence between the court's customary law and society's customary law. Citing the situation in parts of Ghana and Nigeria, he asserts that machinery has been established for the authoritative declaration or modification of customary law. When such a declaration or modification is made, it is binding on the courts which are thereafter required to treat it as part of the customary law, whether it is in accordance with customary practice or not. He thus concludes that the divergence between lawyers' customary law and sociologists' customary law must be seen not as a consequence of unfortunate, remediable defects in the process of establishing lawyers' customary law, but as a necessary, irremovable phenomenon in the enforcement of customary law by state courts. It follows that it is erroneous to regret or criticise the divergence (Woodman 1985:156).

These arguments, in support of the creative role of state courts, are based on experiences in the common law jurisdictions of Ghana and Nigeria and founded on strong theoretical and conceptual grounds, some of which are supported by empirical evidence. Indeed, the crux of the argument is that, in applying customary law, state courts inadvertently create a variant of the law, judicial or lawyer's customary law, which does not correspond with social practices in the community. In Woodman's own words:

> *'The state courts' remedies and procedures are such that they cannot reproduce the circumstances in which social norms operate and by which they are enforced and consequently they cannot simply "apply" those norms. The legal systems of necessity exercise a creative function: when they appear to apply customary law, they in reality create a new type of "customary law". An alternative formulation is to say that customary law is institutionalised by the state legal system. However, "institutionalisation" should not be taken to imply that the product is not substantially new'* (Woodman 1988:181).

These developments that are validated in some jurisdictions have, regrettably, put state courts at the center of the evolution of customary law, competing for legitimacy with the society, the latter often regarded as the foundational base of customary law (Anyangwe 1987: 9; Ngwafor 1993: 7-8). In view of the strength of these arguments, one may be mistaken to give credence to their validity in Anglophone Cameroon since the entity was subjected to similar colonial experiences as Ghana and Nigeria. Nonetheless, evidence within the jurisdiction, as documented in the subsequent section, suggests that judicial customary law is of theoretical, rather than of practical, feasibility in Anglophone Cameroon.

The reality of judicial customary law: Anglophone Cameroon in perspective

Anglophone Cameroon is the portion of Cameroon that came under British administration following the capitulation of Germany during World War 1 and the subsequent partition of Cameroon between the victorious powers of France and Britain. Like Ghana and Nigeria, Anglophone Cameroon is essentially part of the common law heritage. Arguably, customary law is subjected to almost similar experiences as in those jurisdictions. In addition to determining its equitability prior to admissibility, state courts of Anglophone Cameroon equally have the mandate

to convert customary law to case law precedent upon it being declared notorious and established. Logically therefore, similar experiences in Ghana and Nigeria are predicated to occur in Anglophone Cameroon. Nonetheless, evidence suggests that the territory has been insulated from some of these developments and there are no indications that a variant of customary law has emerged from the jurisprudence of state courts, as I will now document.

Judicial customary law: an illusion in Anglophone Cameroon

Records suggest that state courts of Anglophone Cameroon, unlike their counterparts in Ghana and Nigeria, are yet to create a rich and compelling jurisprudence on customary law, especially pertaining to its establishment. And although the legislation in force mandates them to recognise, without further proof, customary law that is said to be well-founded and notorious to the court, the distinctive composition of these courts, among others, makes it less likely for them to engage in the restatement of customary law. Cameroon has a unified court system in which most of the ordinary state courts are not precluded from applying customary law, provided it is not repugnant to natural justice, equity and good conscience. The lack of professionalisation in the administration of customary law in these courts is worrisome. Indeed, the composition of the courts, of judges with no customary pedigree, except, arguably, for customary courts, ensures they struggle to engage with customary issues appearing before them. The requirements of judgeship in these courts are weighted in favour of proven knowledge in colonially received laws as opposed to customary law. Indeed, at the inception of their legal training at the university on to their professional training at the School of Magistracy, Yaoundé, fondly referred to in its French acronym as ENAM, judges are schooled in the principles of Western-oriented laws with little attention paid to customary law education.

The situation is not any different at the specialised division of the Court of Appeal, the Customary Division of the Court of Appeal, where the absence of professionalisation in the delivery of customary justice is more troubling. To mitigate this defect, customary assessors are appointed to serve in the court, who are persons deemed to be knowledgeable in customs. These assessors are expected to guide the court on the substance of the prevailing customary law within the immediate jurisdiction of the court. Unfortunately, the assessors themselves, in some instances, are not only ill-qualified to guide the court on customs prevailing outside their own tribal groups, but are also, for lack of motivation, rarely present in court for good measure. Since assessors are often local officials appointed from within the area of jurisdiction of the court, they are usually unhelpful to a court grappling with the intricacies of a customary rule originating beyond the jurisdiction of the court, of which they have little or no knowledge. Consequently, under the circumstances, neither the input of the judges (who are not trained in customary law), nor the assessors (who, in most instances, are not fully versed with the custom under consideration), is felt in the adjudication process, the logical outcome being a porous decision of the court liable to be rejected on appeal.

