

LEGAL IMPERIALISM AND THE DEMOCRATISATION OF LAW:  
TOWARDS AN AFRICAN FEMINIST JURISPRUDENCE ON THE  
DEVELOPMENT OF LAND LAW AND RIGHTS IN NIGERIA 1861- 2011

by

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## **Abstract**

This thesis examines the role of law in the establishment of colonial rule in Nigeria in the 19<sup>th</sup> and early 20<sup>th</sup> century and argues that the legal imperialism of this period continues to characterize the post- independence modern legal system creating a crisis of legitimacy, relevance and justice which can only be resolved through a process of democratization of law. Focusing on a case study of the development of land law in Southern Nigeria, from 1861 to 2011, and its impact on women's land rights, the thesis explores the continuities and discontinuities in land use policy, law and practice and options for democratic reform. It demonstrates that there has been a growing centralization and concentration of power over land in this period, which tends to result in widespread abuse and the dispossession of large groups of people of access to land and livelihoods. It shows how women have been disproportionately affected by these developments and how their dispossession has been facilitated by a colonial legal system – through its discourse, legislation and processes of conflict resolution. Colonial conceptions of law and of gender have intersected to produce a dominant discourse and practices relating to “customary” and “modern” law and rights that goes largely unchallenged today.

This thesis analyses these intersections adopting an historical and contextual feminist approach, which I have termed an African feminist jurisprudence, using the term jurisprudence here to mean the philosophy of law. It calls for a shift of emphasis from the customary/modern law dichotomy to focus on substantive issues of equality, equity and justice in law reform as well as the active participation of citizens in governance.

## **Preface**

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## List of Abbreviations

NLJ	Nigerian Law Journal
NLR	Nigeria Law Reports
ANLR	All Nigeria Law Reports
FSC	Federal Supreme Court Law Reports
AC	Appeal Cases (Law Reports)
WACA	West African Court of Appeal Reports
NWLR	Nigerian Weekly Law Reports
SC	Supreme Court Law Reports
JAL	Journal of African Law
COMCOL	Commissioner of Colony Papers (Ibadan National Archives).

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The IDRC supported my three months of archival research at the Nigerian National archives in Ibadan, the University of Ife and Supreme Court in Lagos in 2009. I thank them profoundly for facilitating my efforts to retrieve and put in a more permanent form some of the records which may soon be permanently lost in those repositories if something is not done urgently.

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I thank all my family members and friends too numerous to mention who were an essential part of my Canadian and global community, and without whose support this thesis could not have been completed.

## Dedication

I am thankful that this thesis comes from my heart, for so often along the way, I was afraid of losing heart.

The thesis started out as a thesis on the Democratization/Decolonization of Law with a case study of violence against women and wound up with a case study of the development of land law and women's land rights in Nigeria. I sometimes lamented the change of case study but in the course of writing, I came to understand the intimate relationship between both case studies.

**I dedicate this thesis to the strong women of my life; my mentors, ever present, who made me take love, strength and integrity for granted because they surrounded us with it.** I thank them for it because we needed it to become who we are. It was a very limited and partial view of real life but it gave us the strength to fight for what we believe in, FOR if all are equally disempowered, who will fight and who will advocate for those unable to advocate for themselves?

**So, to Granny Turton, Iya Oni Gari, Mama Yaba, Mama Dugbe and all Granny Turton's chirpy, cheerful sisters** (who gathered often at birthdays, weddings, christenings and funerals to sing, pray, laugh, eat and toss back the occasional stout and schnapps); **to the Goyea Aunties, and to the Cousins who raised us - Coz Joko, Bukunola, Oyinkan and Tokunbo. To my sisters and my nieces,** and of course **to ever present and loving Mother** – a tower of strength and dedication. These are the women that I knew and know but I must make mention of **Madam Okuyemi of Mobalufon**, my great- great- grandmother, who must have lived between 1820 and 1880 and who left her extensive kola nut farm to her descendants. I did not know her and there are no photos of her but she was a constant inspiration in the writing of this thesis which focuses on women's land rights – a real window into the past, connected to me and demonstrating Ijebu women's citizenship and sometimes forgotten aspects of their foresight, industry and strength. They too gave access to land and were not just given it.

# Chapter 1: Introduction

## 1.1 Background

This thesis is about legal imperialism or domination through law – the exploitative exercise of power over people using mechanisms of law – and how to reverse it by establishing more democratic forms of social regulation. It was inspired in part by discussions in the Nigerian legal community in the 1980s about the urgent need for law reform.<sup>1</sup> These discussions stemmed from a widespread dissatisfaction of both the general public and the legal profession with the operation of the legal system both in terms of content or rules as well as form or institutions and procedures. Institutions of law and law enforcement are alienating and often perpetrate injustice<sup>2</sup> for the vast majority of Nigerians who encounter them. As a result they lack legitimacy and are inefficient. This has triggered a crisis of law and the legal system which was predominantly explained up until the 1990s in terms of the “foreignness” of law or its colonial roots. It is increasingly expressed now in terms of a lack of justice and the need for access to justice. However, calls for law reform are still often focused on indigenization or decolonization of law on the assumption that it will somehow lead to greater justice.

What exactly does decolonization entail and will it solve the problems of the legal system? What is the nature of the reform needed so law can bring about social change and justice? Indeed can “foreign”, colonial law which has generated so much injustice bring about justice without first being decolonized? These are some of the questions that have been raised in

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<sup>1</sup> For a summary of some of the key issues in these discussions, see *Proceedings of the National Conference on Law Development and Administration in Nigeria* (Lagos : Federal Ministry of Justice, 1987).

<sup>2</sup> This is particularly true of the police and the lower courts.

the debates and discussions on law reform in Nigeria. To understand how laws and legal institutions have developed and what kind of reform is needed, this thesis takes a case study of the development of legal institutions and rules relating to land tenure in Nigeria focusing on its impact on women, who form a disproportionate number of the poorest and most marginalized sections of most groups.

My hypothesis, based on my understanding of modern legal systems, whether European or African, is that the most fundamental problem is one of a lack of justice and access to justice rather than “foreignness” or colonial origins. And yet the perception of colonial origins as problematic is widespread and cannot be dismissed out of hand. This thesis is therefore an investigation of colonial origins in the realm of land law (my case study) in order to understand what could be problematic about them. It is an investigation of developments in modern land law to gauge its success in decolonizing law. It is, simultaneously, an investigation of the impact of both colonial developments and modern developments in land law on women in an attempt to understand the most fundamental problems raised and to make suggestions for future changes.

Standard legal texts on the Nigerian legal system note the tremendous influence of English conceptions of law in the country and the use of legislation by the colonial government to effect a wholesale re-organization of the legal system.<sup>3</sup> Legal scholars often embrace the idea of legal pluralism as a characteristic of African legal systems, in which European law (English, French, German or Dutch) exists side by side customary law and in some cases religious law and

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<sup>3</sup> See for example, Omoniyi Adewoye, *The Legal Profession in Nigeria: 1865-1962* (Ibadan: Longman, 1977) [Adewoye, *Legal Profession*]; TO Elias, *The Nigerian Legal System* (London : Routeledge, 1963) [Elias, *Legal System*] and AO Obilade, *The Nigerian Legal System* (London : Sweet and Maxwell, 1979).

institutions.<sup>4</sup> The use of this kind of typology of law and legal systems strongly suggests that different and relatively autonomous systems of law co-exist within one legal system and is being increasingly questioned.<sup>5</sup> There is also a body of literature which explores the pre-colonial and colonial processes which influenced the development of customary law in Africa.<sup>6</sup> This literature shows how pre-colonial processes taken for granted or viewed as static or relatively stable were in a state of tremendous flux long before the establishment of formal colonial rule, already deeply influenced by patterns of trade; formation of kingdoms and conquests; the slave trade; and changes in patterns of governance in many areas.<sup>7</sup> It also debunks the myth of colonial generosity or tolerance in leaving intact and giving jurisdiction to indigenous systems of custom or law and sought to show how, in the process of a subtle imposition, colonial authorities re-interpreted customary law or custom and relegated it to the bottom of a hierarchy of laws, thus making domination more effective.

The modern legal system in Nigeria today, in particular the establishment of new institutions of dispute resolution and a specialist legal profession which gradually took charge of new processes of administration of justice, was modeled along the lines of the English legal system and yet developed in a very different context. Law was often deployed as an instrument

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<sup>4</sup> IO Agbede, "Legal Pluralism; The Symbiosis of Imported Customary and Religious Laws : Problems and Prospects" in MA Ajomo ed, *Fundamentals of Nigerian Law* (Lagos : Nigerian Institute of Advanced Legal Studies 1989) [Ajomo, *Fundamentals*] 235.

<sup>5</sup> Robert Seidman, "The Reception of English Law in Colonial Africa" in Ghai, Luckham and Snyder eds, *The Political Economy of Law* (Delhi : OUP, 1987) 107. See also Kristin Mann & Richard Roberts, *Law in Colonial Africa* (Portsmouth, NH : Heinemann Educational Books, 1991) at 5.

<sup>6</sup> See Adewoye supra note 3; Martin Chanock *Law, Custom and Social Order : The Colonial Experience in Malawi and Zambia* (New York: Cambridge University Press, 1985) [Chanock, *Law and Custom*] and Francis Snyder, *Capitalism and Legal Change : An African Transformation* (New York: Academic Press, 1981).

<sup>7</sup> Chanock, supra note 6; see also Kristin Mann, *Slavery and the Birth of an African City: Lagos, 1760-1900* (Bloomington : Indiana University Press, 2007) [Mann, *Slavery*].

of conquest and control, what John Comaroff has termed “lawfare.”<sup>8</sup> Lawfare took many forms. These included the signing of treaties with local rulers to grant or transfer powers to European traders and representatives of States; enactment of legislation especially on important subjects such as taxation and acquisition of land for public purposes; interpretation of legislation and the re-interpretation of custom.

Resistance to lawfare also took many different forms. Marginalized groups in Africa ignored, challenged and sought to change imposed laws. They also maintained and created parallel regulatory systems relevant or favorable to their activities. The existence of parallel regulatory and enforcement regimes competing with the state system has led to a phenomenon which has been labeled “lawlessness”<sup>9</sup> particularly in urban areas where coherent pre-colonial systems of regulation have broken down the most and people are involved in significant innovations. “Lawlessness” is further heightened in situations of armed conflict, whether low intensity or full scale warfare. These persistent struggles for dominance, resulting in challenges to state power, have spawned numerous analyses of the postcolonial state, with descriptions such as “weak”, “fragile,” “failed” and “rogue” being employed to characterize it. These activities and discourses of resistance challenge dominant notions of the nature and role of the state and law in society and raise the issue of a democratization of law and legal discourse, often expressed in colonial contexts in terms of decolonization.

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<sup>8</sup> See John Comaroff, “Colonialism, Culture and the Law : A Foreword” (2001) 26 Law and Social Inquiry 305.

<sup>9</sup> Usually by the state. It has been argued by several scholars that the phenomenon of vigilante groups developing into paramilitary organizations competing with state institutions, widespread in West Africa in the past fifteen years is an example of this. An increasing number of scholars are now theorizing “lawlessness”. See for example, Eboe Hutchful, “Security, Law and Order” (2001) Africa Development, Vol. XXVI 1; Achille Mbembe, *On the Postcolony* (Berkeley : University of California Press, 2001) and John and Jean Comaroff, eds., *Law and Disorder in the Postcolony* (Chicago : University of Chicago Press, 2006).

Debates on democratization in African societies have been raging in the social science community since the 1980s<sup>10</sup> but have generally not been extended into the legal community or discourse on law. This is largely a result of the predominant trends in fragmentation of knowledge and the development of professions but also a presumption in a lot of academic legal work that law and democracy are somehow inextricably interlinked. This presumption has of course been challenged in the extensive literature on Law and Colonialism. Furthermore, three areas of legal specialization where the boundaries of knowledge have been challenged the most are in constitutional law, criminal law and land law, all of which involve fundamental issues of power sharing and the use and control of a vital resource, and which have generated considerable multidisciplinary research. An interdisciplinary study of developments in land policy and law will therefore shed considerable light on relationships between policy and law and on pressures for and processes of transformation of law.

I have used the term democratization in this thesis to refer to the opening up of space for participation in decision making by growing numbers of interest groups and individuals. This concept of democratization is more in line with aspirations towards Athenian style democracy with its connotations of direct participation than the liberal democratic conception which emphasizes representation through multiparty elections. Democracy needs to be contextualized and unlike Western liberal conceptions which arose during the Enlightenment in reaction to Absolutist states in Europe, in the modern African context, pressures for democratization arise largely in reaction to constraints on participation imposed by colonial and post-colonial States. In many instances, democratization signals a revitalization of systems which gave people the

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<sup>10</sup> Many of these debates are reflected in various publications by the Council for Social and Economic Research in Africa (CODESRIA) including its quarterly bulletin and its journal entitled "Africa Development" between 1986 and 2006.



space and mechanisms to participate directly in governance at the family and larger community levels.

### **1.1.1 Decolonizing Law - Land Law Reform**

Struggles over land have generated and continue to generate serious conflicts in many parts of Africa. These have included struggles between indigenous elites and colonial powers, as well as struggles between indigenous groups and between individuals claiming rights over the same parcels of land. Some scholars have noted how, in the colonial period, these struggles opened up opportunities for some male elites to position themselves to best advantage and to the detriment of women.<sup>11</sup> These contending claims to land create tremendous political tension and have therefore since colonial times put land law reform high on the agenda of various governments in most African countries.<sup>12</sup>

In one such sweeping reform, a military government in Nigeria in 1978 passed the Land Use Decree.<sup>13</sup> This legislation vested all land in government, granting former owners and all future owners, rights of occupancy and use only. Nigeria thus has national or federal legislation on land, instead of a multiplicity of customary laws and state laws. Yet, like the colonial government, this government was careful to acknowledge and recognize some pre-existing

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<sup>11</sup> See Chanock, *supra* note 6; see also Nkiru Nzegwu, *Family Matters : Feminist Concepts in African Philosophy of Culture* (Albany : SUNY Press, 2006) and Lynn Khadiagala, "Negotiating Law and Custom : Judicial Doctrine and Women's Property Rights in Uganda" (2002) 46:1 *Journal of African Law* 1.

<sup>12</sup> See for example major commissions of enquiry into land matters - the West African Lands Committee (WALC) established in 1910 and the East African Royal Commission on Land and Population established in 1953. Recently in 1998 Tanzania and Uganda passed new National Land Acts following a lengthy process of review.

<sup>13</sup> Now referred to under civilian governments as the Land Use Act.

customary rights to land to prevent massive resistance. Debates have thus raged on since 1978 as to how radical this legislation has been.<sup>14</sup>

Recently, in the wake of resistance to Nigerian governments' compulsory acquisitions of land, land grants to oil companies and other industrial and agricultural enterprises, taxation of land and land transfers; there has been a resurgence of pressures for the abrogation or reform of the Land Use Act and a return to "customary" systems of land tenure. However, under many of these systems as currently conceived, women's access to land is restricted by rules of marriage, divorce, inheritance, gender roles and access to resources. The question of what constitutes "customary" law and the nature of "traditional" political authority structures is also pertinent. The issue of land law reform thus raises fundamental questions about the character and role of the State, to what extent it has changed since its genesis in the colonial period, whose interests it serves and future directions for the development of law in the society.

### **1.1.2 Gender Dimensions of Law Reform and Development**

Today in Nigeria, as in most parts of Africa, women constitute a significant proportion of active farmers involved in food and cash crop production and shoulder disproportionate burdens of responsibility for domestic work and providing care to family members. There are also several situations in which men migrate in search of work, often from rural to urban areas, leaving the women behind to take charge of agricultural production and care of children and the elderly. Protracted armed conflicts in which men and young boys are drafted for military activities compound these male patterns of migration and absence from the household and normal

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<sup>14</sup> See for example – Oshio Ehi, "The Land Use Act and the Institution of Family Property in Nigeria" (1990) 34 *Journal of African Law* 79.

productive activities. Furthermore, women experience aggravated and specific forms of violence and victimization during armed conflicts. Several years of structural adjustment policies<sup>15</sup> involving the partial withdrawal of the State from provision of infrastructure, health services and education, have also imposed additional burdens of responsibility for subsistence and care of the family on women.

Yet in many countries, including Nigeria, these burdens and responsibilities do not come with commensurate rights to participation in decision and policy making or direct access to and control of land resources essential for shelter and livelihoods. “Land grabbing” in the wake of the demise of husbands and fathers, as well as expropriation by the state, continue to deprive women of secure access to shelter and livelihoods. Limitations on women’s rights to land and decision making are usually attributed to customary laws relating to the structure of the family and community and to inheritance and land ownership. Changes in custom and customary law throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries, and legislative interventions have not, until very recently, been in favor of an enhancement of women’s access to land. Persisting biases against women in legal regimes governing land ownership, allocation and use, result in a situation in which women in all age groups are vulnerable to dispossession and abuse by male relatives and state officials in predominantly patriarchal family and community governance structures.

In the 21<sup>st</sup> century, and in particular since the 2008 financial crisis, African governments have made huge grants of land to foreign investors in the name of encouraging investment and more “efficient” use of land. These investors, whether individual or large corporations, are interested in the establishment of export processing zones; large scale agricultural export

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<sup>15</sup> Imposed from the late 1980s in most parts of Africa.

projects, the production of bio-fuels and the establishment of luxury housing developments and resorts, among other things.<sup>16</sup> Families and whole towns are often displaced with minimal compensation, largely disregarding their rights to shelter and livelihoods. The law, in particular laws relating to land use, ownership and transfers, needs to respond urgently to this situation.

In recent years, Nigerian women have sought legal changes to improve their economic and social status and to gain better access to resources. The most publicized campaigns have been around widow's rights and inheritance laws<sup>17</sup> and achieving equality and non-discrimination in conditions of employment. These campaigns are, in a sense, important aspects of women's advocacy for land rights, as the main means of acquiring land and landed property in the country is through inheritance and purchase which is directly related to capacity to generate surplus income. The quest for reform of inheritance laws appears in some cases to pit customary law directly against legislation and common law, as well as provisions for gender equality in the Constitution. An analysis of the evolution of the land rights of women as a vulnerable and marginalized group and their advocacy for law reform is therefore at the intersection of an understanding of the development of patriarchy in colonial and postcolonial situations, legal imperialism and the decolonization of law. Such an analysis has the potential to pose a major challenge to existing trends towards expropriation of land by the state and elites resulting in

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<sup>16</sup> Examples of such projects are the attempted acquisition of 1.3million hectares of land in Madagascar by Daewoo Logistics; the acquisition of a 220,000 hectares of land by Golden Veroleum (an Indonesian palm oil company) in Southeast Liberia, the grants of 1,000 hectares of land and start-up funds and facilities offered to Zimbabwean white farmers fleeing Zimbabwe by the Kwara State government in Nigeria in 2006, and the acquisition of the land of over 20 villages and towns in the Ibeju-Lekki local government area of Lagos in Nigeria for an export processing zone – a joint venture between the Federal and Lagos State governments and a consortium of foreign investors.

<sup>17</sup> See Bolaji Owasanoye and Babatunde Ahonsi eds, *Widowhood in Nigeria: Issues, Problems and Prospects* (Lagos : Friedrich Ebert Foundation and Human Development Initiatives, 1997) and Uju Obiora, *Women and the Right to Inheritance in Nigeria* (Lagos : Shelter Rights Initiative, 2001).

increasing landlessness and poverty among large sections of the population, and to contribute to the decolonization and democratization of law.

## **1.2 The Significance of the Research Study**

In the last two decades human rights advocacy has sought to deal with some of the problems of access to resources and to justice for ordinary people in Africa through assertions of rights – in particular, social, economic and cultural rights. This process has raised tensions between perceptions of rights by many advocates, which are usually based on the dominant international human rights discourse, and the perceptions and priorities of various groups of people at the national and local level. In the light of significant gaps in perception and discourse, there is an urgent need to re-conceptualize law and rights in the African context and to re-evaluate the strategy of rights which has been deployed by many groups, including women, in response to the prevailing situation. This research is an attempt to contribute to such a re-conceptualization through a study of historical processes of development of law in a colonial situation and the disempowerment of women in relation to access to land, taking Southern Nigeria as a case study. It seeks to link existing research on the impacts of colonization on law and legal discourse with research on law and social change including the changing status of women. It is a study on the transformation of indigenous or customary systems of law and, more generally on the development of law and rights in Nigeria with a focus on women's advocacy for land rights and law reform.

It thus raises questions of what law is and the how legal discourse in Nigeria which has been significantly influenced by colonial discourses is developing. What kind of reform of laws

and legal systems are women seeking in a state and legal system that is under considerable attack or “failing”? What kind of strategies for law reform do they need to adopt to enhance their rights and access to resources in a situation where the constitution and state laws have little legitimacy? What is the basis of existing advocacy for and opposition to customary law, especially in the light of existing discussions on the historical development of customary law? The challenge facing women seeking law reform is one of understanding the laws and legal system they seek to change and articulating the nature of the change they seek, in order to improve their situations. This involves them in addressing the situation of “lawlessness” (i.e. a crisis of legitimacy resulting in power struggles) and violence which leaves large numbers of them largely unprotected and vulnerable. To meet this challenge, research is needed that goes beyond the pre-occupation with Eurocentric notions of the rule of law in Africa to a more fundamental understanding of the roots of the crisis of legitimacy of the legal system, in order to formulate relevant agendas for reform.

In the realm of access to land resources, research that promotes an understanding of the various interests at work that have produced and maintain current systems and regulations on access to land and land use is needed. Only such research - that questions and addresses the basis of legitimacy for the exercise of power over land resources - can thus project an alternative vision of land rights from existing competing interests. This research study asks what we can learn from historical processes of evolution of women’s land rights and their struggles in relation to land. It poses the question of what a post-colonial, African, feminist jurisprudence can look like; and what broader philosophical issues and understandings it must embrace within the context of globalization. It argues and proceeds on the basis of a hypothesis that current dominant perceptions and characterizations of the relationship between colonialism, law and

women's rights have clouded rather than clarified our analysis of the role and dynamics of legal systems and therefore of directions for law reform. This in turn has affected the capacity of many groups to generate and participate in meaningful change capable of satisfying their yearnings for access to justice. Legal imperialism - as a process which results in the reduction of peoples' capacity to participate in and influence processes of law making, adjudication and enforcement - and resistance to it in terms of a decolonization and democratization of law, is therefore worth conscious investigation.

This research is also intended to be an important contribution to alleviating the dearth of literature on jurisprudence and legal theory focused on the African experience, offering a critique of Western concepts of law, based on the often stark contradictions arising from the application of these concepts in colonial and postcolonial contexts in Africa.

Specific research questions to be addressed are what impact European colonization in the 19<sup>th</sup> and early 20<sup>th</sup> centuries has had on indigenous systems of law in Southern Nigeria and how it has shaped the modern Nigerian legal system; how these colonial changes affect discourse and practice in the area of land use and rights; how they affected the development of women's land rights in Southern Nigeria specifically; what the continued implications for those rights are today; and how the foregoing historical study can inform processes of land law reform and law reform more generally in the future.

### **1.3 Methodology and Sources**

These research questions will be addressed through an historical exploration and analysis of the development of the Nigerian legal system and land law adopting a world systems approach

and a feminist analysis, both building blocks of what I will term “An African Feminist Jurisprudence”.<sup>18</sup> A world systems approach views developments in specific parts of the world within the context of a global economic and social system which emerged from the 15<sup>th</sup> and 16<sup>th</sup> centuries, and situates the development of laws and legal institutions in this historical and social context. For this reason, the term “legal imperialism” rather than “law and colonialism” is employed to characterize the nature and logic of legal change in this period<sup>19</sup> and to emphasize that law was part and parcel of colonialism and not separate from it. A feminist approach adopts a gender lens to view the specific impacts and implications of these developments on women in order to propose strategies to mitigate disproportionate disadvantages that they experience as a group. These two approaches combined and applied to law produce a perspective on law which has the potential to be truly inclusive of most major interest groups in society and can be applied to promote more equitable and just laws and legal systems.

### **1.3.1 A World Systems Approach**

The international discourse on social development in Africa, Asia, South America and the Caribbean - areas of the world that experienced major upheavals as a result of European colonization - was until the early 1970s dominated by what came to be known as “Modernization theory”. Theories that fit within this category took the economic, political and social development of modern European industrial nations as a point of reference against which developments in other societies were to be measured. The economic path and achievements of

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<sup>18</sup> At this preliminary stage of my contribution, I have refrained from calling it a “Third World Feminist Jurisprudence” or indeed just Jurisprudence in an age of Globalisation which in my view should incorporate a gendered and more genuinely global perspective.

<sup>19</sup> For, as we will see, the foundations of legal domination or domination through law, were laid long before formal colonisation or the imposition of an outside “foreign” government administration.



these industrial capitalist nations were viewed as the highest level of achievement of human society historically, towards which all other nations were to aspire and against which their achievements were measured, adopting the classification of “developed” and “developing or less developed” country<sup>20</sup> Modernization theory has been critiqued for its Eurocentric and a-historical presumptions of a unilinear path of capitalist development deemed desirable for all societies.

The most significant critiques came from scholars from Latin America, the Caribbean and Africa in the 1970s and 80s. Building on and applying a framework of Marxist political economy, these scholars argued that capitalism is a system based on exploitation which generated economic growth in Europe by exploiting and generating “underdevelopment” in other areas of the world from which surplus was extracted through a process of unequal exchange. Underdevelopment is thus not a state of original backwardness but the result of the imposition of a particular pattern of specialization and exploitation in specific countries within a world economic system. Major and notable contributors to the elaboration of these theories of underdevelopment and dependency were Andre Gunder-Frank<sup>21</sup> and Walter Rodney.<sup>22</sup> What distinguishes these theories is their adoption of the world system, which they argue emerged in the 15<sup>th</sup> century, as the unit of analysis rather than individual nation states. Theories of underdevelopment and dependency have been refined significantly over the years to explore the

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<sup>20</sup> Later, in the cold war period, the popular terms became “first world and third world”. These terms were adopted in international discourse and by the United Nations.

<sup>21</sup> Andre Gunder-Frank, *Capitalism and Underdevelopment in Latin America: Historical Studies of Chile and Brazil* (New York: Monthly Review Press, 1967). See also, *Dependent Accumulation and Underdevelopment* (London Macmillan 1978) by the same author.

<sup>22</sup> Walter Rodney, *How Europe Underdeveloped Africa* (London and Dar es Salaam : Bogle-L'Ouverture Publications, 1972).

nuances of the world system and the experiences of various countries in Africa, Asia, Latin America and the Caribbean.<sup>23</sup>

The term “world systems analysis” today evokes the name Immanuel Wallerstein probably because this scholar specifically uses this term to describe his work and has written extensively on this subject, doing a detailed historical analysis of the emergence and development of the capitalist world system from the 16<sup>th</sup> to the 20<sup>th</sup> century in a series of three books.<sup>24</sup> Wallerstein explores how events within Europe as well as trade linkages between European empires and nations and Africa and the New World led to the establishment of a capitalist world system and stimulated the growth of industrial capitalism within Europe. In this respect, he departed from the dominant analyses of Adam Smith and David Ricardo as well as classical Marxists who took countries or nations as their unit of analysis, going on to explore developments within and between them as if they comprised fairly independent units. In response to some criticisms, Wallerstein himself is careful to point out that *world systems analysis* does not claim to be a macro theory of world development since the 16<sup>th</sup> century, nor does it claim that there is only one world system. Its focus is, however, on understanding the development of an increasingly integrated *capitalist* world system using a particular approach or mode of analysis – political economy.<sup>25</sup>

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<sup>23</sup> See the work of Samir Amin, Arghiri Emmanuel, Paul Baran and Paul Sweezy. Specifically on the development and application of these theories in the African context see Claude Ake, *A Political Economy of Africa* (Harlow: Longman, 1981) and Bade Onimode, *Imperialism and Underdevelopment in Nigeria : The Dialectics of Mass Poverty* (London : Zed Press, 1982).

<sup>24</sup> Immanuel Wallerstein, *The Modern World System* (New York : Academic Press 1974). See also *World Systems Analysis : An Introduction* (Durham, North Carolina : Duke University Press) 2006.

<sup>25</sup> Immanuel Wallerstein, *The Modern World System 1: Capitalist Agriculture and the Origins of the European World Economy in the 16<sup>th</sup> century* (Berkeley :University of California Press 2011) at xviii

In this thesis, I adopt a world systems approach or analysis of development as espoused by these various theorists and elaborated upon significantly by social scientists such as Herb Addo, Claude Ake, Janet Abu Lughod, Mahmoud Mamdani and Dipesh Chakrabarty. This world systems analysis views imperialism – or the domination of one part of the world by groups from another part of the world - as central to the development of capitalism. It argues that the development of capitalism on a world scale takes place as a result of the exploitation of certain areas of the world by other areas through direct extraction of profit or tribute, by unequal exchange or through monopolistic control of trade in an increasingly integrated world system. This results in uneven development and the division of the world into developed core areas or metropolises and satellite or peripheral areas. As world systems theory developed in order to explain differences in development in different parts of the world, it identified a core and a periphery in terms of European states and their colonies or ex-colonies. In later years, and in response to criticisms and discussions, this initial classification of the capitalist world system was amended to acknowledge the existence of similar processes of uneven development internally within countries, as well as the existence of a group of countries classified as the semi-periphery which had achieved a measure of industrialization and thus improved their bargaining power and economic status within the system.<sup>26</sup>

World systems theory has gone through other refinements. Under the auspices of a project launched in 1978 by the United Nations University to fundamentally rethink concepts of development,<sup>27</sup> Herb Addo propounds an innovative theory of imperialism adopting a world

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<sup>26</sup> Such as South Korea and the so-called Asian Tiger countries.

<sup>27</sup> The project was entitled Goals Processes and Indicators of Development (GPID)

systems approach.<sup>28</sup> He presents a newly synthesized formulation of the concept of imperialism which he argues is urgently needed to understand the persistence of underdevelopment or the development of peripheral capitalism.<sup>29</sup> In his view, a major obstacle to the development of such a formulation has been the Eurocentricity of dominant ideas. What is needed is a world systems approach which seeks to explain the world to the world and not Europe to the world or the world to Europe.<sup>30</sup> According to Addo, a world systems approach “allows for the full recognition of the participation of third world societies in the unfolding of world history both as object and subject.”<sup>31</sup> Such recognition has important implications. It allows for the admission that periphery sources contribute to the persistence of imperialism, rather than being passive objects. Flowing from this, it also recognizes their potency in bringing about a transformation of the world system which is often denied by classical Marxists who argue that socialist change or revolution will emanate from advanced capitalist countries. In Addo’s view, Marxists and some radical leftists impose too limited an historical specificity on the term “imperialism”, using it (like Lenin) to describe late 19<sup>th</sup> century European domination. He propounds an alternative thesis on imperialism which he terms the “continuity of imperialism”, arguing that from the standpoint of peripheral countries the development of capitalism was the other side of the coin of imperialism, domination and exploitation. He adopts a definition of imperialism as “the exploitative aspects of the world-wide expansionist processes making up the global development of the capitalist world-economy and leading to the pauperization of some parts of the world and

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<sup>28</sup> Herb Addo, *Imperialism : The Permanent Stage of Capitalism* (Tokyo: The United Nations University, 1986).

<sup>29</sup> Ibid. at 7

<sup>30</sup> Ibid. at 7 and 12.

<sup>31</sup> Ibid. at 7

the enrichment of other parts”<sup>32</sup> It was thus not just “the highest stage of capitalism” as proposed by Lenin.<sup>33</sup>

This conception of imperialism differs from the Eurocentric liberal, radical, and Marxist conceptions, in that it considers imperialism in the specific and total context of the history of the methodical and persistent accumulation of capital in Europe from its very nascence in the fifteenth century to the present. ... The exact point of departure is, therefore, *four-squarely based on the distinction we refuse to make between the earlier history of the process of capital accumulation, the so-called prehistory of capital, and the world-history consequences of capital as an already accumulated thing, dating from the emergence of finance capital in Europe in the late nineteenth century.*<sup>34</sup>

Post-structuralist and post-modernist theories, reacting to the priority given to economic relations in development theory up until the 1990’s, have highlighted the importance of politics and discourse in the development and transformation of societies.<sup>35</sup> Emphasizing that culture and discourse are equally constitutive of society, these scholars invite us to view modernity and development through the eyes of the “subaltern” arguing that there can be multiple modernities and that a structuralist analysis masks a form of neo-modernization theory.<sup>36</sup> Some of them question the application of European theories of modernity to non-European societies. Pertinent questions they raise include whether or not the periphery necessarily “mimics” the core or is hostage to its hegemony and what the possibilities are for developing alternative knowledges and futures.<sup>37</sup>

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<sup>32</sup> Ibid. at 18

<sup>33</sup> See Lenin, “Imperialism : The Highest Stage of Capitalism” in *Lenin :Selected Works* (Moscow : Progress Publishers, 1963) 667.

<sup>34</sup> Addo, *supra* note 28 at 117.

<sup>35</sup> See for example the work of Jacques Derrida and the South Asian Subaltern Studies Group of scholars.

<sup>36</sup> See Dipesh Chakrabarty, *Provincialising Europe : Postcolonial Thought and Historical Difference* (New Jersey : Princeton University Press, 2000).

<sup>37</sup> See for example Janet Abu-Lughod, *Before European Hegemony : The World System AD 1250-1350* (New York : Oxford University Press, 1989) and Lauren Benton, “From the World-Systems Perspective to Institutional World History : Culture and Economy in Global Theory” (1996) *Journal of World History*, Vol. 7 No. 2 261 – 295.

Whilst acknowledging these critiques, extensions and reformulations, I invoke world systems analysis in a broad sense in this thesis as a methodology rooted in a study of history and of colonialism as part of the process of the development of an integrated capitalist world system. It rejects or challenges the modernist division of knowledge about society into the economic, political, sociological, legal and other subdivisions, adopting a more wholistic approach that shows the linkages between these dimensions, and yet is flexible enough to allow different analyses emanating from different standpoints or priorities - geographic and otherwise - to emerge.<sup>38</sup>

### **1.3.2 A Feminist Approach**

With the emergence of theories and movements for the rights of man in the context of the revolt against the Absolutist State in 18<sup>th</sup> century Europe, emerged feminist theories and movements which insisted on the rights of woman.<sup>39</sup> An interest in and relationships with women in the colonies also developed, heavily influenced by missionary activity, the work of early anthropologists and, later in the 20<sup>th</sup> century, by modernization theory. The status of women in non-European, “primitive” societies was presumed to be inferior to that of Western women, aspiring to similar paths of development. Western feminism thus developed within the context of dominant imperialist forms of knowledge which influenced much of the work of feminists and women’s rights activists in the 19<sup>th</sup> and early 20<sup>th</sup> centuries.

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<sup>38</sup> An important methodological contribution to such analyses is to be found in Standpoint theory, and scholarship reflecting a growing interest in different forms of knowledge. See for example, Sandra Harding ed., *The Feminist Standpoint Theory Reader : Intellectual and Political Controversies* (New York : Routledge, 2004) See also Raewyn Connell, *Southern Theory: The Global Dynamics of Knowledge in the Social Sciences* (New South Wales : Allen and Unwin 2007).

<sup>39</sup> See, for example the pioneering work of Mary Wollstonecraft, “A Vindication of the Rights of Woman” (1792) <http://www.bartleby.com/144/>

Thus, alongside critiques of modernization theory in the eighties emerged strong critiques of racism and imperialism within women's studies and the international women's movement,<sup>40</sup> highlighting the intersections between race, class and gender. National and international interest and lobby groups were formed to analyze and counter these dominant theories, misperceptions and power relationships and spawned a whole new area of scholarship focusing specifically on the gender dimensions of national and international development. This malaise with Western or Euro-centric feminism crystallized in the 1980s and was expressed in a number of international forums held in the UN decade for women by African, Asian, Caribbean and Latin American women as well as various non-European and native American women living in Europe and the United States. Groups of these women, notably researchers and community activists began to organize regionally and internationally to change representations and research priorities relating to women from these areas. Important examples of such organizations are the Association of African Women for Research and Development (AAWORD) established in 1977 and Development Alternatives with Women for a New Era (DAWN) – an international network of feminist scholars and activists from the Third World or Economic South, established in 1984.

In her introduction and contribution to an interesting and groundbreaking collection of articles entitled "Third World Women and the Politics of Feminism",<sup>41</sup> Chandra Mohanty reviews the emergence of what she terms Third World Feminism. She defines this feminism as a

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<sup>40</sup> Some of the most important international forums which make it possible to speak of an international women's movement in the 1970s and 80s were supported by the declaration of the United Nations decade for women and activities that were organised within that context. Early expressions of an anti-imperialist feminism came from black women in the United States and Britain. See for example, Shabnam Grewal ed., *Charting the Journey : Writings by Black and Third World Women* (London : Sheba Feminist Publishers, 1988.)

<sup>41</sup> Mohanty, Russo and Torres eds, *Third World Women and the Politics of Feminism* (Bloomington and Indianapolis : Indiana University Press, 1991) at 1[Mohanty, Russo and Torres]. This book emanated from a conference held at the University of Illinois in 1983 with a theme – "Common Differences : Third World Women and Feminist Perspectives".

kind of oppositional consciousness reacting to Eurocentric world structures and discourses, particularly in scholarship. It arises from a “common context of struggle” against racism, colonialism and capitalism.<sup>42</sup> She introduces the concept of an “imagined community” to highlight the fact that the basis of this community is not real racial or cultural characteristics or geographical location but *ideas* about them.

In “Under Western Eyes” Mohanty specifically challenges dominant discourses on Third World Women in Western feminisms as an aspect of colonisation identifying two main projects of Third World Feminisms –

Any discussion of the intellectual and political construction of “third world feminisms” must address itself to two simultaneous projects: the internal critique of hegemonic “Western” feminisms, and the formulation of autonomous, geographically, historically, and culturally grounded feminist concerns and strategies. The first project is one of deconstructing and dismantling; the second, one of building and constructing. ...It is to the first project that I address myself. What I wish to analyze is specifically the production of the “third world woman” as a singular monolithic subject in some recent (Western) feminist texts. The definition of colonization I wish to invoke here is a predominantly *discursive* one, focusing on a certain mode of appropriation and codification of “scholarship” and “knowledge” about women in the third world by particular analytic categories employed in specific writings on the subject ...<sup>43</sup>

This was an early contribution to the critique of the othering of third world peoples and women in Western scholarship<sup>44</sup> and of binary oppositions in the understanding of power in society. Mohanty problematizes the category “woman” as a homogenous oppressed group, and a

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<sup>42</sup> Chandra Talpade Mohanty, “Cartographies of Struggle : Third World Women and the Politics of Feminism” in Mohanty, Russo and Torres, ibid 7 [Mohanty, “Cartographies”].

<sup>43</sup> Chandra Talpade Mohanty, “Under Western Eyes : Feminist Scholarship and Colonial Discourses” [Mohanty, “Under Western Eyes”] in Mohanty, Russo and Torres, ibid at 51.

<sup>44</sup> This theme is also taken up by Edward Said in his famous work on Orientalism.



singular focus on gender defined as male/female domestic relations abstracted from any historical and social context.<sup>45</sup>

The globalisation or universalization of a specific gender lens and conceptualisation of struggles arising from this abstraction has been critiqued more recently by a number of other scholars including Oyeronke Oyewunmi<sup>46</sup> and Nkiru Nzegwu<sup>47</sup>. There is now also an abundance of literature on the impact of globalization on women in different parts of the world, contextualizing and tracing the history of women's activity in various sectors and their contributions to the economy and society. Such concrete studies of women in the world system include studies of women in the agricultural sector in Africa, Asia and Latin America; women workers in the textile and garment industries in Asia, notably India and Bangladesh; and Mexican and Pilipino migrant women workers.<sup>48</sup> In Mohanty's more recent work, she highlights a critique of global capitalism and its effects on women of the South or what she terms the "Two-Thirds World".<sup>49</sup>

An historical and contextual approach to the study of women and gender relations, emphasizing the relationship of women to structures of power in both local and international contexts, in particular the impact of global capitalism on women in the Third World or the South, their agency, and their survival and living strategies, is now fairly established in the social sciences but its lessons are rarely extended into the study and application of law.

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<sup>45</sup> Mohanty, "Cartographies", supra note 42 at 12.

<sup>46</sup> Oyeronke Oyewunmi, *The Invention of Women :Making an African Sense of Western Gender Discourses* (Minneapolis : University of Minnesota Press, 1997).

<sup>47</sup> Nkiru Nzegwu, "Globalisation and the Jenda Journal" (2001) 1: 2 JENdA: A Journal of Culture and African Women Studies 1. <http://www.jendajournal.com>.

<sup>48</sup> See Maria Mies, *Patriarchy and Accumulation on a World Scale : Women in the International Division of Labour* (London : Zed Books Ltd. 1998). For a sample and review of literature on some of these studies, see Visvanathan et al, *The Women, Gender and Development Reader* (London : Zed Books Ltd. 2011).

<sup>49</sup> Chandra Mohanty, *Feminism Without Borders : Decolonising Theory, Practicing Solidarity* (Durham, London : Duke University Press, 2003) See especially, Chapter 9.

### 1.3.3 Critical Legal Studies and A Feminist World Systems Approach: Implications for the Analysis of Law

The impact of European contact and colonial administration on indigenous systems of social regulation or law has been theorized in various ways by anthropologists, colonial administrators, lawyers and scholars in different historical periods. In the early 1900s there was debate among European anthropologists as to whether “primitive” societies had law or whether what they had should be defined as custom or something else.<sup>50</sup> Malinowski’s influential intervention in this debate posited that all societies have law if we define law simply as processes of social regulation or control for the maintenance of social order.<sup>51</sup> Much early anthropological writing on law reflected modernization theory, seeing systems of social ordering amongst native peoples as “primitive” possibly evolving to more “advanced” western models.<sup>52</sup> These evolutionary theories of society grew in influence in the late 19<sup>th</sup> and early 20<sup>th</sup> century in Europe and strongly influenced colonial administrators and judges.

By the late 19<sup>th</sup> and early 20<sup>th</sup> century, the dominant perception of the laws and legal system in colonies articulated by colonial administrators, anthropologists and other scholars, missionaries and indigenous elites in Africa was expressed in terms of plural legal systems comprising two or three main different systems of law – the native/customary law, Islamic law

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<sup>50</sup> Major participants in this debate in this period included Malinowski, Radcliffe Brown, Paul Bohannan and Max Gluckmann.

<sup>51</sup> Bronislaw Malinowski, *Crime and Custom in Savage Society* (New Brunswick, New Jersey :Transaction Publishers 2013, new edition). This book was first published in 1926.

<sup>52</sup> See Henry Maine’s influential ideas of evolution of law as being a movement from status to contract . Thus distinguishing between traditional and modern societies and legal systems, referred to in Karuna Mantena, *Alibis of Empire : Henry Maine and the Ends of Liberal Imperialism* (New Jersey : Princeton University Press, 2010).

and the European or modern state law.<sup>53</sup> Recognition of Muslim law was relatively easy as they had written codes but African and other indigenous or native laws and custom posed peculiar problems because they were unwritten and their content had to be ascertained. Much time was spent by anthropologists, sometimes commissioned by the colonial governments, in field work and research to ascertain customary law<sup>54</sup>. The main method adopted by colonial administrators engaged in dispute resolution was that of consulting traditional rulers and local “experts”. By the first few decades of the 20<sup>th</sup> century, there was already a drive to document and make these laws more certain so they could be referred to in processes of adjudication like European law.

Yet, the purported retention and application of traditional laws in colonial courts led to dramatic changes in the form and content of those laws, de-contextualizing them. Several scholars have contested the notion that customary law in Africa is rooted in ancient traditions continuing from the pre-colonial era. Notable among these scholars are Professors Gordon Woodman, Martin Chanock and Francis Snyder. They have sought to show how the activities of colonial administrations in effect created rather than used existing law and legal systems. Their position is often referred to as the Creation of Customary/Traditional Law thesis<sup>55</sup>. Although these scholars are all agreed that customary law went through significant changes in the colonial period such as to render it a “new creation” of the state, their analysis of this process and their conclusions concerning its implications for the future of the legal systems in question are

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<sup>53</sup> Islamic law was often classified as a specific type of native or customary law.

<sup>54</sup> See Commissioners reports and pamphlets on native law and custom in various parts of Nigeria such as Ijebu, Ondo and Igboland. For example, Ward Price, *Land Tenure in the Yoruba Provinces* (Lagos : Government Printer 1933). See also the draft report of the West African Lands Committee (WALC) which will be reviewed in Chapter 3.

<sup>55</sup> Although Chanock speaks more of the “birth” and “development” of customary law in the colonial period, and an early article by Francis Snyder adopts this term, it is the reactions and critiques of the general trend of this argument that have made it popular. See for example, a special issue of the *Journal of African Law* on “The Construction and Transformation of African Customary Law” (1984) 28:1&2 *Journal of African Law*. A more general book by Hobsbawm and Ranger in 1983 used the term “Invention”.

sometimes very different. These differences will be discussed in detail in Chapter 6. The re-interpretation of custom by colonial courts gave a small group of men – the so-called leaders and experts on traditional law and customs - the power to define what constituted customary law, giving them voice whilst systematically silencing or muting women’s voices.

The State’s inability to effectively monopolize the use of force has been exploited mainly by male groups, often leaving women as major pawns or casualties in hostilities – the proverbial grass trampled upon when two elephants fight. Women’s resistance was thus in many situations ignored or neutralized by a combination of the colonial state and local male action or inaction and colored what survived as customary law. In later years of the 20<sup>th</sup> century, this “invented” or transformed tradition is then subjected to a Western feminist analysis and found wanting as “backward” indigenous traditions detrimental to women, to be jettisoned in favour of modern women’s rights models and strategies based on constitutionalism, the rule of law and a specific conception of human rights.

The tendency to view law or custom among non-European peoples deemed “primitive” as different, has greatly impeded valuable comparative studies of systems of social regulation and this has extended to analyses of post-colonial legal systems. Just as some social scientists have tended to focus on the nation state as the main unit of analysis to which world systems theory was a response; in law, the critical legal studies movement which emerged as a response to legal positivism and formalism in the West, has tended to focus on law in Western countries, in particular in Europe, the United States and countries where the European Diaspora has become dominant in terms of population or political and economic influence such as Canada, Australia

and New Zealand.<sup>56</sup> The Law and Development Movement, on the other hand, which emerged in the 1970s, and focused on post-colonial legal systems, tended in its early years to adopt a framework based on modernization theory viewing the legal systems of developing or third world countries as defective and aspiring to become more like the legal systems of Western countries.<sup>57</sup> Later scholars working on law and colonialism in the late 1990s and thereafter, adopted a more nuanced view of the development of law in colonial situations.<sup>58</sup> Still, relatively few of them, among them John and Jean Comaroff, Sally Engle Merry, and Boaventura de Sousa Santos, have linked developments in law in colonial and post-colonial situations to developments in law in Europe and the United States. The Critical Legal Studies movement has thus predominantly focused on law in England, the United States and countries with a history of large scale settler colonialism, viewing the contact between different pre-colonial and Western legal systems in terms of independent and different systems interacting. This has been to the detriment of a broader perspective emerging on Law and Globalization. For just as a world economic system developed, strong elements of a world global legal system also developed as a result of the establishment of colonial empires and global interaction. Some legal scholars based in the Global South, or focusing on the development of legal systems there, have done some interesting critical work.<sup>59</sup> However, these two streams of critical legal theory have tended to run in parallel, failing to link insights from critical analyses of Western legal systems to those of post-colonial legal systems often just viewed as dysfunctional. Such linkages are more often

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<sup>56</sup> It has also tended to focus on common law systems.

<sup>57</sup> For a review of this scholarly movement see, D M Trubek and Marc Galanter, "Scholars in Self-Estrangement : Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) *Wisconsin Law Review*, 1062.

<sup>58</sup> See for example, Mann and Roberts, "Law in Colonial Africa" *supra* note 5. See also Martin Chanock, "Law and Custom" *supra* note 6.

<sup>59</sup> See the work of Rajeev Dhavan, Roberto Unger, Dani Nabudere, Issa Shivji, Albie Sachs and Peter Fitzpatrick.

made by scholars from the Global South<sup>60</sup> faced with the immediate and practical problems of colonial and postcolonial legal systems. Such work tangentially refers to the effects of colonial and post-colonial systems on women, rarely making it a focus of research or study. The transfer by immigrant groups of aspects of their systems of social regulation to countries in Europe and North America is also bringing some issues of legal pluralism and law and globalization increasingly into the mainstream in Western nations.

