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The function of indigenous law in a modern economic and political state: The Cameroon scenario

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Using Cameroon as a case study, this research examines if a legal system built primarily upon indigenous laws can serve modern economic, political, and social realities. Indigenous laws have several attractive advantages (such as expediency in dispute resolution, and fostering community cohesiveness), and may fully thrive in a homogenous society. However, after examining the realities in Cameroon, the study concludes that since the society has dozens of tribes with values and traditions which are invariably different, and because the country relies on foreign aid, what is advocated is a system whereby indigenous and formal laws co-exist.

Key words: Indigenous, laws, formal, Cameroon, political, economic, social realities.

INTRODUCTION

Many studies on informal social control have harped on the relative decorum and limited interpersonal conflicts in local settings in developing countries in comparison to the plethora of cases taken to formal courts in big cities (Time, 2000; Austin, 1987). Explanations for this perceived phenomenon have been given to include adherence and abidance to traditional mores (Okereafoezeke, 2002; Time, 2000; Austin 1995), informal restraints on criminality such as family (Time, 2000; Austin, 1995, 1987), community cooperation and ostracism (Austin, 1984). More current research tends to focus on the settlement process used by local communities. This process is characterized by prompt response to the dispute, use of a neutral and perceptive mediator, and resolution by indemnification or restitution, and reconciliation. Restorative justice, as this process has come to be known is geared towards maintaining community cohesiveness and restoring the aggrieved party close to the position where he/she was prior to the dispute. These beneficial aspects of restorative justice are victim-centered and as proponents of restorative justice suggest litigants proclaim above average satisfaction with the process (Sherman and Strang, 2007). Such satisfaction is credited to the face-to-face confrontation between victim and offender (Green, 2007), sensible and therapeutic benefits (Daly and Stubbs, 2006), and purgative effects that promote closure

(Johnstone, 2002).

Statement of the problem

Even though restorative justice seems attractive, formal courts are scattered throughout the big towns and cities in developing countries. Justice in formal courts is notoriously slow, expensive, and often dwells on stigmatizing the guilty person by creating a permanent criminal judicial record, and hardly opens up the possibility for reconciliation. Braithwaite (2005) has argued that formal criminal justice promotes an adversarial process over a communicative process, and that the looming existence of punishments stalls the effectiveness of formal judicial processes. Its drawbacks notwithstanding, formal courts have invariably handled matters beyond inter-personal relations, as for instance, political issues, corporate disputes, and other issues unique to modernization. These types of non-interpersonal cases were not envisioned in customary/traditional law, and as some have contended, even contemporary legislators have not been able to foreshadow the myriad of crimes which time may unleash (Samaha, 2008, Hart and Sacks, 1994). Giving that strengths and downsides have been raised in both formats, Austin (1987), observed that in Philippines at the

barangay (community of towns and villages) level a blend of informal and formal dispute resolution is evident.

Using Cameroon as a case study, this paper seeks to examine if viable legal systems primarily built upon indigenous law and indigenous legal and quasi-legal notions could have developed in Africa with the potential of serving modern economic, political, and social reality.

A former British and French colony, Cameroon became independent in 1961. Prior to becoming a League of Nations mandate, and subsequently a United Nations trustee under the British and French, Cameroon was a German protectorate. Following its colonial history Cameroon inherited a pluralistic system of laws which remain applicable in the country despite the existence of Cameroonian customary law which preceded those transplanted laws. Since independence, modern (transplanted) laws have consistently replaced or eclipsed traditional laws in most African countries including Cameroon (Okafo, 2009; Okereafoezeke, 2002; Time, 2000). While village settings tend to adhere to traditional laws, the future of traditional law in light of treatment by the received laws in big towns and cities is increasingly questionable. Several factors account for this trend including the lack of progress in village settings as opposed to the visible technological and commercial advancements in the bigger settings, heterogeneity in the bigger locales, plurality of dialects and languages in the towns and cities as well as constant transiency. Giving these factors this study examines if traditional laws can address the ever changing and complex transactions and incidences that are prevalent in both domestic and international dealings. This paper finds relevance in that it focuses the debate on a country with pluralistic formal laws, and a dual official language, as well as a multitude of traditional laws, and multitudes of dialects.

SETTING AND PROCEDURE

This study was conducted in Cameroon. Several methodological techniques were employed. Following years of living in the country and several subsequent visits, numerous discussions were held with legal scholars, judges and barristers. As well, local village chiefs were engaged in discussions and the case notes of one of them were reviewed. The penal code and other treatises were scrutinized. Further, sitting in, and observing which cases were processed in court and how the cases were disposed of further enlightened the research.