At the lower judicial level of customary courts, the quality of justice is also suspect, as these courts are often blamed for applying customs deemed to be repugnant to natural justice, equity, and good conscience, and their decisions are liable to be overturned on appeal at the superior state courts. Customary judges, although knowledgeable in customary law, are unfortunately not skilled in received laws, which are often employed to test the equitability of customary law prior to its admissibility. Thus, the absence of professionalisation in the delivery of customary justice throughout the courts system defeats the rare possibility for superior courts to declare a custom well-founded and notorious, prelude to it being established. Since variations in customary law often occur during the process of establishment, in the unlikely occurrence of this process, the divergence will certainly not arise. This shortcoming in professionalisation is replicated in all state courts of Cameroon, including the Supreme Court.

Inasmuch as this development frustrates the ability of state courts of Anglophone Cameroon to establish customary law by converting it to precedent, in the rare occasions where this phenomenon has successfully occurred, there have not been any noticeable variations between the jurisprudence of the court and existing social practices. Rather, the emerging jurisprudence is often couched, and reflected, in social practices of the people. In other words, the court has merely applied the customary law as dictated by the ethos of the community, an outcome that justifies the sanctity of associating customary law with society. A practical illustration of a customary rule that has, exceptionally, met the criterion of notoriety before our state courts, and perhaps been converted into case law precedent, is reflected in the authoritative pronouncement by state courts that the chief or traditional ruler holds communal land in trust for the entire community and cannot therefore claim private ownership over it. This is a long-established customary rule which is almost unanimously endorsed and applicable by most of the ethnic groups in Anglophone Cameroon. According to the rule, although native lands are held by the chief or traditional ruler on behalf of the community, real ownership lies with the people of the community and the chief plays only the role of a trustee. As a supervisory authority, the chief cannot claim ownership over communal land, save the portion allocated to him. This rule has been reiterated in a number of cases, among which are *Chief Thompson Ewone v. Attorney-General and Director of Lands and Survey* (cited by Anyangwe 1984: 271) and *Presbyterian Church Moderator v. D.C Johny* (cited by Anyangwe 1984). In both cases, the traditional rulers of the various communities acted in a manner suggestive that ownership of communal land was vested in them, as custodians of tradition, and not in the people and they could alienate it to whomever they choose without seeking the consent of the community. Rejecting these claims, the courts, rather than creating a variant of customary law divorced from social practices, endorsed a social practice that governs communal land ownership in Anglophone Cameroon and which is generally observed in society, a proposition that upholds the sanctity of society's customary law.

In his exposition on 'lawyer's customary law', Woodman (1988) asserts that state courts are likely to reach conclusions on customary law when the social practice is in the process of change and are liable to record outdated social practice as customary law, which may not reflect the evolved practice. This is a conceptually feasible argument, even in Anglophone Cameroon, given that records indicate that state courts often take several years to adjudicate a dispute creating the opportunity of the social practice evolving to a new form whilst still under consideration before the courts. In this connection, state courts may be deliberating on an outdated customary practice that does no longer find its expression in contemporary social practices or does no longer resonate with the people. In practice, this is only a probability in Anglophone Cameroon, albeit an unlikely one, because of the perception to which custom is viewed in this society. Custom is an evolutionary concept which, unfortunately, is still regarded with an essentialist flavour in Anglophone Cameroon, portrayed as a cultural package handed down through generations and devoid of any outside influences. Therefore, attempts at ushering changes in custom is often resisted by conservatist forces as this will necessitate a departure from the ways of the past.