Women in Africa and in the Global South more generally, confronting unjust and discriminatory social practices and legal systems are thus called upon to demystify law, both “customary” and “modern” and to challenge hegemonic manifestations of law and legal theory, whilst simultaneously challenging hegemonic feminism and social development theories. Theirs is no easy task. Existing solutions emanating from other contexts which are sometimes pressed upon them are often unworkable in their contexts. Their task thus calls for a Third World, African or more specific local feminist legal theory drawing from the insights of all the streams of critical legal theory earlier referred to. This thesis is a contribution to the development of such a jurisprudence in the Nigerian and African situation, building it from the bottom up from a particular case study of women’s land rights. The conceptual framework of a feminist world systems analysis of law adopted is concerned with contextualizing law and making it relevant to the concerns of the majority of people in society. It is concerned specifically with gender, economic and social justice and the inextricable linkages between them, seeking ultimately to promote a more democratic global legal culture and sub-cultures.

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<sup>60</sup> Ibid. or those working on International Law who identify with perspectives which have come to be known as Third World Approaches to International Law (TWAIL).

My case study is of the development of women's land rights in Southern Nigeria between 1861 and 2011. The colony of Lagos was established in 1861 and was the first step in the creation of modern Nigeria. 2011 marked 150 years from this event and is a convenient time span within which to view and review developments in land use and law. Partly for reasons of geography, Southern Nigeria, and in particular, the parts of South Western and South Eastern Nigeria I focus on, has a longer history of direct trade relations and interaction with Europeans than Northern Nigeria and therefore of incorporation into the modern capitalist world system. Northern Nigeria was influenced more by its relationships with North Africa between the 15<sup>th</sup> and 19<sup>th</sup> centuries<sup>61</sup>. The relationships between Southern Nigerian groups and Europeans over a period of four centuries illustrate gradual and complex interactions which eventually developed into a colonial relationship. The influence of Islam and Islamic law – which had written sources and a class of professionals administering it - in large parts of Northern Nigeria in the 19<sup>th</sup> century mediated its encounter with Europeans and their institutions. My focus on Southern Nigeria is thus one of convenience and an attempt to restrict the volume of material<sup>62</sup> to be dealt with. In relation to women's land rights, it does not indicate huge differences as some of my references to the Northern Nigerian situation will reveal.

The development of customary law as a major site of convergence and potential conflict between different legal systems will be examined and re-conceptualized in the context of the major changes that have taken place in the laws and system of administration of justice relating to land between 1861, when the first colony in the Niger area - Lagos - was created, and the

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<sup>61</sup> Northern Nigeria is of course a large area comprising many different groups and nations with different histories although a large number of them were colonised by the Fulani and became part of the Fulani empire known as the Sokoto Caliphate in the 19<sup>th</sup> century. It is fairly arbitrarily designated as the area above the two major rivers that dissect the country – the Niger and Benue rivers - shown on Map 2.

<sup>62</sup> In particular, pre-colonial historical material, as there is extensive historical research on this area.

present day. These developments are classified into two major periods corresponding to major political developments in the country - the colonial period between 1861 and 1959 and the post-independence period after 1960 when Nigeria gained political independence from the British. Research by legal historians and anthropologists will be brought to bear in fresh analyses of the development of land law and policy, the problems it raises and its particular impacts on women in Nigeria. Very little of this kind of interdisciplinary research and analysis which situates legislation and case law in its social and historical context has been done on Nigerian law.

#### **1.3.4 Sources**

This study has been conducted through library and archival research. Primary sources examined include historical records of correspondence between colonial administrators, and between them and representatives of indigenous peoples; petitions to government officials; memoranda to and reports of major Commissions of Enquiry; legislation, court records and law reports on cases from the 19<sup>th</sup> and 20<sup>th</sup> century relating to land claims in Southern Nigeria. These include the report of the West African Lands Commission established in 1912, colonial Public Lands Ordinances, the 1978 Land Use Act of Nigeria and the Report of the Law Reform Commission on the Reform of the Land Use Act 1992. Secondary sources include books and scholarly articles in journals by numerous historians, social scientists and lawyers, as well as news reports and articles that reflect the nature of public commentary and debates. I use these sources to chart major developments in Nigerian customary and common law focusing on land law.

Women's struggles for land and related rights are examined through cases and an analysis of historical records and studies on the activities of women leaders, women's



organizations and lobby groups. The focus is on law reports and court records of selected landmark cases from native courts as well as high courts and the Supreme Court in which women have challenged the changing discourse on their land rights as well as the constitutionality of customary law relating to land tenure in Nigeria in the colonial and post-independence period. These are a particularly important resource for understanding women, law and social change which have been relatively neglected. Such a detailed consideration of law reports and court records set in the context of broader historical studies, will indicate more clearly the ratio decidendi of the cases in question and the possible bases for distinguishing them in future and reversing changes effected through them.

Against the background of this historical study and analysis of developments in the Nigerian legal system and land law, theoretical insights and conclusions on strategies for law reform and decolonization and democratization of law are drawn.

#### **1.4 Outcomes of Research and Contribution to Knowledge**

This research is a trans-disciplinary project that links the extensive work done in history and the social sciences on the nature of the state, social change and development, to work being done in the discipline of law on law and social change. Such linkages are particularly important in the African context where the theoretical basis of various interventions by governments and multilateral agencies are rarely explicitly articulated or questioned until problems arise.<sup>63</sup> It is a contribution to rethinking approaches to law and order beyond the legal positivist emphasis on

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<sup>63</sup> Interventions in aid of “Law and Development” are once again becoming popular, after a lull in the 80s and 90s, as are programs on Democratic Governance and the Rule of Law, in spite of the problems raised by the earlier Law and Development Movement in the 60s and 70s.

the State and underlying social contract theory<sup>64</sup>, and putting in place more participatory, gender sensitive and people friendly law reform processes. It also contributes to contextual understandings of law in Africa - which have rarely been the focus of attention of lawyers on the continent. The specific study of land law and land law reform in Nigeria and its impact on women, adopting a historical and contextual analysis, has to the best of my knowledge, never been done. The thesis thus provides a unifying theoretical framework through which we can view and understand law and law reform in an age of globalization.

The next chapter explores the history of the establishment of colonial relations in Nigeria and the role of law and legal changes in those processes. Chapter 3 focuses on developments in land law as a central aspect of colonial legal change, examining legislation and landmark cases which gave rise to new concepts of land rights and use. It also examines the changing balance of power between groups of elites which influenced and resulted from legal change. Chapter 4 examines emerging concepts of women's land rights in colonial and post-colonial Nigeria as a result of new political and economic arrangements and ideas on gender. It reviews some of the major developments in women's land rights in Nigeria from the pre-colonial to the independence period, highlighting landmark cases, commentary and relevant legislation as sites of conflict and social change. It analyses the ways in which women's access to land resources have come to be restricted and justified in many communities of Nigeria, mapping the trends in "legal imperialism". Chapter 5 analyses the first major attempt at reforming land law in the post-independence period - The Nigerian Land Use Act 1978. It examines the background to and rationale for the Act, the changes it made and the use to which it has been put by governments. It

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<sup>64</sup> Advanced by influential scholars such as Thomas Hobbes, John Locke and Jeremy Bentham.

analyses the continuity and discontinuities in land policy and law which the Act represents, the agitations for reform, some of the major reform measures that have been taken and the politics underlying them. Against this background, in Chapter 6, I review the debates on the status of customary law and the evolution of a Nigerian common law as responses to legal imperialism which raise the fundamental issue of the de-colonization or democratization of law. I then revisit the issue of land law reform and what we can learn from women's struggles and the development of their land rights in Nigeria.

## Map 1 Map of Africa Showing Location of Nigeria

Source : <http://www.vidiani.com/?p=10970>

Map 1 has been removed due to copyright restrictions. This map is a political map which shows the location of Nigeria, and its neighbouring countries in West Africa, within Africa including major towns.

## Map 2 : Map of Nigeria Showing the 36 States of the Federation and Major Towns.



## Source:

[http://www.geoatlas.com/medias/maps/countries/nigeria/nl15668a/nigeria\\_pol.jpg](http://www.geoatlas.com/medias/maps/countries/nigeria/nl15668a/nigeria_pol.jpg)

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## **Chapter 2: Law in the Establishment of Colonial Relations in Nigeria**

This chapter examines the processes that led up to the establishment of colonial rule in Nigeria and demonstrates how law was an arena of political struggle. It explores the early history of the Niger area of West Africa and its incorporation into the current world system and the establishment of colonial relations which led to the creation of Nigeria. In this chapter, I focus on the role of law and legal changes as part of these processes, reviewing constitutional changes in this area as central aspects of colonial legal change. I examine the gradual but systematic introduction of new political and legal institutions, and the impact of indirect rule on existing institutions. This chapter, by tracing the development of these institutions, demonstrates how and why dominant definitions and typologies of law in Nigeria as “modern/English” and “traditional/customary” are often more misleading than illuminating in the quest for understanding and intervening in social and legal change in the country today. I show that what emerged in this period, as a result of interaction with Europeans, were hybrid systems developed by the natives and settlers to respond to changed economic and social circumstances.

### **2.1 Early History of the Niger Area**

The country today known as Nigeria is located in the West African sub-region and comprises of over two hundred indigenous nations and language groups. Many of these groups have long histories of trading with one another and forming part of the large empires and

kingdoms which are known to have existed in the area since the 8<sup>th</sup> century AD,<sup>65</sup> whilst some lived in relative isolation as smaller units.<sup>66</sup> The development of the area, as with most areas, was significantly influenced by its geography and related developments in economic activities such as fishing, pastoralism, agriculture, metal working skills and associated craft by its peoples.<sup>67</sup> The production of a variety of goods gave rise to local and inter-regional trade between the coastal, forest and savannah areas of West Africa, North Africa and beyond. The famous Trans-Saharan trade, and efforts to control the various sections of it, stimulated the formation and determined the fortunes of the various large kingdoms which grew in the area between the 8<sup>th</sup> and 19<sup>th</sup> centuries. The earliest and best known empires of West Africa in this period were the empires of Ghana, Mali, Songhai, Kanem Bornu, Benin, Oyo and Ashanti. Some of these large political groupings existed simultaneously in different parts of the region with overlapping boundaries at different historical periods. Some supplanted others – as with Ghana and Mali - and they all, over time, had a profound impact on economic and social life and the political configuration of the area.<sup>68</sup> This period was characterized by significant movements of peoples as a result of trade, expansion of kinship groups and conflicts.<sup>69</sup>

In the eastern part of West Africa, much of which is today in Nigeria, the empire of Kanem-Bornu and the Hausa city states were important political systems. The kings and

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<sup>65</sup> Basil Davidson, *West Africa before the Colonial Era: A History to 1850* (New York: Longman, 1998) at 26. According to Davidson and other historians, records indicate that the Kingdom of Ghana may have existed since AD 300.

<sup>66</sup> Mabogunje, *The Land and Peoples of West Africa*, in JF Ade-Ajayi and Michael Crowder eds, *History of West Africa Vol I* (NY: Columbia University Press, 1972) at 30. See also, Reuben K Udo, *Environments and Peoples of Nigeria : A Geographical Introduction to the History of Nigeria*, in Obaro Ikime ed, *Groundwork of Nigerian History* (Ibadan : Heinemann Educational Books, 1980) at 8.

<sup>67</sup> Mabogunje, *Ibid.*

<sup>68</sup> See Basil Davidson and Mabogunje, *supra* notes 65 and 66.

<sup>69</sup> *Ibid.*

queens<sup>70</sup> of Kanem-Bornu controlled important towns along the trans-Saharan trade route to Fezzan, Tripoli and Egypt including Adamawa, Kano and Bornu between 1200 and 1800, periodically threatened by rebellious Hausa states, the Bulala, the Jukun and later the Tuareg. The 16<sup>th</sup> and 17<sup>th</sup> centuries were a period of tremendous movement and re-organization of states right across West Africa. Conflicts over the control of trade; migration to escape these conflicts; the impact of developments in the coastal Atlantic trade with Europeans from the 15<sup>th</sup> century; and growing Fulani expansionism; were all important factors in the political changes in the area. The Nupe, Tiv and Jukun kingdoms to the south of Kanem-Borno were also expanding northwards and the forest kingdoms of Benin and Oyo were waxing strong as a result of the Atlantic trade.

### **Map 3 Trans-Saharan Trade Routes circa 1880**

1. Source: <http://ericrossacademic.files.wordpress.com/2011/01/historic-routes.jpg>

Map 3 has been removed due to copyright restrictions. It was a map of the major Trans-Saharan Trade Routes circa 1880, showing some of the main towns in the Niger area or present day Nigeria along those routes.

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<sup>70</sup> The records show that one queen – possibly the aunt of Mai Idris seized power for some years before he ascended the throne and that his mother was instrumental in preserving his heritage and position at the death of his father. See Basil Davidson, *supra* note 65 at 68.

Changes in North Africa and the Mediterranean wrought mainly by wars between Muslims and Christians, in which the Spanish, Portuguese, Morrocans, Egyptians and Turks featured prominently, also contributed to the disruption of trans-Saharan trade. Some of these conflicts were motivated by the desire of the Southern Europeans to reduce the control of North African middlemen over international trade, especially the trade in gold.

Simultaneously with these developments in the Mediterranean and as a result of improvements to technology for navigation and sailing borrowed from the Chinese and the Arabs, Europeans (notably the Portuguese) began to explore the Atlantic coast of West Africa. Historical records show that by 1446 they reached the mouth of the Senegal River venturing further to Elmina in 1471 and to the Bight of Benin in 1472.<sup>71</sup> These early explorers were seeking direct access to the gold trade in West Africa and also a trade route to India. The Portuguese were quickly followed by the Spanish and somewhat later by the French, British, Dutch, Danes, Swedes and Germans. Trading at first with the coastal peoples in the Niger delta for the first few years of their arrival in the Bight of Benin, the Portuguese ventured further inland and established contact with the Kingdom of Benin in 1485. Trade with a centralized kingdom offered better organization and security. For several years the Portuguese and other Europeans traded along the West African coast moving goods from one part to the other. They bought pepper, elephant teeth, ivory and some slaves in the Benin area and exchanged the slaves for gold on the Gold Coast further west. In this way, goods were moved further along the coast and in larger quantities than local West African traders were accustomed or able to go. The main

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<sup>71</sup> It is likely that European contact with West Africa dates back much earlier than this from sporadic records such as those recording voyages of Hanno and other Carthaginians, but definitive and continuous records exist from the 15<sup>th</sup> century. See Alan Burns, *History of Nigeria*, 7<sup>th</sup> ed. (London :Allen and Unwin Ltd., 1969) at 65-70. See also, Basil Davidson, *supra* note 65 at 178-183.



goods that were exported to Europe at this time were gold, ivory, elephant teeth and peppers, although a few slaves were also taken to Europe. Early relations with African kingdoms also involved the exchange of diplomats and educational exchanges.<sup>72</sup>

From the early 16<sup>th</sup> century things began to change and the Portuguese slave trade became more prominent as they took slaves from Benin and the Eastern part of modern Nigeria to work in plantations established in the nearby Portuguese island colonies of Sao Tome and Principe. Some slaves were also shipped to Lisbon and sold in slave markets there. When Esigie, the Oba of Benin, banned the sale of male slaves to Europeans around 1525, the slave traders simply shifted to other nearby markets for their supply.<sup>73</sup> Sao Tome and Principe thus became a major base for the slave trade to Lisbon and the Americas right from the early 1500s. Trips of these European sailors were financed largely by the European aristocracy and a few wealthy European traders in the 15<sup>th</sup> and 16<sup>th</sup> centuries. Henry the Navigator of Portugal and the kings and queens of Castille, Spain and the Netherlands actively supported these voyages. The Portuguese went towards Africa and from there to the East Indies whilst the Spanish, in search of a sea route to Asia,<sup>74</sup> found themselves in the Caribbean Islands and the Americas.<sup>75</sup>

Initially, the expeditions to the Americas were not as profitable as hoped. Imposition of taxes (sometimes in quotas of gold to be delivered to the Governor on pain of amputation of limbs) on the native peoples and their enslavement, among other things, did little to alleviate the problem. The indigenous population was decimated by the cruelty of slavery and the diseases

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<sup>72</sup> Burns, *ibid.* at 67

<sup>73</sup> AFC Ryder, "The Transatlantic Slave Trade" in Obaro Ikime, ed, *Groundwork of Nigerian History* (Ibadan : Heinemann Educational Books Ltd., 1980) 236

<sup>74</sup> The land route having been blocked to them after their wars against the Moors.

<sup>75</sup> Christopher Columbus' first voyage was in 1492 when he landed in Hispaniola Island (today called the Haiti and the Dominican Republic) and travelled on to Cuba.

brought by the Europeans, notably smallpox. Around 1581 Spain conquered Portugal and took over its government. In the same year the United Provinces of the Netherlands declared their independence from Spain and joined the African trade, seeking to take advantage of Portuguese weakness to capture some of its strongholds. In 1637, after earlier unsuccessful attempts, they captured Elmina Fort on the Gold Coast and established other forts in the area.<sup>76</sup> English expeditions also came out with greater regularity and secured the support of the Queen of England from 1561.<sup>77</sup> Gold, ivory and pepper in exchange for iron and cloth were still major items of trade for the Dutch and British traders in the 16<sup>th</sup> and early years of the 17<sup>th</sup> century.

This period witnessed fierce rivalry between Europeans. The Reformation had weakened the influence of Rome and Papal Bulls were no longer an effective way of maintaining trade monopoly. However, because the commercial interests which financed these ventures were getting better organized,<sup>78</sup> attempts were made to reduce conflict which threatened their profits and to respect the stake of the various companies all along the coast of West Africa. From the 1630s when most of the Europeans had staked their claims in the Caribbean and the Americas, and established gold mines and plantations, the demand for African slaves suddenly escalated.<sup>79</sup>

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<sup>76</sup> Davidson, *supra* note 65 at 187

<sup>77</sup> Zook GF, "The Company of Royal Adventurers Trading into Africa" (1919) 4:2 *Journal of Negro History*.

<sup>78</sup> This was the period of the rise of the Charter and Joint Stock Companies in Europe as a result of the attempt to spread the cost of these expeditions and trading ventures.

<sup>79</sup> This was due in no small part to the debate on the treatment of the natives in the Americas by Spanish and Castilian missionaries, including Bishop La Casas, who suggested that African labour be imported as a substitute.

**Map 4 Africa circa AD 1575, Portuguese and Spanish contact.**

Source: Kwamena-Poh, J Tosh et al, African History in Maps (Essex: Longman, 1982) 16

Map 4 has been removed due to copyright restrictions. It is a map of Africa circa AD 1575 showing some of the main empires, city states and towns and areas of Portuguese and Spanish influence in international trade.

So although the Spanish and Portuguese had been exporting some African labour to their colonies in Brazil and Peru and other parts of South America for a century, and the English and other nations' companies had experimented with African slaves in Haiti and elsewhere from the mid 16<sup>th</sup> century,<sup>80</sup> it was in the 17<sup>th</sup> and 18<sup>th</sup> centuries that the Atlantic slave trade became the dominant trade and was systematized. This European demand for slaves drove the trade and changed the political and economic (as well as social) configuration of sub-Saharan Africa. Arms were sold to African leaders and wars were waged to obtain slaves, several kingdoms rising to prominence as a result of their position in the slave trade.<sup>81</sup> In Europe, access to sugar, rubber, cotton and other goods produced on plantations in the Americas drove the industrial revolution and the production and sale of machinery and arms in Europe and the Americas.

As this brief historical background shows, and as world systems theorists, notably Herb Addo<sup>82</sup> have pointed out, the development of mercantile and industrial capitalism in Europe was inextricably linked to international trade and in particular to the colonization of the Caribbean Islands and the Americas and the development of the Atlantic Slave trade. They were not discrete events confined to Europe. These trading relations had a significant impact on all the groups involved in it and on the political configuration of the areas of the world in which they lived. This period marked the beginning of the creation of the modern world system characterized by increasing linkages and integration of international trade and production.

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<sup>80</sup> See Alan Burns, *supra* note 71 at 69.

<sup>81</sup> Including the Kingdom of Lagos whose history and strategic importance we will consider next.

<sup>82</sup> Herb Addo, *supra* note 28.

## **2.2 The Establishment of Colonial Relations in Nigeria**

The history of the establishment of colonial relations in Nigeria must begin with the history of Lagos and its annexation by the British government, for it was the establishment of this base on the Atlantic coast that facilitated Britain's influence over the economy and politics of Nigeria. The relationships between European traders, initially slave traders and later those engaged in the trade in palm oil and other commodities, the local rulers, European military personnel and missionaries as well as large groups of refugees and internally displaced persons who interacted at close quarters at different phases of the history of this very cosmopolitan city state, give us important insights into the nature and mechanisms of development of colonial rule there and in many parts of Africa.

Lagos is a cluster of islands round a peninsula, first inhabited by migrant fisherpeople from surrounding areas and was not of much strategic importance in the Niger area until the late 16<sup>th</sup> century. The earliest accounts of the settlement of Lagos indicate that the area was first settled by migrant fishing people including some from the Ijebu waterside. Later, a group of Awori<sup>83</sup> fleeing from war further inland in Isheri settled in Ebute-Metta (an area already claimed by the Ijebu) and moved on to establish the settlements of Oto and Iddo on the neighbouring island, intermarrying with the earlier inhabitants. A few of this group of migrants moved across to the larger island opposite (today called Eko or Lagos Island) to farm. These Awori migrants were a large group and intermarried with the smaller groups they found in the area. The leader of the Awori who established his base at Iddo was called the Olofin and people in the area came to recognize him as the paramount ruler, especially at the time when they were attacked by the

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<sup>83</sup> Considered today as a sub-ethnic group of the Yoruba.

Kingdom of Benin and needed a strong leader. The 16 eldest sons of the first Olofin became the Idejo – an important class of chiefs of Lagos. This is how the Awori became the dominant group in the Lagos area by the 16<sup>th</sup> century, claiming first settler status and legitimizing their claims to control fishing and land rights there.<sup>84</sup> Autonomous settlements were established by migrant Aja and Ijebu fisherpeople on Lagos Island and all the historical sources are agreed that until the 17<sup>th</sup> century, Lagos was a place where various migrant groups lived peaceably together, but that it was a relatively unimportant settlement - a transit place en route to the larger and more important kingdoms of Ijebu and Benin.

As earlier noted,<sup>85</sup> by the 1470's the Portuguese had sailed as far east along the West African Coast as the Bight of Benin and begun trading with the Ijebu across the Lagoon behind Lagos Island. In 1485, a Portuguese captain – John Affonso d'Aviero - visited Benin City and this initiated the establishment of trading links with the kingdom. The rise of a state at Allada (in present day Benin Republic) after 1550 prompted military expeditions west by Benin in an attempt to retain its relevance in the trade with the Europeans. Iddo was attacked and on occasion successfully repulsed these attacks<sup>86</sup>. The Bini<sup>87</sup> eventually established a military camp on a part of Lagos Island today known as Victoria Island and Kuramo waters. The city that grew on the island there has since been known as Eko to the indigenous inhabitants. The Bini military commanders adopted a policy of peaceful co-existence for a time, consulting with the heads of

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<sup>84</sup> The earliest written accounts of the history of Lagos were compiled by missionaries in the 19<sup>th</sup> century from oral accounts of the Chiefs and residents and have since been expanded by a number of scholars. See Rev. J B Wood, *Historical Notices of Lagos, West Africa* (1880); Robert S Smith, *The Lagos Consulate 1851-1861*. (Berkeley & Los Angeles : University of California Press 1979); Patrick Cole, *Modern and Traditional Elites in the Politics of Lagos* (London : Cambridge University Press, 1975); Kristin Mann, *Slavery*.

<sup>85</sup> See page 37 above

<sup>86</sup> Mann, "Slavery", supra note 7 at 27 , See also, Alan Burns, supra. note 71 at 39.

<sup>87</sup> The name of the core ethnic group in the Kingdom of Benin

local communities and eventually establishing a governing council. Later in the 17<sup>th</sup> century, the Oba of Benin appointed a viceroy to oversee the Lagos community and to exact tribute from them. This viceroy was related to both the Awori and the Benin royal houses. He took the title of Oba (translated as King) and the title of Olofin fell into disuse.<sup>88</sup> Although the heads of communities retained a certain measure of autonomy, the Oba of Lagos became a hereditary and paramount position, paying tribute and maintaining an allegiance to the Benin Empire. The rise of Aja kingdom and Oyo (both Yoruba) to the north and west of Lagos, and the establishment of its presence by Benin empire, led to a shifting of boundaries and control over this area throughout the 17<sup>th</sup> century. However, Benin influence in Lagos was stronger than that of the other two empires in this period, probably because of the ease of water transportation.<sup>89</sup>

### **2.3 The Early Constitution<sup>90</sup> of Lagos**

The Oba of Lagos was supported, kept in check and sometimes rivaled by four classes of Chiefs who formed part of his council. The first group was the Idejo who, most sources agree,<sup>91</sup> represented the original owners of the land in Lagos and therefore had power to allocate unoccupied land within their areas. Even the Oba had to request land from them. The second group was the Akarigbere - descendants of the warriors of the Benin army, which settled in Lagos and were closely associated with the ruling dynasty. The head of this class of chiefs is the

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<sup>88</sup> See Mann, *ibid* at 29. Versions of oral tradition differ as to whether the Olofin was defeated in battle by these emissaries of the Oba of Benin, or whether, after one or two unsuccessful attempts to defeat him, the Binis opted for peaceful co-existence on uninhabited parts of the area, from which they could operate. Most versions of the history of the area agree that the Binis eventually established a military camp on one of the Lagos islands – Eko - and started a dynasty which became the dominant one in Lagos. See also Cole, *supra* note 84 at 11-13.

<sup>89</sup> Mann, *ibid*.

<sup>90</sup> I use this term here, in the broadest sense, to mean the structure of governance and rules relating to power sharing in the society, although unwritten.

<sup>91</sup> See Mann, “Slavery”; Smith; and Cole, *supra* note 84.

Eletu Odibo – kingmaker and chief minister - who historically was the representative of the Oba of Benin at the court of Lagos and crowns the Oba. The third group of chiefs was the Ogalade – a priestly caste. A fourth class of chiefs in Lagos were the Abagbon or Ogagun who are described by Smith as war captains, led by the Ashogbon who with the Eletu Odibo was responsible for conducting the Ifa consultation<sup>92</sup> which preceded the naming of a new ruler. The Erelu – an important female chief<sup>93</sup> headed the market women.

The council of chiefs met regularly and independently as well as with the Oba. Apparently, the council consisted formerly of just the Akarigbere and ten Idejo chiefs. It then expanded to include 16 chiefs representing members of the four classes of chiefs.<sup>94</sup> Smith comments on the highly centralized nature of the Lagos kingship but speculates that this may have been mainly a result of the growth of the power of the Oba as a result of the slave trade rather than the history of links with Benin.<sup>95</sup> What is noteworthy about the development of the constitution of Lagos from the Benin incursion in the mid 16<sup>th</sup> century is the development of a loose confederal type arrangement which acknowledged the authority and rights of the Idejos and the extended families which derived their rights from them. As the importance of the Kingdom of Lagos and the leadership of the Obas became critical to its defence, the authority and autonomy of the Idejo was diminished and even challenged<sup>96</sup> although they continued to be recognized as landowners, and the principle of governorship by consent remained strong in the

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<sup>92</sup> A form of divination performed by the Yoruba to assist with decision making on all important matters of life.

<sup>93</sup> There was no class of female chiefs but this was an important position in a kingdom that depended largely on trading activities.

<sup>94</sup> There is some dispute as to the numbers of the Idejo in the oral sources. The 10 referred to as being members of the early Council were probably the 10 put in charge of areas of Eko or Lagos Island which is where the Oba was based. Although some accounts state that the Olofin appointed 16 of his sons as Idejo, the 16 on the Oba's Council included representation from other classes of chiefs. See Cole, *supra* note 84 at 17.

<sup>95</sup> Smith, *supra* note 84 at 5.

<sup>96</sup> See Cole, *supra* note 84 at 22.



relationship. This led to a rather interesting situation in which the Oba or paramount ruler and his chiefs had no direct power over the allocation of land resources but “the Idejos could not refuse him [the Oba] land if and when he asked for it; but he had to ask for it, thereby reinforcing the Idejo’s ownership and the element of consent in the whole relationship.”<sup>97</sup>

The mixing of Yoruba and Benin customs relating to succession in Lagos led to frequent power struggles within the ruling house of the Kingdom of Lagos. The wealth accruing from coastal trade in this period no doubt aggravated these struggles. In Benin custom, the Oba is succeeded by his eldest son, whereas in many Yoruba kingdoms the eldest surviving brother is successor to the throne or the kingship rotates among ruling houses or units of the royal family. The role of divination in the selection of the Oba is held to be important, determining which ruling house (which is able to present a suitable candidate, for example, of the right age) should be next in line, but does not seem to have prevented the various conflicts which occurred among the Lagos ruling houses.<sup>98</sup>

Kristin Mann, in her book *Slavery and the Birth of an African City* explores the important role played by the growth of the coastal trade with Europeans in the rise of the Kingdom of Lagos. She notes that whilst Lagos became an important port due to its geographical location from the 16<sup>th</sup> century and its inhabitants profited from ferrying goods across the Lagoon and to the ocean, other states and kingdoms along the West African coast at which European traders first traded and built their forts were more important and handled the bulk of the trade in slaves and other goods. However, with the expansion of the empire of Dahomey in the 18<sup>th</sup> century, and disruptions in trade at Allada and Ouidah which it caused, the trade shifted further west towards

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<sup>97</sup> Ibid at 12.

<sup>98</sup> Cole describes the pattern of succession from about 1700 to demonstrate the differing bases of succession. Ibid at 13-14

Porto Novo and Badagry, increasing trading activities from Lagos to these places. The breakup of the Oyo Empire and the civil wars that accompanied it were an additional boost for slave trading in Lagos as many captives of war became available for the slave markets. Equally important, however, was the deliberate attempt by Lagos rulers to create an enabling environment for the foreign traders operating in the kingdom and the alliances they forged with them.<sup>99</sup> The very constitution of Lagos was thus a result of the changes in the socio political structure of this region, resulting from the Atlantic trade with Europeans, referred to earlier, and more directly from Benin “imperialism”.<sup>100</sup>

The growing importance of Lagos as a slave trading port and the benefits derived by its rulers from this trade made the rulership a much coveted position.<sup>101</sup> Aggravated by the machinations of the different powerful interest groups in and around Lagos, including Portuguese, Brazilian and British traders and officials, it generated the famous constitutional crisis over succession between 1800 and 1851 and eventually culminated in the colonization of Lagos.

## **2.4 The Colonization of Lagos**

In 1803 the Danish abolished the slave trade, followed by the British in 1807 and in 1808 the United States banned the importation of slaves. Britain was at this time the dominant

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<sup>99</sup> Mann, *Slavery*, supra note 7 at 43-44

<sup>100</sup> Constitution is used here to mean both the establishment of the kingdom as well as the governance structures, and the term imperialism is used to describe the relationship because Benin conquered and established its hegemony over the peoples living in the Lagos area to found the Kingdom of Lagos which paid homage and tribute to Benin for decades.

<sup>101</sup> Patrick Cole comments extensively on the Baba Isale system or system of patronage which became so much a part of political and social life in Lagos at this time and spread to other parts of the country. Cole, supra note 84 at 24-44.

European naval power and sought at the same time to prevent other countries from continuing the slave trade by establishing the West African Squadron to intercept slave ships. These measures were of limited efficacy until after 1833 when slavery, rather than just the trade in slaves, was abolished in all parts of the British Empire. The Portuguese and Spanish continued the trade and took on the flags of countries not party to agreements to stop the trade. In fact, the trade is said to have intensified between 1808 and 1851, carried out with increased ruthlessness in terms of the treatment of slaves.<sup>102</sup>

Lagos was a major center of the slave trade at this time benefitting from the Yoruba civil wars and also from alliances developed between its rulers and Spanish, Portuguese and Brazilian traders who had been allowed to establish bases along the coast there. Disputes among factions of the ruling house of Lagos were related in part to support accorded to different groups of traders by different factions. The various chiefs thus supported candidates for the Obaship who they felt would favour, or at least not threaten, their economic activities. It was within this context that in 1831 when the reigning king of Lagos died,<sup>103</sup> his brother – Kosoko – was not invited to succeed to the throne as had been the custom sometimes, in accordance with Yoruba tradition. The Eletu Odibo or Kingmaker, invited his uncle – Adele - who had been earlier deposed by his own brother, to take office. This uncle died within 3 years and again Kosoko was sidelined in favour of Adele's son - Oluwole. The Eletu Odibo, who had blocked Kosoko's bid for the crown on this occasion, orchestrated harassment of that faction of the ruling house culminating in accusations of witchcraft and the banishment of Kosoko's sister from the

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<sup>102</sup> See Burns *supra* note 71 at 103 and 107.

<sup>103</sup> He was asked to commit suicide, through the chiefs, due to dissatisfaction with his reign by the residents of the town

kingdom by the Oba. In the conflict that ensued between the two factions of the ruling house, Kosoko was defeated and fled to Ouidah – a nearby town. On the death of Oluwole seven years later, an uncle of Kosoko – Akitoye - was again crowned. In an effort to make peace, he invited Kosoko back from exile. However, the conflict deepened and war broke out between the factions in which Kosoko gained the upper hand and Akitoye was forced into exile in 1845 at Abeokuta and later Badagry. From exile, Akitoye sought the support of the Egba in Abeokuta and the British to reclaim the throne.

This pattern of depositions, exile and return occurred several times in the early 19<sup>th</sup> century. The sidelined or deposed kings sought support to return to power from neighbouring towns and kingdoms, traders whom they had favoured, as well as missionaries and European governments. The British – with their West African Squadron stationed off the West African coast and patrolling the waters, was an important military and economic power in the quest for allies.<sup>104</sup> But so also were the Portuguese and Spaniards all of whom were alternative sources of arms. All the kings of Lagos in the 19<sup>th</sup> century were heavily involved in the slave trade. In the course of its anti slavery activities, the West African Squadron had bombarded Lagos in 1825 during the reign of Idewu Ojulari, and Domingo Martinez – a notorious Brazilian slave trader - operated out of Lagos for several years during Akitoye's reign.<sup>105</sup> This contradicts the idea that the British intervened on Akitoye's behalf because, unlike Kosoko, he was committed to ending the slave trade. Akitoye came under pressure from the missionary community in Badagry where he had sought refuge to stop the slave trade. With the support of Abeokuta which Kosoko threatened with invasion, he agreed to sign a treaty with the British for the abolition of the slave

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<sup>104</sup> The British first established a naval presence at Fernando Po in 1827.

<sup>105</sup> See Smith *supra* note 84 at 11.

trade in Lagos if they would support him against Kosoko.<sup>106</sup> The British were, at this time, under pressure from the abolitionist movement at home and internationally, and were also seeking greater stability in the area to facilitate “legitimate” trade in palm oil and it was in this context that they joined forces with Akitoye.

In 1851, the British Consul to the Bights of Benin and Biafra – John Beecroft – with a senior officer of the West African Squadron attacked Lagos and was repulsed by Kosoko’s forces. The Foreign Office then approved reinforcements and a major military expedition against Lagos on Christmas Eve in the same year. Kosoko escaped to Epe and Akitoye was re-installed on the throne. On January 1 1852, he signed a treaty with the British for the abolition of the slave trade, promotion of legitimate trade and protection of missionaries. A British Consulate was established in Lagos shortly thereafter.<sup>107</sup>

Local institutions of “slavery” and patronage also ensured a steady supply of supporters for the various factions of the Lagos power elite.<sup>108</sup> Kosoko and his supporters mounted constant attacks on Lagos, often disrupting the palm oil trade on the lagoon. After the death of Akitoye in 1853, his son Dosunmu was hastily installed and supported by the British. However, British consuls made a concerted effort to reconcile the warring factions of the ruling house, signing a Treaty at Epe with Kosoko in 1854. Under this agreement Kosoko became the king of Palma and Lekki (the neighbouring area to the east through which he had fled to Epe) on condition that he relinquish his claim to the throne of Lagos. He and his supporters began to engage in the palm

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<sup>106</sup> See Akitoye’s letter to Beecroft reproduced in Alan Burns *supra* note 71 at 118.

<sup>107</sup> At first a Vice Consul was appointed and the next year a Consul for Lagos and the Bight of Benin was appointed to oversee British interests in the area.

<sup>108</sup> Both Cole and Mann comment on the rapid rise to positions of power of several “ex-slaves” who were loyal to kings of Lagos including Taiwo and Oshodi who founded families famous in Lagos today. See Cole, *supra* note 84 at 29-32 and Mann, *Slavery* *supra* note 7 at 76-78.

oil trade, exporting this commodity from the Ijebu area through the port of Olomowewe. However, the slave trade continued from these easterly sections of Lagos and Dosunmu was unable to control the activities of the traders.

Recognizing the strategic importance of gaining a foothold in Lagos for its harbor and for the purposes of controlling trade with the interior of Nigeria, especially in the face of competition from the French, British consuls interfered increasingly in local politics.<sup>109</sup> In June 1861 following voluminous correspondence in the preceding year, the British Foreign Office instructed the Consul to arrange for the occupation of Lagos. A month later, the consul and the senior naval officer summoned the King of Lagos to a meeting on board one of their warships to inform him of the intentions of the British government. After tolerating his resistance for one month, they gave him an ultimatum and stationed the warship within firing distance of the town center. On the 6<sup>th</sup> of August, the King, accompanied by a few chiefs, signed the Treaty of Cession.<sup>110</sup> Under the terms of the treaty “port and island of Lagos” were ceded to the Queen of Great Britain and the King was granted an annual pension.

Thus it was that European merchants and the states that protected their interests, who had promoted the slave trade, sold arms and ammunition and fuelled local wars and kidnappings that led to massive destabilization and insecurity in the region for two centuries, when the demand for slaves was high, now took on the role of abolitionists and sought to depose their former partners some of who had not yet adjusted to the changing global economic climate.

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<sup>109</sup> Smith, *supra* note 84 in Chapter 7 gives a detailed account of the nature of some of this interference.

<sup>110</sup> Reproduced in Alan Burns, *supra* note 71.

## **2.5 The Role of the Returnees : the Saro/Krio Factor**

One of the products and agents of the profound transformations of this period are the group of returnee slaves whose role and influence in the establishment of modern West African states was absolutely crucial. At the end of the 18<sup>th</sup> century, freed slaves from London, England who had benefitted from the growing tide of opposition to the slave trade in England, joined abolitionist groups and activists who began to think and organize around a return of ex-slaves to Africa. Black loyalists who had fought on the British side in the American War of Independence were promised freedom and resettlement on land in Nova Scotia, Canada. On arrival, many of these promises of land were reneged upon and the black communities were subject to racist attacks and harsh conditions of living. This triggered a series of petitions to London and proposals for a return to Africa. A settlement had been established by Granville Sharpe on the West African coast in 1782 in the present day Sierra Leone in pursuance of this vision of a free settlement where all peoples of all races interacted on a free and equal basis.<sup>111</sup> The Sierra Leone Company organized a number of voyages back to Sierra Leone from Canada and the UK and some of the English blacks, the Black Loyalists, as well as a group of Jamaican Maroons (resettled initially in Nova Scotia) thus formed the nucleus of the new settlement in Granville town in Sierra Leone in 1793.

Following the formal abolition of the slave trade in 1807, larger groups of slaves much more recently captured in West Africa and other parts of Africa were released by the British Naval Squadron which patrolled the seas, in this new settlement which was renamed Freetown.

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<sup>111</sup> See Christopher Fyfe, "Freed Slave Colonies in West Africa" in John Flint ed, *The Cambridge History of Africa, Volume 5* (Cambridge : Cambridge University Press, 1976) 172.

The British government took responsibility for the Freetown settlement after 1808 making it a major base for the navy to free slaves. This later and more numerous wave of settlers was referred to as “re-captives” (having been captured as slaves and then re-captured and released in Freetown by the Navy) and later came to be known throughout West Africa as the “Saro” (a term probably derived from “Sierra Leoneans”). On their release in Freetown they clustered in groups according to place of origin or ethnicity. The influence of the initial settlers from England, North America and the West Indies, who had been Christianized much earlier and introduced to specific trades such as carpentry and masonry, was significant and the younger more recent settlers were sent to missionary schools and apprenticed into the trades, absorbing much of this dominant culture. This group of people, uprooted from their natal communities and educated in Christian schools modeled along European lines, adopted a form of English mixed with local languages – Creole - as their lingua franca and as a result are often referred to as the “Krio”.<sup>112</sup> They formed the nucleus of the first Western educated elite of traders, artisans, missionaries, teachers and civil servants on the West African coast from the early 19<sup>th</sup> century.

This group of immigrants often had tense relations with the indigenous communities of Sierra Leone on whose land they encroached as the settlement grew. There were many clashes and much insecurity in the area in spite of the activities of missionary organizations and the attempt by the British government in 1838 to establish a rudimentary system of administration for the area in an attempt to control the mish mash of self-governing ethnic communities living there.<sup>113</sup> Many of the later immigrants spoke their native languages and could trace their origins

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<sup>112</sup> Especially within the context of Sierra Leone in order to distinguish them from the other indigenous ethnic groups in the country such as the Mende.

<sup>113</sup> EA Ayandele, *Holy Johnson : Pioneer of African Nationalism, 1836-1917* (London: Frank Cass & Co Ltd, 1970) at 19.



back to other societies of West Africa. Large groups of them were Yoruba – casualties of the Yoruba wars which began in the 1820s. From the 1830s some of them banded together, purchased confiscated slave ships and returned as traders to various points east of Sierra Leone including Cape Coast, Accra, Badagry and Lagos. Some of them settled in the Yoruba towns of Porto Novo, Badagry, Lagos and Abeokuta keeping in touch with Sierra Leone and providing valuable information to Sierra Leone residents on events in their homeland.<sup>114</sup>

Mission schools in Sierra Leone produced some of the first Western educated Africans in West Africa who became central to the missionary activities in the area.<sup>115</sup> A predominantly Christian group, they became partners of the Europeans and middlemen between them and the indigenous African populations playing important economic, social and political roles in the settlements along the West African coast and in the interior.<sup>116</sup>

## **2.6 Law and Social Change in Southern Nigeria**

The previous sections have examined some of the fairly rapid changes in the system of governance and trade relations that occurred in Lagos, from the 16<sup>th</sup> century. The Atlantic trade and in particular the very lucrative arms and slave trade, played an important part in determining the power struggles that shaped and changed the constitution of the kingdom of Lagos and surrounding areas. A good analysis of these struggles over succession that gave the British a relatively easy foothold in Lagos is reflected in this comment by Cole:

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<sup>114</sup> See Fyfe, *supra* note 111 at 188.

<sup>115</sup> Samuel Ajayi Crowther, the first African ordained as a Reverend and later a Bishop was a “Saro” of Yoruba parentage who later returned to Nigeria to establish and head early missions of the Church Missionary Society.

<sup>116</sup> The influence and importance of this group has been commented on by various historians. See Ajayi, *Christian Missions in Nigeria 1841-1891* (Longmans, 1965) and E A Ayandele, *The Missionary Impact on Modern Nigeria 1842-1914 : A Political and Social Analysis*. (New York: Humanities Press, 1967) [Ayandele, *Missionary Impact*].

One salient fact in the study of traditional politics of Lagos is the uncertainty about what was customary. There are several reasons for this. First, the rapid successions to the Obaship during the early nineteenth century completely unsettled “custom”, which had hardly had time to be defined. Second, the Obas, through the wealth from the slave trade, were themselves only just establishing their authority over the other classes of chiefs. Many of the rules governing the various institutions were therefore fluid. ... Thus the conflicting accounts often heard about what constituted native custom, and what the origins, functions and positions of the various classes of chiefs were, may well be due to simple ignorance, a more likely explanation is that the competitors chose what myths supported their particular interests.<sup>117</sup>

After the restoration of Akitoye to the throne in 1851, large numbers of liberated slaves returned to Lagos from Sierra Leone, and directly from Brazil and Cuba. Cole cites figures for 1881 which put the number of “Saros” and Brazilians at 4,754 out of 37,458 residents of the town.<sup>118</sup> The establishment of this returnee class as well as European merchants and missionaries who settled in the town meant that they needed land to settle on and establish their businesses. The new government of Akitoye which was consolidating its victory over Kosoko, re-allocated lands which had belonged to Kosoko’s supporters and issued Crown Grants not recognizing the profound effect that this practice would come to have on the politics and economy of Lagos. Following the cession of Lagos in 1861, there was a renewed scramble for land on the island and to secure Crown Grants which King Docemo continued to issue liberally.<sup>119</sup> The new land grant holders, many of whom were Saro were thus able to acquire land which they believed they held in fee simple and could pass on to their children and dispose of as they pleased.

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<sup>117</sup> Cole, *supra* note 84 at 19.

<sup>118</sup> *Ibid.* at 45

<sup>119</sup> See A. G. Hopkins, “Property Rights and Empire Building : Britain’s Annexation of Lagos, 1861” (1980) 40:4 *Journal of Economic History* 777 at 791.

The Lagos aristocracy and in particular the Idejo had been strongly opposed to the annexation of Lagos by the British because of the threat it seemed to pose to their control over land. They were re-assured that their rights over land were secure and indeed they were encouraged to make grants of land. However, differing processes of making the grants and differing understandings of their consequences, resulted in the shift in power that they had feared and were expressed in the land disputes that took place in the late nineteenth and early twentieth centuries in Lagos and environs which will be discussed in the next chapter.

Equally important to the growth of “legitimate” trade in this period between 1850 and 1900 was access to credit, for European traders had to advance credit to African middlemen and women to purchase agricultural products from the direct producers in the interior areas. Policing this system based on ethics and trust was fraught with problems as several commentators have noted.<sup>120</sup> Conflicts over trade practices and payment of debts were therefore a very important trigger for the attempts by Europeans to exercise jurisdiction in matters of conflict resolution and eventually to establish political hegemony in Southern Nigeria.<sup>121</sup> After 1830, the European trading firms established land based operations including warehouses for the storage of agricultural produce.<sup>122</sup> Land in the coastal areas like Lagos thus became valuable to them. Armed with their Crown Grants, the Saro (and other landholders) were thus able to use land to secure extensive credit from these firms.<sup>123</sup> They became trade partners of choice for the firms and made fortunes as a result.<sup>124</sup>

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<sup>120</sup> See for example Alan Burns *supra* note 71 at 73.

<sup>121</sup> See A. G. Hopkins, *supra* note 119 at 788

<sup>122</sup> Unlike the era of the slave trade when they operated largely offshore leaving land based operations to the indigenous middlemen. See Hopkins, *ibid* at 786.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid* at 785.

## 2.7 The Development of New Judicial Institutions

The emergence and entrenchment of these new rules relating to trade and landholding was facilitated by the establishment of a supportive machinery for the administration of justice in the form of forums for dispute resolution or judicial institutions to which we will now turn. The most extensive and comprehensive work on the history of modern judicial institutions in Southern Nigeria has been done by Professor Omoniyi Adewoye<sup>125</sup>, and Dr T.O. Elias<sup>126</sup>. Adewoye notes that English style courts were older institutions in Southern Nigeria than English law and that their establishment was an important part of the process of establishing colonial domination of the territory.<sup>127</sup> The earliest courts were the informal “Courts of Equity” which were most prominent in the Niger Delta area, which is where European traders first arrived and operated. There were also informal forums presided over by the British consul in Lagos from 1851, prior to the formal assumption of sovereignty by the British Crown in 1861.<sup>128</sup> Consular courts also emerged in the Oil Rivers Protectorate and the Protectorate of Southern Nigeria after 1872, over which the British consul presided.<sup>129</sup> We will therefore examine the introduction of

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<sup>125</sup> Omoniyi Adewoye, *The Judicial System in Southern Nigeria 1854-1954 : Law and Justice in a Dependency* (New Jersey : Humanities Press, 1977) [Adewoye, *Judicial System*].

<sup>126</sup> T.O. Elias, *Legal System*, supra note 2.

<sup>127</sup> Adewoye, supra note 125 at 31

<sup>128</sup> Alan Burns, supra note 71 at 132; see also Adewoye, *ibid* at 46.

<sup>129</sup> Relatively little research has been focused on these two kinds of courts which British Consuls were actively involved in from about 1850 in the areas where they operated. For the most comprehensive account of their operations and references to sources of information see Martin Lynn, “Law and Imperial Expansion : The Niger Delta Courts of Equity, c1850-85” (1995) 23:4 *Journal of Imperial and Commonwealth History*; Adewoye, *Judicial System* at 33-38; Omoniyi Adewoye, “Judicial Agreements in Yorubaland 1904-1908” (1971) 12 *Journal of African History* 4 [Adewoye, “Judicial Agreements”]. See also Obaro Ikime, *The Fall of Nigeria* (London : Heinemann, 1977) 22.

new judicial institutions in the Niger Delta and in Lagos and their spread from these two coastal bases inland.