DISPUTE RESOLUTION IN CAMEROON IN BOTH INFORMAL AND FORMAL JUDICIAL SETTINGS

Just as inadequacies are obvious with formal systems of justice, so are inadequacies evident in indigenous systems of law. The Indigenous system of dispute resolution is characterized by an older male (usually the chief) in the community together with a few chosen elderly men who form a panel (seldom are women

involved) who rely on community mores and “wisdom” to persuade the litigants to set aside their differences. Even when women are included in the panel, their numbers are disproportionately small. In the Mwaku village of the Bakossi tribe in Cameroon for instance, the panel or traditional council comprises eighteen people, ten men, four women and four youths, and they meet every Sunday with the chief presiding over every deliberation (Time, 2000). The process of dispute resolution entails mediation with the intent of implementing a solution-based outcome while still maintaining community harmony particularly since the litigants by and large do remain in the same community.

As the only method of dispute resolution in Cameroonian villages and small towns, indigenous law is applied in all types of disputes including breach of contracts, matrimonial issues, land and tenancy disputes, property crimes, and assault and battery. Sanctions imposed by the chief and his panel include reprimands, giving livestock, palm wine, agricultural products, and even banishment. Litigants who are dissatisfied with outcomes in traditional forums of dispute resolutions have to take their cases to formal courts in big towns or cities where there will be trials *de novo*.

Towns have customary courts and these courts are presided over by “notables” (Time, 2000). Notables are ordinary citizens without any formal legal training who are presumed to be astute in folkways. They decide matrimonial cases, land and property disputes but defer child custody issues and alimony to high courts.

Two formal systems of law exist in Cameroon due to the colonial heritage. Anglophone Cameroon has applied English law since colonization, and has continued to do so following a 1955 Magistrate Court Law. Section 11 of the 1955 law states:

Subject to the provision of any written law and in particular of this section and of section 10, 15, and 33 of this law, the common law the doctrines of equity, the statutes of general application which were in force in English on the first day of January 1900, shall in so far as they relate to any matter with respect to which the legislator of southern Cameroon is for the time being competent to make laws be in force within the jurisdiction of the court.

Francophone Cameroon (8 out of ten regions/states in the country are French speaking) applies French law (code penal, code civil). Article 46 of legislation prevalent in what was Federal Republic of Cameroon stressed the need for the inherited laws to be retained as long as they did not conflict with the constitution. Section 38 of the constitution of 1972 reinforced and added gravitas to Article 46 by stating:

The legislation resulting from the laws and regulations applicable in the federal state of Cameroon and in the federated states on the date of entry into force in all of

their provisions which are not contrary to the stipulations of this constitution shall remain in force, for as long as it is not amended by legislative or regulatory process (Constitution of the United Republic of Cameroon, 1972: 22). Formal courts, which include courts of first instance, high courts, appeal courts, and the Supreme Court, apply formal justice.

Could indigenous/traditional laws serve modern economic, political, and social realities?

Cruz (2007: 3) notes that the terms “customary law, common law, indigenous law, tribal law, tradition, custom, norm, and primitive law” are used interchangeably to “refer to the law of indigenous peoples.” These customary laws are unwritten customs and mores passed down through oral tradition (Asiedu-Akrofi, 1989). Formal law in the context of African nations is usually Western law adopted by the various former colonies.

Even though formal law has certain values and doctrines that are not evident in indigenous practices, as for instance, having set *lex scripta* of criminal procedure and evidence, established rule of law, and set laws/codes that regulate everyday transactions, and established ways of enforcements, a good number of local people still prefer traditional practices (Brillion, 1983; Austin, 1994, 1995; Thompson, 1996; Time, 2000, 2011 (forthcoming); Okafo, 2009). This preference stems in part from apathy toward agents of the justice system, excessive delays in disposing cases, and over punitiveness of the justice system. Further, preference for indigenous law may also be due to autochthonous people preferring “their own value system” (Cruz, 2007: 2).

In Cameroon, there is no single customary practice. Each tribe has its own values and traditions which are invariably quite different. Because there are over a hundred tribes, and dialects, uniformity in practice is sometimes not obtainable. However, there is seldom tension in applying a custom since assessors from the tribes of each litigant are always present when there is a dispute. Assessors interpret traditional practices, and when they are absent during a trial, any verdict rendered is null. For the most part, since everyday transactions and reasons for litigation in traditional settings mirror what goes on in the cities and in advanced countries, the efficacy of addressing these social and political realities cannot be challenged as long as the process reflects the practices and values of the society. Traditions and customs are not entirely static, like every process, customs adapt to contemporary occurrences. A jury in a western system of law decides a case using common sense while applying the law that governs the case. In like fashion, decisions of traditional rulers, notables and assessors are shaped by common sense and the applicable traditional value.