Even though the chances of change in custom are surely real, and may even occur unconsciously in society, unsurprisingly, the perception of custom in Anglophone Cameroon is stacked against generalising this development. Thus, since achieving independence in 1960, it is difficult to ascertain with precision and certainty the substance of any custom, as distinct from unenforceable social practices, that is recorded as having mutated in Anglophone Cameroon. In view of the conservative articulation of customary values, it is not surprising that Cameroon has found it intractably difficult to suppress so-called 'barbaric' customs through legislative and judicial endeavours (Kiye 2015b: 94). Practical illustrations of this conundrum are the circumvention of selected provisions of the Civil Status Registration Ordinance, 1981, (as

amended), and the Penal Code, 1967, that frowns at and criminalises respectively certain customary values. Indeed, section 72 of the Civil Status Registration Ordinance outlawed some of the consequences associated with the payment of dowry under customary law, frequently adjudged to be repugnant by state courts. On its part, in addition to outlawing some of the consequences associated with the payment of dowry, Section 77(2) of the same law also outlaws the practice of levirate. Early marriages and female genital mutilation are criminalised by the Penal Code, 1967. Irrespective of these bold initiatives, premised on the object of provoking changes in custom, these outlawed practices are still being vibrantly observed in society, evidence of the remarkable resilience of customary law and its unresponsiveness to change dictated from above. Although such changes emanating from society are less likely to be resisted, generally speaking, Cameroonian customary law has, arguably, not responded positively to change since the inception of statehood in 1960. It therefore calls to reason that the rigidity of Cameroonian customary law militates against its evolution in society, not least the norm evolving during its consideration before state courts.

To emphasise, there is also the argument that judicial customary law may arise because previous decisions on customary law may be treated as binding authority, leading to the further possibility that the courts might disregard local variations in customary practice. This view suggests that when the court has established a customary precedent, that precedent may be regarded as being binding on all ethnic groups and therefore may be applied even to groups whose custom on the said subject does not reflect the precedent. Although this is also a probability, the likelihood of its practical occurrence in Anglophone Cameroon is also in doubt. In Cameroon, it is trite and settled law for customary courts to state the custom upon which their decisions are based, (paragraph 2 of law no. 79/04 of 29th June 1979), failure to comply will result in the nullity of the decision as was the situation in the case of *Obi Francis Mbeng v. Florence Bessem Obi* (suit no. CASWP/CC/78/95: unreported). In this case, the judgment of the Buea Customary Court granting divorce in a polygamous marriage was declared a nullity for the failure of the court to declare the custom to which its decision was founded; more so, as each party to the divorce had a different custom.

By extension, superior ordinary courts entertaining customary issues are by implication not precluded from stating the reasons underlying their decisions, and in the case of customary issues, also mentioning the customs they apply. By authoritatively enjoining courts to state the custom on which their judgments are founded is testament to the fact that state courts are only to associate precedent with a particular ethnic group or groups whose customs led to its development, and not with ethnic groups whose customs are unassociated with it. In other words, the fragmentary nature of Cameroonian customary law, with a plurality of ethnic groups, ensures that precedents are not of general, but of specific, application, and are situated within the rules of an identifiable ethnic group. In this context, precedents created from custom of one ethnic group will be binding only to cases involving the same ethnic group, an occurrence that forestalls variations in customary practice and defeats Woodman's assertion.

Evidently, in view of some of the arguments advanced, the process of the judicial establishment of customary law is rarely taken seriously in state courts of Anglophone Cameroon. Giving credence to this observation, few customs, if any at all, have been documented as having attained the status of 'notoriety', for purpose of it being absorbed as case law precedents in the state justice system, the logical stimulus, according to Woodman (1985, 1988), for creating variations in customary law. Instead, Anglophone Cameroonian courts have been more engaging with another process, the other side of the same coin, which entails adjudging the equitability of customary law, an important precursor to judicial establishment. Yet, even in the exercise of this prerogative, no divergence has been recorded to have occurred in customary law.

Adjudging the equitability of customary law through duality tests: unlikely to lead to divergence

The area where state courts of Anglophone Cameroon have been notoriously engaged in judicial activism on customary law is in the sphere of ascertaining its equitability, a process which is intertwined and walks hand in glove with judicial establishment. The process of adjudging the equitability of customary law, in other words the judicial regulation of customary law, refers, in this context, to the process of admissibility of customary law by state courts provided it passes the duality tests of repugnancy and incompatibility. The process is a symbiosis to the establishment of customary law in state courts: the equitability of a norm may, upon its notoriety, leads to its establishment; and, contrarily, in the absence of establishment, the norm may still be enforced provided it is equitable. The processes, although closely related and entangled, are separate and one could be forgiven for erroneously fusing them together.

In addition to section 14(3) of the Evidence Ordinance, Cap. 62 of the Laws of the Federation of Nigeria, 1956, the court's responsibility to pronounce on the equitability of a custom finds its legislative endorsement in article 1(2) of the 1996 Constitution, as complemented by, among others, section 27(1) of SCHL, 1955. The latter provision dictates the use of duality tests of repugnancy and incompatibility to ascertain the sanity of customary values prior to admissibility as evidence in any judicial proceedings (Kiye 2015a: 85-106). Since state courts are more engaged in this process, it is relevant to further verify whether, in exercising this function, state courts have created a new version of customary law.