The courts of equity in the Niger Delta were established to mediate in disputes between European and local traders in the coastal communities of the Niger Delta. These courts emerged to regulate trade relations and settle trade disputes between traders of the different nations operating in the area. They were an early example of international law, relying on consensus and collaboration in resolving disputes. According to Adewoye, “the courts sprang up as a matter of necessity to administer some rough form of justice between Africans and European supercargoes trading along the Niger Coast.”<sup>130</sup> He suggests that the origin of the name ‘court of equity’ was probably derived from the English courts of equity indicating the focus of these courts on the requirements of fairness and honesty in trade relations without too much attention to technicalities.<sup>131</sup> He further notes that they initially operated entirely on the basis of consent and co-operation of the various parties involved and had difficulty enforcing their decisions. They were presided over by leaders of the main trading organizations in the area and imposed fines as penalties or trading embargoes on erring parties both of which required the co-operation of other traders to be effective. The courts thus acted as a pressure group on traders. Their influence and institutionalization in the different communities of the Niger Delta depended on their acceptance by local and foreign leaders in the area who were responsible for policy making and monopolized the use of force. The Europeans in particular, needed them to enforce some sort of order in trading activities among themselves as well as between them and the indigenous traders,

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<sup>130</sup> Adewoye, “Judicial System” supra note 125 at 33-34.

<sup>131</sup> Ibid.

ensuring that they were not totally at the mercy of indigenous tribunals and actions.<sup>132</sup> The Courts of Equity were first referred to by European explorer – Dr Baikie - in the context of Bonny in 1854 which indicates that they were in existence before that time.<sup>133</sup> They spread to other parts of the Niger Delta and were subject to the supervision of the Consuls who were the European government representatives in the area.<sup>134</sup>

The Foreign Jurisdiction Acts of 1843 was the legal basis for the exercise of extraterritorial judicial power by the British around the world. They empowered the British Monarch to “make laws and constitute courts for the administration of justice that might be necessary for the peace, order and good government of Her Majesty’s subjects and others within the said present and future settlements.”<sup>135</sup> Thus, even outside Dominions and Crown Colonies, by 1866 the British Crown was exercising jurisdiction over criminal matters as well as over its subjects and others involved or implicated in disputes with them.

In 1872, by virtue of an Order in Council, the Consulate and the Courts of Equity in the Niger Delta were put on a more formal footing. This Order in Council spelt out the powers of the Consul which included re-organization of the Courts of Equity and the setting up of a machinery of administration. Governing councils were established, presided over by the consul and comprising African chiefs and European traders as members. These councils exercised both administrative, as well as legislative and basic judicial functions.<sup>136</sup> Their civil and criminal jurisdiction was limited, greater powers being assigned to the consul to order more severe

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<sup>132</sup> See Alan Burns, *supra* note 71 at 64 and 73, on the lack of ethics in the trade in this period.

<sup>133</sup> Elias, *Legal System* *supra* note 126 at 58

<sup>134</sup> *Ibid.*

<sup>135</sup> The Coast of Africa and Falkland Islands Act 1843; The Foreign Jurisdiction Act 1843.

<sup>136</sup> The European members were in a majority and Adewoye details the constitution of the councils including the requirements for quorum and regular weekly meetings. See Adewoye, *Judicial System* *supra* note 125 at 39.

punishments.<sup>137</sup> After the Berlin Conference in 1885, the British established the Niger Coast Protectorate comprising Opobo, Brass, Bonny, Degema and Calabar among other settlements and several more consular courts were established in these locations.

In order to increase their influence over trading rules and practices, the various European traders grouped together and sought the support of their home governments. This resulted in the appointment of representatives such as consuls and commissioners by some countries (as seen above). Another strategy employed by the traders was to form cartels as a means of monopolizing the trade and excluding other European merchants and nations. This was successfully utilized by George Goldie Taubman in 1879 when he amalgamated the four main British firms operating in the Niger area into one large company called the United Africa Company. The UAC was able to influence and manipulate local rulers who controlled the supply of goods in the area, acting initially with the military support of the British consuls in the area. In 1882 this company was incorporated as the National African Company and persuaded or intimidated some local rulers in communities in the Upper Niger area to sign treaties granting it monopolistic trading powers. It also convened courts of its own, established a fleet of gunboats as a police force and levied customs duties on other European traders seeking to operate in the exclusive trading zones it had created for itself.<sup>138</sup> The position of the National African Company was further strengthened when it received a Royal Charter from the British Crown in 1886, a year after the Berlin Conference at which European nations partitioned Africa or agreed on exclusive areas of influence within the continent. The name of the company was changed to the

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<sup>137</sup> Ibid.

<sup>138</sup> Some communities, like Onitsha, that opposed this attempted monopoly of trade by the company were attacked by British naval and military contingents. The Saro traders operating in the area were also squeezed out of the market by the price fixing and other unfair trade practices of the company.

Royal Niger Company and the Charter gave it full powers of government in its areas of operation.<sup>139</sup> The development of the Courts of Equity, the Consular Courts, and the courts established by the Royal Niger Company in the second half of the 19<sup>th</sup> century thus represented a gradual shift in the balance of power from local elites to European traders and administrators (particularly the British) in policing trade relations in the Niger Delta area.<sup>140</sup>

In Lagos, as in the Niger Delta, the presence and interaction of different communities also gave rise to the need for new judicial institutions to adjudicate especially but not exclusively in matters of trade. Initially local forums for the administration of justice such as the courts of the local chiefs and King were dominant but once Europeans and African émigrés established an increasingly permanent presence in the area and credit transactions became widespread, things began to change. The establishment of the British Naval Squadron at Fernando Po in 1827 and the appointment of Consuls thereafter, was thus a significant indicator of changing relations, although the area in which they traded was far too large to guarantee them influence without the support of indigenous groups and leaders. The African émigrés established their own court at Olowogbowo in Lagos to deal with disputes arising in their communities, especially issues of debt.<sup>141</sup> As earlier mentioned, the British consul was called upon to settle disputes by various groups seeking appropriate or acceptable forums.<sup>142</sup> These were the precursors of the colonial courts and Adewoye notes that the desire for accepted and effective forums for dispute resolution

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<sup>139</sup> A summary of the provisions of the Charter and the Regulations made by the Company relating to the Administration of Justice is given by Elias, *Legal System*, supra note 125 at 87-89.

<sup>140</sup> This was in spite of the effective resistance of the local traders and chiefs who ignored or flouted the decisions of the courts periodically until inter group rivalry weakened them (as it also did the Europeans) or military force was used against them. See Adewoye, *Judicial System*, supra note 125 at 35, and Elias, *ibid* at 65-66. The latter gives the example of the German bombardment which affected British interests and the refusal of the German traders and Commissioner to subject themselves to the jurisdiction of a Court of Equity.

<sup>141</sup> Adewoye, *Judicial System*, supra note 125 at 46.

<sup>142</sup> See Alan Burns, supra note 71 at 132 and 141.



to promote administration of justice especially debt recovery and protection of property was one of the reasons advanced by the British Consul in 1860 in urging British occupation of Lagos.<sup>143</sup>

In the first quarter of 1862, the colonial government established the first formal courts in the colony of Lagos to adjudicate in disputes between British subjects and between British subjects and natives. Between 1861 and 1874 (when major administrative re-organization removed Lagos from the Sierra Leone Colony and merged it with the Gold Coast Colony) 7 main courts were constituted:

- The Supreme Court
- The Petty Debt Court
- The Slave Commission Court
- The Court of Civil and Criminal Justice
- The Court of Requests
- The Divorce Courts
- The Vice Admiralty Court

In the first twenty years of their existence, many of the courts were short lived; subject to constant renaming and reconstitution; were convened irregularly in improvised quarters and were staffed by whatever personnel were available including merchants, surgeons and military personnel. According to Adewoye, only three qualified barristers or solicitors sat on the bench in Lagos between 1862 and 1905 and the first fully qualified legal practitioner in Lagos started practicing in 1880.<sup>144</sup>

The colonial court system in Lagos underwent multiple and rapid changes between 1862 and 1876 when Lagos was administratively separated from Sierra Leone and merged with the Gold Coast Colony. A new Supreme Court Ordinance made extensive changes to judicial

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<sup>143</sup> Adewoye, *supra* note 125 at 47; see also Alan Burns, *ibid* at 131.

<sup>144</sup> Adewoye, *ibid* at 52;

administration in the area.<sup>145</sup> This Ordinance and the Criminal Procedure Ordinance which accompanied it laid the foundations for the modern legal system in the colony. It provided, inter alia, that the English common law, the doctrines of equity and the statutes of general application that were in force in England on July 24th 1874 should be in force within the jurisdiction of the Supreme Court. Prior to this, as Adewoye has remarked, the judicial system was based on improvisation rather than clear rules and procedures emanating from the English Legal System. The courts were staffed by available officials with a variety of backgrounds, and advocates who appeared before the courts were “self taught attorneys” up until 1880.<sup>146</sup> In spite of this lack of trained legal personnel and the concentration of power in colonial executive offices in practice, the Lagos colony was the first place where a fairly coherent modern formal court structure and regulations for the operation of the courts were put in place. The indigenous system of administration of justice was also recognized and some attempt was made to deal with the relationship between it and the new system. All the Supreme Court Ordinances since 1863 contained a provision that:

Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the said Colony and Territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature existing at the commencement of this Ordinance, or which may afterwards come into operation.

This provision is fairly typical for most of the West African territories administered by the British.

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<sup>145</sup> Supreme Court Ordinance No. 4 of 1876, Laws of the Colony of Southern Nigeria, 1908, I, pp.14-145

<sup>146</sup> Adewoye, *Legal Profession*, supra note 3 at 17.

## 2.8 Indirect Rule and the Administration of Justice beyond the Coastal Areas

Having established a foothold in Lagos in 1861, the British were able to interfere much more decisively in the local politics of Yorubaland, carrying out military expeditions against kingdoms further inland such as the Ijebu and in the process issuing decisive threats of military action against others. In West Africa, stopping the slave trade as well as securing the well being of its citizens were the primary reasons advanced for the extension of British jurisdiction over the peoples of the area. A series of treaties were thus purportedly signed between British government representatives and local rulers in Yorubaland and the Niger Delta between 1830 and 1900 placing these areas under British protection.<sup>147</sup>

In addition, a series of judicial agreements were entered into by rulers in Yorubaland by virtue of which the jurisdiction of the Supreme Court was extended to these areas. The Saro and Brazilian émigrés who resettled mainly in Lagos and Abeokuta established their own courts in the 1850s.<sup>148</sup> At first, the existing systems of administration of justice in areas outside Lagos were interfered with minimally as the colonial government lacked the personnel to supervise such a wide area. In each town, the administration of justice was initially left to the headman (Baale) or the Chief with appeals being heard by the paramount Chief in the area.<sup>149</sup> Local litigants, however, could and did apply to have their cases transferred to the British Resident or District Officers or appealed to them where they had no confidence in the traditional

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<sup>147</sup> A large number of these treaties or terms in them were refuted by these local rulers. See Adewoye, “Judicial Agreements”, supra note 129.

<sup>148</sup> The Petty Debt Court at Olowogbowo was earlier referred to. Those who later settled in the Christian Mission of Abeokuta area also established a Court of Redemption to redeem slaves, and a Divorce Court in 1881 and 1886 respectively. See Ayandele, *The Missionary Impact*, supra note 116 at 47

<sup>149</sup> See Annual Report of the Lagos Colony 1899 and 1900 - 1901.

rulers' court or were dissatisfied with the judgment they had received.<sup>150</sup> There are extensive records of such requests for transfer made especially in the Province of Oyo<sup>151</sup> which had a large number of cases coming before the local courts.

Between 1900 and 1914, by virtue of a series of judicial agreements, the jurisdiction of the Supreme Court was gradually extended to the whole of the Southern Protectorate of Nigeria. The Supreme Court was given exclusive jurisdiction over homicide, general criminal and civil jurisdiction over non-natives, and general jurisdiction where one of the parties was a non-native. By virtue of Native Courts Proclamations in 1901, 1906 and 1907, Native Courts were established in the Southern Protectorate, comprising of local officials with the British Resident officer or his local representative sitting as an advisor or assessor.<sup>152</sup> These native courts were authorized to hear cases between natives as well as cases between natives and non-native where the non-native consented in writing. Land held under native tenure and within their locality was under their jurisdiction. The Native Courts were supervised by a Native Council in some areas which was comprised of members appointed by the District Officer and was presided over by him. This court could invite native assessors to its aid. The Native Councils also carried out legislative and administrative functions and were therefore an important mechanism in the system of Indirect Rule. There was still much improvisation in this period and it was not until the amalgamation of Southern and Northern Nigeria in 1914 that the native courts were put on clearer and firmer footing.

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<sup>150</sup> Ibid.

<sup>151</sup> See Oyo Provincial Papers – Native Court Cases 25 in COMCOL1; See also Ogbomosho Native Court Records 1928-42.

<sup>152</sup> See WALC, “Minutes of Evidence” at 306.

Nigeria was created with the amalgamation of the Northern and Southern Protectorates in 1914. At that time a major judicial reorganization was carried out. There were now 3 classes of courts – a Supreme Court, Provincial Courts and Native Courts. Lawyers did not appear before Provincial and Native courts and the Provincial courts continued to be closely linked to and supervised by Provincial administrators. Under the Native Courts Ordinance 1914 four grades of native courts were created (A, B, C and D). These became the official local courts at the District and Provincial levels with their jurisdiction spelt out in terms of punishments and the monetary value of matters coming before them and remedies they could give.<sup>153</sup> Grade A courts had full civil and criminal jurisdiction but were not allowed to administer the death penalty without the consent of the Governor. They were usually staffed by the Paramount or Head Chief sitting with his principal officers. Grade B, C and D courts had decreasing jurisdiction in terms of the monetary value of cases they could hear and the punishments they could award. They were staffed by petty chiefs sitting together. In this way, the traditional authorities were incorporated into what was essentially a new colonial system of courts.

In judicial reforms instituted in 1933, the Divisional or Provincial level courts were abolished and appeals from the Native Courts went to the High Court and Supreme Courts. The majority of disputes in most communities were still settled by family elders and local headmen as these were the most accessible and comprehensible forums to residents and it was often considered taboo to take family disputes to outsiders until the capacity of the family and local community elders to resolve them was completely exhausted. After the 1933 reorganizations, issues of cost and legal representation in the state courts became increasingly significant.

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<sup>153</sup> For example, even the Grade A native courts could not order the death penalty without the confirmation of the Governor.

## **2.9 Conclusion**

As we have seen, the process of introduction of new institutions of dispute resolution was a gradual one, initially targeted at specific non-indigenous communities and restricted to specific kinds of disputes – mainly trade disputes. As part of the process of the changing balance of power, new administrative offices and institutions were introduced which exercised increasing legislative and judicial powers. Separation of powers was not an aspiration to which the early colonial administration pretended. The colonial government lacked the personnel to staff institutions and prior to the second decade of the 20<sup>th</sup> century suffered heavy losses of personnel due to tropical diseases, especially malaria. Much reliance was thus placed on the strategic use and threat of force and on incentives to and alliances with local rulers. Much reliance was also placed on returnee slaves, expatriate Africans and the missionaries to conduct reconnaissance and trade expeditions in the area in the mid and late 19<sup>th</sup> century. The European traders operated largely off the coast venturing to establish coastal bases in Lagos and some parts of the Niger Delta only with the shift from slave trade to “legitimate” trade in agricultural produce especially palm oil. The need for new institutions and greater influence on governance came with increasing land settlement and the attempt to reach direct agricultural producers and monopolize the trade, restricting the activities of indigenous middlemen. This is graphically depicted in the formation and activities of the Royal Niger Company.

As demonstrated in this section, the establishment of these new judicial institutions was driven by the internal needs of new settler/immigrant communities as well as the need for regulation of intra group relations and the reluctance of the new settlers to subject themselves to the jurisdiction of local tribunals. The cultural changes that therefore undergirded the

introduction of these new institutions is inextricably linked to the economic system and changes that were taking place in this period and into which African States had been drawn right from the 16<sup>th</sup> century slave trade. “Legal” culture tied to political power and to changing social relationships was an essential part of these changes.

The encouragement of “legitimate” trade in commodities such as palm oil, cotton and cocoa in the earlier years of the 19<sup>th</sup> century, and the influx of “returnees” who had been taken as slaves into Lagos and South Western Nigeria after 1851, gave rise to increased pressure on land resources and a rise in its value. Larger areas for harvesting and cultivation of export crops were demarcated and established and the returnees as well as European and Brazilian traders and the colonial administrators needed land for homes and to conduct their businesses. The King of Lagos and some Idejo chiefs, as well as Abeokuta chiefs<sup>154</sup> were already making grants of land to these groups of people between 1851 and 1861. The indigenous system of making grants of land or recording land transactions through reliance on the memory of witnesses and persons present at handing over ceremonies, also came under increasing pressure as witnesses could and were being manipulated and their reliability was called into question by the new settler interest groups. These groups introduced their own procedures and infused new understandings of land use and holding into the system in an attempt to secure their land grants. The issue of what kinds of interests were being transferred within the context of a changing economy therefore gave rise to some conflict in a process of interpretation of the interface between traditional understandings of land use and tenure and new trends towards absolute, exclusive individual ownership.

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<sup>154</sup> Who made grants of land to the early missionaries there.

The new native court system (which came into being initially alongside existing indigenous courts) soon subverted their operations and acquired a higher status in the hierarchy of judicial institutions in the area.<sup>155</sup> The development of the native courts and the introduction of the Supreme Court and other courts modeled along European lines was the corollary of indirect rule in the sphere of administration of justice.

As earlier noted, the Kings of Lagos and the Idejo chiefs co-operated in land allocations in the 18<sup>th</sup> and 19<sup>th</sup> centuries, and because there was relatively little pressure on land friction was minimized. The power to grant or allocate land had remained fairly stable for at least a century. The Treaty of Cession in 1861, and the passing of various Public Land Ordinances by the British thereafter, threatened to shift the balance of power in a very significant way and was resisted strongly. The nature of that resistance and the political forces that lined up on either side is an important part of the story of the development of land law and the constitution in modern Nigeria.

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<sup>155</sup> As seen in the frequent transfers of cases to the Resident's or District Officer's courts. See page 64 above.



## **Chapter 3: Land Law and Social Change in Southern Nigeria 1861-1961.**

### **3.1 Introduction**

In the previous chapter we discussed some of the major events and processes which led to constitutional and legal changes in Lagos and Southern Nigeria in the pre-colonial period up to the colonization of the area in the second half of the nineteenth century. These included the massive displacement of peoples in Southern Nigeria and neighbouring areas in the 19<sup>th</sup> century as a result of the slave trade and civil wars; the introduction and expansion of export trade in palm oil and other agricultural produce leading to the establishment of new systems of credit and exchange; the introduction of new systems of dispute resolution and the eventual establishment of British military and political hegemony in the area in an attempt to exert greater control over trading relations. We also saw how the resettlement of the returnee ex-slaves in Nigeria and different parts of West Africa played a strategic role in promoting these changes. Given the changes in systems of production of agricultural produce for export in this period and the need of the new settlers for land for shelter and places of business, it is not surprising that some of the major disputes that occurred and the earliest legislative measures taken by the colonial government centered round land and the authority to use and allocate it.

This chapter examines how political changes affected systems of allocation of land in the colonial period, how changing ideas and practices of land use and tenure generated conflict among the various inhabitants of the area, and how those conflicts were resolved - leading in turn to profound economic and political changes in the area. In the first section, we examine the attempts by the new colonial government to ascertain the existing rules relating to land and to make new rules that adapted, expanded on or built on them. This was done mainly by

establishing Commissions of Inquiry into the nature of native land tenure in various areas and by consulting “traditional leaders” and knowledgeable persons or scholars from the various communities.

### **3.2 Colonial Legislation and Commissions of Inquiry.**

As noted in Chapter 1 the foundation for conflicting ideas and some of the major disputes over land in the second half of the nineteenth century was laid by the arrival of immigrant groups with some ideas about land tenure which were different from the natives’, and the deliberate or inadvertent collusion of the King of Lagos and Chiefs in the area in fostering or confirming these ideas by allocating land to immigrants in exchange for money and issuing them documentary evidence of these transactions in a European style format. This practice was continued by the colonial government and reinforced with the passing of various ordinances on land in the early years of colonial rule. The full implications of these transactions often only became evident several years after the transactions had taken place when issues of inheritance or power to dispose of the land arose.

In 1863, about a year and a half after the colony of Lagos was officially established, the colonial government in Lagos passed Ordinance No. 9 which established a Commission to inquire into title to land in the Settlement of Lagos and to grant Certificates of Title to those with valid claims within the period of one year.<sup>156</sup> It also gave power to the Commission to establish a register or record of titles. This was an early attempt to introduce greater certainty into an

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<sup>156</sup> TO Elias, *Nigerian Land Law and Custom* (London : Routledge and Kegan Paul, 1951) at 316. [Elias, *Land Law and Custom*]

increasingly chaotic system of land holding and transfers which resulted from changing patterns of assertion of power to grant land by indigenous groups as well as presumptions of individual and absolute ownership by émigré groups. Ordinance No. 10 of 1864 and Ordinance No. 9 of 1865 extended the life and modus operandi of this Commission. Ordinance No. 9 of 1869 contained similar but far more drastic measures by which the Crown sought to establish jurisdiction over land in Lagos and gave rise to considerable controversy leading to significant reforms 8 years later. This latter ordinance provided inter alia for persons in effective possession of lands for a period of 3 or more years prior to the passing of the Ordinance (without paying rent or acknowledging the title of any overlord) to apply to the Administrator of the colony for a grant of the property in question.<sup>157</sup> It also provided for serving of notice to occupiers of land to apply for certificates of title within a specified period or risk losing their land to the Crown; and for the Crown to take control of “unoccupied” lands. The Ikoyi Lands Ordinance of 1908<sup>158</sup> led to the creation of the Ikoyi Crown Lands<sup>159</sup> and provided, like so many colonial land enactments seeking to acquire land or to increase certainty in land transactions, that all persons claiming land in a specified area should verify their title within a specific period or forfeit the lands to the Crown or government.<sup>160</sup> In 1883, the Registration Ordinance<sup>161</sup> was passed which established a Lands Registry in Lagos and required all future Crown Grants to be registered within thirty days. These early ordinances therefore resulted in the confirmation or issuing of more Crown Grants<sup>162</sup>

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<sup>157</sup> Ibid at 317.

<sup>158</sup> Ordinance No. 16 of 1908. Ikoyi is an area of Lagos in which the colonial government established a Government Reserved Area (GRA) for the exclusive residence of its personnel and as a result, it remains one of the most expensive areas of Lagos today.

<sup>159</sup> Ibid. Section 7

<sup>160</sup> Ibid. Section 2.

<sup>161</sup> Ordinance No. 8 of 1883 as amended by Ordinance No. 12 of 1883 and Ordinance No. 2 of 1894

<sup>162</sup> It is estimated that over 4000 Crown Grants were issued in Lagos between 1863 and 1914. See Elias, *Land Law and Custom*, supra note 156 at 318.

leading one to conclude that the colonial government at this time intended to legitimize this process and form of land allocation.

The question of the precise impact of regime change in the 1861 cession of the territory of Lagos to the British Crown constantly arose as local chiefs and families appeared to have a different understanding from the colonial authorities. Immigrant communities, especially the Saro and Brazilian émigrés who were seeking security of tenure over land they had acquired, and who had conceptions of land holding different from the indigenous local residents, also exerted tremendous influence on early colonial practices and legislation. Several other groups such as slaves, domestics and persons who owed some allegiance to chiefs or wealthy members of the elite, also seized the opportunity of regime change in 1861 to secure land rights from which they might otherwise have been precluded.<sup>163</sup> Various disputes relating to land which arose in the late 19<sup>th</sup> century soon indicated the problems that could arise from these differing conceptions of rights to land and gave rise to protests by traditional authorities and other interest groups in and outside Lagos. Concerns about rapid changes in land tenure and the growing significance of conceptions of individual and absolute rights, as well as rights claimed by colonial government officials, were widespread across Southern Nigeria and West Africa and resulted in several petitions to the government as well as organized resistance.<sup>164</sup>

In response, the colonial government was compelled to set up Commissions of Inquiry to address these concerns and grievances. One of the major commissions of inquiry established in this period relevant to Southern Nigeria was The West African Lands Committee (WALC)<sup>165</sup>

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<sup>163</sup> This is illustrated in the case of *Ajose v Efunde* discussed below at page 79.

<sup>164</sup> See J Casely-Hayford, *The Truth About the West African Land Question* (London : Routledge 1971).

<sup>165</sup> See Committee on the Tenure of Land in West African Colonies and Protectorates, Minutes of Evidence (London : Colonial Office, African (West) No. 1047, 1916) [WALC, “Minutes of Evidence”] and Committee on the Tenure

established in 1912 which sat for a period of 3 years and received memos and extensive evidence from a large number of traditional leaders of communities, lawyers, interest groups, scholars and administrative officers.<sup>166</sup> The terms of reference of the Committee were “to consider the laws in force in the West African Colonies and Protectorates (other than Northern Nigeria) regulating the conditions under which rights over land or the produce thereof may be transferred, and to report whether any, and if so, what, amendment of the laws is required, either on the lines of the Northern Nigeria Land Proclamation or otherwise.”<sup>167</sup> It had 8 members and was chaired by Sir Kenelm E. Digby. Its work was interrupted by the outbreak of the First World War as a result of which the full committee ceased to meet and the work was completed by a sub-committee. The draft report was submitted but remained a confidential document which was never published by the government. The Committee sat 52 times and took oral evidence from 79 witnesses and written evidence from numerous other individuals and groups. Its report was one of the most comprehensive documents on land in West Africa in that period, expressing the colonial government’s perspective on (a) the basis and development of British jurisdiction over land in the four colonies of Gambia, Sierra Leone, Gold Coast and Southern Nigeria, (b) clashing ideas of native and individual tenure, (c) the state and impact of existing legislation and (d) how to strengthen native tenure.

In the course of taking of evidence by the Commission interesting issues were raised and discussed regarding the impact of new legal forms and ideas on the pre-colonial native system

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of Land in West African Colonies and Protectorates, Draft Report (London : Colonial Office, African (West) No. 1046, 1917) [WALC, “Draft Report”].

<sup>166</sup> Also pertinent are reports commissioned by the colonial government from colonial administrators and judges. These include EA Speed, Report on Land Tenure in Ibadan (1916); the Ward Price Report on Land Tenure in the Yoruba Provinces (1933) and the Tew Report 1939 (Sir Mervyn Tew was appointed to carry out an inquiry into title to land in Lagos and Ebute Metta in November 1938).

<sup>167</sup> WALC “Draft Report” at viii.

and how to manage this interaction. They are reflected in the Minutes of Evidence of the Commission.

The two issues regarding the impact of the Treaty of Cession on land tenure in Lagos and the nature and preservation of pre-existing native law and custom came up for discussion in the WALC proceedings. Some witnesses and memos contended that the introduction of English law and ideas had interfered with native tenure and destroyed it especially in terms of legitimizing and authorizing the buying and selling of land. The discussion in the extract below is instructive.

11,040. The Government has not introduced English law; it is the educated native who has introduced these ideas? - We have confirmed the buying and selling of land.

(Chairman.) We have introduced English law by the Ordinances.

(Mr Wedgwood.) But we have not introduced English law to supplant native law, but the natives themselves prefer individual tenure based on English law rather than on native custom.

(Witness.) I should rather think that the introduction of European law has led to the destruction of native land tenure in those places where the buying and selling of land takes place.

11,041. If we had not introduced it, it would not have taken effect? - It would not have taken effect because it would not have been legalized. This school tries to make out that we are now interfering with the development of the native land law.

11,042. All that we are trying to do is to stop the harm that we have already done, according to your view? - Yes.

(Mr Wedgewood) Have you any idea of how we could do it? Is it a question of repealing any of the Ordinances that we have already passed?

11,043. (Chairman to the witness) Perhaps you had better continue reading your Memorandum, and we can deal with that question later? – The non-interference with native land tenure should have come at the commencement. What we are now interfering with is this introduced custom. I would stop this by giving every so called landowner the title of Bale, or head of a House, and then make him conform once more to the native law. Each Bale should be able to dispose of his land as the head of a House, and to prevent the impoverishment of his House he should be held responsible for the welfare of every member of his House. If this is not done, the head of a House no longer

can be held responsible for the welfare of every member of his House and want and misery and class-hatred will follow.<sup>168</sup>

Colonial officers and administrators were well aware of the implications of ongoing processes of legal change and the colonial creation of new customs which later scholars referred to and termed the creation or invention of customary law.<sup>169</sup>

The Commission recommended the preservation of native tenure of land with its prohibition on sale and mortgage in the bulk of the West African dependencies, especially with regard to land for “habitation and cultivation.”<sup>170</sup> They, however, acknowledged that the situation in urban areas like Lagos and Calabar had changed substantially and recommended significant limitations on transfers of land to non-natives as well as extensive regulation of transfers for the purposes of mining, logging and the cultivation of export crops:

Whilst this is the main principle underlying our Report, we feel that it must be recognized that conditions in some of the urban districts within the dependencies of the West Coast have become so changed by contact with Europeans and Europeanized natives, that customary tenure has been to a large extent superseded by a form with striking resemblances to English land tenure, a form which we have called individual tenure. We consider that it is no longer possible to revert to the old system in such areas, and we therefore propose that there should be power in each dependency to declare any district subject to these conditions to be an *exempted district* when facilities would be given for the creation within it of a land tenure on English lines.<sup>171</sup>

As earlier noted,<sup>172</sup> the system of making Crown Grants of land created considerable confusion in Lagos in the mid to late nineteenth century. Akitoye and Docemo had issued several “Crown Grants” or grants endorsed by the King of Lagos in the 1850s and the practice

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<sup>168</sup> WALC, “Minutes of Evidence” supra note 165 at 394-395.

<sup>169</sup> See discussion on page 23 above.

<sup>170</sup> Ibid at 105

<sup>171</sup> Ibid.

<sup>172</sup> See page 71 above.

was continued by the colonial governors, particularly Glover who was governor of Lagos between 1863 and 1872. The grantees asserted or believed that obtaining such a grant amounted to obtaining individual title or the equivalent of the English estate of a “fee simple absolute in possession”. Many indigenous chiefs and families were of the view that grants of land entitled the grantees and their families to *use* of the land but not to alienate or sell it without the permission of the original owners. By the time the WALC was sitting it was too late to reverse the effects of many of the changes that had been put in place through practice and legislation.<sup>173</sup> But the problem of differing interpretations would not just go away and gave rise to protracted litigation over several years.<sup>174</sup> Eventually legislation was passed to clarify the legal impact of Crown Grants in Lagos. However, it took almost ninety years after the commencement of these practices, and the passing of the early colonial Land Ordinances which reinforced them, for these official corrective measures to be taken. In 1947, four major ordinances recognizing customary tenure and making the Crown Grants subject to it were passed belatedly.<sup>175</sup>

Related to the issue of the legitimacy and interpretation of Crown Grants was the issue of the effect of the Treaty of Cession 1861 as it was the basis on which the Crown came to exercise any power over land in the colony of Lagos. With much more dealing in land as a result of the influx of émigrés from Sierra Leone and the establishment of a system of trade by credit, pressure on land increased significantly, giving rise to issues that had to be resolved. The new English style courts in the colony were one site of the resolution of such disputes, used mainly by

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<sup>173</sup> As observed by the Commissioners, see p76 above.

<sup>174</sup> Notable among these cases were the famous disputes between the Oshodi family and former protégés of Oshodi (Arotas) who derived their title originally from him, over Epetedo lands allocated to them by Governor Glover.

<sup>175</sup> These were: The Crown Grants (Township of Lagos) Ordinance No. 18 of 1947; The Arotas (Crown Grants) Ordinance No. 19 of 1947; The Epetedo Lands Ordinance No. 20 of 1947; and The Glover Settlement Ordinance No. 21 of 1947.



African immigrants and European traders and settlers and it is interesting to see how they dealt with the complex issues arising in this period of transition. The next section examines and reviews the assertion of particular interests in land by major interest groups in Southern Nigeria through courts, how those disputes were resolved and how native customs and law as reported by assessors were re-affirmed, adapted and changed.

### **3.3 A Review of Selected Landmark Land Cases in the early 20<sup>th</sup> Century.**

Several of the prominent land disputes in Lagos in the first four decades of colonization related to establishing what the existing system of land tenure and interests in land were and what changes had taken place as a result of major constitutional developments, in particular the treaties establishing the Colony and Protectorates in Southern Nigeria. I now review of some of the major cases which first raised fundamental issues regarding rights to use and allocate land and which reflect the changes in the administration of land resources which occurred in the colonial period. In the new colonial courts which heard these cases, two main and related questions arose for the consideration of judges:

- i) What was the existing native law and custom relating to land in Lagos and environs? And
- ii) What was the effect of the Treaty of Cession on existing land law?

One of the most famous cases that raised the issue of the nature of land tenure and authority over or control of land in the early colonial period was the case of *Amodu Tijani v Secretary, Southern Provinces*<sup>176</sup> This case, which commenced in the second decade of the 20<sup>th</sup> century, was made famous both by the facts and the extensive issues raised, as well as by the fact

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<sup>176</sup> *Amodu Tijani v. Secretary, Southern Provinces*, 1921 3 NLR 24; [1921] 2 AC 399. [*Tijani* cited to NLR]

that it went all the way to the highest international court recognized at the time by all parties involved – the Privy Council. It came to symbolize the organized resistance of the indigenous Lagos landowning chiefs and families to the introduction of a colonial system which did not recognize their rights and somewhat arbitrarily overrode them. However, some of the issues raised in the case had been raised in prior and parallel decisions in the early colonial period and it is important and interesting to review and comment on some of these leading decisions.

One of the earliest, oft cited although unreported, cases on the nature of land tenure in Lagos was that of *Ajose v The Queen's Advocate, Efunde, & ors*<sup>177</sup> This was a dispute between descendants of two families who obtained their rights over the parcel of land in dispute through grants made by the local chief in the area – the Ashogbon. The plaintiff claimed to be entitled to the land by virtue of inheritance and challenged the subsequent issuing of a Crown Grant for the land to the defendant's predecessor in title – Ogunbiyi - in 1868. The defendant claimed also to be entitled to the land by virtue of a subsequent grant made by the local chief to Ogunbiyi – her deceased brother - who in turn issued a deed of gift to her. Both parties derived their title from “slaves”<sup>178</sup> to whom the chief – Ashogbon - had indeed made grants of land. The plaintiffs claim raised the issue of the capacity of an enslaved relative to pass on title to land under native law and custom. The court thus had to decide the extent of the chief's authority to grant, take back and re-allocate land under native law and custom; as well as the effect of Crown Grants and the Treaty of Cession 1861 on those rights.

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<sup>177</sup> Judgement was given in this case on 14<sup>th</sup> July 1892. It is reproduced substantially in A Berriedale Keith & Smalman Smith, “Tribal Ownership of Land” (1902) 1:4 Journal of the Royal African Society 455 at 457-461. <http://www.jstor.org/stable/714875>

<sup>178</sup> Tangentially, the case is an interesting commentary on local social relations translated as slavery. The evidence did show that although the defendant's brother had also been “acquired” by the local chief – Ashogbon – he had been redeemed shortly after by his parents thus rendering his status different from the plaintiff's predecessor in title, even though he opted to remain in the service of the Ashogbon.

Extensive evidence was taken from and reference made to the White Cap Chiefs of Lagos and various persons deemed knowledgeable on the subject of native law and custom relating to land in Lagos. This testimony formed part of the growing body of facts on this subject of which judicial notice came to be taken in future years. In the decision of the court, Chief Justice Smalman Smith affirmed that:

The absolute ownership of territory, has never, so far as my experience teaches me, been acknowledged in this Yoruba land as inherent in the sovereignty of the kings of the country, but there is undoubtedly a national proprietary right vested in the kings and his chiefs or council, as representing the community who elect and appoint them originally, and who conjointly may exercise the right of alienation. ... The white capped chiefs who are charged by the King and the community with the disposal of land have each allotted to them a portion of territory within which they might exercise their powers.<sup>179</sup>

He also quoted Chief Faro – a white capped chief who gave evidence at the trial - as saying:

The white capped chiefs have the power to dispose of land. They cannot sell land, no chief could sell land. If land is given to a man and he builds on it a house, he could not be turned out if he did not do anything wrong (that is to say, for example, if he took the wife of a chief or tried to poison the chief who gave him the land). If he died and left no heir, but had slaves living on the land, the slaves could not have authority over the land. The chiefs would give someone else authority over the land and the slaves, and the land would descend in the same way as before, subject only to good conduct. The slaves who live on the land, as long as they live in the house, may live there, but they have no rights as against their master or his family, and might be turned out if they misbehaved.<sup>180</sup>

Under native law and custom grantees of land thus had the right to beneficial use and to pass the land on to their heirs. Where they had no heirs, the chief and his family had a right of reversion. Slaves given land could not pass title to others. The Ashogbon had exercised his right of

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<sup>179</sup> Berriedale Keith & Smalman Smith, *supra* note 177 at 458.

<sup>180</sup> *Ibid.*

reversion in taking back the land on Faji's death and granting it to Ogunbiyi. But did Ogunbiyi have the right to obtain a Crown Grant on the Land and what was the effect of the Crown Grant and the Treaty of Cession?

The court found that on the evidence, the Ashogbon knew of and acquiesced in the issuing of the Crown Grants and so could not object to them. On the all important question of the impact of the Treaty of Cession, the court held that the rights of sovereignty over the territory of the Kings and Chiefs of Lagos were ceded by the Treaty of Cession 1861 to the Queen of England. Reversionary rights to land were thus vested in the Queen not the chiefs and after the abolition of slavery, the defendant's predecessor in title had every right to seek a Crown Grant and "vested rights" as occupier of the land. Ogunbiyi and other legitimate occupiers of land like him had acquired "vested rights" as of 1861 and could not be divested of their rights "by the shadowy claims of the Ashogbon, or white capped chiefs of Lagos, whose functions and powers as regards public lands ceased to exist in 1861".<sup>181</sup>

Whilst propounding this theory of vested rights, the courts still recognized the importance of investigating the legitimacy of the claims of occupiers through evidence on native law and custom prior to 1861. However, the justices seem to have been suggesting clearly that, had Faji or Ogunbiyi been acquired as slaves after 1861, since slavery was abolished and an illegal activity, they could have acquired vested rights in the land under the new constitutional arrangements. However, this issue did not arise directly in the case.

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<sup>181</sup> Ibid at 460.

More direct challenges to the constitutional changes that occurred in this period arose in the case of *Oduntan Onisiwo v AG of Southern Provinces*,<sup>182</sup> and *AG of Southern Nigeria v. John Holt Ltd.*<sup>183</sup> In the former case, the Plaintiff – Onisiwo - was a white capped chief and made a claim for a declaration of title to lands in the area of Abekun Lighthouse in Lagos. The Crown claimed that the said lands had been ceded by Docemo under the Treaty of Cession 1861. Winkfield – Acting CJ gave judgment in favour of the Plaintiff. The lower court found that the AG had not satisfied the court that the land was included in the Cession and is Crown land. It found, on the evidence, that the Onisiwo family are the owners of the land.

On appeal, the Attorney General sought to argue that the Treaty of Cession was applicable to the land in question and was made between Queen Victoria and King Docemo **with the advice and consent of his council**. He claimed that the Onisiwo family had not proved that the area in dispute was outside the bounds of the colony. He also sought to challenge the jurisdiction of the court on the grounds that the Treaty of Cession was an international treaty which Municipal courts have no jurisdiction to interpret. In the alternative, the defendant also claimed that the plaintiff had not adduced sufficient evidence to support the claim that Kupodo – his ancestor and family - settled the area prior to the arrival of emigrants from Benin, and that there was insufficient evidence to show that Kupodo was a white capped chief or that Onisiwo is his descendant, thus directly challenging the very basis of Onisiwo's case.

The full court including Winkfield, Osborne CJ and Stoker dismissed the appeal. It assumed jurisdiction on the grounds that the extent of land included in the Treaty of Cession was a matter of fact to be proven and not a matter of law. Furthermore, relying on the authority of the

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<sup>182</sup> [1912] 2 NLR 77. The decision of the lower court was rendered in 1908

<sup>183</sup> [1910] 2 NLR 1

English case - Walker v Baird<sup>184</sup> - the court was competent to construe the words of the Treaty. From the evidence taken, the Court found that the strip of land in question was under the control and authority of the Onisiwo as head of the Onisiwo family long before the cession of 1861 and that the Onisiwo were acknowledged as Idejo white capped chiefs in the area. The historical origins of the Onisiwo family were thus not material. Having found that the land was included in the Cession, the material issue before the court was what the effect of the Cession was on the land. In determining this issue, Winkfield J was of the view that government exercise of jurisdiction over a piece of land does not make the land Crown land. Justice Stoker agreed stating that “The Crown since cession had by various acts clearly indicated its recognition of private ownership/control of land in Lagos”. Such acts included the Public Lands Acquisition Ordinances (No. 8 of 1876) which sought to acquire land for public purposes. In this case, the court sought to make a distinction between *the Crown’s exercise of sovereignty and ownership and control of land* (or sovereignty and proprietary interests in land). This was in marked contrast to the decision in Ajoose v Efunde discussed above.

The case of *AG of Southern Nigeria v John Holt Ltd.*<sup>185</sup> went all the way to the Privy Council. John Holt Ltd. – the defendants in the case - had acquired land adjoining the Lagos lagoon from local owners. They then went on to reclaim parts of the lagoon and built a place of business including storage facilities. The government later constructed a road that effectively ran through their place of business and when the company protested, the government sought a declaration from the Court that the land belonged to government by virtue of the Treaty of Cession 1861 and that under this treaty the Crown had absolute rights over the land and the

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<sup>184</sup> [1892] AC 491

<sup>185</sup> [1915] AC 599

foreshore of the lagoon surrounding Lagos island.<sup>186</sup> The government also sought a direction that an easement for the purposes of using the premises as storage was unknown to English law as the defendants' use of the land was not a right assumed or asserted over the land of another since the Crown owned and possessed the land from the start making the defendants trespassers. The defendants' claim and appeal was based on their right to ownership through their predecessors in title. So, once again the relationship between these predecessors in title and the Crown by virtue of the Treaty of Cession 1861 was called into question. The court decided that the Treaty of Cession gave the Crown de jure possession of the foreshore and all reclaimed lands. It was stated that the Cession to the Crown **did not just grant sovereignty and jurisdiction to the Crown but also property in the land**, although the rights of previous occupiers remain unaltered until altered by appropriate Imperial legislation.

Yet these pronouncements on the effects of the Treaty of Cession and the nature of colonial land rights were again somewhat altered in the locus classicus on this point – the case of *Amodu Tijani v. Secretary, Southern Provinces*.<sup>187</sup> The Plaintiff was the head of the Oluwa family and one of the Idejo chiefs of Lagos. The colonial government acquired a substantial part of the Oluwa family land in Apapa on the Lagos mainland, relying on Paragraph 6 of the Public Lands Ordinance 1903.<sup>188</sup> “Paragraph 6 ...says that where lands required for public purposes are the property of a native community, ... The head chief of such community may sell and convey the same for an estate in fee simple, ... the chief may transfer the title of the community.”<sup>189</sup>

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<sup>186</sup> Ibid. at 607

<sup>187</sup> *Tijani*, supra note 176.

<sup>188</sup> Ordinance No. 5 of 1903, Cap. 112 Laws of the Colony and Protectorate of Southern Nigeria

<sup>189</sup> *Tijani*, supra note 176 at 24

Chief Oluwa initially challenged this acquisition on the grounds that the land belonged to his family and the colonial government had no power to order such an acquisition. Later, he claimed compensation as representative of his community. The court was thus called upon once again to examine the effects of the Treaty of Cession on title to land in Lagos. Chief Oluwa argued that King Docemo had no seigneurial rights over the land in Lagos and therefore could not cede what he did not have to the British Crown. Referring to the earlier Onisiwo and John Holt cases, extensive evidence was taken again to ascertain whether the land was owned by the Idejo chiefs of Lagos or by the King. The colonial government argued that following the Benin conquest, the system of landholding changed in the Lagos area with the land being vested in the King of Lagos as representative of the Benin Kings. This argument was strongly resisted by the plaintiffs as being contrary to what had been earlier established in the *Ajose v Efunde*, *Onisiwo* and *John Holt* cases. Furthermore, evidence was introduced and accepted by the lower court from the correspondence of colonial officers and Parliamentary debates in England on the response of colonial officers in 1862 to the protest of the Lagos Chiefs on the giving away of their lands by King Docemo. They were assured that the Treaty did not deprive them of their private property.<sup>190</sup>

*Ajose v Efunde* had suggested that the Cession effected a transfer of lands to the Queen of England who then held the reversionary right to land instead of the chiefs. In the *Onisiwo* case however, it was argued that the Treaty was an Act of State and that sovereignty which was vested in King Docemo had been transferred to the British Crown. This separation of sovereignty from ownership and property in the land was rejected in the *John Holt* case. In the *Tijani* case,

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<sup>190</sup> Claimant's Exhibits 9 and 10, *Ibid* at 26



the Privy Council, commenting on the nature of native title, decided that it was a “usufructuary” right – “a mere qualification of or burden on the radical or final title of the Sovereign where that exists”.<sup>191</sup> The Privy Council went on to hold that the effect of the Treaty of Cession was to vest the radical title to land in the British Sovereign, leaving the usufructuary rights of communities or their rights of beneficial user, intact. They further stated that the issuing of Crown grants as evidence of title did not modify existing substantive rights.

Once the effect of the Cession was decided upon, the issue became one of the basis on which the Chief and his family should be compensated for the acquisition of the land by the Crown. There were two separate but related issues here – how should the compensation be calculated and to whom should it be paid. The Court again decided that the full beneficial ownership rights of private landowners or “a full native title of usufruct” was what was to be paid for and that “The Chief is the only agent through whom the transaction is to take place.”<sup>192</sup> In the precise computation of compensation, the court also decided that the Chief’s right of administrative control, apart from the value of the land should be compensated for. This would cover tribute and administrative fees he might have been receiving from the family/community or grantees of land.

The decisions in these cases seem sometimes contradictory and reflect the process by which the courts were trying to work out the fundamental issue of the effect of the Treaty of Cession 1861, until the pronouncement of the Privy Council in the Amodu Tijani case. The Privy Council based its decision on an interpretation of the Public Lands Ordinance 1903, not questioning the authority of that ordinance and its contents regarding the power of chiefs to sell

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<sup>191</sup> Ibid at 58

<sup>192</sup> Ibid at 63

family land. Yet, as had been shown in the evidence taken in earlier cases such as *Ajose v Efunde*, the chief had no such power under native law and custom of which judicial notice had been taken. It was however, shown during the hearing that this understanding of native title was already changing in practice and the white capped chiefs, including Chief Oluwa himself had been involved in selling or making grants of their family and community lands. These grants were not however contrary to the idea that the chiefs and heads of landholding families were administrators on behalf of the family and community and held the reversionary right to the land.

The Privy Council decided that the Chiefs of West Africa are in the position of trustees on behalf of their communities, but that their rights of administrative control of land are substantial enough to deserve separate compensation out of the total sum paid by Government. This however, does not address the question of the beneficial rights to the land and how King Docemo could have ceded what he did not have to the British Crown. Some scholars have suggested that this was a clear case of pacification of local chiefs in an explosive situation.<sup>193</sup> It should also be observed that the chiefs themselves, in allowing the issue to be re-interpreted in the course of legal proceedings by lawyers to center round compensation, in the final analysis, appear to have abandoned the resolution of the question of the nature of native title.<sup>194</sup>

The Privy Council took the view that all that King Docemo passed on at the time of Cession were *his own sovereign rights and not proprietary interests in the land except his own private rights*. They held however, that the chief was no more than a trustee of the land and

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<sup>193</sup> Especially when the decision is contrasted with the later case of *Re Southern Rhodesia* [1919] AC 211 in which no such compensation was awarded. Quoting Fowler's correspondence with the Governor of Sierra Leone, Adewoye notes that between 1862 and 1872 "Distrust of the colonial regime was very much in evidence". Adewoye "Judicial System" supra note 125 at 47. See also Glover's dispatches on the situation in Lagos quoted in Adewoye.

<sup>194</sup> One may also argue that they had no choice as those were the only terms on which their case would be heard in the new legal and court system.

awarded him compensation on the basis of absolute ownership. Although in the course of the case the main issues were modified and expressed in terms of the claim for compensation by the Plaintiffs, this has been justified by subsequent commentators in terms of his inability to invoke strict native law and custom when he had been actively violating it for years by selling land.