With regard to breach of contractual obligations, modern courts in Cameroon apply the *lex fori* (law of the

venue of the court) instead of the *lex loci* (law of the place where the contract was drawn). In essence, the place where the plaintiff files a law suit has jurisdiction of a case (Time, 2000). This is the case with indigenous practices as well, but by securing assessors from the various tribes of the litigants, indigenous methods of dispute resolution attempt to ensure equity by taking into consideration how each litigant perceived the contract.

Most disputes everywhere arise because there is a breach of a contractual obligation of some sort, be it failure to perform a minor duty, or a failure to respect a more intricate obligation as for instance, an international treaty, trans-national trade agreement, or some private right and obligation. Malinowski (1926), who is one of the pioneers in this debate, opines that both traditional and formal law strive for the same goal, and that is to address both the economic and social issues that arise between or among people. Consequently, even when approaches are different, the intent is similar. Decades later Gluckman (1955) noted that regardless of the locale, judges will enact similar laws to address similar issues. Giving that traditional councils play the functional roles of legislative, executive, and judiciary, it is not beyond their capacity to figure out how to address a novel issue.

The argument could be made that it is easier to abide by formal law since its mandate is clearly written and published, unlike traditional law that requires that one immerses oneself in the tradition to understand the substantive and procedural aspects of the tradition. To this Benson (1990: 12) asserts that “customary law is recognized, not because it is backed by the power of some strong individual or institution, but because each individual recognizes the benefits of behaving with other individuals’ expectations—given that others also behave as he expects”.

Criticism has been levied on how traditional law addresses matrimonial issues (Time, 2000, 2012 (forthcoming) cited in Time, 2011; Bentheim, 2010; Monekosso, 2001; Beswick, 2001; Erez and Thompson, 1996). Power imbalances in the composition of the tribal council that decide cases (in the Bakossi tribe of Cameroon as discussed earlier, there are ten men and four women) in part accounts for the questionable, if not unconscionable, treatment of women in traditional courts, and not to be ignored, the rather backward mores and practices that continuously subjugate women.

It is to be reckoned that schools are being opened in even very remote villages of Cameroon. It is only through education and self-empowerment that women get from activist groups and non-governmental organizations that change in how women are treated will be realized. In Mexico for instance, women’s organizations have emerged with women advocating fairness and changes to traditional practices that are coercive, yet insisting to retain their traditional identities and values (Castillo, 2002). Some of their demands have included “economic, political, physical, and socio-cultural autonomy” (Castillo,

2002: 12). In Cameroon, even formal laws do not grant women the same human rights as men. As Ngassa (1999: 37) notes "...the law itself, lack of necessary laws ...inability to enforce already enacted laws, the ability of society to assimilate and exploit new laws..." hamper prospects of women in Cameroon from acquiring their human rights.

Coercive treatment of women is not unique to traditional law or to a developing society like Cameroon. Belknap (2007); Bui (2007); Burford and Adams (2004); Hotaling and Buzawa (2003), have documented how battered women are rendered powerless in the U.S. justice system, either by reducing their role in the judicial process to a "passive" one, or by not providing them adequate protection thereby compromising their safety. It is for these reasons as van Wormer (2004); Gilligan (1982), suggest that many western countries are turning to informal methods to resolve matrimonial issues. Informal methods here refer to a conferencing method, but then for this to have integrity it should be gender neutral.

Acquired or transplanted law reflects the values and mores of the society from which the law is borrowed. The value system of that society is inculcated into its citizens from early on in life, and as Cruz (2007: 2) states, "an indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms." Transplanted law therefore does not re-enforce the values of the receiving nation, consequently using that law to regulate the behavior of people is anomalous. Law addresses social situations that arise among persons of that culture, or persons in that culture, and the fact that the law may not be codified, or is not reflective of the ideals of another society does not lessen its ability to control the social processes of those under its sphere.

English and French are the national languages of Cameroon, and just a small fraction of the population is fluent in either, let alone both. The applicable laws in the formal courts are borrowed in their entirety from England and France, and only piecemeal attempts have been made to promulgate laws that depart from the colonial precepts (Time, 2000). Since there are as many dialects in the country as there are tribes, whose dialect gets precedence when there is a dispute is an obstacle that cannot be ignored given that it is impossible to expect anyone to know the hundreds of dialects in the country. Should the indigenous laws be codified in English and French? Cruz (2007) discussed this predicament in relation to Pueblos. She reflectively states that "When a tribe works its Indian tradition into any non-traditional system, the outcome represents a mixture, not pure tradition" (Cruz, 2007: 6). Formal courts are not free of the language dilemma that occasionally crop up in traditional settings. To use language/dialect barrier therefore to cast doubt as to the ability of a country to use its traditional ways to resolve disputes, be they those that relate to modern economic, political, or social realities,

may be casting doubt as to the foundational principles of customs.