There is no record in support of this contention, even though the courts have successfully articulated a powerful and compelling jurisprudence implicitly embedded in human rights consciousness. In this context, they have vociferously invalidated several customary values deemed to affront national consciousness (Kiye, 2015b:75-100). The emancipatory rhetoric coming from state courts has been varied and touches on numerous subjects including the rejection, among others, of discriminatory customs against women, levirate marriage and some of the harsh consequences associated with the payment of dowry under customary law. In those major decisions, state courts have challenged customary values, and refused to recognise and enforce them as genuine expressions of customary law. The court's salutary, yet uncompromising, position towards these customs, implicated in the discrimination of women, has failed to prevent their continuous observance in society in blatant disregard of the court (Kiye, 2015b: 94). In this connection, the divergence of views on custom between the court and the society is apparent, with the former articulating a perspective in tune with human rights values contrary to the position of the former.

In subjecting customary law to the duality tests, the court's mandate is limited to either recognising or rejecting the admissibility of the custom. The court does not have the mandate to reject a repugnant custom and create a milder version of it in replacement and in tune with its own aspirations. Therefore, the rejection of the custom brings to a definitive end the role of the court, a role that may have continued to the final phase of establishment, provided the court had arrived at a different conclusion on the equitability of the custom. The limited role of the court inhibits the prospects of divergence occurring in the substance of customary law between the court's version, which, in this scenario, is non-existent, and society's version, which continues to operate despite objections from the court. Indeed, the choice of either accepting or rejecting a custom by the court is incapable of creating variations in customary law.

Conclusions

Judicial customary law is an emerging and, arguably, an uncontested notion in scholarly discourses on customary law, and the experiences in some common law jurisdictions of sub-Saharan Africa give credence and validity to the notion. State courts have inadvertently created a

divergence in customary law during the process of establishment, a development that has divorced the court's customary law from the version applicable in society. Such an occurrence in customary law has not come to fruition in Anglophone Cameroon, which offers a stark assessment of the phenomenon and, in turn, questions the practical ability of state courts to create a variance in customary law. Although state courts of Anglophone Cameroon, like their counterparts in Ghana and Nigeria, are engaged in the process of adjudging the equitability of customary law prior to its establishment, they are yet to be accused of creating customary law. Rather, on rare occasions of the courts establishing precedents, the precedents have corresponded with social practices. Indeed, the court's precedent is often replicated in existing social practices.

In the sphere of adjudging the equitability of customary law, where state courts of Anglophone Cameroon have been vigorously engaged, records also suggest the impracticability of the process leading to divergence in customary law. By restricting its competence to either recording its assent or dissent to the admissibility of a custom, without the mandate to make changes to it, state courts are reduced to an organ for delivering opinions, which may not be acceptable to the people, a situation that regularly prevails.

The impracticability of judicial customary law in Anglophone Cameroon does not suggest that a variant of customary law unrelated to social practices may not exist in the territory. This is a documented phenomenon, the product of historical and political considerations, that was influenced by colonial and post-colonial processes. The argument often advanced in literature is that some Africans were able to press for and establish state recognition of certain vital social and economic aims which were not 'customary'. These new African aspirations nourished by the emerging elites were accorded 'customary' recognition by the colonisers since it was in their interests to exclude Africans from the machinations of colonial state power and redirect them instead outside the confines of official power (Chanock 1995:175; Snyder 1981:49-90). Even in contemporary Cameroon, there are indications to suggest that a variant of customary law, specifically in the domain of succession to the throne, has been created, and is a reality, in several customary practices, the consequence of a political and administrative process (Kiye 2007: 135-137). In all these instances, rules have been adopted as "customary rules" which do not reflect the mores of the society but rather the selfish desires of a few powerful individuals. Such developments have led to the institutionalisation of alternative norms as customary laws which unfortunately over time have replaced expressions of customary law rooted in social practices. The variation in customary law, which is not the product of state courts, is mostly reflexive of political and administrative processes.

Based on this assessment, it is evident that judicial customary law remains only a conceptual possibility in Anglophone Cameroon. It may become a reality, albeit regrettably, should state courts and the legislature address the inherent flaws in the delivery of customary justice in the territory. In the current nascent state of judicial non-activity in the sphere of establishment of customary law, the notion of judicial customary law will continue to remain an illusion, and a myth, for years to come in Anglophone Cameroon.

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