### **3.4 Colonial Common Law: Expediency, Coherence Or Confusion?**

A prominent Nigerian legal scholar and jurist – Taslim Olawale Elias - argues that even under strict native law and custom, land could be given out to strangers as long as the family consents, and he concludes that at the time of the Cession the King and his Executive Council were the proper authority to negotiate such a treaty or agreement. This analogy and conclusion would appear inappropriate in this situation, for land was not merely given out to strangers in this situation; an entire political unit, a kingdom comprising lands belonging to numerous families, was purportedly given away. Those families most certainly were not consulted, neither were their consents secured. The King and his Executive Council had no such political authority under local arrangements to negotiate such a treaty or agreement. It was an illegal act, which under different circumstances would have triggered the removal of the King and his Council. The White Cap Chiefs are on record as having protested vigorously and having been mollified by the colonial government. Continued opposition to the authority of the colonial government over land probably explains in part the decision in the Tijani case recognizing that customary title or usufructuary rights remained untouched. But was this a true picture of the situation? And are the usufructuary rights of the community *the* qualifier of the radical title or a *mere* qualification or burden on the radical title of the Sovereign? This is an important distinction which speaks

volumes about the relative importance attached to the one or the other yet the two statements are conflated by Justice Haldane within one paragraph and proposition.<sup>195</sup> If the rights ceded to the British crown were Docemo's sovereign rights or rights of administration, one may argue that they left proprietary and beneficial rights which predate and are stronger than those rights of administration untouched, and are thus qualified by them. The language of a "mere qualification or burden" seems to suggest less importance attached to those rights. Later Canadian cases in which the Tijani case was cited as authority have further expanded on the definition or implications of defining rights as "personal and usufructuary". In *Government of Canada v Smith*<sup>196</sup> it was suggested that native land rights being personal could not be transferred to a grantee whether individual or the Crown. This is reminiscent of the suggestions in *Ajose v Efunde* and *Balogun v Oshodi* that following the assumption of Crown Sovereignty over the territory of Lagos in 1861 reversionary rights shifted from the local chiefs to the Crown.

The major problem that continued to plague Lagos society in the early 20<sup>th</sup> century, in view of the recognition of the position of the landholding chieftaincy families, was how title to land could be passed on by a grantee to persons who are not his/her heirs without the cumbersome process of obtaining the permission of all or most members of the original grantor family, important branches of which could object to the grant several months or years after it had been completed. The courts evolved rules about the sale of family property, usually requiring the unanimous consent of all members of the family or of all its main branches.<sup>197</sup> Colonial legislation on land and the system of issuing Crown Grants which super-imposed modern concepts of individual land ownership on native concepts and practices continued to create much

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<sup>195</sup> See dictum on page 28 and 29 above.

<sup>196</sup> 1983 47 NR 132

<sup>197</sup> One of the earliest cases to lay down this principle was *Agaran v Olushi & Ors*, [1907] 1NLR 66.

confusion which the courts were left to sort out well into the late 1940s. One attempt to do so was the theory of the dormant fee simple propounded by Berkeley J. In the case of *Brimah Balogun v Saka Chief Oshodi*<sup>198</sup> as he struggled with analyzing (a) what title had been given to Chief Oshodi Tappa by the Idejo , which he was in turn capable of passing on to his heirs, and (b) the impact of the Cession. In that case, as in several other cases brought by or against the Oshodi family, one of the descendants of Chief Tapa Oshodi sought to prevent the sale of land by a third party who derived his title from the Oshodi family and had obtained a Crown Grant in respect of their land on the grounds that what they held under native law and custom was a right to occupy and use in perpetuity, but not to sell. Again the nature of customary tenure and the impact of Crown Grants had to be decided upon by the judge. In an attempt to validate the Crown Grant his analysis went thus :

Among themselves a customary tenure was the highest which could pass, but it must be remembered that a very few years before these happenings, the whole territory of Lagos had been acquired by the British Crown under a treaty between them and the native inhabitants. I find it hard to believe that the Crown acquired anything short of complete sovereignty as a result of this treaty. What happened after the cession of the territory of Lagos seems to have been that the Crown acquired the dominium directum but left the customary tenure undisturbed as between the natives of the territory. This acquiescence in a local form of land tenure among the natives of the land in their dealings with each other would not operate to extinguish the dominium directum and a fee simple tenure was lying dormant in this dominium directum. I think the fee lay dormant and remained dormant so long as native of the territory was dealing with native of the territory under the communal system which is the basis of the customary land tenure. But when these same natives make use of such forms as conveyance and mortgage, or when family land is treated as private property and alienated to strangers, the dormant fee simple revives in favour of the stranger.<sup>199</sup>

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<sup>198</sup> [1929] 10 NLR 36

<sup>199</sup> Ibid at 47-48

This doctrine of dormant fee simple was yet another attempt to distinguish between Crown sovereignty and proprietary rights of the landowning chieftaincy family and to suggest that all those claiming through the Crown had modern rights which were established if they acted in particular ways. The Privy Council rejected the doctrine of dormant fee simple on the grounds that the concept of fee simple or ownership is completely foreign to native law and custom and cannot exist side by side with it. Yet a similar idea appears to have been revived in another guise in the theory of frozen rights propounded in the Van Der Peet Case in 1996 in Canada. It suggests that when “natives” are in some way no longer acting like they were decades or centuries ago, they somehow forfeit their rights to land to newcomers who have imposed new procedures and ways of acting. The basis of this proposition seems to be that the natives acquiesced in the adoption of the new concepts and procedures and should not be allowed to evade their consequences. This however, means that those “usufructuary” rights are more precarious than a fee simple. The notion of a fee simple lying dormant in the dominium directum would arguably give more security to native title. However, the idea of a fee simple of any sort existing as native title side by side Crown Sovereignty was a dangerous one as recognized by the Privy Council as it could be used in future cases to make claims against the Crown.

The question could be posed as to why 16 Idejo chiefs should continue to hold land in Lagos (even as trustees for their communities) in perpetuity and have the power to allocate it.<sup>200</sup> Chief Oshodi Tapa was one of King Kosoko’s right hand men who was a Nupe from the middle belt of Nigeria sold into slavery in the Kings Court. He served him loyally and had fled with him

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<sup>200</sup> Since they were Awori migrants into the Lagos area where they found migrant fishing communities of Ijebu already resident.

to Epe after the British bombardment of Lagos in 1851. On his return 11 years later, the lands he and his family had occupied (given to him by the King) had been taken over as Crown lands and the government resettled him and his followers on lands at Epetedo obtained from one of the Idejo chiefs. Oshodi, in turn made grants to his followers and to several strangers who then obtained Crown Grants. The nature of the interest he and his successors in title had acquired was the subject matter of numerous cases for many years after his death in Lagos, including this one. Interest groups in Lagos were quick to point out in petitions to the colonial government that the Oshodi family were not “indigenous” nor were they one of the landowning families in Lagos and that they had themselves been allocated land by one of those families. As a result the Privy Council decision that a party purchasing from them who subsequently acquired a Crown Grant had no fee simple is contradictory, as the Oshodi family themselves had no fee simple and the reversionary right should have been vested in the landowning family of Chief Aromire that allocated the land to them through the colonial governor. The petitioners wondered in essence why the purchaser’s title and right to sell should be questioned more than the Oshodi family’s title which was also one of possession in perpetuity. If *they* could sell, why couldn’t the purchaser also sell?<sup>201</sup>

It is thus interesting to note that the term émigré, viewed broadly, could be applied to a large number of individuals and groups who were displaced at different times within the span of a year to several centuries! The Saro were émigrés, so were the Brazilians and even Chief Oshodi (who never left the shores of Nigeria but was “internally displaced” within its borders) was an émigré of sorts in Lagos. What determines and influences the legitimacy of their claims

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<sup>201</sup> See Epetedo Union, “The Oshodi Case and Land Tenure in Lagos. Being a rejoinder to an article contributed into ‘West Africa’ of 22<sup>nd</sup> August 1936 by W.H. Stoker”, Akede Eko, 24<sup>th</sup> October 1936. Sent to the Commissioner of the Colony of Lagos. Comcol 1, 154.

to land in the new places they have settled in? This was one of the cases that illustrated in a glaring way the uncertainties created by the adaptation of old rules on native title to land to the modern practice of selling land, which could not be resolved by the courts. This problem will be alluded to again in our discussion of customary law in Chapter 6 and in particular with reference to Mahmood Mamdani's work on the colonial legal distinction between natives and settlers.

The conflicts triggered by these differing claims to land in Lagos became so acute by 1939 that a Commission was set up under the chairmanship of Sir Mervyn Tew to enquire into title to land in Lagos with reference to the Treaty of Cession 1861 and the validation of Crown Grants issued under the 1869 Ordinance. The recommendations of the Commission led to the passing of new legislation in an attempt to settle contentious issues arising in particular from the two government settlements in Ebute-Metta and Epetedo and the position of so-called slaves or descendants of slaves - "Arotas".<sup>202</sup> This legislation in essence restored the concept of land ownership by the land owning families denying the claims of the "Arota".

This overview of some of the early legislation and cases relating to land in Lagos shows how various interests in land vied for recognition in the late 19<sup>th</sup> and early 20<sup>th</sup> century and how the legal system and courts conspired to gradually change existing ideas about land holding, in line with ongoing changes in the economic and social life of the area. These interests are usually characterized as representing a conflict between English law and customary law but the story of the evolution of these interests and conflicts is much more complex as we have seen.

If the African émigrés simply wanted to be resettled in Lagos and environs, they could have requested and been given land as customary tenants, even through the King. Their

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<sup>202</sup> See the four ordinances referred to *supra* note 175.



occupation of such lands would have been secure as they could hold them in perpetuity. The problem was that they would then have had to recognize the overlordship of the existing political authorities and would not have been able to trade as freely with the Europeans as they wished to. Their trading activities were also dependent on obtaining credit and land was the most secure form of collateral acceptable within the emerging capitalist system they formed a part of.

The displacement of groups of people during the slave trade who were resettled mainly in coastal areas, and their engagement in new economic activities as new patterns of trade and systems of monetary exchange developed, led to the emergence and strengthening of a new economic and political class. This group of people also promoted a gradual introduction of hybrid systems of law and land use and holding which promoted commoditization of land in West Africa. What was evolving and being applied was therefore not English law at all but a selection of principles of English and African law to promote that commoditization. These principles were selectively applied to specific local situations by English and African judges, creating some unique variant which some commentators have described as “colonial law”.<sup>203</sup> A central characteristic of colonial land law was the creation of a market in land. This required a freeing up of land resources from previously accepted customary land tenure systems.

Because of the hierarchy of authority in British imperial government including the courts, and because there were some similarities in colonial situations especially with respect to appropriation of land by the Crown, certain concepts of Crown Sovereignty and “native title” emerged in British jurisprudence. In fact, these concepts and the language and drafting formats in which they were articulated were often transferred from earlier colonial situations to later ones.

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<sup>203</sup> See for example, Robert Seidman and Martin Chanock *supra* note 5 and 6.

A close examination of these concepts and their application however, reveals a series of ambiguities and contradictions explicable only by reference to specific local political and social conditions and the difficulties of transplanting them.

In the context of Canada for example, Christie has observed that

Throughout Canada's long colonial relationship with Aboriginal nations, the Crown and the judiciary have worked in tandem. Historically, executive and legislative arms of government developed and implemented dispossessive and oppressive colonial policies and legal regimes, while the courts consciously developed conceptual frameworks meant to justify the taking of lands and the denial of Aboriginal sovereignty.<sup>204</sup>

The Canadian situation exemplifies settler colonialism from a much earlier period, whereas in Nigeria the Europeans came to trade and only engaged in land based activities after the abolition of the slave trade, and even then on a relatively small scale.<sup>205</sup> The land grabbing agenda central to settler colonialism gave way to a more minimalist law and order approach in Nigeria which acknowledged and sought to minimize the disruptive effects of native resistance on the exercise of European jurisdiction over trade and economic activity.

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<sup>204</sup> Gordon Christie, "A Colonial Reading of Recent Jurisprudence : Sparrow, Delgamuukw and Haida Nation" (2005) 23:1 Windsor Yearbook of Access to Justice, 17 at 17

<sup>205</sup> For example for the purposes of establishing warehouses and small bases of operation for their trading companies, as well as for missionary activities. This has been attributed in large part to the weather and tropical diseases which decimated the European population in West Africa.

## Chapter 4: Social Change and Women's Land Rights in Nigeria

### 4.1 Introduction

One of the set of interests vying for recognition amidst the considerable flux of the 19<sup>th</sup> and 20<sup>th</sup> centuries that is often neglected in scholarship comprise the interests and livelihoods of women in largely agrarian and trading communities. Numerous studies undertaken since the 1970s have shown that women in Nigeria and sub-Saharan Africa in general are responsible for 60 to 80% of agricultural production<sup>206</sup> and yet rarely interact with the modern State in terms of registering ownership of land, accessing credit, extension services and participating in decision making in the agricultural sector.<sup>207</sup> How and why did women's relationships with the State change and diminish in quantity and quality? How were their important economic and social activities affected by changing practices affecting access to land? What steps have they taken to secure their interests, and how successful have they been? In chapter 3 we reviewed the changing trends in land ownership and tenure in the 19<sup>th</sup> and 20<sup>th</sup> centuries and the impact of colonial policy and law on land in general. It is important to understand the position and roles of women in pre-19<sup>th</sup> century Nigeria in order to understand and analyze the changes that took place in the 19<sup>th</sup> and early 20<sup>th</sup> century. A study of the specific gender impacts of the unfolding land tenure regime in Southern Nigeria during this period sheds more light on the complexities of the changing situation, its implications for women in Nigeria today and the need for new analyses.

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<sup>206</sup> See FAO, *Women, Agriculture and Rural Development : A Synthesis Report of The Africa Region* (Rome: FAO, 1995) and Saito, Mekonnen and Spurling, *Raising the Productivity of Women Farmers in Sub-Saharan Africa* (Washington DC :World Bank, 1994)World Bank Discussion Paper 230.

<sup>207</sup> Ibid. See also the World Development Report 2012 for recent trends in women's participation in economic and political decision making.

Processes of alienation of family land in the late 19<sup>th</sup> century and the 20<sup>th</sup> century raised the issue of entitlement to use and control of land resources in new ways, as patterns of land use changed and land became more valuable in urban areas. As earlier noted, various interest groups vied for power over decisions relating to land as well as benefits from it, whether accruing from produce or proceeds of alienation, and rules which emerged from attempts to resolve conflict over land were expressed in oral and written declarations of law as well as in court cases.

Information on these conflicts over land and their outcomes has generally not been disaggregated by gender, and vital processes which had an impact on women's land rights have not been highlighted and understood till recently. Extensive and valuable work on Nigeria has been done by a number of scholars including PC Lloyd, Felicia Ekejiuba, Kristin Mann, Simi Afonja, Nina Mba, Sara Berry and Nkiru Nzeogwu. Useful work specifically on Lagos as colonial gateway has been done by Kristin Mann who has used some court records as well as interviews to analyze the impact of changes in the colonial period on women's land rights and their responses to these changes.<sup>208</sup> This chapter examines the impact of changing concepts, policies and practices relating to community organization, land ownership and use in Southern Nigeria on women in the 19<sup>th</sup> and early 20<sup>th</sup> centuries; their participation in and resistance to these policies and practices; and the dominant outcomes or trends which have emerged today.

As noted in Chapter 2, where there was not a significant population of "strangers" seeking to impose a new system<sup>209</sup>, most natives continued to use their familiar forums for

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<sup>208</sup> Kristin Mann, "Women, Landed Property, and the Accumulation of Wealth in Early Colonial Lagos," (1991) Vol. 16 *Signs*, 682 [Mann, "Women, Landed Property"]. See also Kristin Mann, *Marrying Well: Marriage, Status and Social Change among the Educated Elite in Colonial Lagos* (Cambridge: Cambridge University Press, 1985).

<sup>209</sup> There had always been strangers in Yoruba towns, for example, and they sometimes maintained their practices. So what changed in the colonial period was the attempt by this new group of strangers to evangelise and impose new methods and procedures, they considered superior, as the norm.

dispute resolution – family elders and the chief’s court - turning to the new forums or colonial courts as a form of appeal or where the dispute involved parties from different localities with different rules, or as acknowledgement of the growing powers of enforcement of these new institutions.<sup>210</sup> There was much dissatisfaction with the newly established native courts and many cases were transferred to the district level at the request of litigants in the early years of the 20<sup>th</sup> century.<sup>211</sup> These transfers reflect the tremendous turmoil of this period and concrete changes in “traditional” systems of allocation of resources, social relationships and governance (including law). Where the traditional systems had internally constituted checks and balances, as well as ethical rules within which they operated, their disruption and subjugation represented fundamental changes in those systems and not just minor amendments which left the systems intact, though relegated to a lower status, as is often suggested<sup>212</sup>. In this chapter, I review the changing position of women, their responses to major social changes that affected them, and their coping strategies, including some court cases initiated by women or involving women’s rights to land. The first section of the chapter thus continues the exploration of social and legal change in the establishment of colonial relations in Nigeria focusing on the impact of new economic and social arrangements, rules and dispute resolution processes on women. The second section focuses on the courts as an arena of struggle reviewing some landmark court cases brought by or involving women since the 19<sup>th</sup> century. The third and final section analyzes the development and implications of Nigerian state policy and law on women’s rights to land today.

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<sup>210</sup> See page 64 above

<sup>211</sup> See for example Oyo Provincial Papers *supra* note 151

<sup>212</sup> See for example, John Ademola Yakubu, “Colonialism, Customary Law and the Post-Colonial State in Africa : The Case of Nigeria” (2005) 30:4 Africa Development 201 at 218-219

#### **4.2 Women, Law and Social Change in the Colonial Period: Women's Land Rights in Context**

Land in the communities that made up Southern Nigeria prior to the colonial intrusion in 1861 was the site of residence, work and other activities of individuals, families and communities which they defended against perceived outsiders. Leaders in the various families or communities had responsibilities and decision making powers in relation to the allocation of land not already claimed or in use by its members, but it was generally not permanently alienated to strangers or non-citizens for consideration. First settlement, inheritance or being part of the corporate group by birth or incorporated into it in some other way such as marriage, were the primary means of securing access to land. It is thus vital to understand the dynamics of the formation and development of the family, ethnic group or nation in these societies in order to fully understand what today are called the rules of succession.

P.C. Lloyd, in his most informative and early study of Yoruba land law, notes that “legal relationships are but a small part of the total relationships between members of a society”<sup>213</sup> thus recognizing the embeddedness of law in a social context. This informs the structure of his book in which he dedicates an entire chapter to examining the social and political structure as well as settlement patterns among major Yoruba groups before going on to examine some of the rules and rights relating to land. In his more detailed study of four Yoruba kingdoms he also begins by examining their socio-political structure and settlement patterns. He notes that the Yoruba, as with many other groups, are organized territorially in compounds, quarters, towns, villages and

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<sup>213</sup> PC Lloyd, *Yoruba Land Law* (London: Oxford University Press 1962) at 7

hamlets.<sup>214</sup> Most farming is conducted on the outskirts of towns, or in villages and hamlets some distance from the towns. Ancestral compounds are usually located in villages and towns and are organized around patrilineages. A man thus brings his wife to live in his family compound which is usually also occupied by his brothers, uncles, cousins and their wives and children as well as unmarried sisters, aunts and cousins. Members of the patrilineage, as well as non-members incorporated into it and resident there, have the right to shelter in the compound as well as the right to farmland on which to grow food and conduct other economic activities<sup>215</sup>.

Although the structure of the various groups that today make up Southern Nigeria differed, there were some commonalities that even extended beyond this area to most of the West African region. These commonalities included the organization of settlements predominantly as kinship groups living in close proximity to one another in a specific pattern. The predominant pattern was a series of dwelling places for adult men and adult women and children in an ever expanding cluster. Felicia Ekejiuba, in an article entitled “Down to Fundamentals: Women-centered Hearth-holds in Rural West Africa”<sup>216</sup>, challenged as imposed and Eurocentric the notion of the household – comprising a man, his wife or wives and children - as the basic unit of society in West Africa, calling for a re-conceptualization of the household as women-centered hearth-holds. She argues that the concept of a hearth-hold nested in household and lineage matrices better describes the practical lived experience of people in this region. These female directed social units were, until very recently, the basic unit of organization, production and

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<sup>214</sup> The hamlets are residential locations near farms occupied during farming seasons.

<sup>215</sup> Or at least a patch of land or garden on which to grow food. Where land was scarce or succession was restricted, the allocation of such land was discretionary rather than a right but was rarely refused as it was fundamental to livelihoods.

<sup>216</sup> Felicia Ekejiuba, “Down to Fundamentals : Women-centred Hearth-holds in Rural West Africa” in D Bryceson ed, *Women Wielding the Hoe : Lessons from Rural Africa for Feminist Theory and Development Practice* (Oxford : Berg Publishers, 1995) at 47.

consumption in a traditional family compound<sup>217</sup>. They are made up of a woman/mother and all her dependents whose food security she is partly or fully responsible for.<sup>218</sup>

Ekejiuba notes that in this region, people belonged to birth lineages bound by blood relationships which were patrilocal, matrilineal or gave room for some choice. In patrilineal societies, usually it was women who left their lineages to join their husband's lineages and reside there, having children who became members of that patrilineage. In matrilineal societies, husbands moved into their wives lineages of birth. Both men and women continued to have responsibilities in their lineages of birth for their siblings and relatives, contributing to weddings and funerals among other events. Inheritance was through the lineage i.e. you inherited rights of access and a share along with other blood relatives in your group claiming through the patrilineage, matrilineage or both. Women were outsiders to their husband's families even though both families were bound together in a special way as in-laws<sup>219</sup> when they had common members – children. In the same way, men were outsiders to their wives' families and could not claim rights to inherit or even sometimes to access family land or property there<sup>220</sup>. According to Ekejiuba, a man was responsible for providing a hearth-centered space, some cattle and/or a plot of land for his wife's gardening and agricultural production on her own account.<sup>221</sup> In return he is entitled to access to food, labour and sexual services from the hearth-hold heads,<sup>222</sup> whilst they

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<sup>217</sup> And continue to be so in some rural areas.

<sup>218</sup> Ekejiuba supra note 216 at 51.

<sup>219</sup> In Yoruba the term used is “ano”, today translated to mean “in laws” but which encompasses a much larger group than the nuclear families envisaged in Europe.

<sup>220</sup> In fact, this was considered more taboo, see GBA Coker, *Family Property Among the Yoruba* (London: Sweet and Maxwell, 1966) at 181

<sup>221</sup> Ekejiuba, supra note 216 at 56.

<sup>222</sup> Ibid at 52.



are responsible for providing food, clothing and care for children, the elderly and the sick as well as covering part of the costs of children's education. Thus -

Separate ownership of property, dwelling space and labour, the basis of a woman's autonomy and independence, is enshrined in the ideology and structure of the hearth-hold. In addition to her contributions and the obligatory contributions from the male spouse, transfers from other hearth-holds and households, mostly from members of a woman's natal hearth-hold or patrilineage, enable women to cope with the demands of ensuring her hearth-hold's well-being.<sup>223</sup>

In patrilineal societies which are predominant in the area, the household is made up of several hearth-holds and the male head of household contributes to these hearth-holds but is not entirely responsible for them<sup>224</sup>. The family compound usually comprises several related households and the village or town is organized as numerous family compounds as well as "stranger's" settlements<sup>225</sup>. The hearth-hold is thus often the smallest and tightest unit of organization and solidarity for all practical purposes.

The main point being made by Ekejiuba in her advocacy for the recognition of hearth-holds as important and relevant units within West African societies for the purposes of policy making and implementation, is underlined in PC Lloyd's study of succession. Lloyd observes that:

The Yoruba are a polygynous people; therefore the smallest unit of kin is not the biological family of father-mother-children, but the *omoiya* (children of the mother), the children of one wife in the polygynous household. ... *Omoiya*, and its translation, embrace the children of one woman by several men ... The

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<sup>223</sup> Ibid. at 54

<sup>224</sup> The colonial and modern concept of a male breadwinner as head of household is thus an inaccurate description in these societies.

<sup>225</sup> Although in some societies and over time, these arrangements varied and strangers were granted space within family compounds.

Yoruba always state that their emotional ties with the mother are much stronger than those with the father.<sup>226</sup>

Women's position as independent, active and totally integrated members of families and communities, shouldering different but equal responsibilities with men and entitled to rights and liberties which flow from these arrangements, as well as the impact of various changes on them becomes more evident from a wholistic understanding of the organization of these societies. As Ekejiuba observes on dominant sociological conceptions of the household as an income pooling, co-residential unit comprising women men and children carrying out specific gender roles, it

... projects middle class, western capitalist gender relations on pre-capitalist and non-western emerging capitalist systems. Indeed, as Goody (1976) and Guyer (1984) have demonstrated, the assumptions of a simple household model do not fit African residence, production, decision-making and consumption patterns, particularly as the household model was imported from the West and East Asian social contexts where 'millennia of religious, legal and fiscal measures have given the household a corporate character'.<sup>227</sup>

These descriptions of organizational patterns among many communities in this area by anthropologists, sociologists and their native informants demonstrate the many roles played by women in these societies depending on their age, marital status and whether or not they are blood members of the lineage. The lineage is a corporate group whose members (both by blood and marriage) are fully integrated into the group and have rights of access to land.

The importance of multifarious roles played by women in pre-capitalist Nigerian societies has been further driven home by studies which show many of these historical as well as present day roles. In a study of women's political activity in Southern Nigeria during the

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<sup>226</sup> Lloyd, *supra* note 213 at

<sup>227</sup> Ekejiuba *supra* note 216 at 49 and 50.

colonial period, Nina Mba examines the political activity and roles of women in a selection of Southern Nigerian States seeking to redress the imbalance in Nigerian historiography and situating them in the prevailing social and economic context<sup>228</sup>. This contextualization is key to Mba's work and contributions and is a major feature of the work of many Nigerian female and feminist scholars. In her introduction to a somewhat differently themed collection of essays which she edited on specific prominent Nigerian female social and political leaders, Professor Bolanle Awe also notes that the collection, although one of the first of its kind, is far from exhaustive and reiterates that these leaders were not rare or unusual in their societies and that much work still needs to be done to unearth and document the stories of women leaders from oral traditions and other sources, emphasizing the social context in which these women lived and its impact on women's lives and roles in the society generally.<sup>229</sup>

The economic status and roles of women in pre-colonial Nigerian societies has also been a subject matter of much controversy among scholars, especially in the 1970s, 80s and 90s. The generalizations about women's disadvantaged economic status in Nigeria and Africa, based no doubt on some observations and evidence in modern, post-independence nations, is giving way to much more nuanced analyses of the historical roots and social context of dominant modern trends. Several studies indicate the dangers of broad ranging generalizations that do not take into account historical and socio-economic contexts within and between different societies. Lloyd distinguishes between the culture and structure of societies and notes the impact of structure on

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<sup>228</sup> Nina Mba, *Nigerian Women Mobilised: Women's Political Activities in Southern Nigeria, 1900-1965* (Berkeley: Institute of International Studies, University of California, 1982).

<sup>229</sup> Bolanle Awe ed, *Nigerian Women in Historical Perspective* (Lagos & Ibadan : Sankore Publishers Ltd. and Bookcraft Ltd. 1992) at p.viii.

roles and rules that emerge.<sup>230</sup> In a more recent study of the impact of the introduction of cash crops on Yoruba women in agriculture in the colonial period, Ademola Babalola argues that the impact of the colonial economy on women in Nigeria and other parts of Africa varied considerably depending on the pre-existing sexual division of labour in agriculture, the technological and labour requirements of the new crops and how this labour was mobilized in specific societies. He notes that studies of women in cocoa producing areas of Ondo and Abeokuta in South Western Nigeria indicate that the introduction of this crop and high profits from it enabled men to mobilize hired labour and released women to take up the production and sale of food crops, crafts and trade, from which they could derive an independent income.<sup>231</sup> This strengthened their economic position in the emerging modern context. By contrast, in the tobacco producing areas of Yorubaland further north, it was harder to mobilize and pay hired labour and men relied on their wives and families to produce the crop, thus controlling women's labour and restricting their capacity for independent agricultural production and development of craft and trade. The importance of Babalola's analysis lies in its highlighting the need for detailed studies and nuanced analysis of the position of women in different trades and societies and at different historical periods. As he points out in his introduction, the position of women in Nigerian societies is "dependent upon a cluster of social, economic, religious and political factors. Thus in a discussion of the place of women in Nigeria, a regional and sectoral analysis of this concern is necessary."<sup>232</sup>

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<sup>230</sup> Lloyd, *supra* note 213 at 8.

<sup>231</sup> Ademola Babalola, "Colonialism and Yoruba Women in Agriculture" in Afonja & Aina eds, *Nigerian Women in Social Change* (Ile-Ife:Obafemi Awolowo University Press Ltd 1995) 47.

<sup>232</sup> Ibid at 47.

In the realm of culture and ideology, Ifi Amadiume has done groundbreaking work that demonstrates the often neglected or misunderstood flexibility in many local indigenous cultures. In her book<sup>233</sup>, Amadiume argues that although dual sex systems of economic and political organization existed in Nnobi<sup>234</sup> and many parts of Igboland, flexible gender construction or concepts meant that the dual sex barrier was mediated. She describes how women could be designated as male and gain access to positions of authority in the political and social structure. She explores the institutions of *nhanye* – male daughters and *igba ohu* –female husbands in Nnobi under which a man who did not have sons could designate one of his daughters as male so that her offspring could inherit from him and women who did not have children could “marry” a wife who could have children on her behalf.<sup>235</sup> Amadiume explores the impact of colonialism on these institutions and the process by which women came to be marginalized and disadvantaged.<sup>236</sup> Some of her critics have pointed out the limitations of flexibility this implies since there seem not to have been institutions of female sons and male wives but since procreation was the issue this is not really a relevant criticism.

More recently, Oyeronke Oyewunmi’s work has directly challenged the employment of a gender lens as a dominant lens for viewing social relations in Yoruba and African societies.<sup>237</sup> She argues that western gender discourses are historically specific and not transcultural as is often presumed. She notes other lenses for viewing social relations taking the example of the Yoruba of South Western Nigeria, pointing out that seniority is a more important marker in

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<sup>233</sup> Ifi Amadiume, *Male Daughters, Female Husbands : Gender and Sex in an African Society* (London : Zed Books Ltd, 1987).

<sup>234</sup> Her native town in Eastern Nigeria which she uses as her main case study.

<sup>235</sup> The closest modern practice to this would be surrogacy.

<sup>236</sup> Ibid Chapters 7 and 8.

<sup>237</sup> Oyeronke Oyewunmi, *The Invention of Women : Making an African Sense of Western Gender Discourses* (Minneapolis: University of Minnesota Press 1997).

Yoruba society – determined by age, blood and marriage relations. She takes this argument further in her more recent work focused on epistemologies pointing out that if gender emerges from specific Western histories and social contexts, then these histories of the process of gendering deserve attention by scholars instead of being taken for granted as inherent in all societies.<sup>238</sup>

All these authors make it clear that women in African societies have had and continue to have multiple identities and social positions and status based on blood relationships, age, class and gender, and that simplistically employing one (gender) lens to view them and their roles does them much disservice and in fact often disempowers them by reinforcing and producing knowledge that presupposes their subordination as traditional and historically fixed. Against the background of this more nuanced understanding of the organization of pre-colonial African societies and the roles and position of women, as well as the impact of colonial policies and practices, it is easier to understand their activities, contributions and constraints in the process of social change during the colonial and post independence periods.

Work on women's political struggles in the colonial period done by several scholars including Mba<sup>239</sup> is important. Studies of political action by women in Eastern Nigeria in 1925 as well as the famous political revolt in 1929 reveal that the demands made by women's organizations were wide ranging. They were a reaction to various changes instituted in the society by missionaries and the colonial administration, which had an impact on them but could not be defined narrowly as "women's issues". For example, women in 1925 in a movement couched in religious terms as originating in a message from "Chineke" (God) given to a group

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<sup>238</sup> Oyeronke Oyewunmi eds., *Gender Epistemologies: Gendering Traditions, Spaces, Social Institutions and Identities* (New York : Palgrave MacMillan, 2011) See introduction.

<sup>239</sup> Supra note 228.

of women in Owerri province to pass onto women in other parts of Igboland, demanded that Chiefs co-operate in passing on this message<sup>240</sup>. The women demanded, among other things, a return to pre-colonial social systems including the abandonment of the new coinage currency; banning of prostitution in some areas; that “adultery” by married women should not be a cause of action before native courts; and that the injustices of the new native court system be remedied<sup>241</sup>. They argued that poor men were punished in the native courts by rich men and that the venue of certain kinds of trials be returned to the house of the headmen or traditional ruler in the towns. This reaction against the new system of administration was brought to the fore in the 1929 women’s protests against new tax measures and the warrant chief and native court system. The warrant chiefs were seen as an imposition contrary to existing systems of leadership, and one which was highly corrupt in many places. The Igbo and some other groups in Eastern Nigeria did not have a system of chiefs amenable to the British colonial policy of indirect rule and so these chiefs were appointed and imposed by the colonial authorities to facilitate administration.

The native courts in which warrant chiefs nominated by the British sat, were also seen as corrupt and several were burnt down or heaped with refuse during the protests. The women involved in the revolt demanded the re-organization of the warrant chief and native courts systems, demanding that women be appointed members of the native courts and that leadership systems that gave room for their participation in decision making be re-instituted<sup>242</sup>. The revolt against the native court system in Eastern Nigeria should be seen against the background of its attempts to change social practices in many areas as a result of the activities of missionaries as well as the interpretation of these practices by colonial administrators. For example, new

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<sup>240</sup> The Nwaobiala Movement. See Mba, *supra* note 228 at 70-71

<sup>241</sup> Ibid .

<sup>242</sup> Ibid at 87-89

“Christian” definitions of adultery based on presumptions of monogamous patriarchal relationships did not fit with social practices of widows remaining within households as members, technically one of the wives of the family, whilst for all practical purposes, having sexual relationships with men outside the family unit.<sup>243</sup> Even the practice of male daughters, remaining in and bearing children for their father’s lineages, earlier referred to and described in Amadiume’s work was considered immoral or abhorrent by Christians and colonial authorities as the biological father of the children of such a daughter were not recognized or central to the arrangement. These misinterpretations of traditional practices and laws, among many others, led to prosecutions that were often strange to the accused persons and made the native courts extremely unpopular. As a result, familiar, alternative forums of dispute resolution remained popular and active.<sup>244</sup>

In South Western Nigeria, the expansion of British colonial administration into Yorubaland from 1900 led to the imposition of unpopular free labour and tax regimes through traditional rulers and the police force in the various Native Authorities. As pressure mounted for the colonies to be self sufficient from 1914 (during the First World War) harsher direct taxation regimes were imposed. Sanitary inspectors had people arrested and fined for the flimsiest violations of sanitary regulations and the police or olopa were quite brutal in conducting these arrests. The direct taxation of all adults including women from a young age in the Abeokuta area led to widespread anger and dissatisfaction which triggered a political revolt by women in 1918 and in 1947. Women in this part of Yorubaland were highly mobilized for political action in this

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<sup>243</sup> This for example might occur where the widow was “inherited” by a brother who was much younger than her, remaining in the household with her children but not having sexual relations with her “official husband”.

<sup>244</sup> The role of native authorities and courts in redefining crime, especially crimes affecting women, in the colonial period is an important and interesting topic beyond the scope of this thesis but very much related to the issue of the resurgence of customary criminal law in Nigeria in the 21<sup>st</sup> century.



period as a result. Things came to a head in 1947 and women's organizations which had been organizing sporadically against specific taxes and mistreatment, launched a systematic campaign against the Native Authority and the paramount traditional ruler in the area – the Alake of Egbaland. This campaign was carried out under the leadership of the Abeokuta Women's Union led by Mrs Olufunmilayo Ransome-Kuti, and led to the abdication of the Alake in January 1949<sup>245</sup>. Women in this area and right across South Western Nigeria became active in political parties<sup>246</sup> and continued their political action against government policies and actions deemed oppressive and traditional rulers seen to be collaborating with the colonial administration right up to the 1960s<sup>247</sup>. In reaction to these protests the colonial authorities carried out massive arrests and imprisonment and arraigned protesters before native and magistrates courts.

Women's resistance to colonial policy and administration which they deemed oppressive was not limited to direct political action such as the examples of mass protests and revolts given above. They also utilized traditional and modern forums for dispute resolution to register their protests.

#### **4.3 The Courts as Sites of Struggle and Change: A Review of Some Landmark Cases**

There are several records of women taking action against family members and business contacts at the local, district and Supreme Courts. Most actions would have been taken at the local level in existing forums such as before family elders, the Baales<sup>248</sup>, Chiefs' courts, or the

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<sup>245</sup> Mba supra note 228 at 156-157. See also Johnson-Odim and Mba, *For Women and the Nation : Funmilayo Ransome-Kuti of Nigeria* (Urbana and Chicago : University of Illinois Press, 1997)

<sup>246</sup> Occasionally within the parties but often in women's wings of the parties.

<sup>247</sup> Mba, supra note 228 at 162-164

<sup>248</sup> Headmen in hamlets some of who were later elevated to the position of chiefs by the colonial authorities.

new native courts established as a result of interactions with Europeans<sup>249</sup> because of their proximity and accessibility for most people. Many of these forums did not keep written records, although some references to disputes and outcomes can be found in the plethora of petitions written (usually by letter writers) to colonial government offices<sup>250</sup>. The records of native and district courts have also not been well kept and indexed in Nigeria and some have been lost through neglect, in the movement of courts and by way of various disasters. It would be a herculean task to systematically sift through what exists for cases brought by or involving women, and is beyond the scope envisaged for this thesis. Although a study of these cases might reveal more about perceptions and understandings of rules relating to inheritance of and access to land by local people at the grassroots, the new hierarchy of courts and the growing influence of British notions of “precedent” in the 19<sup>th</sup> and 20<sup>th</sup> centuries make the landmark cases litigated at higher levels equally if not more important. Such cases on access to land brought by, involving or pronouncing upon women’s rights to land and property at the High Court and Supreme Court level during this period, were influential in confirming existing social practices or establishing new State policies and laws. These cases illuminate the nature of some of the changes taking place in society at that historical moment. Among the new settlers in Lagos new family property was being established. The individual able to acquire such property bequeathed it to his children, thereby potentially establishing a new dynasty. In cases of conflict, there was therefore limited recourse to an established and extended family network. Even among families that had been settled in the area for much longer, new sources of wealth led to nuclearisation with branches of

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<sup>249</sup> See Chapter 2 at page 65 and 66 above.

<sup>250</sup> There is a plethora of such petitions in government files in the National Archives and the practice of petitioning government offices as a first step in articulating grievances and disputes continues today. See for example the petitions relating to the Epetedo lands granted to Kosoko and his followers on their return to Lagos, *supra* note 201.

the family separating themselves from the larger family group and the wealthiest members taking on leadership or prominent roles in the family.

In the 1908 case of *Lewis v. Bankole*,<sup>251</sup> the issue of the nature of family property under native law and custom and women's rights to family property among the Yoruba of South Western Nigeria was directly addressed. Chief Mabinuori died intestate in 1874 leaving 5 sons and 7 daughters. In his lifetime he had lived with his wives and some of his children on a large piece of land on which he built a main dwelling and two smaller dwellings for his wives. On another piece of land he owned he had built two houses for his eldest daughter and son, in which they lived with their families. On Mabinuori's death, the various branches of the family continued their occupation of the family compound and houses assigned by him in his lifetime. A few shops or sheds had been erected on the unoccupied portion of the family compound and were rented out or used by members of the family at different times. His eldest son, Fagbemi – an affluent trader - became the head of the family and acted as such in spite of having an older sister. Fagbemi used one of the shops on the property for a while as a salt and liquor store and he also repaired them in his capacity as head of the family. On his death, he passed on his wealth to his eldest son – Ben Dawodu.

By 1882 all the sons of Mabinuori were dead and Fagbemi's son – Ben Dawodu - claimed headship of the family. He dealt with parts of the family property without consulting or rendering account to the family. This included renting out shops constructed by his father or grandfather in the family compound to European trading firms. Ben Dawodu's actions were called into question by his aunts and the rents from the shops were redistributed more equitably.

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<sup>251</sup> 1908 1 NLR 81

On his death in 1900, two of his aunts – Mabinuori’s daughters – took over the management of the land, receiving rents from the shops. In 1905 they entered into an agreement to lease one of the stores on the land to a European firm. Another grandson of Mabinuori’s – James Dawodu – objected. Other grandchildren of the deceased who sought to build on or collect rent from the structures in the family compound for their own purposes were stopped, in some cases by their own mothers. The dispute escalated and in the absence of an accepted head of the family this action was filed in court by a group of the deceased’s grandchildren who were at odds with their aunts and some cousins who lived in the main family compound.

The plaintiffs sought a declaration that they were entitled as grandchildren of the deceased, in conjunction with the defendants, to the family compound and that the family compound was the family property of the deceased.<sup>252</sup>

The court was called upon to decide two main issues –

1. Who was the head of the family and had significant decision making power in the family as well as responsibility for dispute resolution. Because the eldest persons in the family were daughters the issue of whether women could be heads of families was specifically addressed.
2. Who had rights to inherit family property and what was the nature of those rights under native law and custom.

The main property in dispute was the family compound in which Mabinuori had lived. He had in his lifetime supported members of his family in the acquisition of property which was acknowledged as theirs but there were two other properties which were acknowledged as family property. One of them was used for family religious rites and on the other he had built houses on for his eldest daughter and two of his sons.

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<sup>252</sup> Ibid at 82

The plaintiffs, comprising mainly a group of grandchildren, sought to claim that the property was family property, jointly owned by all members of the family, to which they should have access and user rights. Attempts were made to settle this family dispute out of court by electing a head of the family with the advice of some Lagos chiefs. The plaintiffs refused to accept the advice of the chiefs and in response, the defendants (the surviving children and some grandchildren of Mabinuori who were resident in the family compound)<sup>253</sup> put forward the claim in court that the property was their separate property and had been treated as such for decades.

The trial court found for the defendants on the grounds that the plaintiffs had acquiesced for a long time in the treatment of the various properties as separate property not family property, therefore the plaintiffs claim could not succeed in equity. Acting Chief Justice Speed expressed the following view

I have no doubt that the plaintiffs have native law and custom on their side. I mean native law and custom as it was understood and possibly applied 40years ago, but I decline to say that it is existing native law and if it is I am confident that it is my duty to decide that it is repugnant to the principles of equity and to refuse to enforce it.<sup>254</sup>

The dilemma of the judge which gave rise to this comment was how to declare places which had been occupied for years by specific members of a family with the permission of the founder and the acquiescence of the family to be family property, risking their rights to continued occupation. He decided in favour of the defendants that the various properties were separate property and not family property to which the plaintiffs were entitled.<sup>255</sup> The appeal court overturned this decision on the grounds that it was against the weight of evidence which clearly demonstrated that the

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<sup>253</sup> For example, David Lewis, one of the plaintiffs, was the son of Fatola – one of Mabinuori’s daughters and therefore one of the defendants. One of his sisters also occupied the house of her grandmother in the family compound. See *Lewis v. Bankole*, supra note 251 at 88.

<sup>254</sup> Ibid at 86.

<sup>255</sup> Ibid at 92.

properties in question were understood and treated by all concerned as family property. The question was ascertaining the applicable rules governing family property. The court thus ordered that the case be remitted back to the trial court for evidence to be taken on the applicable native law.

As was usual in these cases, the trial court then called on expert witnesses or assessors to proffer their opinions to guide the court on the weight of the evidence before them. Six prominent white cap chiefs in Lagos were called in this case as expert witnesses and agreed for the most part with slight differences of opinion on specific points. The Lagos chiefs were of the view that the eldest son or “Dawodu” should take over the father’s compound as head of the family. Yet, when asked who should have authority over joint property and facilities in the compound (such as a well) they unanimously agreed that it should be the eldest child – in this case a daughter. Later, in his judgment, referring to the totality of the evidence before him, the judge distinguished between who succeeded to the headship of a chief’s family and other families. This may explain the seeming discrepancy in the opinions of the chiefs.

In response to further questions put to them, the chiefs agreed that family property is held and used in common under the leadership of the eldest child but that where there were intractable conflicts in the family, the property could and should be divided up in equal shares between all the children, whether male or female.

Based on the evidence given in the case and the opinions of the assessors, the Court declared and endorsed a number of rules pertaining to family property among the Yoruba in Lagos:

1. Under native law and custom, the Dawodu or eldest surviving son of the deceased takes over the headship of the family but on *his* death, the eldest surviving child, whether male or female, is next in succession.

2. The different branches of the deceased's family are represented "per stirpes" on the family council with each branch having one vote. There is no general right to build on any unoccupied part of the family property nor is there a general right of ingress and egress to the property. Such rights are conferred by the head of the family and the family council. Family property does not imply equal entitlement of every single individual member of the family to occupation and use as equal owners or stakeholders. The family consists of branches designated by the children of a founder.
3. Family property can be partitioned in the event of intractable conflict within the family.
4. Under strict native law, family property cannot be sold but it can be leased in consultation with and with the consent of all members of the family council on which each branch of the family is equally represented.

The court, however, in a strong obiter dictum expressed the view that it had the power to order the sale of family property, including the family house, contrary to strict native law and custom, where it was of the view that such a sale would be advantageous to the family or the property is incapable of partition. The court indicated that this could be done by taking a decision on whether native law and custom is contrary to s.19 of the Supreme Court Ordinance earlier referred to by Speed J.<sup>256</sup>

This case shows the impact of changing economic and social circumstances on rules relating to land in Lagos and other urban areas. Where land was plentiful and families had been in continuous occupation for long periods, allocation to various members of the family to build and farm was no problem. Pressure on land in Lagos was making it more valuable especially as

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<sup>256</sup> See page 114 above, on the grounds that it was repugnant to natural justice, equity and good conscience.

rental property. The issue was not so much shelter or occupation of the premises but its value as rental property and who was entitled to utilize it for that purpose. In terms of the rights of women, the case highlighted the importance of age rather than sex in determining authority within the family among the Yoruba as acknowledged by the expert witnesses. In agreeing that the eldest male child should be the head of the family, yet could and should be succeeded by the eldest female child, they may have been reflecting concerns about specific roles within specific families such as chieftaincy families.

The reason usually advanced for the apparently widespread custom of families being headed by men, is the practice of women marrying and moving to live with their husbands' families. So from the point of view of hands on management and decision making, they were often absent from their father's compounds. Where the women were resident and active in their father's compounds, there seems to be no reason for excluding them from the headship of the family. However, in Lagos by 1908, major economic activities were expanding beyond agriculture, fishing, crafts and retail trading involving new specialized activities from which women were often excluded<sup>257</sup>. Men's access to training and to credit and networks with European traders were much stronger than women's as a result of Victorian attitudes and culture<sup>258</sup>. The Europeans who came to Africa as traders, military personnel and administrators were men. This was invariably true of the missionaries too, although there were more women in this group. But they came with the conceptions predominant in their societies about the role of women, mainly confined to a "domestic" sphere and specific related occupations.

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<sup>257</sup> For example, certain kinds of trade and transportation business and printing.

<sup>258</sup> See Mann, "Women, Landed Property", *supra* note 208 at 693 and 695.



In a largely agrarian society, products and income from farming, trading and reciprocal labour arrangements were sources of wealth accessible to both men and women, but common income in towns like Lagos now came from investment in the land which required not just labour but capital to hire skilled labour and buy materials, for example, for the building of shops and their maintenance in the present case. Credit for trading was a major means of capital accumulation<sup>259</sup>. The eldest sister in *Lewis v. Bankole* did not have the means to invest in and manage the family property in the same way as her brother – Fagbemi and his son Ben Dawodu. So they became the most influential members and de facto heads of the family in their lifetime. Income from the shops which could have facilitated the daughters' accumulation of some wealth was being appropriated by their male relatives and when they protested against this, their authority as elders in the family was disputed by their economically more powerful nephews. Given the strategic location of the family compound and opportunities for renting parts of it out to European traders operating in the area, the property in question was a valuable commercial asset. It is no wonder therefore that various interests in the family were seeking to expand its use from mainly residential to commercial and vying for control over it.

There was interesting dicta from the trial and appeal court judges that indicated their appreciation of these transitions and their conscious participation in them. For example, this case is dotted with the opinions of the different judges on native law and custom and whether or not its predisposition to group rather than individual ownership could be regarded as progressive.

The idea of alienation of land was undoubtedly foreign to native ideas in olden days, but has crept in as the result of contact with European notions, and deeds in English form are now in common use. There is no proposal for a sale before me, so it is not necessary for me now to decide

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<sup>259</sup> Ibid at 696-697.

whether or not a native custom which prevents alienation is contrary to section 19 of the Supreme Court Ordinance. But I am clearly of the opinion that despite the custom, this Court has power to order the sale of the family property, including the family house, in any cause where it considers that such a sale would be advantageous to the family, or the property is incapable of partition<sup>260</sup>.

The Chief Justice, in the final stages of the case, also expressed interesting opinions on the nature and status of the property in question. It is not clear whether those opinions represented his view or a commentary on arguments put forward by counsel in the case.