Difficulties in using indigenous laws to serve modern economic, social, and political realities

That traditional law can be adopted to handle contemporary social, political, and economic realities is not as easy as may appear. Cruz (2007: 8) lists a number of pertinent questions that need to be properly addressed if indigenous laws can be the law of the land. Among the questions are:

... What traditional law are we talking about? ... How is traditional law organized? Are there some aspects of traditional law that are inappropriate for discussion? How should elders be selected? Who is an elder? In what manner should meetings and interviews be conducted? Who should be involved in the work and who should make decisions regarding the interpretation of materials gathered? Can the meaning of the law survive the translation from the native language to written English? Should it be translated or kept in the native language? Who holds the law? Who is to say what traditional law applies or translates to this modern time?

As Cruz acknowledges these are in fact very difficult questions, and responses to them depend on several factors including: the history of each tribe, the level of assimilation of colonial influences, the influence of inter tribal marriages, as well as how much of the dialects, land, and folkways have been retained. Further, giving that local chiefs, particularly those in many African states, rule their tribes as dictatorships as their rulings are not subject to challenges nor are there any mechanisms of accountability or transparency, it is difficult to fathom the extent to which indigenous laws can serve broad modern interests.

In the context of Cameroon, having indigenous law as law of the land and the law that applies in dealings with other countries may be an uphill task. Currently, some tribes (for example, Douala, Bamileke, Bassa, Ewondo, Hausa, Bali, and a few others) are more than hundreds more either in fact, or seemingly, more dominant and strive for more national recognition as the pre-eminent tribe. Should one tribal law be projected as the national law if Cameroon ever considered dispensing with western law there likely will be more putrefaction and more dividedness. As a bi-jural country, strife is evident as common law is increasingly being suppressed. Take the CIMA CODE, for instance, a French acronym for *Conference InterAfricain de Marche d'assurance en Abrege*, which embodies laws that deal with insurance issues, it completely ignores common law (Time, 2000). As well, as a signatory to a 1996 treaty that blends civil and commercial laws in sixteen Francophone African countries, Cameroon projects only civil law and French,

and completely disregards common law and English. If Anglophone Cameroon is already crying foul and contemplating seceding, it is hard to imagine the chaos that will ensue if one tribe's laws were chosen as law of the land.

As Pimentel (2010) notes, independence from colonial rule comes with a price for most African nations. To be part of the community of nations, and a member of the United Nations, Pimentel (2010) observes that African countries invariably have to conform to western law. Further, he remarks that because African countries rely on the World Bank, the International Monetary Fund, and other countries for their economic growth, they are almost fated to embrace western systems of law especially since these organizations and countries usually stipulate the legal system that best projects their interests. Such also is the case when western countries, in promoting human rights and justice, define what justice is and stipulate the process by which justice is attained.

Okafo (2009: 231) maintains that left to their own devices Africans and indeed former colonies can maintain indigenous laws that best serve their needs. He states "colonization breeds criminalization. This is because a colonizer needs coercive rules and regulations, usually with excessive penalties attached, to obtain compliance with the colonizer's policies, which invariably are out-of-sync and thus unpopular among the colonized." The point is well taken except that if countries like Cameroon have to continuously rely on foreign aid for sustenance, and can never seem to be able to account for the aid or loan money, then the donor or lender should dictate a process of accountability even if it means imposing their own system of justice (BBC surmised that "tackling AIDS cannot happen until a cure is found for Cameroon's second deadly virus—corruption" (Cuffe, J. <http://news.bbc.co.uk/2/hi/africa/6198337.stm>, retrieved 1/6/2007)). BBC proffered this statement after doubts were raised as to whether Cameroon could account for the \$133 million (68 million pounds) given to help HIV/AIDS patients. These doubts were raised given a history of graft and extensive mismanagement of funds in that country raised by Transparency International.

Conclusion

A country's heritage and identity are marked by the values and norms with which it has evolved. After all, the sovereignty of a nation and its tradition can only be fortified if its laws are premised upon the values and norms it adopted from its inception. When borrowed law is made the dominant applicable law in a country, it signals that the values of the lender country are also imported. To legitimize and enforce such laws, the people upon whom they are imposed must readily be receptive of them otherwise a constant clash will ensue. That said, there is nothing to suggest that the prevalence of

indigenous laws per se leads to law abidance or to easy law enforcement.

This discussion will have little significance if indigenous laws were advocated just for those under its influence. However, the thesis rests upon whether indigenous laws can be used to address modern social, economic, and political realities. Giving that many African nations depend on the United Nations and other organizations for intervention during crisis, and these organizations are also restraining forces for human rights violations, there is thus a limit to what indigenous laws can control. Moreover, when a country constantly depends on others for economic viability, that country accepts not only the terms of the aid, but also the rule of law projected by the donor to secure its interest. What is ultimately drawn from this discussion and advocated is a process whereby indigenous laws and formal laws coexist with each delineating its role.

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