After inspection of the property in dispute, I am convinced that a partition would not be in the best interests of Mabinuori's family; the site as a whole is a valuable one, in a business quarter with frontages on two busy thoroughfares, ... If, after the decision in this action, the members of the family continue to disagree, it appears to me that the best course will be for the Court on application being made to it by any of the parties to settle the terms for leasing the stores and such other part of the compound as it is desired to let, and to appoint the receiver of the rents, and give such other consequential directions as may be necessary<sup>261</sup>.

This case was one of the earliest commentaries on the nature of family property among the Yoruba in Lagos and of the rules governing inheritance and decision making within the family under native law and custom. It, however, demonstrated the dynamic and contextual nature of that law and custom and some of the basic principles governing it, emphasizing women's right to occupy, use and inherit family property equally with men.

Another interesting case which came before the Supreme Court in Lagos on appeal from the Baale's<sup>262</sup> Council in Epe in 1920, was the case of Saka Agoro v. Barikisu Osi Epe and

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<sup>260</sup> Lewis v. Bankole supra note 251 at 105.

<sup>261</sup> Ibid at 103.

<sup>262</sup> Baale is the Yoruba term for the local headman in a village.

Adisatu Morenikeji<sup>263</sup>. Epe is a Yoruba town some 90 km from Lagos which was part of the Ijebu kingdom<sup>264</sup>. Most commentators consider the development of Lagos to have been peculiar and somewhat different from other Yoruba towns and villages because of its strategic importance in trans-Atlantic trade, the large settlement of returnee slaves (both Saro and Brazilian) and the mixture of different peoples who settled there. So it is interesting to compare developments in law and custom relating to women's rights to land in other parts of Yorubaland or South Western Nigeria.

In this case, family property belonging to one Sunmonu Agoro had been administered by the eldest of his five children – Saka- as head of the family for 25 years. Saka had sold some of the property without the consent of the family and without rendering account to them. Adisatu Morenikeji – one of his sisters - lodged a complaint with the Baale and his council asking them to compel Saka to account for the proceeds of sale and seeking a partition of the rest of the property between the children. Saka appeared before the Baale (local headman) and his council and surrendered some of the proceeds of sale to them which they divided amongst the remaining children. They also divided up some of the family land for distribution to the children. Adisatu then sold her portion to Barikisu Osi Epe. Saka sought to set aside the sale on the grounds that he was the head of the family and that he did not consent to the partition. The case was heard by Mr Justice A. R. Pennington who found in favour of the plaintiff. In his judgment, he noted that the defendant – Adisatu Morenikeji - “had no rights of inheritance in her father's property she only had a right to live in the property<sup>265</sup>”.

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<sup>263</sup> *Saka Agoro v. Barikisu Osi Epe and Adisatu Morenikeji* [1920] Supreme Court Suit No. 324. Reported in the Nigerian Law Journal (NLJ) July 1922, at p.3 [*Agoro*]

<sup>264</sup> To which Kosoko fled after the British bombardment of Lagos in 1851, see p. 50 above.

<sup>265</sup> *Agoro*, supra note 263 at 6

The defendants appealed to the Full Court with Pennington sitting once again with Mr Justice Combe and Mr Justice van der Meulen<sup>266</sup>. The majority found in favour of the defendants on the grounds that the judgment of the trial court was against the weight of evidence. The defendants had called 4 witnesses who testified that the plaintiff was present at the partitioning of the family land and that he received his share. The plaintiff adduced no counter evidence to support his claim of objecting to the partition of the family property and not acquiescing to it as the defendants sought to show that he had done. Justice Combe expressed the view “That Native Law and Custom permits of the partition of family land when all the members of the family consent to the partition there is no doubt whatever”<sup>267</sup>. On the question of Adisatu’s rights of inheritance in her father’s property, the judge merely noted that the defendants questioned this statement as a correct statement of Native Law and Custom but that it was irrelevant to the determination of the appeal. The sole question on appeal was whether or not the plaintiff had consented to the division of the family property.

Mr Justice Pennington in his dissenting opinion justified his earlier findings, revealing in his judgment that the Baale and members of his Council had visited him before and during the trial seeking to influence his judgment. As a result, he had no confidence in their impartiality and had decided the case in favour of the plaintiff –:

Before I knew that such a case was to be heard by me, the Bale of Epe and 3 of his Chiefs, amongst them Belo Giwa had come to my quarters to “Salute me”. They gave me a long history of a man who had refused to abide by their decision to divide some land. They spoke with great warmth and finally informed me that this man had brought the case up to the Supreme Court and begged me to support their decision. ...I reproved

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<sup>266</sup> *Saka Agoro v. Busari Osi Epe and Adisatu Morenikeji*, [1922] Supreme Court of Nigeria, reported in (1922) 1:8 NLJ 6. This practice of the trial court judge sitting on appeal in the full court and its implications for justice was commented on and condemned by members of the early legal profession.

<sup>267</sup> *Agoro*, Ibid at 6.

them and sent them away. They came twice again before judgment but were not allowed to get any further than salutation. In the circumstances I mistrusted their impartiality and decided in favour of Saka Agoro on the ground that he had not consented. I thought perhaps to have put a note at the end of my judgment to this effect. I did not wish to sell off the Bale and Council before their people<sup>268</sup>.

What is most interesting about this case is the commentary and discussion it provoked in Lagos, especially within the legal profession as exemplified in a lengthy discussion and exchange published in the Nigerian Law Journal in 1922 from July to October<sup>269</sup>. Although the appeal court did not think it necessary to deal with the issue, the defendant's pleadings clearly stated their disagreement with the statement of native law and custom in terms of women's rights to share in family property when partitioned. The editor of the Nigerian Law Journal – Adegbesin Folarin – agreed with them and went on to write a stinging critique of the judgments of Mr Justice Pennington:

...the portion of Mr Justice Pennington's judgment in the Divisional Court in the case of Saka Agoro versus Busura Osi Epe and Adisatu Morenike reported in our last issue which reads: "Adisatu Morenikeji had no right of inheritance in her father's property" impelled a dispensation with all formality and punctiliousness. This doctrine so industriously propounded time after time by Mr Justice Pennington whenever any action relating to women's rights to property comes before the Court is not only listened to with bewilderment by the native community owing to its exoticism but it is tremblingly apprehended that if it is allowed to be imbibed by the male sex of this clime its germination will have no other result but the pernicious severance of the sacred tie which binds a family together...<sup>270</sup>

Folarin goes on to argue that native law and custom recognizes equality of rights between male and female children. He comments on the misuse of the property by the elder brother and

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<sup>268</sup> Ibid at 7.

<sup>269</sup> The Nigerian Law Journal (NLJ) was a monthly publication.

<sup>270</sup> Adegbesin Folarin, "Right of Women to Inherit Property" (1922) 1:9 NLJ 2 at 2-3.

purported head of the family and the recognition by the Baale's council (as the court of first instance) of the justice of the claims of the defendants who were clearly motivated by indignation at the behaviour of their brother. He further comments on the failure of the judge after he was visited by the Baale and members of the council to withdraw from the case rather than making that act a basis for his judgment.<sup>271</sup>

This editorial triggered a response in the next issue of the journal from another lawyer – Olayimika Alakija – who in a lengthy article citing various authorities including *Lewis v Bankole* supported the position of Mr Justice Pennington on the issue of women's rights to property as well as on the broader issue of the nature of family property and the powers of the male head of the family to manage it.<sup>272</sup> In a rejoinder, the editor of the *Nigerian Law Journal* again analyzed the cases cited by Mr Alakija giving reasons for his disagreement with the author. This triggered a response jointly co-authored by Mr Alakija and Mr Justice Pennington and a final rejoinder by the editor in the October and November issues of the journal.

These early struggles over land rights and changes in land tenure which were established by the colonial government and re-stated as customary law emerged from and reflected ongoing struggles between different interest groups – European traders, settlers and administrators; local rulers; African strangers/settlers; junior and senior, male and female members of families; slaves/domestics/clients - the outcomes of which were directly related to the changing balance of power between these different groups.

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<sup>271</sup> Ibid. at 4.

<sup>272</sup> Olayimika Alakija, "Native Law and Custom : Devolution on Intestacy of Purchaser" (1922) 1:10 NLJ 2.

Strong conceptions of the right to land as a fundamental human right, vital to livelihoods, are indicated by (a) women's participation in court cases<sup>273</sup>, (b) statements of custom by local elders and chiefs as well as (c) in the local commentaries and debates between contemporary lawyers. Changing patterns of land use, the growing practice of sale of family land and massive displacement of persons in the slave trade and the Yoruba civil wars, created new dependencies and an increase in the value of and trade in land, but had not yet led to widespread "landlessness" or the creation of an urban working class because of the availability of land and the flexibility of predominant land allocation practices.

The power of political elites was based on their decision making power over land and territory, and they increasingly sought to expand it. The Amodu Tijani case and debates on the existence of individual ownership of land in West African societies<sup>274</sup> indicates this. Conflicts over land continued into the second half of the 20<sup>th</sup> century in spite of (or because of) the legislative measures taken by the colonial government.

However, women's de jure rights to family property in Yoruba areas which were beginning to be challenged in the 19<sup>th</sup> century were pretty much re-established by the early 20<sup>th</sup> century as a result of (a) their struggles to resist dispossession reflected in the general practice and discourse and in these landmark cases, (b) the centuries old urbanization in Yoruba areas (c) the extensive commercial activities of Yoruba women involving dealing with or using land,<sup>275</sup> as

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<sup>273</sup> As noted by the editor of the Nigerian Law Journal, see pp. 122-123 above.

<sup>274</sup> For useful summary of this debate, see James Fenske, "The Emergence or Not of Private Property Rights in Land : Southern Nigeria 1851-1914" <http://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Economic-History/fenske-061129.pdf> last accessed in January 2012.

<sup>275</sup> In some areas such as Ijebu and Ekiti, activities of women farming kolanut and cocoa for export on a medium and large scale in the 19<sup>th</sup> and early 20<sup>th</sup> century as well as engaging in long distance trade across West Africa are well known.

well as (d) scholarly and anthropological commentary.<sup>276</sup> New threats to women's access to land emerged in the 19<sup>th</sup> century and continue today as a result of the commercialization, sale and enclosure of land<sup>277</sup> and the weakening of their economic position and ability to purchase it. Most post 1960 landmark cases on the rights of women to inherit and own land in Nigeria are therefore from Eastern Nigeria where some women have continued to challenge the emergent dominant discourse on women's land rights under customary law and sought the support of the higher courts to do so. The pronouncements of the Courts of Appeal and Supreme Court on these issues are important for the entire country as they indicate the attitude of the legal profession and the judges – an important group in policy making - in relation to the understanding and interpretation of customary law and its interface with modern land and constitutional law in the Nigerian Legal System.

#### **4.3.1 Women's Land Rights in South Eastern Nigeria**

In Eastern Nigeria, statements of customary law emerging from the colonial period to date have tended to disenfranchise women. Yet the work of Ekejiuba, Amadiume and other sociologists/anthropologists referred to earlier in this chapter indicates that these statements and concepts are flawed. Women in Eastern Nigeria as elsewhere in much of West Africa were heads of hearth-holds with full rights to access land for livelihoods and shelter. Male heads of households had no power to negate these rights until new political arrangements which

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<sup>276</sup> This does not rule out the need for vigilance. In a book published in 1966, an influential legal scholar expresses the view that women in olden days, under strict native law and custom, had no rights to land. See GBA Coker *supra* note 220 at 178.

<sup>277</sup> As we will see in the next chapter, the practice of groups moving to new territories as a result of population pressure on land or to diffuse political conflict became increasingly constrained as the modern state laid claim to all available territory and the power to claim or allocate it.



marginalized women and a market in land emerged and became significant. Mba and Van Allen's study of the "Women's War" in Eastern Nigeria in the 1920s shows that women in Eastern Nigeria directly resisted the imposition of colonial political and legal institutions and the collaboration of male elites who benefitted from it. The colonial government ignored most of their demands even though token gestures such as the appointment of a woman to one native court were made.<sup>278</sup> The imposition of the warrant chiefs system and discrimination in new educational systems and associated lucrative work also circumscribed women's access to substantial resources. The spread of Christianity and social relationships and norms associated with it as well as men's growing political and economic power and the power to determine social norms in their favour, further combined to circumscribe Eastern women's power in modern society in spite of much resistance. The de jure position of women in relation to dealing with land has been stated in a number of influential publications by anthropologists and lawyers as well as some landmark cases which will be examined below. The widely accepted position today is that women in Igbo speaking areas of Eastern Nigeria do not own land as they cannot inherit from husbands or spouses.

One of the earliest cases cited as support for this proposition is the case of *Nezianya v Okagbue*.<sup>279</sup> In that case one Ephraim Agha married Mary Menkiti under the Christian form of marriage in 1895. He had a piece of land and they lived together on a portion of it with their only child - Josephine. He later took another woman and Mary left him and lived separately with Josephine. Ephraim died in 1909 and Mary took possession of the house, letting it to tenants and making various improvements to it. She

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<sup>278</sup> See Mba, *supra* note 228 at 41.

<sup>279</sup> [1963] 1ANLR 352.

also sold a portion of the land to one Ude. With the proceeds of sale, she built two mud houses with thatch roofs on a portion of the land and let them out to tenants for about eight shillings a month. When she tried to sell more, Ephraim's relatives objected and took action in the Native Court claiming that she had no right to alienate the land. Josephine died leaving two children to whom Mary left the property in her will. Mary died during the court case instituted by Ephraim's paternal uncle – Okagbue. Her grand-daughters instituted an action against the defendants claiming the land in question exclusively and seeking an injunction to restrain the defendants from interfering with their possession.

The defendants claimed that under Onitsha native law and custom, when Ephraim died without a male issue, his real property descended to his family or relatives and that Mary could not at any time have succeeded to it. The trial judge found for the plaintiffs on the facts but held that in accordance with Onitsha native law and custom, "possession by a widow of the husband's land can never be adverse to the rights of the husband's family as to enable her acquire an absolute right to it against the family"<sup>280</sup>

The plaintiffs appealed and on appeal counsel argued that Mary could defeat the claim of her husband's family in equity by the doctrine of long possession. It was argued that at the time she went into possession, it was without the consent of the family rendering her possession adverse and yet no member of the family interfered or objected to her dealing with the property for many years. She had thus acquired a prescriptive right over the property and could defeat the family's claim. Her disposition of the

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<sup>280</sup> Ibid at 354.

property by will to her grand-daughters was thus valid. They further prayed the court not to give effect to the rules of Native Law and Custom since the family acquiesced in Mary's possession for so many years. Citing S. 22(1) of the High Court Law of Eastern Nigeria the repugnancy doctrine was invoked.

The Supreme Court thus identified and addressed two issues arising in the case:

- 1) Whether under Native Law and Custom a prescriptive right can be acquired to land, and
- 2) Whether, under the Native Law and Custom of Onitsha, a wife could become the owner, by virtue of adverse long possession, of her deceased husband's property.

On the first issue, the Supreme Court found that there was a long line of precedents for allowing long term adverse possession that has been acquiesced in for an adequate period of time to take precedence over a claim of title to land under Native Law and Custom.<sup>281</sup>

The court however noted that in *Oshodi v Balogun*, a distinction was drawn between acquiescence in occupation that would bar the overlord from bringing an action for ejection and acquiescence that would pass the original rights of the overlord to the occupier. Bearing this distinction in mind, the court found that the widow in this case and generally, could never be considered a stranger to the family and could therefore not have adverse possession, nor claim title by effluxion of time even where the family can be said to have acquiesced in her possession or given their implied consent to her dealing with the property.

She occupied the land by virtue of her relationship (as a wife) to the family of the respondents, and her possession can never be adverse to the rights of her husband's family and she cannot, however long she was in possession of the

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<sup>281</sup> The earliest authority for this proposition cited was the case of *Akpan Awo v Cookey Gam* 2NLR 100. Other cases cited in support of this proposition were : *Oshodi v. Balogun & Ors.* 4 WACA 1; *Caroline Morayo v. Okiade & 4 Ors.* 15 NLR 131 and *Saidi v Akinwunmi* 1 FSC 107 at 110.

land, acquire an absolute right to possession of it as against her husband's family. Her descendants therefore can make no claim to the land.<sup>282</sup>

This position was also taken by the West African Court of Appeal in the case of *Dosunmu v. Dosunmu*<sup>283</sup>, where it was held that a wife's descendant cannot claim the husband's property (rent from rooms allocated to the wife). In this case Josephine and her daughters were not outsiders but descendants of Ephraim. However, at the time this case was heard, the proposition that female children cannot inherit landed property was being established through popular commentary and writings by professionals. This was based largely on the idea that men were heads of households in a patrilineal society. Yet the organization of compounds outlined by Ekejiuba, for example, indicates that women had recognized rights of citizenship in their husband's family compounds and rights of return to their father's compounds. When people did not live in family compounds anymore and adopted Christian marriage, these rights it seems were not transferred to their new living arrangements and yet the rights of male relatives were. This case was framed as a case between the widow and the deceased's male relatives and so the issue of the rights of female children was not broached directly. This was probably worsened by the fact that the female grand-daughters sought to claim exclusive possession within a context where they were not living on the premises. However, this should not have put them at significant disadvantage given that the male relatives were not living on the premises either and what was at stake was the commercial value of the land and rents from tenants.

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<sup>282</sup> *Nezianya v Okagbue*, supra note 279 at 357.

<sup>283</sup> *Dosunmu v Dosunmu* 1952/55 14 WACA 527.

The issue of the rights of female children in present day Eastern Nigeria was more directly broached in the case of *Mojekwu v Mojekwu*<sup>284</sup>. This went on appeal to the Supreme Court in the case of *Mojekwu v Iwuchukwu*<sup>285</sup>, (Mrs Theresa Iwuchukwu having been substituted as the respondent for Mrs Caroline Mgbafor Mojekwu who had died). In this case - the Plaintiff – Mr Augustine Mojekwu had brought an action in the High Court of Onitsha in 1983, claiming that he was entitled to the statutory right of occupancy of a property at 61 Venn Rd Onitsha, owned by his late uncle – Okechukwu Mojekwu. Okechukwu Mojekwu acquired a parcel of land from the Mgbelekeke family of Onitsha under a kola tenancy<sup>286</sup> and built a house on it. He died in 1944 and was survived by two daughters – Mrs Basilia Nwokwu and Mrs Theresa Iwuchukwu and a son – Patrick. Augustine’s father – the only brother of Okechukwu, died in 1963 and Patrick died during the Nigerian Civil War without any children. Augustine thus claimed to be the head of the Mojekwu family and rightful heir to the estate of his uncle by virtue of Nnewi native law and custom, Nnewi being the area from which the Mojekwu family came. Under the Ili Ekpe custom of Nnewi and other parts of South Eastern Nigeria, it was said that the deceased’s closest male relative inherits in the absence of a son. Augustine Mojekwu reported that his two cousins accompanied him and signed the document by which he obtained the consent of the Mgbelekeke family to take over the kola tenancy of his uncle after paying N600.00<sup>287</sup>. He tendered this document in evidence as Exhibit 1.

The defendant – Mrs Caroline Mojekwu - claimed that the property in question had passed to the late Patrick and that it later passed to his son – Emeka born in 1973. She claimed

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<sup>284</sup> [1997] 7 NWLR Pt.512 at 283.

<sup>285</sup> [2004] 4 SC Pt II.

<sup>286</sup> A kola tenancy is a grant of land for a token fee or no fee at all. Kola refers to kolanuts which are presented or shared at many traditional ceremonies as a sign of friendship.

<sup>287</sup> Worth about US\$1,000.00 at the time.

that when the house went into ruins during the Nigerian Civil War, she rebuilt it with her own money and she put in all the tenants. According to her, the plaintiff had secured recognition by the Mgbelekeke family as the person entitled to continue the kola tenancy through a misrepresentation of facts. Under Onitsha customary kola tenancy, on the death of a kola tenant, the male and female issues of a deceased tenant succeed him.

The trial judge – Justice Amaizu – considered the case and on all the evidence dismissed the suit of the plaintiff on September 17<sup>th</sup> 1993. In the Court of Appeal several issues were formulated for determination. Key issues determined by the court were:

- What is the applicable law governing the devolution of the house?
- Was the plaintiff the eldest surviving male issue in the Mojekwu family entitled to inherit the property in dispute under Nnewi native law and custom?

The court decided that the applicable law was the *lex situs* – the kola tenancy law of the Mgbelekeke family. That law (according to the evidence of expert witnesses) states that succession to land under the Onitsha kola tenancy is by the children of a deceased tenant whether female or male. The case of *Udensi v. Mogbo* was cited to buttress this point and the point that the Oli-Ekpe custom of Nnewi - the Mojekwu family's homeland - did not apply to the property in question. The contentious question of whether or not Patrick had a son who was entitled to inherit was deemed irrelevant.

Yet the Court of Appeal still went on to pronounce that the Oli-Ekpe custom was repugnant to natural justice, equity and good conscience and contrary to the human rights guarantees of equality and non-discrimination on the basis of sex, in the Nigerian Constitution and the U.N. Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and dismissed the appeal on April 10<sup>th</sup> 1997. The Supreme Court agreed with the

Court of Appeal in essence and found that the *lex situs* was indeed the applicable law. The appellant could not rely on the signing of Exhibit 1 because the daughters did not know that the *lex situs* applied. They were under the erroneous belief that Nnewi Oli-Ekpe custom applied. It however noted that neither party to the suit had raised the question of the validity of the Oli Ekpe custom. In fact, by accompanying their cousin to the Mgbelekeke family and signing Exhibit 1, the respondents were in effect recognizing the existence and validity of the custom. In the opinion of the justices of the Supreme Court therefore, the Court of Appeal Judge erred in pronouncing upon the Oli-Ekpe custom. They indicated clearly that in their view the court was wrong to make the pronouncements it had made on the repugnancy and unconstitutionality of the custom without hearing evidence and arguments on the custom from the people whose custom it was. Justice Uwaifo's statements on this thus merit further analysis as an indication of the possible future position of the Supreme Court and as instructive for advocates of non-discrimination and equality in law. The Supreme Court has indicated that using human rights to challenge customary law requires carefully considered arguments and not just sweeping generalizations, supposedly in favour of women. What constitutes discrimination? Are women as a group disadvantaged? So in this case, the disadvantaged group appeared to be widows and daughters but what is the comparator group? Is it men or brothers or male relatives?

At the end of the day, the decision in the Mojekwu case suggests that if the property in question had been located in Nnewi for example and the Onitsha customary law on kola tenancy had not been applicable, the women would have been unable to challenge Augustine's claim to the property or they would have had to do so on completely different grounds. In Onitsha, the kola tenancy could be inherited by daughters but in Nnewi, the Oli Ekpe custom under which it was said that land could not be inherited by daughters would have applied and been directly in

issue. This relatively modern case which went to the highest court indicates that women in most parts of Eastern Nigeria clearly lost out in the restatement of customary law in the colonial and postcolonial period. Considering that the buying and selling of land was not practiced in most communities, the token position of male head of household did not give rights to males to exclude anyone, including females, from the use of the land. But with new uses such as sale for consideration coming into play, the customary law was being restated to exclude females from benefitting from the proceeds of sale on the grounds that they could not inherit land. They were members of the family and entitled to use and occupation of the land so the interpretation of the term inheritance was and continues to be rather narrow and is long overdue for reconsideration by the courts. It is interesting to note that this situation was predicted by some witnesses at the WALC hearings. For example, the witness quoted earlier said:

I would stop this by giving every so called landowner the title of Bale, or head of a House, and then make him conform once more to the native law. Each Bale should be able to dispose of his land as the head of a House, and to prevent the impoverishment of his House he should be held responsible for the welfare of every member of his House. If this is not done, the head of a House no longer can be held responsible for the welfare of every member of his House and want and misery and class-hatred will follow.<sup>288</sup>

This recognizes that once land became a commodity which could be bought and sold, if new mechanisms were not put in place for the heads of families, who held in trust for the families, to act in a manner that guaranteed the welfare of the family, their position of headship was prone to abuse. Colonial law by recognizing so called customary headship of families by men and their right to inheritance but failing to recognize the customary law of trusts and responsibility for the family that went with it, created a situation that has resulted in the suffering and impoverishment

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<sup>288</sup> WALC, “Minutes of Evidence”, supra note 165 at 394-395.



of large numbers of women. It is time that women's rights advocates re-visited and re-conceptualized this area of law.

Whilst women in Western Nigeria appear to have fared better, the commoditization of land and the inability of the majority of women from all parts of Nigeria to raise the resources to purchase it in modern contexts, as well as women's limited involvement with the modern State puts them all in a similarly disadvantaged position. These modern trends and major changes to land use, tenure and law have thus had fairly uniform impacts on women in all parts of the country.

#### **4.4 Women, Modern Constitutions and Customary Law**

Post independence governments in Nigeria continued with measures similar to those of the colonial government (emphasizing registration of land title) and in the process strengthened the position of male heads of families and chiefs in whose names the land was often registered even if acknowledged as family land. As we shall see in the next chapter, The Land Use Act 1978 which appeared to mark a break from customary law and colonial legislation on land in Nigeria arguably incorporated or has left intact much of what existed. It expressly refers to and recognizes customary law rules regarding family or community ownership and partition of land as well as inheritance<sup>289</sup> thus endorsing their continued relevance. Women in Nigeria have sought to challenge the application of some customs by (a) invoking the repugnancy doctrine as seen in some of the cases above, (b) by campaigning for legislation which outlaws or overrides them, or (c) by challenging their constitutionality under fundamental human rights provisions of

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<sup>289</sup> See for example, The Land Use Act 1978 Section 29, 3(b) and Section 24(a).

Nigerian constitutions or international human rights conventions. Constitutional mechanisms still appear to be the least utilized and are worth reviewing and assessing.

Modern constitutions of Nigeria since its creation in 1914 resulted from pressure by nationalist groups for inclusion in institutions of governance. From 1862, when a Legislative Council was created for the Colony of Lagos, piecemeal concessions were made by the colonial government to include unelected Nigerian representatives into the Councils. After amalgamation in 1914, a Nigerian Council was established by the Governor-General – Lord Lugard.<sup>290</sup> Like its predecessors, it was a purely advisory body and its resolutions were not binding on the Governor.<sup>291</sup> For the first time in 1922 there was a re-organization and the elective principle was introduced into Nigeria, albeit somewhat nominally. The majority of the members of the Legislative Council were still unelected but its responsibilities were more broadly defined and some space was opened up for future indigenous participation in governance. This was significantly expanded in the constitutional reforms of 1946, 1951 and 1954.

After almost a century of nationalist agitation by indigenous leaders, constitutional conferences were held in England which culminated in the 1960 Independence Constitution and the handover of the reins of government by the British to indigenous leaders. Much of the nationalist agitations had centered round arbitrary arrest of leaders, freedom of assembly and speech and definitions of treasonable felony. The 1960 Constitution and subsequent constitutions therefore contained some provisions relating to civil liberties or fundamental human rights. These provisions were modeled significantly along the lines of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 as with many

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<sup>290</sup> Nigerian Council Order in Council of November 22<sup>nd</sup> 1913.

<sup>291</sup> Ibid Section 17.

other constitutions of ex-British colonies in this period. There were other influences also which were attempts to take care of the concerns of minority groups on the eve of Independence. These provisions were a result of the recommendations of the Willink Commission on Minorities established in 1959 after one of the Constitutional conferences in London. The emphasis in these provisions was on the right to life; freedom from inhuman treatment<sup>292</sup>; freedom from slavery; right to personal liberty, rights pertaining to due process of law in civil and criminal actions; freedom of religion; and freedom of expression, peaceful assembly, movement and residence. Although there is a provision regarding freedom from discriminatory legislation on the grounds of religion, political opinion, community, ethnic origin or place of birth, no mention is made of discrimination on the grounds of sex. It is also noteworthy that there is a right of compensation for the compulsory acquisition of property expressed in positive terms<sup>293</sup>. The 1963 Republican Constitution which did away with some of the vestiges of colonial rule<sup>294</sup> was not a significant departure from the 1960 Constitution with regard to its human rights and specifically its anti-discrimination provisions.

After 13 years of Military Rule, from 1966-1979, the first comprehensive attempt at constitutional reform involving fairly extensive consultation of various interest groups in Nigeria culminated in the 1979 Constitution which adopted a Presidential System of Government modeled along American lines. The Fundamental Human Rights provisions of this constitution were the most comprehensive to date including a prohibition of discrimination on the basis of

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<sup>292</sup> Section 19, with a proviso in Section 19(2) which exempts laws in the country which prescribe punishments that were lawful and customary as at 1<sup>st</sup> November 1959 – on the eve of independence. These concessions to “customary” law thus have a long history and have recently been heatedly discussed in the context of the declaration of Sharia law in the Northern States of the Federation.

<sup>293</sup> No doubt a pre-occupation of the departing colonial regime.

<sup>294</sup> The Queen of England was replaced by a Nigerian President as Head of State.

sex<sup>295</sup> and circumstances of birth.<sup>296</sup> They were however, once again suspended when a military regime took power in Nigeria in December 1983. The next civilian constitution which incorporated fundamental human rights provisions was the 1989 Constitution. Few significant changes were made to this constitution in respect of human rights provisions. The current 1999 Constitution is essentially the same. So post 1979, we come to an era of a new format in human rights provisions and in the establishment of quasi-governmental and non- governmental organizations for the promotion and enforcement of human rights. Women's human rights have thus received greater publicity in line with international trends since the UN decade for Women. However, the juxtaposition of women's human rights with culture, custom and customary law continues in scholarship and in practice<sup>297</sup> and deserves to be given some attention here.

The current 1999 Constitution provides that Nigeria is a State based on the principles of democracy and social justice;<sup>298</sup> and that national integration shall be actively encouraged whilst discrimination on the basis of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.<sup>299</sup> Section 17, which outlines the social objectives of the State, provides that "The State social order is founded on ideals of Freedom, Equality and Justice."<sup>300</sup> Furthermore, it is stipulated that the State shall direct its policy towards ensuring that all citizens, "without discrimination ... , have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment;"<sup>301</sup>.

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<sup>295</sup> 39(1) of the Constitution of the Federal Republic of Nigeria 1979.

<sup>296</sup> This latter provision in S. 39(2) was intended to protect children "born out of wedlock" after a heated debate in the country.

<sup>297</sup> As seen in Justice Tobi's declarations in the *Mojekwu* case, see p. 131 above.

<sup>298</sup> Constitution of the Federal Republic of Nigeria 1999, (Lagos: Federal Government Press, 1999) s14.

<sup>299</sup> *Ibid* S.15(2)

<sup>300</sup> *Ibid* S. 17(1)

<sup>301</sup> *Ibid* S. 17(3)

Right from colonial times, native law and custom, now sometimes referred to as customary law, has been recognized in the Supreme and High Court Laws of Nigeria and the relevant provisions have been updated and transferred to the relevant High Court Laws of each State of the Federation. The provision remains basically the same and an updated modern version is to be found in Section 26 of the Lagos State High Court Law:

The High Court shall observe and enforce the observance of customary law which is applicable and is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of customary law.<sup>302</sup>

The High Court and any other court must thus first decide what customary laws are applicable; ensure that they are not repugnant to natural justice, equity and good conscience; and that they are also not incompatible either directly or by implication with any law for the time being in force (including, by implication, the Constitution).

The first stage test – ascertainment of customary law - is important, for this is where the rule **in context** can be stated for application, before the latter two tests are applied to it.

Section 1 of the 1999 Constitution states that the Constitution is supreme and any law inconsistent with its provisions shall to the extent of the inconsistency be void.<sup>303</sup> Section 315(1) which deals with applicability of existing laws states that “ Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution”. To trigger the application of these various sections of the Nigerian Constitution and law, parties to a suit would have to

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<sup>302</sup> High Court of Lagos State Law, Cap 60, Laws of Lagos State 1994.

<sup>303</sup> See s 1(3).

expressly plead and refute the existence of a rule of customary law as well as its constitutionality.

No doubt holding true to the common law spirit of not making law but leaving it to the legislature, or, in the case of customary law, taking evidence on it, the Supreme Court in the *Mojekwu* case referred to above did not pronounce definitively on the justice or constitutionality of Customary Law. The issue was not expressly or properly pleaded in any of the cases and the Supreme Court of Nigeria has not been inclined to pronounce upon matters of constitutional law that it considers important to the polity or in the public interest as in other jurisdictions<sup>304</sup>. However in the case of *Mojekwu v. Ejikeme*<sup>305</sup> brought by another *Mojekwu* family, which I will hereafter refer to as *Mojekwu 2*, the Court of Appeal once again had the opportunity to directly address the “repugnancy” and constitutionality of specific customs relating to the rights of widows and daughters to inherit property in Onitsha in Eastern Nigeria.

The relevant facts of the case were as follows. Reuben *Mojekwu* was married to Sarah *Mojekwu* and had three children. His only son Samuel died early, in 1938. His two daughters – Comfort and Virginia - outlived their father who died in 1996. Comfort died without children whilst Virginia had two children – Chinwe and Uzoamaka - before she got married in 1957 to Mr Eze. Chinwe gave birth to Izuchukwu *Mojekwu* and Uzoamaka gave birth to the first appellant.

These grandchildren and great grandchildren of Reuben *Mojekwu* as plaintiffs and appellants sued the respondents – distant cousins of their grandfather and great-

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<sup>304</sup> This is usually done through a Reference. In the same way, the sensitive issue of the constitutionality of the introduction of Sharia Criminal Law (including certain harsh punishments for adultery and fornication) in 13 Northern States of the Federation was avoided in 2002-2004.

<sup>305</sup> [2000] 5 NWLR 403

grandfather - for trespassing into his compound in 1993. They claimed that they were the rightful heirs of Reuben Mojekwu who acknowledged his granddaughters borne of his daughter Virginia under Nrachi Nwanyi custom, which initiated her into the family to take the position of a male issue, in his lifetime as his heirs. Under Nrachi Nwanyi custom – a goat, four gallons of wine and eight kola nuts were presented to the members of the family and they were informed that the member in question was initiating his daughter into the role of a male daughter (researched extensively by Ifi Amadiume and referred to at page 106 above). Any children this daughter then bore, were considered to be his heirs and part of his family, not the family of their biological father.

The defendant/respondents claimed that they are distant cousins of the deceased Reuben and that the lineage of the deceased became extinct due to the lack of a surviving male child. They also denied that Nrachi ceremony was performed by the deceased for his daughter Virginia and that she was assimilated into the Ejikeme or Mojekwu family and able to have an heir who could inherit. They affirmed that the ceremony *was* performed for Reuben's daughter – Comfort – who died childless. They affirmed that according to Oli-ekpe custom, they were entitled to inherit as the closest male relatives to the exclusion of his daughter and granddaughters.

The trial court found that Reuben's lineage did indeed become extinct on the death of his daughter – Comfort – for whom Nrachi ceremony was performed. The plaintiffs were not heirs under Nnewi custom since no Nrachi was performed for Virginia and her children are not therefore direct issues of Reuben. As such, Bennett Ejikeme, the distant cousin of Reuben was entitled to inherit the estate under Oli-ekpe custom.

The plaintiffs appealed and the Court of Appeal found for the appellants as direct blood relatives of the deceased, ruling Oli-ekpe and Nrachi Nwanyi customs to be inconsistent with public policy and repugnant to natural justice, equity and good conscience, as well as unconstitutional and in contravention of international human rights conventions. This is an interesting judgment in which Justice Niki Tobi once again had the opportunity of pronouncing Oli-ekpe to be repugnant in a situation where it was the applicable law unlike in the earlier case of *Mojekwu v. Mojekwu*, where the *Mgbekeleke kola* tenancy was found to be the applicable customary law.

The recognition of custom in the shape of customary law and the establishment of special courts to apply customary law during the colonial period in Africa has been the subject of much research and commentary since the late 19<sup>th</sup> century. Anthropologists and historians in the early colonial period sought to decipher what the customs and traditions of various “native” peoples were and to document them. In the Nigerian context some of the scholars involved in this kind of documentation were Meek and Bohannan<sup>306</sup>. Building on this work legal scholars and administrators in the colonial period and the immediate post-independence period focused their attention on the documentation and codification of Customary Law<sup>307</sup>. The tacit acceptance of certain rules of customary law so declared, relating to inheritance of land and property by women, in spite of strong opposition to them which continues till date in the form of direct action by organizations and movements, may have done some damage to the process of reform. So called customary rules of inheritance of landed property by female children and widows in

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<sup>306</sup> CK Meek, *Land Tenure and Land Administration in Nigeria and the Cameroons* (London: HMSO, 1957); PJ Bohannan, *Justice and Judgement among the Tiv* (London :Oxford University Press, 1968).

<sup>307</sup> See for example reports and monographs on Benin, Ondo and Ijebu provinces by CW Rowling and HL Ward-Price. See also the Restatement of African Customary Laws Project of the School of Oriental and African Studies in the UK. To which scholars such as SNC Obi and GBA Coker contributed.



Eastern Nigeria is a case in point. Under the common law doctrine of judicial notice, when evidence of a social fact or practice has been tendered so often as to make it notorious, the courts may take judicial notice of it, such that evidence of its existence no longer has to be tendered afresh in subsequent cases. It may be argued that judicial notice has been taken of rules of customary law such as the Oli-ekpe custom, under which the next male relative in line inherits rather than close female relatives, thus making more difficult the introduction of innovative interpretations of custom at the first stage of ascertaining the rules under the High Court Laws. Nonetheless, the Supreme Court in its judgment in the Mojekwu case indicated or suggested that it might be appropriate for the court to make pronouncements on the repugnancy and unconstitutionality of custom if it had heard evidence and arguments on the customs from the people whose custom it was. The court has thus left room for arguments regarding the existence and interpretation of customs being pleaded by the parties in a suit.

I have earlier referred to a body of historical, philosophical and legal literature exploring the way in which customary law which privileged certain interest groups developed in the colonial period and continues to be deployed in the post-independence period to promote specific interests.<sup>308</sup> In an excellent exposé on this issue, Nkiru Nzegwu explores the development of representations and misrepresentations of culture and custom that have disenfranchised Igbo women and legalized patriarchy since the colonial period. She takes a personal example of a family dispute after her husband died which resulted in a court action - in the case of Nzegwu v. Nzegwu<sup>309</sup> - to illustrate her points.

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<sup>308</sup> See Chapter 1, p 3 above.

<sup>309</sup> Nkiru Nzegwu, *Family Matters : Feminist Concepts in African Philosophy and Culture* (New York: State University of New York Press, 2006).

Nkiru Nzegwu's husband, a lawyer, suddenly and unexpectedly died in his family homestead, where his older brother – Alexander - and family also lived, in October 1980. According to Nkiru, by mid morning on the day of his death, Alexander demanded from her a full explanation of how and why his brother died (although she was not present at his death) and money for the funeral. By the next day, Alexander demanded keys to his brother's bedrooms and law office and when she refused began a campaign of calumny accusing her of having a hand in his death. Later, formal charges of being involved in the death by her in-laws and attempts to evict her from the house and physically harass her led Nkiru to take court action. In spite of ongoing attempts by both her family and the in-laws to resolve the matter amicably, a full-fledged court battle resulted which lasted six years.

The first case of *Nzegwu v Nzegwu* was filed in Customary Court in Onitsha (Suit No. CC0N/88/80). In it Nkiru sued her brother –in-law Alexander, his wife Lilian, her husband's uncle, a half brother and his two daughters and a niece. She sought an order of the court to prevent them from ejecting her and her two daughters from her matrimonial home, specifically to:

- Allow her to enter the family building and collect her personal belongings and those of her late husband.
- Restrain the defendants from ejecting her from her husband's house at Onitsha
- Require them to pay her N2,000.00 damages for assault and battery committed against her on the 26<sup>th</sup> of November 1980. (p121)

In her statement of claim, the plaintiff made reference to the family's threat and plans to eject her using a masquerade – a dire method of eviction and posthumous divorce in Igboland. Due to the urgency of the matter, the court heard the case the day after it was filed. When the defendants failed to turn up (the first defendant pleading that he was bedridden) the court reconvened in his

bedroom and having heard objections to the motion for an interim order, overruled them and granted the order restraining the defendants from molesting and ejecting the plaintiff, including using any type of masquerade.<sup>310</sup> The plaintiff immediately sought court protection to enter the house from the High Court and got it. She later transferred the substantive case from the customary court to the high court where it was heard as Suit No. 0/78/81. Judgment was given in 1986.

The plaintiff's claim was for access and not inheritance; for a right to reside in her late husband's residence on the family land, which he had not finished building before he died; and for her two daughters' usufructary right of residence. The court found :

1. That under Onitsha native law and custom, a married woman has the right to reside in a house built by her husband and that she must have committed a very serious wrong to justify her being deprived of that right. (The latter finding was in response to the defendant's claim that the right was a qualified one – contingent on "good behaviour".)
2. That it was reasonable for the plaintiff to have refused to surrender the keys to the defendant at that stage.
3. That the plaintiff is entitled to reside in the house during her lifetime and cannot be ejected without due process of law.
4. And her daughters (notwithstanding their being female) are also likewise entitled.

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<sup>310</sup> Ibid at 122.

One can thus distinguish the Nzegwu case from the 1963 Nezianya case earlier discussed<sup>311</sup> which merely established that a woman cannot inherit her husband's property or seek to exercise ownership rights by selling it.

Nzegwu offers an interesting insider's view and interpretation of Onitsha custom and explores changes in the colonial and post-independence period which in her view have resulted in the marginalization of women. In an incisive sociological and philosophical analysis of the case in question and similar cases including *Mojekwu v. Mojekwu*, she examines the role of the courts in ascertaining and interpreting customary law, noting the male dominated character of processes of law and policy making since the colonial period.<sup>312</sup> Her analysis of Oli Ekpe custom<sup>313</sup> and women's modern responses to it are instructive. She asserts that widows who remain in their husband's family homesteads are entitled to continue to bear children there in his name and carry on the lineage. This issue was raised also in the *Mojekwu* cases and was clearly not well understood by some of the judges. According to Nzegwu and other scholars, several options were open to widows on the death of their husbands. They could chose to remain married and living in his homestead, bearing children in his name, who were recognized as part of his family. If they had no male children, they could also "marry a wife" who could bear sons who inherited her homestead and in that way carried on the lineage.<sup>314</sup> What was required in these cases was a declaration of the intention and appropriate rituals in the light of which the biological father of the children and even the "surrogate" mother could not lay claim to the children.

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<sup>311</sup> See p.126 above.

<sup>312</sup> Ibid Chapter 3. We will return to an analysis of these cases in discussing customary law in chapter 6.

<sup>313</sup> Called Oku Ekpe in Onitsha dialect.

<sup>314</sup> An arrangement that might be likened to surrogate motherhood today except that the surrogate mother becomes part of the household of her patron – which is why the practice is expressed in terms of marriage.

The flexibility of Igbo culture in the pre-colonial period is demonstrated by these customs and several of the demands made by women during the Aba revolt of 1929 which were dismissed or ignored by the colonial authorities and are only recently being unearthed, documented and analyzed by feminist historians and scholars.<sup>315</sup> This kind of knowledge is still not popularized or widespread. This is evident in the handling of these issues in the pleadings of cases as well as in the judges' attempts to grapple with customs and historical contexts they are not familiar with<sup>316</sup> and their resulting commentary. Nzegwu comments on the commentary of another female legal scholar to demonstrate why, paradoxically, declaring Oli Ekpe custom repugnant to natural justice, equity and good conscience, although it worked for the women who brought this action, could be problematic:

*Oku-ekpe* states that in the absence of a male child to inherit a father's estate upon his death, the late man's brothers are the next in line of inheritance, followed by his nephews. But this is after the widow has died and all the daughters are married. In the early stages of colonialism, when the combined forces of Christianity and educational ideology were pressing daughters to marry, daughters undercut the principle of *oku-ekpe* by breaking up their marriages and returning to live as idigbe in their natal homes. Any children they had after their return inherited the property.<sup>317</sup>

Nzegwu further explains that:

These options, which had been available to women, began to disappear between 1899 and 1920, due to the increasing influence of Christian ideology in the social life of Onitsha indigenes. Within the Christian ethical scheme, such options – idigbeship, woman to woman marriage, women's polygamist relations, and marriages for deceased sons – were morally reprobate.<sup>318</sup> ... In the light of the modifications and aberrations to which the custom of *oku-ekpe* has been subjected, Igbo feminist legal activists such as Joy Ezeilo readily denounced *oku ekpe* as "archaic". What they miss in their quick denouncement, however, is that we are dealing with a distortion of a fairly

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<sup>315</sup> See discussion of this by Mba on p.108 above.

<sup>316</sup> Either because they are not from that part of the country or familiar with the customs.

<sup>317</sup> Nzegwu, supra note 309 at 134.

<sup>318</sup> Ibid at 136.

modern custom that was devised to respond to colonial economic policies affecting the value of land. ...Contrary to suppositions, *oku ekpe* is not an archaic custom but a modern response to land commodification. As the preceding analysis shows, three factors were responsible for the travesty (of the rush by male family heads to declare land oku epe) : the closing off of options which women had used to balance their family, men's attempt to gain monopolistic control of land; and the community's failure to address the implications of the new value systems that created numerous social problems.<sup>319</sup>

In pointing out the context and misrepresentations of these customs, Nzegwu draws our attention to the fact that they are neither ancient nor immutable – a theme to which we shall return in depth in the next chapter. These conceptual and translation difficulties are further aggravated in an adversarial system in which the parties seek to win the case within the context of a legal system which places the burden of challenging rules and interpretations of law and bringing about law reform on individual disputants. Too much is left to the assessment of lawyers regarding how to plead the cases for the purposes of extremely expensive proceedings which could take years and which the average citizen cannot afford to engage in. It is therefore not at all surprising that Nigerian women in the past four decades once again turned to direct action targeted at changing and using legislation or State law relating to succession and inheritance by widows and female children to advance their access to land and property.

In a widespread campaign against demeaning widowhood rites and property grabbing by deceased husband's relatives, women's organizations in the country over the past twenty years have succeeded in bringing these issues to public attention and in getting laws passed in a few

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<sup>319</sup> Ibid at 138.

states to prevent them, thus effectively delegitimizing these practices.<sup>320</sup> But by conducting these campaigns as campaigns against harmful traditional practices, women have often not challenged the basis and pedigree of these customs and traditions. Having customs declared repugnant to natural justice, equity and good conscience or unconstitutional, rather than insisting on a re-examination of their context and the application of fundamental principles in a changing social context can be counterproductive, failing to engage fully as conscious actresses in the process of social change. Whether in the sphere of direct political action or individual and family disputes, women lost out in the colonial period as a result of the colonial state and missionaries' preference for engaging with men. Decision making processes were centralized and men were actively supported in the exercise of political and economic power. As new processes of administration were introduced – political institutions such as town councils and native authorities, registration of land, new courts and legal procedures, taxation and granting of credit - women's direct involvement with these processes and with the emerging State diminished, limiting the expression of their perspectives and interests. Men's perspectives and interests were amplified through participation in these institutions and processes as well as through access to the modern forms of education needed to access them.

Whilst women remained largely in traditional spheres of economic activity and utilized political processes - many of which gradually lost their significance and power - predominantly male political interest groups (as we saw in Chapter 3<sup>321</sup>) did not hesitate to challenge custom and

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<sup>320</sup> See for example, the Enugu State Law on the Prohibition of Infringement of Widow's and Widower's Fundamental Rights Law No. 3 of 2001, and the Oyo State Widows' Empowerment Law, 2002. All these laws have so far been passed at the State rather than Federal level.

<sup>321</sup> For example, with former "slaves" obtaining Crown Grants, claiming absolute ownership rights in land and passing it on to their kin or selling it. See the case of *Ajose v Efunde* and the Oshodi cases earlier referred to above at 79 and 90.

tradition, to participate in its re-interpretation and to make fundamental changes to it. One such fundamental change meant to revolutionize land use and law in Nigeria was the Land Use Act 1978 which we will consider next.



## Chapter 5: The Nigerian Land Use Act 1978 : Continuity or Change?

### 5.1 Introduction

In 1960, Nigeria became an independent nation 46 years after its official declaration as a British colony but almost a century after a part of this entity – Lagos – was declared a colony. The government under the 1960 Constitution was headed by a Governor General – the representative of the Queen and a Prime Minister. The Queen was still the symbolic Head of State. In 1963, the country became a Republic with a President as Head of State and a Prime Minister as Head of Government. The basic sources of law remained the same as in the colonial period except that legislation was now carried out by the local legislature. In Southern Nigeria, customary law continued to apply, subject to the repugnancy doctrine, and statutes of general application applicable in England as of 1900 also continued to apply. Land law was primarily customary land law as modified by the courts and one important modification was the widespread acceptance of sale of land by families with the consent of all members of the family and in accordance with procedures laid down by the courts which became part of the law.<sup>322</sup> English common law as well as the “received” English law of Property relating to estates and mortgages, trusts, succession, conveyancing and Wills, continued to apply as well. Land acquired by government and deemed to have become private, individual property by virtue of Crown Grants, government allocation and outright sale with the consent of the family that owned it, was held in fee simple. The English law of real property thus existed side by side with customary land law, its application determined by the nature of the transactions in question. The

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<sup>322</sup> These principles were established in a series of cases from the colonial period. See for example, *Agaran v Olushi & Ors* (1907) 1NLR 66.

continuing importance of family property<sup>323</sup> and the fact that registration of land or a conveyance did not imply valid title,<sup>324</sup> meant that disputes relating to ownership and therefore valid transfers, were still widespread.

In Northern Nigeria, the Land Tenure Law 1962 was passed adopting in essence the provisions of the Land and Native Rights Proclamation of 1910. This law provided that all land in Northern Nigeria was under the control and dominion of the Government and that no title or occupation was valid without the consent of the government. All occupation and control of land was to be exercised with due regard to existing custom.<sup>325</sup> This was the situation in the post independence period between 1960 and 1978 when the 4<sup>th</sup> military government in Nigeria took the bold step of promulgating uniform land legislation applicable in the entire country.

On March 29<sup>th</sup> 1978 the Federal Military Government of Nigeria under the leadership of General Olusegun Obasanjo promulgated The Land Use Decree<sup>326</sup>. On the eve of handing over to a new civilian government in 1979, the government integrated the Decree into the new 1979 Constitution<sup>327</sup> thus making it impossible to amend, except in accordance with the procedure for amending the constitution. The Land Use Decree was renamed the Land Use Act<sup>328</sup> and minimally revised in 1980 to bring it in line with civilian legislation, and is still in force today in spite of much agitation for its repeal over the years. This legislation was the first piece of

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<sup>323</sup> Most land was family land as even those owned by private individuals became family land on the death of the individual who owned it. New forms of family property were thus being constantly created.

<sup>324</sup> New conveyances were not always registered and even where they were, title could still be disputed by family members or other persons.

<sup>325</sup> Land Tenure Law 1962, Cap. 59, Laws of Northern Region of Nigeria.

<sup>326</sup> The Land Use Decree, Decree No. 6 of March 1978

<sup>327</sup> S. 274(5) of the 1979 Constitution of the Federal Republic of Nigeria

<sup>328</sup> By virtue of the Adaptation of Laws (Redesignation of Decrees etc) Order 1980 which changed the military terminology to “Acts” and “Laws”. It is today published as The Land Use Act, Cap 202 in the Laws of the Federation of Nigeria 1990. [Land Use Act].

national legislation relating to land in the country since its creation in 1914, replacing or overriding previous regional, state or local land laws. Has it made any difference to the uneasy co-existence of differing conceptions about entitlement to and use of land highlighted in the colonial period and examined in the previous two chapters?

The Act vests all land in the Government represented by the Governors of each State of the Federation to hold in trust for the people of Nigeria, granting these governors extensive powers of management and control.<sup>329</sup> This chapter examines the context and background to the promulgation of the Land Use Act and summarizes its main provisions. It reviews the major critiques of the Act and the attempts at reform to date, raising critical issues about the direction and focus of reform within the context of a new wave of calls for reform in the second decade of the 21<sup>st</sup> century. Several commentators have expressed the opinion that this piece of legislation amounted to a nationalization of land, nothing less than a revolution<sup>330</sup>. Still others have remarked that much of the land in rural areas and even in major urban centers such as Lagos, is still held by families, and buying and selling of land as well as conflicts over land continue unabated with attendant insecurities. They therefore argue that the Act has been largely a dead letter leaving the status quo regarding land tenure and holding in the country intact decades after its advent.<sup>331</sup>

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<sup>329</sup> Ibid S.1 and 2.

<sup>330</sup> See, for example S. A. Oretuyi, *Title to Land in Nigeria : Past and Present* (Ile Ife: Obafemi Awolowo University Press Ltd. Inaugural Lecture Series 100, 1991) at 15.

<sup>331</sup> See for example, J. A. Omotola, *Law and Land Rights : Whither Nigeria?* (Inaugural Lecture, Lagos: University of Lagos Press 1988) at 27-28, see also R.K. Udo, *The National Land Policy of Nigeria*. (Ibadan : Development Policy Centre, Research Report No. 16, 1999) at 46.

## **5.2 Background to the Land Use Act 1978**

At independence in 1960, Nigeria was a Federation comprising a Western, Eastern and Northern Region. A coup d'état in 1966 brought the military to power and after ten years of military rule the country was in effect governed as a unitary state in line with the hierarchical structure of the military, with a concentration of power in the Center which controlled oil revenues. By 1970, after a civil war, the regions which had been relatively self sufficient (and which later became 12 states) had become weak and dependent on the Centre.

The colonial governments had focused on the provision of military and police forces as well as infrastructure such as roads and railways, to facilitate the activities of private traders in the area. Post independence governments ushered in an era of state directed development in which they elaborated ambitious development plans and actively participated in the ownership and management of industries, as well as educational institutions and hospitals. The international boom in oil prices in the seventies, and the massive expansion of infrastructure and importation of goods in the post civil war economy, led to spiraling inflation in the prices of consumer goods and in particular of land. By the mid 1970's land was a valuable commodity sought by the government, oil companies and industrialists, as well as a growing population of urban based middle class public servants.

The small landholdings as well as ownership structures which vested control over land in families and traditional community leaders, discouraging sale, made acquisition of land difficult for these new elite groups in the country. As was indicated in the earlier chapters, although the commoditization of land and land speculation had grown considerably from the late 19<sup>th</sup> century, particularly in major urban areas such as Lagos, the majority of the land in the country was still

controlled by families and traditional leaders. Furthermore, much of the land in urban and rural areas was not yet surveyed and so the boundaries of plots were sometimes imprecise giving rise to disputes. Many unscrupulous members of landowning families also took advantage of the heightened demand for land to inflate prices or to sell without consultation and permission of members of their families. Occasionally, they even sold the same piece of land to several unsuspecting buyers. Conveyance of family property was thus fraught with danger, and security of title could not be guaranteed. Yet many had no choice but to buy from these families who held much of the land in the Southern part of the country.

It was in this environment of hyper inflationary trends that the new military government which came into power in 1975, headed by General Murtala Mohammed<sup>332</sup> and General Olusegun Obasanjo sought to institute a number of major reforms, shortly after launching the 3<sup>rd</sup> National Development Plan 1975-1980. High on their list, in response to the agitation of civil servants and the middle class was the issue of commodity price and rent control. In August 1975, the government established an Anti-Inflation Task Force to identify the causes of inflation in the country and to recommend short and long term solutions. This task force identified existing land tenure systems as one of the causes of inflation and recommended that a decree be promulgated vesting all lands in the state governments to minimize speculation and establish effective control of land transactions.<sup>333</sup> In January 1976 the Rent Panel was established to review, inter alia, the level and structure of rents in relation to the housing situation in the country with particular reference to urban centers. This panel once again identified the system of

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<sup>332</sup> Mohammed was assassinated in 1975 in a failed military coup.

<sup>333</sup> See, Nigerian Law Reform Commission, *Report on the Reform of the Land Use Act* (Lagos : Nigerian Law Reform Commission, 1992) at 41.

land tenure as a cause of inflation and recommended that the government should vest all lands in the state.<sup>334</sup> This time the recommendation was accepted and in 1977, the Federal Military Government of Nigeria under the leadership of General Olusegun Obasanjo established a Land Use Panel made up of eleven members representing different parts of the country and different professions. It was chaired by Hon. Justice Chike Idigbe.

At the inauguration of the Panel in April 1977, Brigadier Musa

Yaradua<sup>335</sup> justified its establishment in these terms :

The need for establishment of this Panel arose from the recommendation of various commissions and panels set up to examine some aspects of the structure of our social and economic life. The problem had been foreseen and articulated in the Third Development Programme. Both the Anti-Inflationary Task Force and the Rent Panel Reports identified land as one of the major bottlenecks to development efforts in the country. ... The Federal Military Government is fully aware of the land racketeering, the pernicious role of middlemen in land speculation and in the sometimes bitter and unending litigations in land transaction in the country. At present, it is not only the individual who wants to build his or her house that is facing difficulties in finding suitable land, the Local, State and Federal governments are also inhibited by problems placed in their way in acquiring land for development.<sup>336</sup>

The terms of reference were as follows:

- 1) to undertake an in-depth study of the various land tenures, land use and land conservation practices in the country and recommend steps to be taken to streamline them;
2. to study and analyze all the implications of a uniform land policy for the country;
3. to examine the feasibility of uniform land policy for the entire country; make necessary recommendations and propose guidelines for implementation;
4. to examine steps necessary for controlling future land use, and also opening and developing new land for the needs of Government and Nigeria's

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<sup>334</sup> Ibid.

<sup>335</sup> Then "Chief of Army Staff" - the second in command to the Head of State.

<sup>336</sup> Report of the Land Use Panel 1977, cited in [Ajomo *Fundamentals* ] supra note 4 at 67

population in both urban and rural areas and to make appropriate recommendations.<sup>337</sup>

The panel toured the country and received memoranda from various individuals and groups. It submitted a majority report endorsed by all except one member, who submitted a minority report.<sup>338</sup> All members of the Panel agreed on the need for reform but they disagreed on the nature of the reform. The majority recommended that a deeds registry be established for the whole country and that compulsory registration of title be put in place. They also recommended the abolition of some incidents of customary land tenure such as customary tenancy<sup>339</sup> to simplify and clarify title to all land. The minority report recommended the vesting of all land in the government through a uniform land law which would bring Southern Nigeria in line with Northern Nigeria. The government appears to have adopted more of the recommendations from this report than the majority report.

### **5.3 The Land Use Decree 1978 – A Summary of Provisions**

The preamble to the original Land Use Decree states as follows:

WHEREAS it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law;  
AND WHEREAS it is also in the public interest that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved;

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<sup>337</sup> Ibid.

<sup>338</sup> See Udo, *supra* note 331.

<sup>339</sup> This was an important issue as it is at the root of some intractable land conflicts in Nigeria – notably the one between the Ife and Modakeke people. It relies on the argument that groups of settlers who moved to an area and were granted land to use as customary tenants, in spite of the passage of centuries and intermarriage, never acquire rights to the land but continue to be tenants and obliged to pay tribute to a so called customary landlord – the local “native” group. As we will see later, this issue of abolition of customary tenancy was once again raised in the 1992 Review of Land Law.

NOW THEREFORE, THE FEDERAL MILITARY GOVERNMENT hereby  
decrees as follows:-

It is noteworthy that the subsequent revision, made mainly to reflect the change from a military regime,<sup>340</sup> merely has a short description, instead of this preamble, which says –

An Act to Vest all Land comprised in the territory of each State (except land vested in the Federal government or its agencies) solely in the Governor of the State, who would hold such Land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the State and to organizations for residential, agriculture, commercial and other purposes while similar powers with respect to non urban areas are conferred on Local Governments.

This difference in preamble may reflect differences in the attitudes and goals of the ruling governments rather than just a change in the form of the legislation.<sup>341</sup>

Under the Act, the Governor of each State now has extensive discretionary powers over land. The most extensive legal interest which individuals or corporations can own is a **right of occupancy**, there is no such thing as a freehold or fee simple under Nigerian land law after 1978. This right of occupancy may be statutory or customary depending on whether the land is situated in an urban or rural area and has been conferred by the Governor or the Local Government. However, the state as ultimate landlord, represented by the governor, may also grant other interests in land such as easements<sup>342</sup> and licences<sup>343</sup> in any location, whether rural or urban and

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<sup>340</sup> See supra note 328.

<sup>341</sup> The Military Government in 1978 had declared its intention of controlling speculation by wealthy private individuals and promoting development by making land available for development projects and to individuals for housing. See statement by Yaradua above at 155. The silence of the civilian government on the vision informing the Act could indicate that government's disagreement with the original vision.

<sup>342</sup> Land Use Act, supra note 328, s 5(b).

<sup>343</sup> Ibid s12.



levy rents for land which it allocates to individuals or enterprises for their use.<sup>344</sup> Indeed, today, “ground rent” - a rent which the State levies on all premises laid out and allocated by it, whether they are empty plots or built up – is a significant source of income for most State governments.

Section 2 of the Land Use Act gives the Governors power to manage urban lands with the advice of a Land Use and Allocation Committee which they appoint and the composition of which is left to their almost total discretion.<sup>345</sup> Although rural lands are to be managed by the Local Governments with the advice of a Land Allocation Advisory Committee, this Committee is once again to “consist of such persons as may be determined by the Governor acting after consultation with the Local Government...”<sup>346</sup> The powers of Local Governments to control and manage land are therefore default powers over land that the governor has not designated urban land, acquired compulsorily, or granted to individuals or enterprises.<sup>347</sup> Those powers are also limited in terms of the size of the territory to 500 hectares for agricultural purposes and 5,000 hectares for grazing purposes.<sup>348</sup>

Another interesting and extensive power granted to the Governor under the Land Use Act is “the power to enter upon and inspect the land comprised in any statutory right of occupancy or any improvements effected thereon at any reasonable hour in the daytime and the occupier shall permit and give free access to the Governor or any such officer so to enter and inspect.”<sup>349</sup> He also has the power to grant licenses for areas up to 400 hectares “to any person to enter upon any land” which is not already allocated by government, “to remove or extract any stone, gravel,

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<sup>344</sup> Ibid s 10(b) and 16.

<sup>345</sup> Ibid s 2(3)

<sup>346</sup> Ibid s 2(5). The Governor is not obliged to take their advice after the consultations.

<sup>347</sup> Ibid s 6(3).

<sup>348</sup> Ibid s 6(2).

<sup>349</sup> Ibid s 11.

clay, sand or other similar substance ... that may be required for building or the manufacture of building materials”<sup>350</sup>. The Act *does* provide that the Governor “may”<sup>351</sup> delegate his powers and may make regulations for the carrying into effect of the provisions of the Act.<sup>352</sup>

The requirement of the Governor’s consent for most transactions involving land, including assignments, mortgages and subleases<sup>353</sup> is an important and cumbersome one, given the nature of government bureaucracy and corruption. The penalties for failure to obtain the Governor’s consent are harsh, ranging from the imposition of a penal rent<sup>354</sup> to the revocation of the right of occupancy.<sup>355</sup> The power of revocation in this latter section is framed in terms of “overriding public interest” which is very broadly defined and includes governments requiring the land for mining, oil pipelines and extraction of building materials.

In the light of such extensive powers of Governors under the Land Use Act, what are the rights of the holders of rights of occupancy? For as long as the right of occupancy subsists, they have the right to exclusive and “absolute possession of all the improvements on the land” and may assign, transfer or mortgage such improvements *with the consent of the Governor*. This provision does not appear to grant holders of this right much security, in particular when governments are not obliged to pay compensation except for the unexhausted improvements on the land and for economic trees,<sup>356</sup> and when they can revoke these rights of occupancy on the grounds of overriding public interest.

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<sup>350</sup> s 12.

<sup>351</sup> s 45(1)

<sup>352</sup> s 46(2)

<sup>353</sup> s 15b, 21 & 22

<sup>354</sup> s 5(f), S.20(1)

<sup>355</sup> s 28

<sup>356</sup> s 29

## 5.4 Calls for Reform

Right from its inception, the Land Use Act has triggered much opposition on many different grounds. A leading expert and commentator on the Act has criticized it on the grounds that it is very poorly drafted and gives rise to much ambiguity and contradiction. In his view, many Nigerian judges resorted to the default position of adopting rules of statutory interpretation based on the general intent of the statute rather than interpreting some of its sections in the light of policy directions and human rights provisions contained in the Constitution.<sup>357</sup> Such a broader approach to statutory interpretation could regulate the manner in which the government exercises the broad regulatory powers conferred on it by the Act. For example, Section 16 of the Act which regulates the determination of appropriate ground rent by the Governor provides that it shall be based on rent fixed in respect of similar land in the area having regard to the circumstances of the case.<sup>358</sup> Yet, the very next subsection also provides that the Governor shall not take into consideration any value due to capital expended upon the land by the same or any previous occupier or any increase in the value of the land due to the employment of such capital.<sup>359</sup> What does this mean? The fixing of ground rent and the differentials between different parts of a municipality are clearly due to the kind of properties and the developments on them which is in turn determined by the capital expended on buildings and facilities in the area or government zoning policies. In interpreting this section, the courts could make governments accountable for their zoning policies and fixing of ground rent by calling on them to state the basis of their decisions.

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<sup>357</sup> Omotola, *supra* note 331 at 12.

<sup>358</sup> Land Use Act s16(a).

<sup>359</sup> *Ibid* s16(b).

One of the most controversial and criticized aspects of the Act was the attempt by the government that passed it, and subsequent military governments, to “entrench” the Act in the Constitutions of the Country.<sup>360</sup> Section 274(5) of the 1979 Constitution provides that nothing in the Constitution shall invalidate the Land Use Act. The precise implications of this provision have been mooted in several cases culminating in the decision of the Supreme Court of Nigeria in *Nkwocha v. Governor of Anambra State & 2ors.*<sup>361</sup> This case decided that although the Land Use Act was entrenched in the 1979 Constitution by virtue of Section 274(5), this did not make it an integral part of the Constitution but merely an “extraordinary statute”. As a result of the failure of the Supreme Court in this case to pronounce expressly upon the effect of a direct conflict between a provision of the Land Use Act and the Constitution, subsequent judgments of the Courts of Appeal and High Courts on this point have been contradictory. For example, dealing with the related issue of the jurisdiction of State High Courts in matters concerning Customary Rights of Occupancy, the interpretation of S. 236 of the Constitution came up for determination in the case of *Ajao & Anor. v. Odofin.*<sup>362</sup> That section provided as follows :

Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest obligation or claim is in issue ...

The question then was whether this unlimited jurisdiction of the State High Court could be overridden by Section 41 of the Land Use Act, which provides that area or customary or equivalent courts have jurisdiction over matters relating to customary rights of occupancy

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<sup>360</sup> The Nigerian Daily News.com, April 4<sup>th</sup> 2011. <http://www.thenigeriandaily.com/2011/04/04/group-unfolds-agenda-targets-land-use-act-removal-from-constitution/>

<sup>361</sup> [1984] 6SC 362.

<sup>362</sup> [1999] 12 NWLR (Pt 631) 471.

granted by local governments, since the Act is entrenched in the Constitution by virtue of Section 274(5). The Court of Appeal held, contrary to the decision in Nkwocha's case and some subsequent cases<sup>363</sup> that the State High Court had no jurisdiction in spite of the constitutional provision. The provision of the 1979 Constitution which incorporates the Land Use Act has survived in subsequent constitutions and appears in the current 1999 Constitution as S. 315(5) which provides that : "Nothing in this Constitution shall invalidate the following enactments, that is to say - ... (d) The Land Use Act." This is a clear indication that both military and civilian governments to date are quite satisfied with the status quo and are far from committed to changing the extraordinary status of the Act under the Constitution.

The requirement of the Governor's consent for the assignment of interests in land, inheritance and mortgages has come under the most attack to date. Lawyers, estate surveyors, land developers and traditional rulers have all registered their opposition to it. Obtaining the consent is a long and difficult process and costs 15% or more of the deemed value of the property *as assessed by government*. Property developers, bankers and other investors thus see this as an obstacle to a thriving property market.<sup>364</sup>

In an interesting and important argument, Professor Omotola observed<sup>365</sup> that the Land Use Act did not destroy or abrogate pre-existing land rights. By virtue of the transitional provisions of the Act contained in Sections 34 – 38, pre-existing rights were recognized. Indeed, they had to be as holders of valid interests in land post 1978 could only be determined by reference to pre-existing land tenure systems and rights. The effects of the extensive and new

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<sup>363</sup> See for example, *Kaduna v. Governor of Kaduna State* (1986) 4NWLR (Pt 35) 361

<sup>364</sup> Adefulu & Esionye, "Nigeria : An Overview of Nigeria's Land Use Amendment Bill", Real Estate and Construction, 24<sup>th</sup> June 2009. <http://www.mondaq.com/article.asp?articleid=81844>, last accessed on September 30 2013.

<sup>365</sup> Omotola supra note 331 at 14; and Udo, supra note 331 at 38.

powers of the Governor on these pre-existing rights are, however, still a matter of debate and controversy in the courts. Professor Omotola has sought to draw a distinction between “express” grants of a Statutory Right of Occupancy made by the Governor after 1978 and “deemed” rights of occupancy resulting from a conversion of pre-existing land rights under Sections 34 and 36. He and other lawyers have sought to argue that some provisions of the Act, especially those relating to the duration of a right of occupancy and therefore the requirement to obtain the Governor’s consent for transfers, do not apply to deemed rights of occupancy.<sup>366</sup> This is an important argument and one that could curb the powers of the Governor, but it has not been accepted by many judges. The situation would appear to be that all rights of occupancy are of limited duration and therefore that transfers of land, including inheritance, still require the Governor’s consent although widespread monitoring of compliance with this is not being enforced by state governments.

Another critique of the Land Use Act which has been advanced in particular in relation to oil producing areas of the Niger Delta is that Nigerians in effect became tenants of the government and lost their rights to land and natural resources as well as any say in how those resources are exploited and the proceeds spent. Excessive discretion is given to government to acquire land for public purposes and make grants of land to investors which is prone to being abused in spite of some brave attempts by courts to hold that there is no such thing as absolute discretion and to insist that governments give specific reasons for revocation of Certificates of Occupancy.<sup>367</sup>

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<sup>366</sup> Omotola, *ibid* at 16-19

<sup>367</sup> *LSDPC v. Foreign Finance* (1987) 1NWLR (Pt. 50) 415 and *Obikoya & Sons Ltd. v. Governor of Lagos State* (1987) 1NWLR (Pt.50) 385 referred to in Omotola *ibid* at 25.

## 5.5 Reform Processes

In 1991, another military government of Nigeria mandated the Law Reform Commission to review the Land Use Act. This was the first official and extensive review of the Act and it culminated in a Draft Land Decree of 1992 which was never adopted by the government. The Law Reform Commission constituted a group of experts including legal scholars, practicing lawyers, land administrators and estate developers to submit papers and proposals on the review of the Act in accordance with its terms of reference. It called for submissions from the general public through paid advertisements in popular newspapers. The Commission itself prepared a background package outlining key issues for the review of the Land Use Act, main proposals and recommendations made and following all its consultations, organized a national workshop to discuss emerging proposals in December 1991. After the workshop, it published a report explaining its recommendations and draft legislation.<sup>368</sup>

The Draft Decree is divided into 10 parts dealing with specific subjects.<sup>369</sup> I will briefly discuss the major changes recommended by the Law Reform Commission. First, it recommended the re-instatement of the original preamble to the 1978 Land Use Decree as more reflective of the goals of the legislation and recommended the vesting of all lands in the country in the Federal rather than State governments whilst leaving management and control under the jurisdiction of the State Governors and the Local Governments. The distinction that the Law Reform Commission drew in its report between the vesting of “radical” title (which it also

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<sup>368</sup> Report on the Reform of the Land Use Act, 1992, *supra* note 333. See also Udo’s commentary on the Draft Decree – Udo, *supra* note 331.

<sup>369</sup> The main subjects are : Control and Management of Lands, Alienation of Rights of Occupancy, Revocation of Rights of Occupancy, Compensation , Documentation and Registration of Land Instruments and Title, and Lands Tribunals.

referred to as allodial title) and beneficial interest is reminiscent of the distinction which the Privy Council confirmed in the case of *Amodu Tijani v. Secretary of State, Southern Provinces*. So it recommended that the Federal Government, like the Crown in the 19<sup>th</sup> century, hold the radical title, which is described as nominal, but no beneficial interest.<sup>370</sup> In this draft decree, management and control continue to be vested in the State and the Local Government but this time these two levels of government are to exercise their powers through institutions with clearer responsibilities and guidelines - The Land Use and Allocation Council at the State level and the Land Allocation Advisory Committee at the Local Government level. The Governor is obliged to consult and his discretion is somewhat reduced.

The Commission recommended the abolition of the distinction between statutory and customary rights of occupancy on the basis that it is misleading to refer to administration at the local government level as customary since it is just another level of the modern government apparatus. In specific sections on Government Lands<sup>371</sup> the Commission distinguished between Government Lands and all other lands, in a sense endorsing the distinction between an express and deemed right of occupancy as advocated by Professor Omotola. It outlined the jurisdiction of Federal, State and Local Government over land acquired by them for use for public purposes. All other lands, vested nominally in the Federal Government are to be held by individuals and groups with full beneficial rights of use and occupation, subject only to revocation by government on the grounds of public interest which is defined in much greater detail than in the existing Act. The implications of this distinction between government lands and all other lands is that ground rent and penal rent provided for under the Land Use Act 1978 would no longer be

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<sup>370</sup> Report on the Reform of the Land Use Act, *supra* note 333 at 29.

<sup>371</sup> Part VI of the Draft Decree, *ibid* at 44.



applicable to non-government lands **and** these lands can be held in perpetuity, meaning that the requirement of the governor's consent for their transfer, assignment and inheritance is also restricted to cases of transfer to foreigners and major changes of approved use. Families and individuals would thus be able to dispose of their land, acquired before 1978 when the Act came into being, without going through the bureaucratic and expensive process of obtaining the Governor's Consent.

Much clearer guidelines for designating land as urban are recommended in terms of population size and density. Registration of land instruments and title is also recommended, including the establishment of a Land Records office at the local government level. These recommendations go to the heart of security of tenure. The limits to land areas that can be held by individuals (half a hectare under the current Land Use Act) are however abolished leaving room for land speculation and inflation as was the case before the Land Use Act in 1978. Compensation for the acquisition of undeveloped land is recommended although a distinction is made between undeveloped and unoccupied land which is land not put to use for a continuous period of 12 years prior to notice of revocation of title.

The Draft Decree attempted to deal with the problem of customary tenancy which has generated so many major conflicts over land in the country particularly in Ife and Warri. It recommended the purchase of the reversionary interest of customary landlords through a process akin to voluntary arbitration. This is a bold and necessary move which will be discussed further in Chapter 6 and it remains to be seen if it will survive in future suggestions for reform or be accepted. Special Land Tribunals are recommended to speed up the process of handling land cases. They are to have jurisdiction over land equivalent to the high courts.

Although the Law Reform Commission's recommendations and this Draft Decree appear to deal with the thorniest issues relating to reform of the Land Use Act 1978 which had been raised by organized and relatively influential interest groups such as traditional rulers, property developers, bankers and lawyers, the general direction of the reforms proposed seems to be towards a re-instatement of the pre-1978 situation. These proposals, if adopted would expand the privatization of land and access by wealthy groups albeit leaving the power or potential for regulation in the hands of government. Whilst reducing the concentration of power over land in the hands of Governors of States, which is a welcome development, the proposals do not really address changing the structure of governance in this area in any meaningful or fundamental way. It fails to clearly outline and address policy issues relating to the provision of access to land for housing and livelihoods by the vast majority of Nigerians. In this respect, it does not deal adequately with the de-centralization of power over land and people's participation in decision making regarding land use including development projects. In an era of widespread government acquisitions of land and forced evictions for private sector driven development projects, this is a crucial issue which is being addressed by vulnerable groups in society including women.

A further indication of these trends towards privatization and the expansion of markets in land, is to be found in the most recent attempt at reform of the Land Use Act 1978 initiated by the government in 2009. This process is once again an attempt to respond to or pacify powerful interest groups which are unhappy with the failure of governments to implement *any* reforms to date. In April 2009, the President inaugurated an 8 person Presidential Technical Committee on Land Reform with the following terms of reference:

- i. to collaborate and provide technical assistance to State and Local Governments to undertake land cadastral nationwide;

- ii. to determine individuals' "possessory" rights using best practices and most appropriate technology to determine the process of identification of locations and registration of title holdings;
- iii. to ensure that land cadastral boundaries and title holdings are demarcated in such a way that communities, hamlets, villages, village areas, towns, etc. will be recognizable;
- iv. to encourage and assist State and Local Governments to establish an arbitration/adjudication mechanism for land ownership conflict resolution;
- v. to make recommendations for the establishment of a National Depository for Land Title Holdings and Records in all States of the Federation and the Federal Capital Territory;
- vi. to make recommendations for the establishment of a mechanism for land valuation in both urban and rural areas in all parts of the Federation; and
- vii. to make any other recommendations that will ensure effective, simplified, sustainable and successful land administration in Nigeria.<sup>372</sup>

It would appear from the name of the Committee, its terms of reference and a document issued by its Chairperson and posted on the internet in 2011, that the Committee was conceived of primarily as a group of technical experts to advise the President on the modalities for carrying out a mapping and data collection exercise in the country and to spearhead specific land reforms. It had a conception of what land reforms were needed and was trying to give precise proposals on how they should be carried out. As the Chairman's report indicated, the direction of reform the Committee and government were trying to pursue were two fold – to reverse the incorporation of the Land Use Act in the Constitution and to establish a base map of the land area and data on landholding in the country.<sup>373</sup> The Committee recognized the enormity of its task and the need for the co-operation of a large number of government and other agencies. It therefore spearheaded the presentation of a Bill to create a National Land Reform Commission,

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<sup>372</sup> Akin Mabogunje, *Land Reform in Nigeria : Progress, Problems and Prospects* <http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/mabogunje.pdf> at 11. Last accessed on October 2 2013.

<sup>373</sup> Ibid at 9.

or more precisely, to transform the Technical Committee into such a Commission and expand its resources.<sup>374</sup>

The Bill has not been debated or passed by the National Assembly to date. The political instability in the country resulting from a period of prolonged ill health of the President from 2009 and the eventual takeover by the Vice President followed by fresh elections in April 2011, made this an inauspicious time to be promoting such major reforms. This might also explain why the processes undertaken by the Presidential Technical Committee were relatively quiet. Their activities were not widely publicized or known to most people in the country, outside specific professional associations such as surveyors and lawyers, and specific government agencies and officials. The focus of their activities might also explain why a Presidential Technical Committee was considered more appropriate for the task than the Law Reform Commission and why the Committee made no mention in its published documents of the prior activities of the Law Reform Commission relating to reform of the Land Use Act 1978. Following the change of government including legislators in 2011, there is no progress being reported on the activities of the 2009 Presidential Technical Committee.

## **5.6 The Land Use Act and Women's Land Rights.**

The Land Use Act 1978 was in its own way a revolutionary measure; as revolutionary as the annexation of Lagos and the establishment of colonial rule. Just as an uneasy co-existence and interaction between pre-colonial land use and ownership patterns and colonial ones spawned new systems and problems which the government, including the courts, had to deal with. That

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<sup>374</sup> Ibid at 12.

process persists with a change of actor/actresses. It is no accident that a move as bold and potentially far reaching as the vesting of all lands in the State was repeated in 1978 by an authoritarian military government, and that to ensure that no changes could be made easily to the legislation, it entrenched it in the Constitution of the country. All the civilian constitutions of Nigeria have been midwived by military regimes, so this provision was preserved in the 1989 and 1999 Constitutions. The authoritarian powers over land conferred on the Governors have been exercised mainly in relation to compulsory acquisitions of community lands for State projects and for foreign private investors, backed by military action. As most commentators have therefore observed, the most striking impact of the Land Use Act 1978 was the facilitation of easy and cheap acquisition of land by governments. Its impact on communal and individual tenure was much less obvious, not because government lacked the power to enforce changes, as we have seen in our analysis of the Act, but because it has chosen not to do so where possible, probably in order to avoid massive social reaction or unrest.

There is tremendous similarity between the activities of the colonial government and the post 1978 governments of Nigeria in relation to land. The judicial declaration of radical title being vested in the Crown is akin to the more overt legislative vesting of radical title in the State Governors under the Land Use Act 1978. These acts lay the basis for legitimization of new power arrangements. The simultaneous reference to such radical title being “nominal” and recognition of continuing beneficial title being vested in natives in colonial times or individuals, families and communities post 1978 also gives one a sense of *déjà vu*. The assertion of power over allocation and ultimate decision making over land is a necessary administrative and regulatory power. The question of who exercises it and how it is exercised, is at the heart of political organization and relationships in all communities. Individual access, use and benefit is

the default until challenged. The basis of the claim for use and benefit, and arrangements for sharing it, is what the law seeks to regulate. Changes to existing use, once institutionalized, usually require justification. This is why changes in radical title are usually declared to be nominal unless brought about by express agreement or military force. The problem with these purportedly nominal arrangements is the gradual and subtle process by which they become paramount, sometimes masking disenfranchisement of individuals and whole groups.

Post 1978, communities and individuals have conducted their land transactions largely ignoring the provisions of the Land Use Act. The majority of people continue to use land as they always have, making adjustments for changing socio-economic circumstances until they encounter State obstructions. However, even in the face of State inaction, some interest groups, especially lawyers, property developers and entrepreneurs, recognize that the Land Use Act could pose a looming threat to their activities or heralds significant change. The widespread practice of backdating land transfers post 1978 to a pre-1978 date to avoid the provisions of the Act applying to them, as well as innovative interpretation of Section 34 and 36<sup>375</sup> of the Act are indicative of this. More overt political opposition is expressed in form of agitations for reform of the Act to eliminate the insecurity associated with sudden State action. However, in both the colonial and the current situations, government acquisitions of land proceed gradually, expanding the quantity of State lands. A marked difference in the post 1978 situation is the increase in acquisition of land by government for its large scale development projects in the 1970s, many of which were then privatized in the 80s and 90s, and its more recent compulsory acquisitions of land all over the country *for* and on *behalf* of foreign and local investors or the

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<sup>375</sup> Sections relating to the extent of recognition of prior interests in land by the Land Use Act.

private sector.<sup>376</sup> Although the leasing and acquisition of land is not yet as significant in West Africa as in East, Central and Southern Africa, it is on the rise since 2008.<sup>377</sup>

Amidst this positioning of various interest groups in the process of land reform in Nigeria, what happens to relatively vulnerable groups who have not articulated their interests in the same terms as any of the more powerful groups, and yet bear the brunt of lack of access to land resources? What potential does the Land Use Act have for restoring and enhancing women's land rights in Nigeria?

The policy underlying the Land Use Act 1978 is nowhere in the Act made explicit but can be deciphered from the circumstances surrounding the promulgation of the Act, pronouncements of the government that passed the Act, the preamble to the Act and its content. As earlier noted, the Federal Military Government in power in 1978 was implementing a Third National Development Programme which involved government taking control of the “commanding heights of the economy” including the oil industry and a steel industry. In order to do this, the government had identified easy access to land as key, and reducing “racketeering” and land speculation as a means of reducing inflation and land litigation.<sup>378</sup> The original preamble to the Act refers to the rights of all Nigerians to use and enjoy land in the country for

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<sup>376</sup> Examples of such transactions include acquisition and allocation of land to Zimbabwean white farmers who fled Zimbabwe by the Nigerian government in 2006, and of lands in Ibeju-Lekki area of Lagos State for the purposes of an Export Processing Zone being built by a consortium of Chinese companies, referred to supra note 16. See also <http://www.lfzdc.org/>

<sup>377</sup> The exception is perhaps Liberia where six major companies have acquired agricultural concessions over about one third of land in Liberia (7-8 million acres) as at 2012, see Nat Walker, Susan Megy, Varney Kamara and Mike Butscher, *Agricultural Land Concessions and Conflict in Liberia: Policy Analysis Brief* (Monrovia: EWER Group, 2012) <http://www.lern.ushahidi.com/media/uploads/page/3/EWERPolicyBriefLiberia> see also <http://www.nytimes.com/2012/01/21/opinion/in-liberia-a-nobel-laureates-problem.html>.

<sup>378</sup> See remarks of Brigadier Yaradua referred to above at 155.

the purposes of “providing for the sustenance of themselves and their families”<sup>379</sup> thus setting the tone and framework for the interpretation of the Act. Even the later amendment to reflect civilian government refers to the Governor of a State holding land in trust for the people and having the power to allocate it to individuals and organizations.<sup>380</sup> Section 1 of the Act also refers to the Governor holding land in trust and administering it for the use and benefit of all Nigerians in accordance with the provisions of the Act. The Act may thus be evaluated in terms of the extent to which it has made land accessible to all Nigerians for their use and livelihoods, made land accessible to government for development projects, reduced insecurity of tenure and land litigation.

Can the Land Use Act guarantee women improved access to land? Government’s ability to compulsorily acquire land for housing schemes could make land available to women who apply for it under these schemes. However, they would still have to have access to sufficient surplus income to be able to take advantage of these schemes. Where they have such resources, the system of allocation is purportedly gender blind. This generally means that larger numbers of men who have better access to information about these schemes, the documentation needed to access them and resources to purchase are more likely to benefit from them.<sup>381</sup> Customary tenure, which, as we have seen, restricts women’s control of land in some parts of the country, still exists in the guise of pre-existing rights of occupancy in the Land Use Act, under which most land is held in rural areas of the country, although a local government may grant fresh customary rights of occupancy to both men and women from any lands that it may have acquired.

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<sup>379</sup> See Preamble above at 156.

<sup>380</sup> See above at 156.

<sup>381</sup> The myth of women not being allowed to own property independently of their husbands, under customary law, in some parts of Nigeria has become so widespread that it may prevent many women from applying and may influence the behaviour of the mainly male bureaucrats involved in the allocation procedures.



The embedding of the Land Use Act in the Constitution has been opposed on the grounds that it makes it hard or almost impossible to amend. However, this may in fact offer women and other vulnerable groups some protection based on the stability of the law. The courts can use the constitutional framework as a guide for interpreting the Act and curbing the mode of exercise of power by the Governors and other officials. For example, the Land Use Act could be read in conjunction with the fundamental human rights provisions of the Constitution and become a charter of land rights to shelter and to livelihoods.

This potential of the Land Use Act to guarantee access to land resources for women in Nigeria is obstructed by four main things : The almost unlimited power of Governors to make decisions on land, the lack of guidelines for the appointment of Land Use and Allocation Committees to enhance their independence from government, the lack of guidelines for the allocation of land and the continued recognition of privatized forms of customary tenure. Even the reform proposals of the Law Reform Commission do not sufficiently address these issues. Communities should be able to participate in decisions about who should represent them on Land Use and Allocation Committees and what development projects to allocate land to. Whilst I would support the shift of emphasis of the Land Use Act to land **use** rather than **ownership**, if the legal framework is to guarantee access to land for women, women should be able to participate in determining who is on those committees as well as ensure better gender representation. Much more importantly, guidelines or criteria for the allocation of land, especially for housing should take into account equal access for women.

The widespread participation of Nigerians, including women, in a process of fundamental reform of the Land Use Act is thus key. Pending any such reform, what strategies are open to women to secure access to land under existing law? As most land in the country is said to be subject to

customary law which is recognized by the Land Use Act, it is important to understand the distinction being drawn between customary and any other forms of tenure. The next chapter will revisit the realm of the customary which emerged in the colonial period and its impact on women's land rights.

Even in the absence of these crucial reforms, the courts should be much more expansive in their interpretations of the Land Use Act, to achieve its stated goals and the goals of the nation as stated in the Constitution. Adopting the mechanism of creating a trust without detailed guidelines on how that trust is to be exercised and what is beneficial to a group as large and complex as a nation (who are not minors) is fraught with problems. It leaves too much discretion in the hands of the trustee – in this case the Governor – making the law a tool for the achievement of his goals within the constraints of the socio-economic environment in which he finds himself. We will now consider briefly the nature of that socio-economic environment in Nigeria.

## **5.7 Capitalism and Legal Change in Nigeria**

As we saw earlier in Chapters 2 and 3, many parts of the West African region were integrated into a world economic system from the 16<sup>th</sup> century onward as suppliers of slave labour for the Americas and parts of Europe. This very lucrative trade and the arms trade that grew with it strengthened the position of strategically located and endowed kingdoms such as Lagos.<sup>382</sup> The Benin military leaders who came to the area respected the claims of the Idejo and first settlers they found there. They entered into a working alliance with them and the

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<sup>382</sup> Which was an accessible port on the Atlantic coast.

sovereignty of the new king was exerted in terms of administration not property. Even the Olofin and Idejo in their dealings with the first settlers seem to have been responding more to a need for organized resistance against the Bini rather than asserting property rights in land that would have resulted in exclusion or expropriation. The Kings of Lagos continued to request land as needed from the Idejo right up until the 19<sup>th</sup> century.<sup>383</sup>

What then changed these relationships and land tenure in Lagos and environs? Several commentators and scholars have noted that what changed in that period was the emergence of a market in land,<sup>384</sup> which hitherto was not bought and sold for money. This market in land did not emerge as a result of the establishment of colonial administration as the colonial authority's need for land could have been satisfied through the pre-existing system of allocation in Southern Nigeria. It was the settlers, notably European traders, the Saro and Brazilian émigrés, whose need for land for resettlement and new forms of trade and industry, drove these developments. Their need for land could also have been satisfied under the existing system of land tenure initially but by this time, in the mid 19<sup>th</sup> century, the local kings and chiefs, long engaged in the slave trade, were utilizing land as a means of securing patronage or support. The Saro and Brazilians with a recent history of being casualties in the slave trade wanted independence from this system of patronage.<sup>385</sup> Most importantly, in the new trade and service sector they were engaged in, land soon emerged as the most valuable and acceptable form of collateral.<sup>386</sup> They thus began to seek it, not for use but for investment, renting and mortgaging it in exchange for credit facilities. In this they were supported by the British abolitionists, consuls and

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<sup>383</sup> See Cole *supra* note 84 at 12.

<sup>384</sup> See Hopkins, *supra* note 119 at 787-790. See also Mann, *supra* note 208 at 697.

<sup>385</sup> Kristin Mann's book "Slavery and the Birth of an African City" *supra* note 7 is essentially a study of patronage relations in Lagos and how they changed over time

<sup>386</sup> Hopkins, and Mann, *supra* note 384.

administrators who offered them protection and support in the course of an emerging “legitimate” trade in palm oil and other primary products.

West African communities thus moved from being integrated into a world economic system as suppliers of labour, to being suppliers of agricultural produce and raw materials. In this transition, the Saro and other émigrés became important partners and suppliers of services for European traders and missionaries. Speaking the same language and sharing some aspects of culture,<sup>387</sup> they became intermediaries and agents in the relationships between local Africans and Europeans. Mann and Hopkins have demonstrated the centrality of credit to the expansion of the trade in agricultural produce, especially palm oil, and how it led to the emergence of a market in land. This process of commoditization of land required new rules that enabled land to be sold and purchased easily.

The Oba of Lagos, in issuing Crown Grants, was increasing his patronage base and diluting that of the Idejo, extending his sovereignty but not necessarily wishing to change the system of land tenure.<sup>388</sup> The new settlers, slaves and other interest groups sought to take advantage of these Crown Grants, interpreting them as conferring absolute ownership and the power to transfer to strangers, and not just occupation in perpetuity. These assertions of individual and absolute ownership amounted to a loosening of the political control of the existing elites.

Mann suggests that the alliances which facilitated these changes and early colonial policy on promoting a market in land could have played out very differently and indeed changed with the change in policy towards “indirect rule”. As was demonstrated in the draft report of WALC,

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<sup>387</sup> Such as Christianity and individualistic attitudes associated with the monogamous family unit.

<sup>388</sup> See Cole, *supra* note 84 at 12.

the Tew Commission Report and the legislation which followed them,<sup>389</sup> colonial policy seems to have shifted back to supporting and forming alliances with traditional rulers rather than the émigrés and emerging professional class, including lawyers.<sup>390</sup> Irrespective of the groups supported by the colonial administration's policies, the market in land was established in coastal cities like Lagos and Calabar. This was demonstrated by the failure of the attempted reversal of policy in Lagos.<sup>391</sup> The Ordinances passed in 1947, recognizing that Crown Grants were subject to customary tenure, were passed decades late, when holders of the Crown Grants had been exercising rights of fee simple owners such as obtaining mortgages. That the land market did not develop as quickly in other towns may be due to the restricted nature of trading and production activities which drove the development of the market.

The colonial state emerged to facilitate advantageous conditions of trade for British traders seeking to access inland producers of raw materials and bypass or exercise greater control over the African middlemen. It provided protection, dispute resolution forums and infrastructure among other things. Its activities were financed by revenue derived from this trade and through local taxation.<sup>392</sup> The middlemen, through a nationalist struggle, eventually fought to take back control and the post-colonial state was established. That control of local trade, however, continued to be exercised within the framework of a world trading system in which they were constrained by access to technology and monopolistic practices of European traders.<sup>393</sup>

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<sup>389</sup> See discussion above at 76-77.

<sup>390</sup> The colonial administration's antagonism towards lawyers and the middle class in the early 20<sup>th</sup> century is discussed at length in Adewoye, *Judicial System*" Chapter 9.

<sup>391</sup> Even after the 1947 Ordinances (see page 77 above) the market in land continued to expand and litigation for protracted periods between new owners and families purporting to hold the reversionary interest in the land was widespread.

<sup>392</sup> See Onimode, *supra* note 22 at 106-110.

<sup>393</sup> The attempt to monopolise trade was the major impetus for the establishment of colonial rule. Rulers such as Jaja of Opobo in the Niger Delta were deposed when they entered into effective competition with Europeans, shipping

In the 1960s and 70s, espousing an agenda of “developmentalism” through the establishment of modern industries, the post-colonial state became a major instrument and site of accumulation of wealth, participating directly in the economy through ownership and control of industries. The cut-throat competition between elites from the three regions which constituted the Federation was reduced by hierarchical military governments which gained access to national resources, transforming the federal system into a de facto unitary one. The need for land for infrastructure, industries and other development projects increased and customary tenure was viewed as an impediment to easy access. The Land Use Act was the solution adopted. The monopoly of decision-making regarding land, which had metamorphosed into ownership of land by chieftaincy and individual families, was replaced by State monopoly. This monopoly has been used largely to facilitate accumulation by transnational corporations, a small local private sector and a few families in alliance with the State. But it has also been used to challenge the monopoly and regulate the activities of large corporate actors.<sup>394</sup> The imposition of structural adjustment policies in the 1980s and its aftermath represented a reversal of trends. State monopoly and activity was downsized through privatization policies. State control of land has not, however been addressed yet. The private sector and particular interest groups such as private builders and developers are chaffing at the restrictions contained in the Act regarding easy transfer of land on the grounds that it raises the transaction costs of land development. Communities in resource rich areas also see State ownership and control as an impediment to benefits that could and in their view should accrue to them. Should privatization of industries be

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goods directly to England and restricting European trading companies in their areas. See Kalu Ume, *The Rise of British Colonialism in Southern Nigeria 1700-1900: A Study of the Bights of Benin and Biafra*. (New York : Exposition Press, 1980) at 205-207.

<sup>394</sup> See for example the Nigerian Enterprises Promotion Decree 1972 (popularly known as the Indigenisation Decree) which transferred majority ownership of companies in most industries to nationals.

accompanied by privatization of land resources? What form should it take? There is a growing consensus that the Land Use Act should be reviewed but many differences regarding the direction and details of the review. In my view this review should be an open one conducted through the Law Reform Commission and giving room for the views and concerns of various interest groups to be reflected. Within the context of an understanding of the trends that militate against women's access to land, organized women's groups, in particular, need to seize the opportunity of any such review process to make their concerns known and to ensure that their interests are incorporated.

## **Chapter 6: Customary Law, Legal Imperialism and the Democratization of Law in Nigeria: Issues Arising.**

### **6.1 Introduction**

As we have seen in the preceding chapters, introducing and changing law or systems of social regulation was a central part of the establishment of colonial relations and government in Nigeria. This was a process that took place over a period of two centuries differing in focus and intensity at various times and inextricably intertwined with the creation and constitution of the modern state. It did not take place as a monolithic, sudden, and total rupture with the past<sup>395</sup> but declared its recognition of and willing co-existence with existing indigenous systems as a matter of policy.<sup>396</sup> However, such recognition was in and of itself an assumption of jurisdiction and the power to introduce new rules although the willing co-existence rendered it much less brash. As a result, the dominant perception of the laws and legal system in the West African British colonies articulated by colonial administrators, European traders, missionaries, indigenous elites and the legal profession was one of a dual legal system comprising native law and custom or customary law and English or modern State law.<sup>397</sup>

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<sup>395</sup> Even though there were some aspects of this in the initial introduction of colonial statutes, imposition of colonial administrators and the activities and deployment of the police force.

<sup>396</sup> For a typical example of a clause relating to the application of native law and custom in Nigeria, see Section 19 of the Supreme Court Ordinance 1908 in Appendix B. It is a reproduction of a similar clause in the 1863 and 1876 Supreme Court Ordinances.

<sup>397</sup> Islamic law was often classified as a specific type of native or customary law, although it had several written sources.



This notion of a dual legal system has given rise to discussions on the nature of customary law, its relevance to sustainable development and good governance<sup>398</sup> and attempts to reform and restate it.<sup>399</sup> In Nigeria, calls for a revival of customary law are surfacing in some circles, the most important of which has been the revival of Sharia criminal law in the northern states of the country. Native law and custom was *deemed* applicable to marriage, tenure and transfer of real property, and to inheritance and testamentary dispositions between natives unless a contrary intention could be inferred from the transaction or actions of the parties.<sup>400</sup> Because there are different rules applicable in different localities and among different ethnic and religious groups, complex rules evolved to deal with cross cultural situations.<sup>401</sup> Academic literature is replete with work that juxtaposes customary law with English or modern law and presumes that the latter is most often disadvantageous to women and to modern development.<sup>402</sup> There is another more subdued but fairly developed trend towards excavating empowering and women friendly practices and customs that indicate gender equality and equity in ancient customs and law in many societies.<sup>403</sup> In recent times there is also a growing literature on women's rights and

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<sup>398</sup> See Orebech et al eds, *The Role of Customary Law in Sustainable Development* (New York: Cambridge University Press, 2005); and Fenrich, Galizzi and Higgins eds, *The Future of African Customary Law* (Cambridge, New York, Melbourne : Cambridge University Press, 2011).

<sup>399</sup> See for example, a Manual produced for Anambra and Imo States by a Division of the Ministry of Justice in 1977 - SNC Obi, *The Customary Law Manual: A Manual of Customary Laws Obtaining in the Anambra and Imo States of Nigeria* (Enugu, Nigeria: The Government Printer 1977). See also Osibajo & Kalu eds, *Towards a Restatement of Nigerian Customary Law* (Lagos, Federal Ministry of Justice, 1991) for some interesting and more recent debates on the future of Customary Law.

<sup>400</sup> See Supreme Court Ordinance, *supra* note 392. Appendix B.

<sup>401</sup> For example, to govern marriage or inheritance in an Igbo family resident in Yorubaland, or a Yoruba Moslem married to an Igbo Christian.

<sup>402</sup> See Muna Ndulo, "African Customary Law, Customs and Women's Rights" (2011)18:1 *Indiana Journal of Global Legal Studies* 87; and Susan Okin, ed, *Is Multiculturalism Bad for Women?* (New Jersey : Princeton University Press, 1999).

<sup>403</sup> See for example, Albie Sachs and Gita Welch, "The Bride Price, Revolution and the Liberation of Women" (1987) 15 *International Journal of the Sociology of Law* 369; see also Armstrong et al, "Uncovering Reality : Excavating Women's Rights in African Family Law" (1993) 7 *International Journal of Law and the Family*, 314-369.

culture which is in some respects now beginning to call for internal dialogue within cultures rather than a juxtaposition of the customary and the modern in the realm of rights discourse.<sup>404</sup>

Customary law in Nigeria is recognized and applicable mainly in the realm of land and property law and of personal laws relating to the family - marriage, divorce and inheritance. Since the colonial period, the sphere of the customary has therefore operated to regulate the lives of women more than any other group for it is within the sphere of familial relations that some of the crucial rights and status of women in society are defined, and rights to land for most women are also acquired mainly through inheritance or family grants. Our survey of the impact of developing land law in Nigeria on women since the 19<sup>th</sup> century has shown that their access to land is increasingly precarious and invites a deeper analysis of the real issues to be addressed in post colonial law and land reform that would benefit systemically impoverished groups.

This chapter traces the development of ideas about custom and customary law in the colonial and post- colonial period in Nigeria, highlighting their gender bias and exploring how these ideas have been projected in the realm of land law. It examines the implications of the discourse and debates on customary law for women's rights and in particular their rights to land. It advocates a re-conceptualization of law and customary law that will clarify rather than obscure the substantive issues at stake for women and enhance their advocacy and strategies for law reform in the 21<sup>st</sup> century. The chapter is divided into three main sections. In the first section, I explore the impact of European colonialism on African legal systems. An important dimension of this impact is the emergence of the concept of "native law and custom" or customary law. I examine the basis of the existence of this type or classification of law in the Nigerian legal

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<sup>404</sup> Susan Williams, "Democracy, Gender Equality and Customary Law : Constitutionalising Internal Cultural Disruption" (2011) 18:1 Indiana Journal of Global Legal Studies 65.

system, the debates and discussions on its nature and future and possible directions for its reform favorable to women. I argue that the colonial bifurcation between English/European or State law and native law and custom produced a certain dynamic in the colonial legal system which significantly influenced legal concepts, content and process, as well as legal education. This continued bifurcation has contributed to obscuring, rather than clarifying issues in discussions on law reform in Nigeria. These issues are often framed in terms of a response to negative effects of European colonialism on African societies and legal systems and the need for decolonization. In the second section, I explore the theme of decolonization, arguing that one of the dimensions of colonization in the legal sphere, or legal imperialism, was the centralization of power in capitalist and patriarchal state institutions, and the promotion of a legal discourse which facilitated and maintained exploitative economic and social relations within the existing world system with significant impacts for women. The final section explores how women might redefine and engage with law and legal discourse at a local, national and global level that will be most beneficial to them, taking an illustration from one of the cases on women's land rights in South Eastern Nigeria which we considered earlier in Chapter 4.

## **6.2 Understanding Colonial Law and Legal Systems**

The European traders who had been trading in the West African region for centuries were either subject to local law and utilized its mechanisms or improvised to achieve the results they wanted, often deploying military power for these purposes. They continued to make these choices of what mechanisms for dispute resolution to utilize well into the 20<sup>th</sup> century irrespective of the establishment of a colonial administration and courts in places such as Lagos.

Like the local residents, they often made their choice of forum based on their assessment of what would yield the best and quickest results. For example, Elias cites a case of debt recovery initiated by a European firm, which was transferred from the court of the King of Porto Novo to the Lagos Supreme Court at the request of the “native” defendant who hoped to be dealt with more leniently by the new court.<sup>405</sup> Europeans did not therefore switch to using the new colonial courts which were not necessarily initially effective for all types of disputes in the transition period of colonial rule. Local residents also did not suddenly abandon their norms and familiar forums of dispute resolution. The indigenous system of social regulation ran in parallel as well as merged with the colonial legal system to varying extents during the initial decades of this transition to colonial society and law.

Informal forums for dispute resolution presided over by the consul and the Courts of Equity in the Niger Delta were early examples of hybrid systems which evolved to settle disputes in a cosmopolitan setting between traders of different nationalities accustomed to different legal cultures. Prior to 1861 when Lagos became a colony, the Saro and Brazilian émigrés who returned to Southern Nigeria from about 1851 also established their own courts to administer justice in a manner relevant to their communities.<sup>406</sup> They often did not utilize existing “traditional” forums of conflict resolution, having been displaced from their communities and legal cultures and adopting and adapting a new legal culture suited to their activities. So whilst the colonial administration lumped native law and custom together as a category to distinguish it from the English forms familiar to them, there were of course many native laws and customs depending on the locality, communities and interest groups. This was therefore in reality a

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<sup>405</sup> See *Voigt & Co v Yesufu Bada*, cited in Elias, *Legal System*, supra note 3 at 80.

<sup>406</sup> They were particularly concerned with recovery of debt. See above at 61.

period in which international laws and legal systems developed into a national law and legal system with various components. The different groups that inhabited and operated in the area, including the Europeans, observed various norms and utilized a variety of dispute resolution techniques and forums to achieve their ends. Sally Engle Merry and other writers on legal pluralism have remarked that legal pluralism was and is much more of a feature of most legal systems than is acknowledged especially in the West and people are constantly negotiating their way through multiple jurisdictional authorities in their everyday lives.<sup>407</sup>

Yet, by the 20<sup>th</sup> century the idea of a dual legal system<sup>408</sup> conceived of as modern/foreign and customary/indigenous was well entrenched, and a major pre-occupation of lawyers and policy makers was how these systems could be better combined and how to resolve conflicts and problems arising from their combination. How did this happen? As we saw earlier several anthropologists and other researchers studied the customs and systems of law of the local groups in West Africa partly in an attempt to ascertain what they were<sup>409</sup>. There was also a debate within this scholarly community as to whether the systems of social regulation they encountered amongst these groups of people could be described as law, given the perceived differences between them and the European or Western systems. This, I would argue, is likely to have been the origin of the distinction between native law and custom and English or European law associated with the establishment of the modern or colonial state. As earlier noted<sup>410</sup>, the establishment of the colonial state was part of a process of assumption of jurisdiction over

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<sup>407</sup> Sally Engle-Merry, "Legal Pluralism" (1988) 22:5 Law and Society Review 869 at 869; see also Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill LJ 579.

<sup>408</sup> Or a tripartite system when Islamic law is acknowledged as an independent legal system separate from customary law.

<sup>409</sup> See discussion above at 24.

<sup>410</sup> See page 59-60 above.

trading activities in the area which required greater political domination than the Europeans had hitherto had both as a result of the hegemony of local rulers as well as competition between themselves. In pursuance of its policy of indirect rule, the British colonial administration recognized and provided for the application of native law and custom by new colonial courts right from the time of their establishment.<sup>411</sup> The bifurcation of the colonial legal system thus had both a content and an institutional dimension. Native courts were established in the main administrative areas of the country by 1907.<sup>412</sup> By the last decade of the 19<sup>th</sup> century there were already some attempts to document native laws and customs so they could be referred to in processes of adjudication in the colonial courts of record, like principles of English common law.<sup>413</sup> These efforts extended into the post independence period. For example, in 1959, following a conference in London on the Future of Customary Law in Africa, an influential project for the Restatement of Customary Laws on the continent was launched at the School of Oriental and African Studies under the direction of Professor Anthony Allot<sup>414</sup>. Since then several debates, conferences and documents on this subject have been held and published periodically in various domestic and international forums.<sup>415</sup>

The dominant discourse on legal pluralism in the 1960s and 70s which recognized and advocated for separate traditional and customary legal systems indigenous to former colonial

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<sup>411</sup> Provisions were made for this in the Supreme Court Ordinance 1863 which was slightly amended and reissued in 1876 during a major re-organisation of the court system of the colony of Lagos and again in 1908 after the creation of the Protectorates of Southern and Northern Nigeria. See Appendix B.

<sup>412</sup> See above at 65.

<sup>413</sup> See for example, Sarbah, *Fanti Customary Laws*, 1<sup>st</sup> edition (London : Clowes, 1897).

<sup>414</sup> The Restatement of Customary Laws in Africa Project. Publications which emanated from this project included SNC Obi, *The Ibo Law of Property* (London : Butterworths, 1963).

<sup>415</sup> In Nigeria, there was a conference on African Indigenous Laws in 1975, and most recently a workshop organised by the Institute of Advanced Legal Studies at the end of 2012. The Leitner Centre for International Law and Justice organised a two day conference at the University of Botswana in 2008. Many of the papers from that conference were published in 2011 in a book entitled “The Future of African Customary Law”, see Fenrich *supra* note 398.

territories, and applicable to the natives and to certain kinds of transactions, emerged within the framework of a legal positivist vision of the legal system as a state centric one. This vision was dominant at a time when the colonial state was establishing itself in West Africa and later when post-independence states sought to continue and extend the legacy of the colonial state in terms of territorial control, infrastructure and services. The discourse was thus focused on a specific type or conception of law as the command of the sovereign and on conflict and conflict resolution systems rather than normative systems. Its view of law was a narrow one with an emphasis on breaches and enforcement mechanisms. It was embraced by the nationalist rhetoric of the 1960s and 70s which sought to legitimize the development of customary law and courts in the post-colonial era promoting their recognition and integration within the State system.

In reaction, in the 1970s, there was a spate of scholarly expositions and critiques which argued that customary law, quite far from being a body of relatively stable, ancient, indigenous norms and procedures amenable to restatement, documentation and codification, was “created” in the colonial period as a result of the profound economic and political changes that took place. Furthermore, the attempt to place it in the straitjacket of judicial precedent would amount to changing one of its fundamental characteristics – flexibility and responsiveness to specific contexts.

Today, many advocates of the retention and reform of customary law continue to discuss customary law as if it is an ancient, stable set of immutable norms and procedures, attributing legitimacy to it based on these qualities<sup>416</sup>. The discourse on legal pluralism, polycentricity or hybridity is, however, moving gradually towards a recognition of the existence of multiple

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<sup>416</sup> See for example, Chuma Himonga, “The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa” in Fenrich, *supra* note 398 at 31.

normative systems within all polities and a focus on how to theorize and regulate their internal development and interactions.<sup>417</sup>

### **6.2.1 The Creation of Customary Law Thesis**

In the 1970s and early 80s, as interest in Law and Colonialism and the Law and Development Movement in the West grew, some legal scholars and anthropologists took a fresh look at the role of law in the establishment and maintenance of colonial relations. These scholars were interested in the issue of “legal transplants” in the colonies and whether and how they worked.<sup>418</sup> They were reacting to the dominant perceptions of the law and the legal system and trends in legal anthropology and among lawyers, in the fifties and sixties, that sought to unearth indigenous customary law, restate and document it<sup>419</sup> for application within the legal systems of former European colonies in Africa, Asia and Latin America. This group of scholars thus contested the assertion that customary or traditional law is rooted in ancient traditions continuing from the pre-colonial era, showing how the activities of colonial administrations in effect created rather than used existing law and legal systems.<sup>420</sup> Their position is often referred to as the Creation/Invention of Customary or Traditional Law thesis although it has some variants. The idea that customary law as we know it today was created in the colonial period is not a new one and was articulated by some judges and colonial administrators as early as the first decade of the

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<sup>417</sup> See, for example, Christoph Eberhard, “Towards an Intercultural Legal Theory : The Dialogical Challenge” (2001) 10:2 Social and Legal Studies 171 for a summary of some of these trends in scholarship in Francophone legal anthropology. See also Webber, *supra* note 407.

<sup>418</sup> See for example, Yash Ghai & Patrick MacAuslan, *Public Law and Political Change in Kenya* (Nairobi : Oxford University Press, 1970) and Robert Seidman, *The State, Law and Development* (London : Croom Helm, 1978).

<sup>419</sup> See for example, the work of P Bohannen, C Meek and SNC Obi.

<sup>420</sup> See Snyder, *supra* note 6; Chanock, *Law and Custom*, *supra* note 6; Woodman, “How State Courts Create Customary Law in Ghana and Nigeria” in Morse & Woodman eds, *Indigenous Law and the State* (Dordrecht-Holland/Providence, RI- USA : Foris Publications, 1988); and Sally Falke Moore, *Social Facts and Fabrications : Customary Law on Kilimanjaro, 1880-1980* (New York : Cambridge University Press, 1986).



20<sup>th</sup> century. For example, In the case of *Wokoko v. Molyko*, the presiding judge was of the opinion that :

... in the past native custom has been by no means static : indeed a great many native customs in West Africa are manifestly of European origin, and it is eminently desirable that native custom should be progressive, as in this case, where the older and, as I hold, superseded custom would restrain development.<sup>421</sup>

He was clearly cognizant of the fact that judges can exercise tremendous discretion in a common law system and supported their doing so. Later, in the early sixties and seventies, scholars like Adewoye and F A. Ajayi<sup>422</sup> commented on the significant changes wrought by the imposition of British rule on the system of administration of justice. However, the creation of customary law thesis crystallized in the 1980s due to the work of scholars such as Gordon Woodman, Sally Falk Moore, Martin Chanock and Francis Snyder<sup>423</sup>.

These scholars were specifically focused on contesting the notion that customary/traditional law is rooted in ancient traditions continuing from the pre-colonial era, and on showing how law is the product of historical interaction between different groups of people, reflecting power relations. One of the main proponents of this position is Martin Chanock. In some of his earlier work in the 70s, Chanock argued that “the failure to study historically the changes in African law in the colonial period has led to a confusion of tenses which affects our understanding of African law.”<sup>424</sup> The idea of dual legal systems and projects to restate and

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<sup>421</sup> *Wokoko v. Molyko* [1938] 14NLR 42, at 44. Quoted in Elias, *Legal System* supra note 3 at 15. Elias considers this a sweeping generalisation and prefers to speak of “influences” of English law on native law and custom.

<sup>422</sup> Adewoye, *Legal Profession*, supra note 3; F A Ajayi, “The Interaction of English Law with Customary Law in Western Nigeria” (1960) 1 *Journal of African Law* 98.

[www.jstor.org/jstor/gifvtdir/ap001655/00218553/ap020013/02a00030\\_1.1.gif?jstor](http://www.jstor.org/jstor/gifvtdir/ap001655/00218553/ap020013/02a00030_1.1.gif?jstor)

<sup>423</sup> See supra note 420.

<sup>424</sup> Chanock, “Neo-Traditionalism and Customary Law in Malawi” (1978)16 *African Law Studies* 80.

codify customary law flowed from this. In his major work on Law, Custom and Social Order<sup>425</sup> Chanock argues that customary law was not a relic of the pre-colonial past brought forward into the present, but a product of specific colonial relationships. In this detailed study he shows how even the pre-European contact period needs to be understood historically in terms of dynamic political and economic processes and struggles between different interest groups. Chanock emphasizes that during the colonial period a new system of administration of justice was put in place which incorporated some local actors but with significantly changed roles and responsibilities. These actors, often in collaboration with the colonial authorities made new rules that represented an intersection between British, local colonial, and contemporary indigenous laws and reflected emerging dominant interests and marginalized others<sup>426</sup>.

Professor Gordon Woodman in his work has pointed out how attempts to codify custom, or even apply it within the framework of a system of judicial precedent and enforcement by the State, fundamentally changes its character. Customary norms then become ossified and institutions for their enforcement may become more dependent on the state than on community approval and sanctions.<sup>427</sup> He thus distinguishes between what he terms “lawyers’ , judicial or official customary law” and “practiced or living customary law”. The former is customary laws recognized by state law, whilst the latter is customary law practiced by people in their everyday lives.<sup>428</sup>

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<sup>425</sup> See supra note 6.

<sup>426</sup> Ibid at 144-145

<sup>427</sup> Woodman, supra note 420.

<sup>428</sup> Ibid. See also Gordon Woodman, “A Survey of Customary Laws in Africa: In Search of Lessons for the Future” in Fenrich supra note 398 at 24-25.

In a useful 1984 summary and commentary on the state of scholarship in this area Professor Peter Fitzpatrick identifies three main strands of work on this subject.<sup>429</sup> First are a group of scholars who argued that the attempt to codify custom amounted to decontextualizing it and making it inflexible and thus fundamentally changing its character. What emerges is not a tradition of customary law as applied in native tribunals at all but a new creation – colonial or modern customary law. He cites major scholars that represent this school of thought as William Twining and Gordon Woodman. According to Fitzpatrick, their main pre-occupation was with highlighting the effects of changing the form of customary law, drawing it into new State legal systems and processes. The second strand of scholarship he identifies focuses on the content of customary law arguing that even when the forms remain the same, the content is fundamentally changed as a result of changing economic and social relationships in colonial society. Scholars he cites as representing this strand include Chanock and Snyder. The third strand of scholarship he identifies focuses on the way in which custom and customary law change and have different effects after capitalist penetration<sup>430</sup>. So even where rules and institutions remain the same, their operative context is fundamentally changed. Whilst applauding these scholars for shattering “the common idea of an essential traditional law directly incorporating a pre-colonial reality.”<sup>431</sup> Fitzpatrick cautions against imposing European concepts and categories on a very different African reality concluding that the struggle for decolonization includes a decolonization of knowledge. His perspective in this early article has the advantage of highlighting the need for

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<sup>429</sup> Peter Fitzpatrick, “Traditionalism and Traditional Law” (1984) 28 JAL 20 at 21. This Special Issue of the Journal of African Law was dedicated to discussions on Traditional Law and the Creation of Customary Law Debates in the 70s and 80s.

<sup>430</sup> He cites Rwezaura as representative of this position. Ibid at 22.

<sup>431</sup> Ibid.

democratization of knowledge and recognition of participation of people in the creation of knowledge rather than ignoring or rendering invisible the knowledge they produce.

In a critique and expansion of Fitzpatrick's commentary, Franz von Benda-Beckman, expresses important reservations about the "creation of customary law" thesis.<sup>432</sup> Firstly, he considers it an overgeneralization to speak of the colonial creation of customary law, ignoring the many instances of smooth evolution of normative systems in villages and the continued use of and confidence in those systems. In our case study, the absence or rarity of certain kinds of dispute over land as well as continued recourse to family elders and community leaders for the settlement of disputes, would represent such smooth evolution, demonstrating the limitations of studying law exclusively through cases or disputes. von Benda-Beckman also points out that very little research has been done on the impact of traditional laws created in State forums on the lives of people in particular communities, questioning the impact of such laws or re-interpretations beyond the academic. Furthermore, he identifies one of the major issues being dealt with as traditional law out of context and asks why it should receive so much attention, whilst State law out of context does not. He also asks why the interpretation and application of State law by natives (e.g. within the context of the native court system) is not regarded as people's state law, corresponding to "lawyer's customary law"<sup>433</sup>. von Benda-Beckmann asks how we should classify the activities of High Courts applying substantive rules of custom, or the State's registration of native title. In essence he is arguing that if everyone is in the process of creation, why single out and emphasize the activities of one group, failing to recognize the activities of others on the same terms when discussing Western law? He argues that - "Changes

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<sup>432</sup> Von Benda-Beckmann, "Traditional Law out of Context" (1984) 28 JAL 28.

<sup>433</sup> Ibid at 32 (Lawyer's customary law is a term made popular by Gordon Woodman).

never become “artificial creations” or “transformations” but remain “change” even if there is little left of the ideas which originally may have given western law its identity. And western law out of context is ignored”.<sup>434</sup> He thus highlights the complexity of the colonial legal environment as comprising both parallel legal systems as well as hybrids.

### **6.2.2 A Creation of Colonial Law Thesis**

At the same time as legal pluralists argued about customary law, some law in development/law and colonialism scholars were highlighting the fact that the establishment of colonial relations in most colonies involved not just legal transplants but the creation of colonial law distinct from law in the colonizing or metropolitan states.<sup>435</sup> They thus distinguished the reception of English law in English colonies in the form of so called statutes of general application, principles of English common law and doctrines of equity, from colonial legislation *and* questioned notions of the purported adoption of English legal institutions and procedures, pointing out how these procedures were selectively adopted or often completely changed in the colonial context either due to lack of personnel or the peculiar goals of autocratic colonial administrations.<sup>436</sup>

A major part of the problem in the discussion on the Creation of Customary Law and the Reception of English or European Law appears to emanate from the use of terminology as well as conceptions of European law as State law, distinct from the unwritten customs of the natives. The term “Creation” or “Invention” and its combination with “Customary” as well as

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<sup>434</sup> Ibid.

<sup>435</sup> Robert B Seidman, “The Reception of English Law in Colonial Africa Revisited” in 2:1 East Afr. Law Rev 47.

<sup>436</sup> See for example Adewoye’s discussion of improvisation in the early colonial legal system in Nigeria where navy personnel and traders served as judges, as well as the attempts by the colonial government to restrict the sphere of operation of lawyers in the early 20<sup>th</sup> century, *supra* note 3 at 108-109.

the use of the term “Reception” is misleading. It is more apt to speak of what I will term – the Creation of Colonial Law in Nigeria.<sup>437</sup> In Chapter 2, we traced the evolution of the modern Nigerian legal system from the development of forums and rules for dispute resolution between natives and European traders in the Niger Delta area and the Courts of Equity, to the establishment of new domestic courts and rules in the colony of Lagos and beyond. Historians such as Adewoye, Mann, Obaro Ikime and Martin Lynn have examined in some detail the gradual processes by which modern states and institutions of law, rules and constitutions evolved or were imposed following the escalation of European trading activities in the Niger area from the 17<sup>th</sup> century. Adewoye in particular shows the high levels of improvisation which characterized the early period of development of legal institutions and the legal profession established or recognized by the colonial government. Martin Lynn also shows how new normative systems and processes of adjudication of disputes developed in the Niger Delta as an early form of international customary law produced by the Courts of Equity and later Consular courts, as European traders sought first to avoid the exercise of existing domestic legal jurisdiction over their affairs and later to exercise jurisdiction over the natives. These various scholars demonstrate how new normative systems emerged which could neither be described as European or English nor as indigenous to the people of the area. These historians and a few lawyers such as Dr. T.O. Elias and Justice Karibi-Whyte may be said to have contributed significantly to our knowledge of the way in which colonial law was created or established in Nigeria.

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<sup>437</sup> I adopt this terminology in order to compare and contrast these discussions with the Creation of Customary Law thesis.

Some scholars such as Chanock and Snyder, unlike the colonial judges and administrators, referred to earlier<sup>438</sup> who acknowledged ongoing change in the legal system, are not pre-occupied with the origin of the norms and ideas but with their function and with understanding what drives legal change. As we have seen, aspects of the colonial law and legal system in Nigeria evolved over several decades and had various elements. When formal colonial government was established, some legislation from England was imported into the legal system of the colony on a fairly ad-hoc basis, no doubt to fill in any possible future gaps<sup>439</sup>. English common law and doctrines of equity were also made applicable in the colony, and native law and custom, for example relating to land, was applied and re-interpreted by the new colonial courts, becoming the prevailing Nigerian common law of real property. Most significantly the government established a hierarchy of laws and courts which reflected the exercise of sovereignty by the foreign government over the natives. This was expressed in the repugnancy clause which gave judges discretion to determine whether native law and custom was repugnant to natural justice, equity and good conscience. However, the limits of this sovereignty was reflected in the persistence of pre-colonial native law, customs and procedures unrecognized by the new governments<sup>440</sup> as well as the negotiated power sharing arrangements between the colonial government and traditional elites reflected in State sanctioned and supported native law and custom.<sup>441</sup> The result was a polycentric legal system comprising a hybrid state legal system made up of various elements some of which were recognizable as borrowed from pre-existing

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<sup>438</sup> See quote from *Wokoko v Molyko* supra note 421.

<sup>439</sup> For example, English statutes of general application in force in England as at 1900 were made applicable in Nigeria.

<sup>440</sup> These would include dispute resolution by family elders as well as the courts of some traditional leaders.

<sup>441</sup> These would include the native courts and councils which were supported by the State financially and through the deployment of the police force for example.

systems, some improvisations and some new, as well as non-state law; all of which had different effects when applied within the new environment of growing monetization and changed power relations.

The legal gaze of scholars and colonial elites trained on State law, and norms which came into direct contact or conflict with it, was a rather narrow one. It failed to see the array of norms which guided and guide behavior and were widely accepted or uncontested, having endured for long periods of time, or having been developed to respond to new situations. These included broad principles or rules which reflected the ethical underpinnings of social interaction such as respect for elders and the right to a livelihood.<sup>442</sup>

In a recent conference on the future of customary law in Africa, scholars working in this area discussed current ideas and perceptions of customary law and its future in the legal systems of the continent. Papers from this conference were published in a book in 2011<sup>443</sup>. The contributions in this book raise many of the issues in the current scholarly debate and discourse on customary law particularly among advocates of its retention and reform. Most of the contributors to this discussion see customary law as a comprehensive system of rules and processes or institutions of indigenous communities in Africa which were displaced in the colonial period. As some of them note,<sup>444</sup> this includes the Islamic legal system or Sharia which was itself displaced by European colonial rule. They also draw a distinction between lawyers' or

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<sup>442</sup> Or to access resources and to work for a livelihood.

<sup>443</sup> See Fenrich, *supra* note 394.

<sup>444</sup> See Abdulmumini Oba, "The Future of African Customary Law" and Fatou Camara, "From Contemporary African Customary Laws to Indigenous African Law : Identifying Ancient African Human Rights and Good Governance Sensitive Principles as a Tool to Promote Culturally Meaningful Socio-Legal Reforms" in Fenrich, *supra* note 394 at 58 and 494.



official customary law and living customary law<sup>445</sup> which they describe as practices and customs of the people in their day to day lives. In the first section of the book three articles by Woodman, Himonga and Oba, give an overview of the main thrust of discussions on the nature and future of customary law.

Woodman, in his contribution, defines customary law as “a normative order observed by a population, having been formed by regular social behaviour and the development of an accompanying sense of obligation.”<sup>446</sup> He contrasts customary law with legislation and notes that his subject matter is “customary laws that exist in Africa” and not African Customary laws, thus acknowledging the variety of customary law systems in the continent *and* that customary law is not confined to Africa but may exist in all societies. Having identified the subject matter of his paper, Woodman goes on to identify some characteristics of customary law.<sup>447</sup> At the end of this section he acknowledges that all these characteristics are characteristics of State law as well. In the next section, he notes the impact of colonialism in drawing artificial territorial boundaries; of indirect rule or judicial recognition of customary law, in generating changes in political power and social regulation and thus the relationship between state law and customary law. Thus he notes the tremendous power of definition wielded by state law and institutions. He poses what he considers to be a critical question of “which law is primary” suggesting that customary law is the first and more fundamental law.<sup>448</sup>

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<sup>445</sup>Ibid. See contributions by Woodman, Oba, and Himonga in Chapters 1-3.

<sup>446</sup> See Woodman, *supra* note 427 at 10.

<sup>447</sup> These are – its tendency to reflect and sustain inequalities in the social order; its variety and differing degrees of mandatory force; its tendency to change constantly; and its uncertainty and controversial nature.

<sup>448</sup> Here it seems he uses the term in the sense in which Jeremy Webber uses it, to mean that it forms the bedrock of the legal system on which statutes and other kinds of law are based. See Webber, *supra* note 407 at 580.

Woodman concludes or arrives at his famous distinction between “lawyers’ or judicial customary law” and “sociologists” or living customary law”. What is this “living” customary law which he says continues to be significant in guiding people’s lives in the field of family and property law? This is where scholars like Martin Chanock shed more light on the historical processes that shape the law and suggest that there is nothing sacrosanct or legitimate about this kind of law and in some cases it might represent a “lawlessness” of powerful interest groups. Woodman indicates that this living customary law is still significant because “traditional” authorities still remain significant although subordinate to the state. He also acknowledges that there are many modern fields of activity such as banking, intellectual property, governed only by state law modeled along the lines of received law. But he still concludes this section by observing that “However, one suspects that in popular observance, in the vast numbers of acts and transactions with subject matter too small in value to be taken to state institutions, living customary law, however great its difference from received law, may still govern.”<sup>449</sup>

In his conclusions regarding the future of customary law in Africa, Woodman notes two current trends : the rapid rate of change in customary laws and the trend towards the spread of state regulation of all spheres of life, and to suppress all customary laws. In his view, such suppression is not a practical possibility and customary law will continue to govern at least some part of the lives of people.<sup>450</sup> An important observation that he makes in relation to seeming clashes between customary and state laws and the attempt to resolve them, is that in resolving one aspect, it may fundamentally affect social relations if such measures are de-contextualized. He gives the example of widows’ rights of inheritance and how giving effect to them might

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<sup>449</sup> Ibid at 26.

<sup>450</sup> Ibid at 28.

undermine the cohesion of the lineage. This of course ignores the fact that in most cases the greed of relatives seeking to marginalize the widow has already undermined the cohesion of the lineage, and mysteriously places all responsibility for this cohesion on the widow.

Himonga uses the terms “official and living” customary law to mean basically the same things as Woodman does in using “lawyer’s and living customary law. In a section dedicated to explaining these concepts, she argues that living customary law is adapted to fit in with changed circumstances whilst official customary law is ossified. In this respect, her use of concepts differs somewhat from Woodman’s as they do not emphasize the question of ancient roots as the source of legitimacy.

“Living customary law represents the unwritten practices observed, and invested with binding authority, by the people whose customary law is under consideration. The test of validity of its rules and norms is its acceptance by these people, rather than the command of the sovereign or pronouncement of a legislator.”<sup>451</sup>

She distinguishes between culture and tradition, seeing tradition as old and rooted practices of a people, whilst culture signifies the inherent evolving nature of the practices. As culture changes, so does the normative system. One may then ask, if culture is modern, why term the law that emanates from it “customary” albeit “living customary”.

Abdulumuni Oba, in his contribution, also adopts the terminology of “official and living” customary law. He starts with a quote from Elias observing that “Law generally can be said to be ‘the body of rules which are recognized to be obligatory by its members’”. Yet he immediately goes on to define African customary law as “the organic or living law of the

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<sup>451</sup> Himonga, *supra* note 413 at 35.

indigenous people” in Africa<sup>452</sup> He makes the point that customary law has been significantly impacted by Islamic law and European legal systems that arose as a result of colonization and was displaced as the complete legal system of indigenous African peoples. He observes that this went hand in hand with displacement of indigenous political authority, and involved the creation of a new system of administration of justice with new courts, other institutions and procedures. There was both a relegation of rules and a relegation of institutions, leading to the creation of a new system of law in which a State sanctioned form of customary law came into existence.

He makes the important point that avenues were created for Africans to opt out of the customary law system and identifies three of the most severe blows to the survival of the customary law system as legal pluralism, state control over customary courts, the attitude of lawyers and legal education and the emergence of written constitutions. Oba raises the pertinent issue of who should adapt customary law to modern contexts - the legislature, the courts or “the people”? This sovereignty, in his view belongs to the people and is expressed directly or through traditional leaders in consultation with various social groupings. He acknowledges that those social groupings and indeed the traditional rulers have changed. Age grades<sup>453</sup> and traditional associations are weakened and traditional rulers have become autocratic. Nonetheless, he advocates the continued relevance of customary law as unofficial law, for example, collective responsibility based on ethnic vicarious liability and solidarity; as official law, for example in the areas of land law and family law; and advocates the introduction of customary law norms and

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<sup>452</sup> Oba, *supra* note 441 at 59. Here he is quoting the Supreme Court in *Oyewunmi v Ogunesan* [1990] 5 SCNJ 33 at 53.

<sup>453</sup> In many African communities “age grades” - referring to persons of the same age group - who often share in a variety of socially significant activities (such as being circumcised together, dancing in the same groups) were important bases of organisation, representation and socio-political intervention.

concepts into the modern legal system.<sup>454</sup> Oba makes many references to authenticity and “foreign values” in this article and notes that legal education does not encompass knowledge about customary law. Lawyers are thus generally ignorant of customary law and see it as primitive or backward, anticipating its withering away. In his view however, whilst customary law cannot return to its pre-colonial status as a full-fledged legal system, it is equally certain that it will not simply disappear or wither away.<sup>455</sup>

All three authors appear wedded to the idea and nomenclature of “Customary Law” yet they do acknowledge in varying degrees that it is simply the law of the indigenous communities prior to colonial imposition. Following its relegation and transformation, what makes it customary rather than simply current law? They all suggest that it is State recognition and that there are non-state authorities competing with the State. What makes what these authorities administer customary law and gives it legitimacy? They all suggest that it is acceptance by the community, but one may ask how this is measured. If acceptance is the litmus test of validity of laws - can communities opt out of state law if they do not accept it? Is customary law being contrasted with positive law – i.e. the command of the sovereign, and is it being presumed that in pre-colonial African legal systems there was no positive law? (yet many African groups, for example, the Yoruba, distinguish between “asa ibile” - the norms of the land and “ofin” – an edict emanating from a recognized authority, indicating a concept of positive law and specialized policing). In most parts of Northern Nigeria, Islamic law also does not fall within the definitions of customary proposed by these three authors. It has written sources and it was also mainly

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<sup>454</sup> Oba *supra* note 441 at 74-78.

<sup>455</sup> *Ibid* at 72.

imposed by a central state authority during the establishment of the Sokoto Caliphate by jihad even if it then became widely accepted in many communities.

It seems that perceptions of “living customary law” and advocacy for it are responses to the colonial bifurcation between laws and processes for the natives and laws for settlers, as well as the subjection of the native system to fundamental changes and supervision within an hierarchy. Yet, ironically, scholars engaged in this advocacy tend to reinforce that bifurcation and its racial basis by failing to identify the fundamental differences between African or customary/traditional law and the imposed colonial law and legal system. We have traced the development of the colonial legal system and noted the processes of imposition and adaptation involved in its establishment. However, we need to identify the nature of the fracture that continues to give rise to dissatisfaction with the existing system and agitation for a return to indigenous African systems of law, which suggest that the present systems are not African.<sup>456</sup>

Adewoye identifies some of the major differences between colonial law and pre-colonial law in African societies in the Niger area.<sup>457</sup> These include the goals of the normative system which form the bedrock of its rules or content, as well as its form or institutions for transmission of rules and adjudication of disputes. For example he notes that the primary goal of many systems of dispute resolution in Africa were to restore harmony in the community so both the procedures for adjudication as well as the punishments meted out were simple enough for the parties to understand and often involved some give and take on the part of litigants. They were not geared towards either party “winning” an outright victory. Also, although intermediaries and advocates were sometimes called upon to intervene in a dispute, they did not become as

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<sup>456</sup> Several of the papers presented at the “National Conference on Law Development and Administration in Nigeria” *supra* note 1 also suggest this.

<sup>457</sup> *Supra* note 3 at 1-2.

formalized and essential to the system as lawyers later did. These goals of the normative system, neglected in the analysis of some advocates of customary law, is crucial to our understanding of different systems of law and comparisons between them.

In a recent article, Professor Jeremy Webber points out that all law is customary law and that “the primary form of law is customary” even though different systems may have different “grammars”.<sup>458</sup> In this he agrees with Gordon Woodman, Himonga and Oba. However, the latter three scholars seem to imply that a specific form of customary law – “living customary law” - which is in their view *indigenous* to African societies and not tainted by the colonial state, should be the primary form of law because it is indigenous and/or reflects the prevailing or accepted ideas of the society at a given point in history. They do not therefore focus on the specific differences in the “grammar” of the law between normative systems or in different societies.

In his work analyzing developments in Aboriginal law in Canada,<sup>459</sup> Professor Gordon Christie examines judicial reasoning and justification for changes in the law relating to Aboriginal rights, with particular reference to Section 35 of the Constitution Act 1982, which recognizes and affirms the Aboriginal and treaty rights of Canada’s First Nations. He examines broader processes of judicial reasoning and justification in the common law system noting that they are founded on the notion that the role of the judiciary is to interpret and apply, not change the law, except in rare circumstances of legislative reluctance or incompetence.<sup>460</sup> He notes that :

the need for changes in the law may arise from social evolutions, either in that society itself has developed in a manner which has created a new situation not clearly covered by legal mechanisms already in place, or that social perspectives have matured to the point that an old situation is seen in new light,

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<sup>458</sup> Webber, *supra* note 407 at 582

<sup>459</sup> Gordon Christie, “Judicial Justification of Recent Developments in Aboriginal Law” (2002) 17: 2 Canadian Journal of Law and Society 41.

<sup>460</sup> *Ibid* at 44

requiring a new legal response. A separate factor driving judicial change is the constant need to measure both the law and government activity against the Constitution, to engage in what is termed judicial review. ... insofar as the Constitution is more than mere documents and words – insofar as it comprises “a living tree” – the judiciary also sees itself charged with affecting change when broader constitutional values call for legal evolution.. These broader constitutional values ... include the protection of minorities and upholding the rule of law, constitutionalism, federalism and general democratic principles.<sup>461</sup>

Christie reviews landmark cases on Aboriginal and Treaty rights since Section 35 came into effect, noting the trends in judicial reasoning which in his view sheds light on the Supreme Court of Canada’s vision of judicial activism in Aboriginal law and the structural dilemmas it highlights.

Christie argues that constitutionally protected rights in Canada, such as Section 35 rights, are rights afforded special protection from dangers posed by democratic and majoritarian processes because they are in the interests of society as a whole. The logic of these protections are that they should subsist to assist the minority populations in question up to the point where they enjoy the place in Canadian society that they should – i.e. that other groups do.<sup>462</sup> However, when Aboriginal rights clash with non-Aboriginal rights directly, the judiciary is faced with the dilemma of how to reconcile these clashing rights and, instead of affording Aboriginal rights the special protection accorded them under Section 35, has reverted to treating them like any other minority rights under the Charter which are subject to Section 1 of the Charter. According to Christie, the failure of the Executive and Legislature to enter into meaningful negotiations with Aboriginal peoples, leading to reconciliation of Aboriginal interests and Canadian interests, puts the judiciary in this difficult situation and raises a number of structural problems. The judiciary is reasoning within a paradigm or vision that presumes that the ultimate purpose of Section 35 is

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<sup>461</sup> Ibid at 46

<sup>462</sup> Ibid at 61



to reconcile Aboriginal societies to Crown sovereignty when the necessary reconciliation which should precede such an assumption has not been achieved. “To the extent that questions exist about the degree to which Aboriginal peoples have ‘contracted’ into Canadian society, questions exist about the extent to which constitutional values and principles apply to them.”<sup>463</sup>

In our Nigerian case study, although the colonial judiciary may be said to be responding to the need for changes in the law arising from situations outlined by Christie above, they unabashedly changed the customary law relating to land having taking jurisdiction to do so by virtue of Section 19 of the Supreme Court Ordinance and the requirement that customary law be proven as a matter of fact before the new courts. This is because they did not afford customary law the status of “law” equal to English law or colonial legislation. So their solution to encountering a legal system with a different vision and “grammar” was to subject it to their own vision and grammar, thus changing it. It is this kind of colonial, and later liberal democratic, vision that Christie contests :

Premised in such a liberal conception are certain fundamental principles about the nature of the self, what is valuable, how value is created and promoted in the lives of individuals. [Given that individuals lead meaningful lives when they choose the ends they will pursue, and given that individuals must therefore be able to weigh and evaluate that which they presently value so as to be able to engage in the process of choosing how best to live, liberty must be the primary value informing the structure of society] ... Aboriginal people, however, live according to neither this conception, nor the fundamental principles premised within the liberal conception of the state. ... Central to Aboriginal ways of living are imperatives directed toward meeting fundamental responsibilities, to families, clans, communities and to the natural and spiritual worlds around us all. The judiciary can be fair in its treatment of Aboriginal interests only if it acknowledges the fundamentally distinct nature of these interests. Should it fail to do so it fails to achieve the degree of neutrality and impartiality its own principled approach to judicial activism demands.<sup>464</sup>

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<sup>463</sup> Ibid at 65

<sup>464</sup> Ibid at 68-69

Thus Professor Christie notes the importance of contextualization of Aboriginal interests.

The colonial judiciary in Nigeria, acting on a vision of dealing with and remedying uncivilized native law and custom, made no pretensions to neutrality and impartiality of the kind referred to above, unabashedly and deliberately dismissing the context of native law and custom. It was in this way that they created customary law out of context, as von Beckman observes, as a part of despotic colonial law.

Our study so far of the evolution of Nigerian society and law has shown how the British colonial administration with limited coverage of the territories it laid claim to, and in competition against other European nations in the area<sup>465</sup>, was compelled to concede a sphere of influence to local interest groups which it collaborated with and strengthened, through economic and military activities and support. In our case study of Nigeria, these were members of the growing population of Western educated elites who worked for the colonial state as well as members of the traditional elites who were amenable to the manipulations of colonial administrators.<sup>466</sup> In these complex interactions, a supervisory role was clearly indicated through treaties and legislation.<sup>467</sup> Traditions were re-interpreted and transformed by the activities of the various stakeholders. Whilst reference to the “creation” of customary law, ascribing it to one set of stakeholders is therefore misleading because they did not create in a vacuum, it was a way of drawing attention to the impact – intended or unintended - of very deliberate policies and activities of the colonial government and various actor/actresses in the area. But the result of

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<sup>465</sup> As demonstrated by the scramble for Africa and the negotiations at the Berlin Conference in 1889. See pp. 59-60 above.

<sup>466</sup> In the early days of colonial expansion, unco-operative traditional rulers were deposed and co-operative ones supported.

<sup>467</sup> Important examples of which were the Treaty of Cession in Lagos and the Supreme Court Ordinance 1863. See Appendix A and B.

these activities was not just the creation of customary law, but the creation of colonial law *and a colonial legal system* in which a new form of customary law, colonial legislation, some English legislation, English common law and doctrines of equity, as well as pre-existing native norms or customs co-existed in a multilegal or polycentric system. What characterized this as a colonial legal system was a legal imperialism expressed in the attempt by the colonial government to superimpose its hegemony over this broad normative system utilizing specific forms of law – legislation and English common law and equity - which it declared as superior. Legal imperialism was thus a fundamental aspect of the establishment of colonial relations and was facilitated by military coercion and the establishment of institutions which facilitated despotic goals. Concerted resistance was met with military force<sup>468</sup> further entrenching anti-democratic tendencies carried on into the postcolonial era. How can we decolonize this legal system in a multilingual, multi-ethnic, multi-religious society such as present day Nigeria which has been forged through a process of colonization? What happens when the colonial is indigenized? When anti-democratic tendencies become institutionalized?

Dr Fatou Camara addresses this issue in part in an interesting paper intriguingly entitled “From Contemporary African Customary Laws to Indigenous African Law”.<sup>469</sup> She presents a compelling argument for doing historical research that facilitates an understanding of ancient indigenous African law which can be used to counter negative or harmful current practices and laws. Camara identifies major fracture points in African history as the introduction of Islam, the

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<sup>468</sup> As seen in the case of the women’s revolts in Eastern and Western Nigeria.

<sup>469</sup> Fatou Camara, “From Contemporary African Customary Laws to Indigenous African Law : Identifying Ancient African Human Rights and Good Governance Sensitive Principles as a Tool to Promote Culturally Meaningful Socio-Legal Reforms” in Fenrich, *supra* note 397 at 494.

Slave Trade and European colonization.<sup>470</sup> She notes that the indigenous African way of life was under intense attack on several fronts during the slave trade and European colonization which destroyed intergenerational transmission of indigenous knowledges and customary norms. She advocates excavation and reconstruction of these knowledges and norms to reverse current degeneration and renew customary norms as opposed to jettisoning them, as part of an African renaissance or renewal of culture. Drawing on research into ancient African civilizations, including ancient Egypt, she notes four main features common to ancient African societies – matriarchy, feminization of spirituality, female participation in politics and circumcision as a coming of age rite – and explores the positive values of community service, gender parity and democracy which they represent and promote.<sup>471</sup> Like Professor Christie, Camara advocates taking the internal logic, goals and “grammar” of indigenous African systems seriously and seeking solutions to problems which are internal to the culture “Framed in this manner, legal reform can be understood as cleaning up the house as opposed to destroying it”<sup>472</sup>. A methodology and analysis that decenters the center by adopting points of reference internal to a culture, or closely associated with it, as the springboard for reform and change. Compelling as her arguments are, Camara’s analysis still raises the issue of what the markers of indigeneity are and why the practices of a particular historical period should be preferred over others. She does indicate that widespread practice and acceptance and a long period of stability, characterized by gradual change rather than fractures, are indicators of the indigeneity of norms.

What is customary about customary law and how does it differ from State law? These discussions and issues raise fundamental questions about processes of colonization and

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<sup>470</sup> Ibid at 497.

<sup>471</sup> Ibid at 500.

<sup>472</sup> Ibid at 495.

imperialism, decolonization and resistance, the relationship between State and Law, and the nature and legitimacy of processes of decision making in society. Important dimensions of these issues are further illuminated when they are set within the context of a local legal system. I will therefore briefly examine the debate in the context of Nigeria over the past few decades.

### **6.2.3 The Nigerian Discussion and Debate**

In Nigeria, the debate on colonial law, customary law and the future of the Nigerian legal system has taken many twists and turns and reveals a number of different perspectives as well as a lack of sustained debate and engagement. One of the most important scholar/practitioners whose work is important in these discussions was Dr Taslim Olawale Elias. Elias was a man who lived and worked at a crucial juncture in the development of the Nigerian and colonial/commonwealth legal and political systems and undertook a detailed study of the systems. Elias produced several pioneering works on the Nigerian legal system which are still points of reference today. For the purposes of this section, I will be referring mainly to his relatively less known and referred to book entitled “British Colonial Law : A Comparative Study of the Interaction between English and Local Laws in British Dependencies.”<sup>473</sup>

In this book Elias examines British Colonial Law and mounts a comparative study of the interaction between English and local laws in the colonies. This is a valuable overview of British Colonial Law, bringing into perspective many of the similarities and underlying logic of the entire system. In defining his subject matter from the very beginning, Elias is mindful of the difficulties of defining colonial law but identifies a typical colonial hierarchy of laws as being :

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<sup>473</sup> TO Elias, *British Colonial Law : A Comparative Study of the Interaction between English and Local Laws in British Dependencies* (London : Stevens & Sons Ltd, 1962) [Elias, *British Colonial Law*].

- Orders in Council
- Queen's and King's Regulations made by the Commissioner
- Ordinances made by the Colonial Government or Legislative Council and assented to by the Sec of State for the Colonies
- Various Imperial Acts of Parliament
- Subject to the above, the common law of England, the doctrines of equity, and all statutes of general application in force in England (on a particular date).
- Native law and custom as specified by the above.<sup>474</sup>

For Elias *colonial law* as distinct from the *law in a colony* is “the body of principles consisting partly of imperial legislation and colonial enactments and partly of all the applicable English law and local customary law throughout the British colonies”. He notes that this definition stresses the theoretical basis of the concept of colonial law :

... that it is a system, however ill-assorted or incomplete, which assumes the existence of certain underlying rational principles. These principles have been and are still being laid down, ... mostly by the courts in their fascinating but often exacting task of finding solutions to the novel legal situations that are constantly arising. Because the issues in dispute not infrequently have no exact precedent or parallel in the judicial experience of the judges who are called upon to adjudicate upon them, the problem of finding the right answers is a real one. This point will be appreciated when one remembers, ... that English legal ideas (with which all judges are familiar) as well as rules of local customary law (with which most judges have at best only a nodding acquaintance because it is largely unwritten, untaught and often very various) have to be applied by the judge in his daily task.<sup>475</sup>

In the paragraphs that follow, Elias notes the onerous responsibility of the colonial judge in reconciling differences between English law and customary law in order to find an answer to a dispute; and the creative role of colonial judges in these situations. To him, “it is the body of theoretical legal principles thus unconsciously accumulated by colonial judges working in

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<sup>474</sup> Ibid at 2.

<sup>475</sup> Ibid at 6-7.

several fields that forms the bedrock of colonial law”<sup>476</sup>. These observations by Elias are crucial to our understanding of the dynamics of colonial legal systems and have been re-iterated in a different form and in a different phase of the debate on the future of customary law and the Nigerian legal system in the 1980s, by Justice Ekundayo in an article on Nigerian Common Law.<sup>477</sup>

Elias is well aware of and distinguishes between traditional laws and customs of the community and the laws enacted in various local government councils empowered to declare and modify rules of customary law. He notes the various documentary sources of customary law or native law and custom. These include evidence of trained and untrained investigators who have made a special study of it contained in books, reports of Commissions of Enquiry or Select Committees of Legislative Councils or conferences of Law Officers of a Dependency.<sup>478</sup> So he acknowledges what others have referred to as living customary law and lawyers’ or official customary law as elements of colonial law.

He makes the important observation that:

The elements that go to make up colonial law will not be found in any one book or series of books. ... large sections of it – the product of express legislation – exist in the various colonial statute books ... But these are really no more than adjuncts to the largely unwritten assumptions of the law which alone give the statutes pith and substance.”

In this respect his views accord with Professor Webber’s regarding the primacy and pervasiveness of customary law. Elias then makes his most important recommendation in this book based no doubt on the purpose of the book. He advocates the teaching of comparative

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<sup>476</sup> Ibid. We see this in many colonial cases, especially the judgements of the Privy Council.

<sup>477</sup> A.M. Ekundayo, “The Common Law of England – A Stranger or an Indigene in Nigeria?” In [Ajomo *Fundamentals*] supra note 3 at 204.

<sup>478</sup> Elias supra note 468 at 5.

colonial law to enable judges “make fuller use of the comparative data at their disposal in the colonies ... and to better appreciate the expanding frontiers of the English common law.”<sup>479</sup>

One must note that this book was published in 1962 and reflects the acceptable nomenclature at that time as well as Elias’ own early views. In his later books he spoke of the need for the development of a *Nigerian Common law* and would probably have advocated the teaching of comparative common law in line with this. His basic theme, however, remains the same in spite of the differences in nomenclature: that as a result of the colonial experience, there has emerged a body of rules and principles in the “Commonwealth” which can be termed the common law system, as opposed to the civil and other legal systems. This system is a melee of valuable principles emerging from a variety of interactions from which we can all learn and to which we can all add and subtract. He thus advocates a fully integrated common law as the desirable goal for any colony which will break down barriers of race and language even more quickly than through political action. Elias’ concept of law is predominantly a state centric one in which he sees traditional law or native customs as a component to be incorporated.

In the 1970s the discussion on the reform of the Nigerian legal system with reference specifically to the future of customary or African indigenous laws continued and a conference was held on this subject in Nsukka in 1974.<sup>480</sup> Interesting views were held by judges and practicing lawyers as well as scholars. In his contribution, Justice M.O. Balonwu, reviews the development of colonial laws and the statutory recognition of native laws and customs. He comments on the ascertainment of indigenous laws by courts, the use of precedents in customary courts (noting that it is not the rigid sense of obligation to follow precedents as in the English

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<sup>479</sup> Ibid at 8.

<sup>480</sup> Elias, Nwabara & Akpamgbo eds, *African Indigenous Laws :Proceedings of a Workshop* (Nsukka: Institute of African Studies, University of Nigeria, 1975).



system) ascertainment of customary law by local legislation citing examples of such legislation, and the limits on the recognition of customary law.<sup>481</sup> Particularly interesting for our purposes are his highlighting ascertainment by legislation, giving the example of Sec 36 of the Native Courts Proclamation of 1901 -

“Every native council, subject to the approval of the High Commissioner, may from time to time make, amend and revoke rules

- i) Embodying any native law in its district, with or without addition and modification, as may be deemed expedient.”

He seems to be making a case for the unashamed creation of customary law by State authorities.

Justice Balonwu’s position is further elaborated in his comments on future policy. He advocates that the courts should have power to “prune” or reform customary law – so when declared repugnant, it should be “void only to the extent of the repugnancy.”<sup>482</sup> Quoting Lord Wright in a Privy Council Judgment in *Laoye v Oyetunde*, who said “The policy of the British Government in this and other respects is to use, for the purposes of the administration of the country, the native laws and customs, in so far as possible...”<sup>483</sup>, he states three goals which in his view, the legal profession in Nigeria had hoped colonial policy would achieve:

1. To raise customary law to the status of enforceable law, without requiring it to be proved as fact;
2. To evolve a common law for the whole country out of the myriads of our customary laws;
3. To adopt and codify on the national level, the principles of English common law and statutes and then to try to harmonize them with those of the common law so evolved - an integration of both systems into a general law for the whole country.<sup>484</sup>

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<sup>481</sup> Hon. Mr Justice M.O. Balonwu, “The Growth and Development of Indigenous Nigerian Laws as part of our Heritage from the British Colonial Policy of Indirect Rule” in *African Indigenous Laws*, *ibid* at 31.

<sup>482</sup> *Ibid* at 64.

<sup>483</sup> 1944 AC 170 at 172.

<sup>484</sup> *Supra* note 481 at 65.

To this end he advocates a systematic study and restatement of customary law and adherence to judicial precedent. He also advocates adequate publicity being given to the law so restated and does not foresee much opposition given that the “original” law was based on the assent of the people. “It is our responsibility and our duty to carry the British policy onwards to the stated goal.”<sup>485</sup> Clearly, Justice Balonwu saw nothing wrong with the subjection of naïve law and custom to state legislation. Like the colonial judges and administrators, he was an advocate of a unified State centric system.

By the 1980s, contributions to this discussion of the future of the Nigerian Legal System were able to build on two decades of post independence judicial decision making on cases thrown up by the local context. Justice Ekundayo in his article earlier referred to,<sup>486</sup> argues that the Common Law of England is no stranger to Nigeria or it would not have survived this long. Taking proverbs as expressions of the jurisprudence of the Yoruba and other West African groups, he attempts to show that major principles of English Common Law and Equity have parallels in Yoruba and other group’s principles of common law. Thus Ekundayo cites Stroud’s judicial dictionary and Isidore Starr’s definitions of common law as “a body of law which has been judicially evolved from the general custom of the realm [and]... judicial decisions based on customs and precedents, as distinct from laws enacted by legislatures and written in statutes and codes.”<sup>487</sup> He thus agrees with Elias that native law and custom was just one part or aspect of colonial law. For him therefore, the terms “natural justice, equity and good conscience” contained in the repugnancy clauses are universal; the natural justice part meaning hearing from

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<sup>485</sup> Ibid.

<sup>486</sup> Supra note 477 at 13.

<sup>487</sup> Ibid at 206.

the two sides. He concludes his comparative analysis by defining Common Law as “the Law of Common Sense mixed with the Law of Nature.”<sup>488</sup>

This is an important and interesting article which seeks to understand the sources of crisis in the Nigerian Legal System. It argues that they are not attributable to the reception or imposition of English Common Law but to a lack of justice, sycophancy (especially on the part of judges vis-a-vis the executive arm of government) and people’s attitudes to law. Thus Justice Ekundayo comes closest to identifying the problem, as one of popular and accessible justice. He raises the important issue of what legal change took place in colonial times and the need for more precision in describing it. He advocates a differentiation between the reception of English Statutes of General Application, and the development of common law in Nigeria and colonial legislation and is of the view that the English common law can and should be developed by judges, taking into account the local context, into a Nigerian common law, just as colonial legislation has been developed into Nigerian legislation.

Interestingly enough, Professor Agbede in his own contribution to the discussion contained in the same book<sup>489</sup> states that “The introduction of British laws into Nigeria to co-exist with the indigenous systems of customary and Islamic laws has produced a tripartite system of law. It is this type of multiple system of law that is often referred to as legal pluralism.”<sup>490</sup> This typology of law used to describe the components of the Nigerian legal system is adopted by many scholars and practitioners and is long overdue for re-examination. As Elias and Ekundayo have argued, customary law as recognized by legislation was developed by the judges as part and

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<sup>488</sup> Ibid at 227.

<sup>489</sup> IO Agbede, “Legal Pluralism : The Symbiosis of Imported, Customary and Religious Laws – Problems and Prospects” in MA Ajomo ed, *Fundamentals of Nigerian Law* (Lagos : Nigerian Institute of Advanced Legal Studies 1989) 235.

<sup>490</sup> Ibid at 235.

parcel of the local common law. Colonial legislation was not English law. So only the statutes of general application of England made applicable as of a certain date were imported or transplanted directly into Nigeria, along with certain principles of English common law. Symbiosis or integration in the realm of common law was a feature of the colonial legal system from the start. Nowhere is this more glaring than in the realm of land law, where pre-colonial forms of tenure and landholding could not be ignored. The failure to consciously acknowledge this and to teach law in context has given rise to popular notions of modern law as an alien import in potential conflict with Islamic and native law and custom. As Agbede rightly notes, this notion of a tripartite system is further buttressed by the creation and perpetuation of a tripartite court system recognized and legitimized in Nigerian Constitutions since 1979.

Without directly taking on the argument concerning colonial creation of customary law, many lawyers and judges since the 1960s have called for the development of a unified Nigerian legal system based on modern principles, particular historical and social contexts and the outcomes of processes such as a sovereign national conference. Frustrated with an inaccessible and alienating colonial and post-colonial legal system in which many norms and processes are unintelligible to ordinary people and the cost of professionals is prohibitive, some scholars are calling for a revival of customary law systems, which emanate from and are controlled by non-professionals and ordinary members of a community – “living customary law” as opposed to “State or official customary law”.<sup>491</sup> Given existing interests and the balance of power in different communities, what guarantees that this “living customary law” is popular, accessible and guarantees justice? To whom and which transactions would customary law apply and who

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<sup>491</sup> See Himonga, *supra* note 416.

would be applying it? Is it based on geographical location, ethnicity or religion? Even if it was, it presumes significant homogeneity of interests within mono ethnic or religious societies neglecting gender, class or economic interests and even sub-cultural interests which significantly affect the law.

If the emphasis is on access to justice in terms of procedure, and cost, then not enough has been said in the discussions on how to reform processes of administration of justice. In fact, customary courts established in the colonial period and staffed by a respected member of the community in which it is located have come to be accepted and are increasingly aping the magistrates and high courts. Under the supervision of the Ministries of Justice in the various States, there are programmes for training customary court judges to adhere more and more to the basics of court procedure in the higher courts. Advocacy for alternative systems of dispute resolution is focused on Mediation as conceived of in Western legal systems, once again professionalized. Where in some towns and rural areas family and community elders and traditional rulers still play an important role in the declaration of guiding rules and the resolution of disputes, what would be the purpose of formalizing such procedures? Acceptance of the rules and processes would be a true sign that such customs or customary law “lives”. If they are found to be oppressive to particular individuals or groups and a complaint is laid before State authorities, then intervention may be justified, irrespective of formalization. These issues are inextricably linked to questions of the basis of authority and the exercise of jurisdiction over individuals and groups in a society, and to what extent they accept and acquiesce in it or resist it – i.e. whether it is democratic or despotic.

The introduction of Sharia penal law through State legislation in 13 states in Northern Nigeria illustrates the tenuous nature of the dichotomy between customary and state law today.

Islamic law was consigned to the realm of customary law in the colonial period in spite of its written sources and the existence of specialists engaged in the interpretation of laws and administration of justice under this system. Like all customary law it was restricted in application to personal laws governing private domestic relations such as marriage and inheritance. Islamic criminal or penal law was abolished although aspects of it were supposedly taken into account in passing a new Penal Code applicable to Northern Nigeria. Was Sharia, as applicable and practiced in these predominantly Moslem societies, “living customary law”? In 2002 the first declaration of Sharia as official law for a state in Nigeria came from the governor of Zamfara State. Several similar oral declarations followed from other states. When it was later pointed out in the heated discussion that ensued that Sharia was already recognized as governing aspects of relationships between Moslems in those States, the leadership in those states moved quickly to pass legislation specifically re-instating Sharia penal law thus making it codified State law. Ironically, this is what those who advocate codification of customary laws would achieve – a transformation of customary law into State law. The emphasis in this new codified Sharia law was on offences of adultery, fornication and theft, criminalizing mainly women and the very poor in these societies. To challenge these laws, the repugnancy test was no longer appropriate. They have to be challenged on the grounds of being ultra vires the states in a federal system or in conflict with human rights provisions of the Nigerian constitution. In a system where both customary and State law are recognized and validated by legislation, the only difference between these types of law is that the former has to be proven as fact before a court until judicially noticed and the latter does not. They are both subject to judicial interpretation which will arise as a result of internal challenges from the communities affected. Democratization of processes

that guarantees space for participation and dissent is therefore the fundamental issue in the establishment and maintenance of any legal system.

### **6.3 Beyond the Colonial Bifurcation of Customary and Modern State Law.**

This thesis has shown that hybridity was a de facto feature of Nigerian colonial society and indeed pre-colonial society in specific locations where intensive interactions between Europeans and Africans occurred - such as the Niger Delta, Lagos and Calabar. New political and legal institutions emerged combining features or representatives of previous institutions in interesting ways to suit new contexts or converting people to adopting them, more or less successfully. I would therefore argue that rather than carve out a sphere labeled customary or indigenous law (which is an anomaly in an environment where natives and settlers have combined and collaborated in various ways for centuries) it would be more productive in the Nigerian context to promote democratic participation in the production of evolving hybrids that serve current purposes and to label them as such.<sup>492</sup> Genuine participation in these processes is what would guarantee its local content and prevent the kind of widespread alienation that is a feature of systems imposed in the colonial period.

Several scholars have in recent times pointed out the continued “orientalism”<sup>493</sup> in the discourse on customary law. For example writing within the context of British Columbia, Professor Renisa Mawani has pointed out the limitations of the persisting conceptualization of the colonial context as a site of relations, encounters and contestations between European and

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<sup>492</sup> Based on territorial or group application if they cannot be incorporated into broader political regulations at the local government, state and federal levels.

<sup>493</sup> I use this term in the sense that Edward Said uses it and made famous.

native, where prevailing distinctions between colonizer and colonized were imposed and worked out. She argues for:

A wider analytic and historical approach, one that characterizes the colonial contact zone as a space of racial intermixture – a place where Europeans, aboriginal peoples, and racial migrants came into frequent contact, a conceptual and material geography where racial categories and racisms were both produced and productive of locally configured and globally inflected modalities of colonial power.<sup>494</sup>

This kind of approach would, in her view, move us beyond the state racism embedded in the designation of the “native” which continues today and has legal expression in customary law.

Mahmood Mamdani, writing within the African context also critiques the colonial bifurcation between settler and native, in his famous and controversial book – *Citizen and Subject*.<sup>495</sup> Analyzing indirect rule, he notes that under this system community “leadership was either selectively reconstituted as part of the hierarchy of the local State or freshly imposed where none had existed, as in stateless societies. According to Mamdani, for the natives, indirect rule signified a mediated – decentralised – despotism.”<sup>496</sup> Mamdani then goes on to examine decentralised despotism in subsequent chapters concluding that indirect rule was the politics of decentralised despotism and customary law was its theory. Of particular interest is his chapter on Customary Law - Chapter 4. According to Mamdani, the bifurcated State comprised the “centrally located modern state and the locally organised Native Authority. Two systems of

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<sup>494</sup> Renisa Mawani, *Colonial Proximities : Crossracial Encounters and Juridical Truths in British Columbia, 1871-1921* (Vancouver:UBC Press, 2009) at 5.

<sup>495</sup> Mahmood Mamdani, *Citizen and Subject :Contemporary Africa and the Legacy of Late Colonialism* (Princeton, New Jersey : Princeton University Press, 1996) [Mamdani, *Citizen and Subject*]. See also Mamdani, “Beyond Settler and Native as Political Identities : Overcoming the Political Legacy of Colonialism” in Ozo-Esan & Ukiwo eds, *Ideology and African Development*, Proceedings of the Third Memorial Programme in honour of Professor Claude Ake (Port Harcourt and Abuja : CASS and African Centre for Democratic Governance 2001).

<sup>496</sup> Mamdani, *Citizen and Subject*, ibid at 17.



courts were established – the native courts and the central state courts. Mamdani like many others describes them as modelled along metropolitan lines. Given the history of improvisations, this was not always true but became increasingly so with the development of the legal profession in Africa which tends to transmit certain professional practices and traditions.

The problem of defining **who the native was** revealed race based definitions especially in a context like Nigeria where you had native settlers and African collaborators forming the majority of colonial agents. Mamdani like some of the creation of customary law scholars highlights the dilemma of establishing what was native or customary law within the context of major transitions and indirect rule. In a section on “Defining the Customary in a Changing Context” he points out how the central State, the local State and a variety of non-state interests were all vying for the power to define the customary. The central state by legislation gave itself these powers and limited other powers through legislation incorporating a repugnancy clause. The sheer upheaval over a number of centuries made it difficult to define a traditional consensus. And yet it is true that every society has some sort of traditional consensus whether it has lasted ten years or ten decades. Mamdani recognises this:

... every claim presented itself as customary, and there could be no neutral arbiter. The substantive customary law was neither a kind of historical and cultural residue carried like excess baggage by groups resistant to “modernisation” nor a pure colonial “invention” or “fabrication,” arbitrarily manufactured without regard to any historical backdrop and contemporary realities. Instead it was reproduced through an ongoing series of confrontations between claimants with a shared history but not always the same notions of it. And yet ... the presumption that there was a single and undisputed notion of the customary, unchanging and implicit, one that people knew as they did their mother tongue, meant that those without access to the Native Authority had neither the same opportunity nor political resources to press home their point of

view. In the absence of a recognition that conflicting views of the customary existed, even the question that they be represented could not arise.<sup>497</sup>

In other words, social consensus should be understood in the context in which it arises and not be reified and become an obstacle to change. Mamdani thus argues that the local must be made accountable and representative and not merely abandoned.<sup>498</sup>

The confusion of issues surrounding the current debate on revival of customary or indigenous law systems in African States does indeed, in my view, arise from the colonial bifurcation between state law modeled along European lines and customary law modeled along the lines of indigenous legal systems with the latter relegated to the bottom of an hierarchy of laws and the underlying suggestion that it was not real or legitimate law unless modernized in line with the former. The response to this legal imperialism has been to reassert the legitimacy of customary law and in the process entrench the bifurcation. Two processes were at work in the transition to a colonial legal system, some of the major details of which we have outlined in Chapters 2 and 3. One was the transformation of indigenous legal systems by contending powerful interest groups and the second was its incorporation into and subjection to a new colonial system modeled along European lines which included a court system, a system of professional advocates or intermediaries, as well as new rules, processes and forms of action relating to dealing with property - such as issuing of Crown Grants; sale of land for money; registration of title to land and mortgaging land. The new colonial institutions – for example, courts and the legal profession were symbols of new political power but old institutions of

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<sup>497</sup> Ibid at 118.

<sup>498</sup> This can be read as a variation on Fatou Camara's analogy of a house being cleaned up rather than destroyed, referred to above at 209.

political power were also transformed. Both these processes and the new colonial institutions that emerged systematically marginalized women.

The reassertion of the legitimacy of customary law is therefore an assertion of the legitimacy of a transformed and modern “indigenous” legal system which is incorporated for the most part into the new colonial system. Some, but as we have seen not all, of its institutions and rules are more familiar and recognizable to local residents largely because of their proximity to them in their everyday lives. But does this signify acceptance and how is the legitimacy of the transformed indigenous system superior to the new state system? If customary law represents decentralized despotism, to use Mamdani’s terms, and State law centralized despotism, I would suggest that a differing basis of legitimacy from “indigeneity” or ancient roots is needed. Democratization of the despotic aspects of both systems is at issue. Participation in decision making is at the heart of democratization even if the outcomes don’t favour all individuals and groups concerned.

What is called for are new understandings of the development of the legal system and processes of social change in African countries and a new nomenclature as pre-requisites for meaningful and effective law reform. The issues of relevant and contextualized norms or content, and comprehensible and accessible processes in a legal system are common in modern society and can be addressed within a framework of a vision of “popular law and justice”<sup>499</sup>; rather than random interpretations of supposedly ancient norms or interest based assertions by

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<sup>499</sup> Such as is described by scholars such as de Sousa Santos in his work on changes in the legal system in Portuguese former colonies in Africa. See, Boaventura de Sousa Santos, “From Customary Law to Popular Justice” (1984) 28 JAL 90.

powerful interest groups. In fact, the trend towards decontextualized ossification of rules<sup>500</sup> which it favours, may wind up benefitting only the most powerful interest groups within the current world system. This is graphically illustrated by the development of land law and women's struggle for land rights in Nigeria.

#### **6.4 Women, Legal Imperialism and Customary Law in Nigeria: Suggestions for Engagement.**

As we have seen in the foregoing discussion of customary law, most scholars emphasize the ancient roots of indigenous or customary legal systems as a basis of legitimacy. This raises the issue of how far back in time we go to define the customary and how we differentiate and choose between the norms of different eras and the different norms of the same era. What should be the basis of choice of norms? Identity and ancient roots are important, especially in reaction to imperialism and processes of colonization which involved a denial of humanity and equality of a group of people, an attack on their way of life or culture and an expropriation of their resources. Every society has mechanisms for the intergenerational transmission of knowledge and norms. For this reason it is difficult simply to debunk the concerns of advocates of customary law. Fatou Camara's analysis, advocating the search for counter narratives within the framework of a specific community's history and culture for example is, in my view compelling. However, it still raises the issue of the basis of choice between different customs. To resolve this dilemma, she identifies core principles and values reflected in the culture. Specifically she identifies participation, harmony and gender parity as some core principles transmitted through

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<sup>500</sup> Described by one commentator as "socio-cryonics", meaning a freezing of culture, see Femi Taiwo, *How Colonialism Pre-empted Modernity in Africa* (Bloomington : Indiana University Press 2010) 13.

African cultures from the time of ancient Egyptian civilization.<sup>501</sup> In this way, she acknowledges the centrality of addressing substantive issues of justice in legal change and reform.

The work of some other scholars shows that they are using the term customary in a modern sense to mean norms currently observed in a community and not emanating from the State.<sup>502</sup> However, they also fall into the trap of presuming those laws to be inherently good and worth promoting, and do not relate them to patterns of influence and structures of power in the society. If customary simply defines habitual and widespread observance of certain norms, then, as Professor Jeremy Weber points out, all law is in some sense customary<sup>503</sup> and in all legal systems, multiple normative systems co-exist governing and influencing people's actions. On what basis should one system be recognized or privileged as the legitimate customary one?

All existing systems of social regulation are also modern in historical terms. The nomenclature of the customary, utilized to separate the native from the settler with all its racist undertones and to obscure (and reduce the costs of) administrative and legal control in the process of European colonization, is long overdue for jettisoning in the post-colonial legal system. It serves no useful function. Local laws and regulations may be differentiated from national ones but they are modern and the basis of their existence should be open to contextualization and negotiation in contemporary society.<sup>504</sup>

All through the processes of accumulation, concentration and transfers of wealth and power which we have traced in 19<sup>th</sup> and 20<sup>th</sup> century Nigeria, women generally lost out although some of them were able to seize opportunities presented by changes in government and rules to

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<sup>501</sup> Fenrich, *supra* note 398 at 507 & 514.

<sup>502</sup> *Ibid* at 53.

<sup>503</sup> Webber, *supra* note 407 at 579.

<sup>504</sup> The declaration of Sharia in the Northern States of Nigeria and subsequent legislation to back this move, has forced this issue in that context as earlier noted on page 217 above.

improve their situation. Those seeking to evade autocratic traditional authorities in 19<sup>th</sup> century Lagos turned to the new courts to argue their claims.<sup>505</sup> Some women also benefitted from expanded trading networks through their alliances with members of the ruling elite. The ideology of women's subordinate economic roles and dependence on men, propagated and reinforced in the colonial economy through the separation and redefinition of domestic and wage labour, was however spreading and being played out in the educational sector, in religious groupings and in the organization of economic activity and the workplace.<sup>506</sup> Women's citizenship and corresponding rights within the family and society indicated in many pre-colonial modes of social organization,<sup>507</sup> as discussed earlier, was eroded significantly in the colonial period. This trend continues today exacerbated by modern forms of information dissemination and the media, and is leading increasingly to a "sexual profiling" of women, and African women in particular, that is often negative or restrictive.

The new world economy that emerged from the 16<sup>th</sup> century, and the processes of imperialism associated with it, changed economic and social relations and organization in most Nigerian and African communities affecting the nature and basis of citizenship in the family – a form of local corporation. This new economy privileged new corporations organized as monopolistic patriarchal alliances for profit, periodically engaged in violent contestations for influence and power.<sup>508</sup> Women's fundamental rights to land, work, education, political participation and their status as hearth hold heads were transformed and undermined through a

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<sup>505</sup> See Mann, "Women, Landed Property" supra note 208.

<sup>506</sup> For an overview of these trends see Afonja & Aina eds, *Nigerian Women in Social Change* (Ile-Ife:Obafemi Awolowo University Press Ltd 1995).

<sup>507</sup> Which may be viewed as local corporations.

<sup>508</sup> As demonstrated in the formation of large colonial companies such as the Royal Niger Company/United Africa Company and its French counterpart in West Africa – the SCOA - and their military and political activities carried out directly, or indirectly through the governments of their home states.

number of mechanisms including new land and inheritance laws in which new concepts of ownership trumped possession and use for livelihoods. This system tends to promote the feminization of poverty and specific forms of violence against women in the private, domestic arena.<sup>509</sup>

Land was an arena which the colonial state could not afford to ignore or leave to native control. Access to land was fundamental to colonization. Securing it by military force was expensive and unsustainable and unnecessary in the Nigerian situation as colonization was characterized predominantly by trade relations not foreign settlement<sup>510</sup>. A series of collaborations and gradual changes in discourse and law took place and were most appropriate in this situation and we have in Chapters 2 and 3 traced the development of this “lawfare” in some detail. The traders, settlers and the colonial government secured access to land for the purposes of setting up residences, offices and warehouses through chiefs who were sometimes their trading partners and through Public Lands Acquisition Laws purporting to acquire certain lands for public purposes. These processes did not immediately or fundamentally threaten women’s access to land through the family in most areas. The issuing of Crown Grants to individuals in Lagos who then claimed ownership<sup>511</sup> was also part of a gradual attempt to introduce a new discourse on land in the territory. This process was dominated by male elites from the settler and

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<sup>509</sup> This is evident in contemporary norms relating to education, work, marriage and sexual expression as well as widowhood rites and rules of inheritance which limit women’s access to resources.

<sup>510</sup> Indigenous African settlement was different as this group integrated well and was still negligible in terms of population, in a context where land was plentiful.

<sup>511</sup> See page 71 above.

indigenous communities and very few women participated and got the grants in their own names.<sup>512</sup>

It was therefore in this process of establishment of a transformed native law and custom which gave new powers of trusteeship or ownership and control to male family heads and traditional rulers that women were marginalized and their citizenship status reduced. These male custodians of power often acted in their own self-interest and irresponsibly and since they had new powers of definition of native law and custom, became increasingly difficult to challenge. Women in South Western Nigeria reasserted their citizenship and rights to inherit land equally with men from the 19<sup>th</sup> century, with the collaboration of some male policy makers and professionals.<sup>513</sup> Women in South Eastern Nigeria, were less successful in their revolt against this marginalization which was evident in the women's war from 1925-1930.<sup>514</sup>

In turning away from the new definitions of customary law which emerged in this period as detrimental to their interests, and seeking to have it declared repugnant to natural justice, equity and good conscience,<sup>515</sup> or getting legislation passed against practices *they acknowledge as traditional*, they run the risk of defining the problem as one of the customary versus the modern. In putting their confidence in the modern - legislation, constitutional provisions and the associated court system - they sometimes fail to recognize that these do not necessarily guarantee access to justice or work in their favour. Sharia penal law introduced through legislation recently in 13 northern states of Nigeria (moving aspects of Sharia from the realm of the customary to

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<sup>512</sup> Mann refers to specific instances where they did, sometimes by subterfuge. See Mann, "Women, Landed Property" *supra* note 208.

<sup>513</sup> This is evident from the testimony of traditional leaders as expert witnesses and professionals in discussions on women's rights to land among the Yoruba, earlier referred to in Chapter 4.

<sup>514</sup> See discussion above at 107-109.

<sup>515</sup> See discussion of Mojekwu case above at 130-131.



that of modern State law) is a case in point and has certainly not worked in women's favour.<sup>516</sup>

The critical legal studies movement in Europe and North America has done extensive work on the problems of access to justice within modern legal systems. State legal systems in Africa and elsewhere are modeled along the same lines and in addition give recognition to some "customary" norms. In seeking law reform therefore, women need to engage with the customary sphere, demystifying and redefining it, as well as seeking change in state laws. Whether the future is one of integration and the primacy of State law, or one of polycentricity and the primacy of customary norms and regulations based on new living arrangements such as housing or residential corporations, the element of democratization, negotiation, shared values and a new consensus will become paramount. Part of this redefinition can be accomplished in its renaming and declaration as modern which will in my view accelerate its withering away. For example, a renaming of so-called customary law as ethnic law – Igbo, Yoruba or Hausa law - is more likely to expose its anomalies and trigger an internal debate on legitimacy and applicability.

Access to land resources for the majority of women in all parts of Nigeria, guaranteed under most pre-colonial systems was eroded within the context of new systems of accumulation and allocation of wealth and social and political organization. This erosion was solidified in the process of transformation of customary law. As we have seen colonial and contemporary customary law is often *law out of context*. Women's analysis of obstacles to their sharing equally in the wealth and resources of their societies and the strategies they adopt to assert their rights must not only challenge interpretations of history and custom<sup>517</sup> but must acknowledge the more general relationship between law and power. They must challenge monopoly and misuse

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<sup>516</sup> Both the legislation and implementation have restricted women's free movement, appearance and sexual activities, introducing harsh penalties such as caning and stoning to death for adultery and sex outside marriage.

<sup>517</sup> As advocated by Fatou Camara, *supra* note 469.

of power, insisting on participation in processes of law making and interpretation, decision making, and on accountability of leaders, irrespective of the nature of social or corporate interaction and organization.

I will conclude this chapter with suggestions for what a feminist contextual analysis of one of the cases earlier referred to in Chapter 4 might look like. My analysis is based on the details given in the law reports which are of course a summary and therefore somewhat limited, as well as on the work of researchers and on my knowledge of the general context. It therefore leaves room for a more detailed and precise analysis. This kind of analysis can be adopted and applied to any of the other cases referred to and is meant to highlight possibilities for analysis of future cases where details and transcripts of the cases are available.

In the case of *Nezianya v. Okagbue*,<sup>518</sup> Ephraim Agha and Mary Menkiti were married under colonial Christian laws of marriage and lived together as a monogamous couple in a house in town and not in the traditional family compound. Ephraim carried over the “traditional” practice of polygamy into these new circumstances and began a relationship with another woman whom he brought into the matrimonial home. This was a breach of agreement implied by Christian marriage with its particular “grammar”. Women in many African contexts are, however, often told that this breach is in line with “tradition” which they should accept. But the marriage agreement is not in line with tradition so why should the breach be conceived in those terms? This second marriage could constitute the crime of bigamy and should have been null and void by virtue of his Christian marriage but there is only one case in modern Nigerian legal

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<sup>518</sup> Supra note 283

history where a conviction for bigamy has been secured.<sup>519</sup> This mixing of “grammars” eventually produced a new language but it was restricted to men. Whereas a dialogical approach – engaging women in the conversation - would have produced a more harmonious grammar and stable language. Mary did not divorce Ephraim but moved out of the matrimonial home to live elsewhere.

Since there was no divorce, on Ephraim’s death without a will, Mary was within her rights to return to take possession of the matrimonial home. She dealt with the property with great enterprise for the benefit of her children building on parts of the land and renting the buildings to tenants. The family at this time did not react to her investment of resources and energy. Even if the second marriage was deemed legitimate according to custom, Mary was the “senior” wife dealing with the property. We are not told of challenges to her actions and claims by the other wife, nor are Ephraim’s family making any claims on behalf of this later wife in the version of the story in the law report. Ephraim’s family later challenge Mary’s dealing with the property, especially selling portions of it, on the grounds that she cannot inherit from her husband and pass on title to the property to her daughter and/or grand-daughters.

With reference to Ekejiuba’s analysis of the organisation of family compounds in Eastern Nigeria and other parts of West Africa, under traditional arrangements Mary would have been established in her living quarters<sup>520</sup> over which she would have had control and around which she would have established a hearth hold. In town she shared living quarters with her husband and moved out when he brought in another woman rather than build a place or allocate independent living quarters to her. In the family compound, in her “hearth hold”, she had the right to farm on

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<sup>519</sup> R v Princewill [1963] ANLR 31.

<sup>520</sup> Separate from her husbands living quarters.

land allocated to her and to trade with the proceeds of sale to expand her hearth hold and the family's wealth. Not only did she have the right, she was expected to do these things. So her building on the land and renting out buildings to tenants in this case were the new ways appropriate in town, under new economic and living arrangements, for expanding family wealth. Indeed, as the court held, under normal circumstances, as a member of the family, her possession should not be adverse to the family's *unless* the family threatened her right to survival, a home, a livelihood and those of her dependants. Under such adverse conditions, I would argue, her possession could become adverse to the family's. Once the principle of partition and sale of family property was accepted in law and in practice by the courts, family heads and traditional rulers during this period, why could Mary not act as a trustee for her children, maintaining her traditional and secure rights of possession as a wife during her lifetime? Why could she not manage the family property in their interests rather than some distant uncle or cousins who had not lived with or interacted with the family intimately even during her husband's lifetime? To simply state that, under customary law, wives do not have the right to inherit in a patrilineal system is clear evidence of de-contextualized interpretations of law. She had the right to possession of her home during her lifetime in the family compound and to raise her children there without hindrance, continuing to farm or make a living. Her husband's male relatives were more proximate physically and were the custodians of the family compound which is not often the case with new urban arrangements. The nature and quality of relationships in the family should be material issues for the consideration of any court in taking a decision on the rights of various parties in a family dispute.

In this case, new rules or interpretations of trusteeship and inheritance that recognise the wife's contribution to a home she shared with her husband and contributed to equipping and

maintaining in various ways, in a new context, were needed. Even if it was argued that she had moved out of the home, her children were entitled to it and she could act as trustee for them. The living context of the family and even its composition for these purposes had changed and yet the customs and rules which enabled a “wife” to function optimally as a head of a hearth hold were not being adapted and applied. Instead rigid formulations that proclaimed that she could not inherit from her husband, pass the property onto their children, or act as trustee for them, were applied. No mention was made of her rights to possession and a livelihood and how to secure them under changed circumstances which arguably is the essence of the customary law in question. If renting property was replacing farming as a form of economic activity and trading in towns, why should this not be available to widows?

This case demonstrates how the rules of governance within the family corporation need to be adapted to the changing location and organisation of the corporation. The rules need to be re-invented for a new context or abolished rather than allow them to linger out of context, weakening and rendering the family increasingly dysfunctional. Arguments such as these were not placed before the court, so the framing of the issues already circumscribed Mary’s ability to have her interests considered and to “win” the case. These are the real problems and dangers of law out of context and its impact on women. Under the common law system, existing rules or principles and the role of the judge is highlighted, forgetting that in practice, the role of counsel or the advocate in presenting the case is central, for the judge does not, in principle, pronounce on matters not in the pleadings nor on arguments not put before him by the advocates. Herein lies the real and practical importance of feminist legal scholarship and advocacy. The challenge is for feminist legal researchers and advocates to pursue and develop appropriate lines of enquiry and argument to secure women’s interests and rights.

## **Chapter 7: Conclusion – Beyond Legal Imperialism: Decolonization and Democratization of Laws and Legal Systems.**

### **7.1 Background**

This thesis is a study of legal imperialism and appropriate strategies for decolonizing law, taking a case study of the impact of European legal imperialism on women's land rights in Nigeria today. It has examined the establishment of colonial relations in Nigeria and the processes of legal imperialism or domination through law. It has also explored major developments in land policy and law in the colonial and post independence periods assessing the nature of the changes they brought about in the society and reactions to them. Against this background, I examined the impact and implications of these changes on marginalized groups and in particular on women) and their implications for future land law reform that is people-centered and gender sensitive. I have argued that changes in laws, the system of administration of justice and legal discourse in the colonial period in Nigeria were an essential part of achieving the goals of colonial economic, political and cultural domination. This is clearly demonstrated in the realm of land law where there has been an increasing trend towards commoditization of land and privatization of land resources by colonial and post-colonial elites. "Legal Imperialism" – domination of one group by another through the use of law and legal institutions - is expressed in the concentration of policy and decision making power in the hands of a small group and is a growing trend. As I have demonstrated, it is a trend that has had specific gender impacts. The possibilities of reversing this trend by challenging the concentration of power in both colonial and post-colonial eras inherent in law making and interpretive processes as well as the methods of administration of justice are most usefully explored from the standpoint of the most colonized

and marginalized groups affected by the system, which are disproportionately female. Women, and particularly poor women, may in that sense be said to constitute the last colonies for whom the issue of decolonization and democratization of law is an imperative.

## **7.2 Legal Imperialism and Colonial Impacts**

Through its survey of the historical origins of the modern Nigerian legal system, this thesis has demonstrated that European legal imperialism did indeed have a profound impact on the development of the Nigerian legal system and on land law in particular. As numerous commentators have observed, including many participants in the Law Development Conference earlier referred to<sup>521</sup> as well as recent commentators and advocates of customary law such as Abdulmumini Oba<sup>522</sup>, the Nigerian legal system clearly has colonial origins. The nation state of Nigeria was created in 1914 as a result of the amalgamation of two British Protectorates – Southern and Northern Nigeria. Prior to this a gradual process of colonization had begun in Lagos from 1861 and spread to Western, Eastern and Northern Nigeria. British Consuls and the Royal Niger Company – a Chartered Company - had established rudimentary systems of administration including courts and had begun to exercise increasing political, military and legal jurisdiction in an area hitherto controlled by local groups. The legal entity – Nigeria, today recognized as a nation state - thus resulted from the exercise of British jurisdiction in the area. But what were the goals and modalities for the exercise of this jurisdiction?

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<sup>521</sup> See supra note 1.

<sup>522</sup> Supra note 444.

As we have demonstrated in this study, colonization was a process initiated and directed by the British government on the request of its citizens trading and operating in the Niger area to protect and enhance their trading activities. This process involved the exercise of military force and threats, as well as the co-optation of local leaders, residents and institutions. Traditional elites and institutions as well as a new group of Western educated elites and recruits into the police force were important collaborators, working to secure the area as an enclave for the production of agricultural produce and minerals for the world market through English trading institutions. The corollary of this method of colonial rule through the natives or “indirect rule” in the sphere of law was the recognition and accommodation of native law and custom applicable to the natives, subject to supervision by colonial authorities. A parallel sphere of English common law and rules of equity, statutes of general application and colonial legislation was established to apply to Europeans, Native Settlers and all who chose to adopt it. New State courts and some native courts were also established and existing forums transformed to serve the purposes of colonial administration. This bifurcated system conceded a sphere of authority to groups of native elites, empowering and supporting them militarily and financially. In this process, colonial authorities reduced the power of existing counterbalancing forces – specific political office holders, age grade groups and women’s groups - within the local political setting,<sup>523</sup> establishing what Mamdani describes as decentralized despotism.<sup>524</sup> Male natives had the opportunity to define or opt out of native law and custom, whilst it became a sphere in which control was exercised by them over women as a result of their increasing economic and political power vis a vis women.

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<sup>523</sup> We explored the way this process played out in Lagos politics in the mid to late 19<sup>th</sup> century in Chapter 2 and 3, and many studies exist of how it played out elsewhere.

<sup>524</sup> See discussion above at 221.



In the arena of land law specifically, resistance to colonial expropriation of land by indigenous interests led to the emergence of a hybrid system which accommodated the desire of settlers for a market in land and secure individual title within the framework of predominant indigenous rules. In reality these rules were transformed to facilitate easy purchase and sale of land. The Amodu Tijani case and several other cases that came before and after it, established principles of landholding from that period. In this process of establishment of new rules powerful interest groups such as chiefs and the Saro returnees, who could afford to engage with the new legal system, successfully got law stated in terms that suited them and the colonial authorities, and that came to be termed indigenous or customary law relating to land. For example, the idea that individuals did not hold land under customary law became pervasive. It was said that the land was held by families and communities through chiefs. Yet in the evidence taken in some of these early cases, it was clear that rights of first settlement were recognized. So the Ijebu people (both men and women) who first came to settle in Lagos and used it as a kind of seasonal residence claimed rights of use which were generally not challenged. When new Awori settlers came to Lagos in large numbers, they lived side by side with these earlier settlers. It was not until they faced a threat from the Bini military settlement that all these settlers organized against a perceived outside threat by acknowledging the overlordship of the Olofin and his 16 sons who became the first Idejo chiefs and came to be recognized as the landowning chiefs of Lagos. So, men's role in war also tended to highlight their leadership and role as custodians of land. For as long as the chiefs did not attempt to deprive the people of their land or claim ownership of it, no conflicts were triggered. But when the issue of compensation and who it was to be paid to arose,

it was made clear that the chief was a representative and could not claim ownership of the land except *his own* family land.<sup>525</sup> The issuing of Crown Grants and the claim of individual ownership in the mid 19<sup>th</sup> century clashed with these ideas but was a point of negotiation between chieftaincy families, settlers and the colonial authorities, negotiations to which the chieftaincy families eventually (but very gradually) conceded as they were engaged actively in the land market.

The evidence given at the WALC hearings and in various court cases suggested that most Nigerian communities up to the early to mid 19<sup>th</sup> century did not conceive of ownership of land as absolute<sup>526</sup>. They thought more in terms of control over allocation and use which was determined by first settlement as well as political organization. Lloyd and other anthropologists make clear the kinds of relationships that existed between family, political organization, citizenship and the right to use land<sup>527</sup>. Historical interactions and changes in political organization (including colonial conquest), brought forth new ideas of control over land. People vigorously resisted in whatever ways they could attempts to expropriate the land on which they lived and worked, usually by appealing to a stronger authority that could represent them. These authorities were often able to hire lawyers and fight on behalf of the family or community and get an amenable system of land use and tenure recognized by the court. In this way, instances of what later might be called living customary law became official customary law. Where there was intractable conflict within a family (as in the case of *Lewis v. Bankole*), we see living customary law often supplanted by official customary law allowing the sale of land, which then, due to the changing environment, became living customary law in Lagos. Thus, a hybrid system, in which

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<sup>525</sup> See p 87 above.

<sup>526</sup> See discussion above at 80.

<sup>527</sup> See discussion above at 99-100.

indigenous law seemed to predominate, emerged. This hybrid system became a predominant part of official land law in Lagos as one could rarely avoid native title in land disputes. The English common law of property was the residual law applicable to very few transactions. On what grounds therefore would we designate it official law? So we see that even in the colonial period the line between living customary law and official law was very thin. The failure of the colonial authorities to acknowledge that the official state law in operation was predominantly native was arguably a matter of political hegemony.

The post-colonial state system embraced and retained the bifurcation between native law and custom or customary law and State law, incorporating it into a Nigerian federal system of government even when its division between settlers and natives was increasingly untenable in a situation where a new national identity was being forged. Colonial land law had already recognized and introduced processes of indigenization and centralization of power over land, vesting in local chiefs and paramount chiefs much more power than they had hitherto had.<sup>528</sup> The recognition of the importance of this new hybrid land law was acknowledged by the pride of place it had in the Nigerian legal education curriculum. The law of real property thus had two aspects – the English law of real property and Nigerian customary land law. In the absence of legislation, one might ask (as we did in the preceding chapter) which of them would qualify as State law and what delayed their merger into a Nigerian common law of real property?

With power over land vested in traditional elites and political power conceded to a new Western educated elite at independence, new economic activities and development programs initiated by the State led to competition for control over land between these two groups. This was

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<sup>528</sup> Dosunmu was deemed to have transferred sovereignty over land to the Queen.

resolved in favour of the latter by the military government in 1978 when the Land Use Decree was promulgated. The issue of decolonization of land law to address external foreign centralized control of land clearly went beyond indigenization. Indigenization had been addressed since the colonial period but in a way that often reinforced centralization of power which was the other aspect of colonization. The aspect of decentralization of power was therefore never addressed. Power over land, whether ceremonial or real, merely kept changing hands, and in ways that further concentrated this power. Those who advocate the development of a Nigerian common law may welcome the unification of laws achieved by the Land Use Act but its increased centralization of power and control over land has, rightly, drawn the most criticism. Arguably, a return of power to the traditional landowning elites would reinstate the local ethnic and regional fiefdoms strengthened by colonial rule.<sup>529</sup> The overall trend towards centralization of power over land since 1861 continues and deepens an important dimension of colonization. This is the democratic deficit in the development of modern Nigerian land law.

Colonization was not simply foreign rule but foreign rule to facilitate exploitative trade relations that pre-dated it.<sup>530</sup> Decolonization cannot therefore be limited to indigenization but must simultaneously address the autocratic and exploitative dimensions of colonization through a program of democratization. This is where the two goals of decolonization and democratization merge and become one. Authors of the Land Use Act identified land speculation and the resultant inflation and insecurity of tenure as major problems for the acquisition and development of land for personal use by individuals, and for public purposes and industrial development for the benefit of the people by governments, especially in urban areas. In rural

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<sup>529</sup> Given the alliances between traditional and modern elites in Nigeria, the presumption that communities are better able to hold traditional elites to account, is a myth.

<sup>530</sup> See Herb Addo, *supra* note 28 at 122.

areas, the system and fragmented nature of landholding was seen as an impediment to large scale development projects. Today, the role of the State is once again changing under conditions of structural adjustment. The developmental state is in retreat and the state has become a vehicle for the private accumulation of wealth by its key operatives and their allies. Control over land, whilst no longer required for large scale state development projects, is still important in determining private access to land and financial resources. Foreign private investors through large corporations are seeking to acquire land in most parts of the African continent,<sup>531</sup> so the State is being pressured into its colonial role of facilitating their activities and a new, more virulent form of land speculation. In this environment, land for personal use and livelihoods is being sacrificed in favour of land as commodity, allocated to corporations for profit. This should be a familiar scenario to women although it was played out at the familial level in the transition from a living customary law that conceived of land as a common resource and recognized their rights to shelter and livelihoods, to an official customary law that turned land into a commodity and gave men ownership and the power to deprive them of access and use.

### **7.3 Women's Rights, Decolonization and Democratization: New Directions for Research and Engagement.**

Colonialism entrenched legal imperialism by establishing a hierarchical and autocratic national legal system in which, as we have seen, women became the ultimate colonies within a familial and community sphere defined and regulated by customary law. Since the colonial period, the sphere of the customary has been deployed to regulate the lives of women more than

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<sup>531</sup> For some examples of such acquisitions see *supra* note 16.

any other group. Customary law is recognized and applicable mainly in the realm of personal laws relating to the family - marriage, divorce and inheritance, including inheritance of land and real property. Women, who are primary users of land and engaged in the care and preservation of family shelters, are being profoundly affected by their inability to secure shelter and livelihoods. In some areas, their rights of inheritance, possession and access have been redefined out of existence. When they *do* inherit land or attempt to purchase it, the transaction costs in terms of government fees and taxes and the costs of maintaining property are often so high<sup>532</sup> as to force them to sell or occupy the property in a poor state of repair, reducing its value.

The modes of social organization that guaranteed women's citizenship in many pre-colonial Nigerian communities, an important incident of which was access to land, have thus been undermined. An African feminist perspective on the democratization of law in the 21<sup>st</sup> century needs both to abandon the customary - modern dichotomy that attempts to relegate women to an imaginary and selectively defined realm of custom and customary law (which is a legacy of colonialism), and to focus on substantive issues of equality, equity and justice as they arise in new and modern contexts.

In tracing the process of establishment of colonial relations in Nigeria, we demonstrated that colonization was not just foreign political domination which was eventually substantially reversed (at independence) but also the imposition of a world capitalist system that revolutionized systems of production. Industrialization, developments in technology and large scale and mass production have had a significant impact on land use. These developments often entail mechanized and large scale production and processing involving land hungry projects. The

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<sup>532</sup> See Felix Morka, "A Place to Live : Resisting Forced Evictions in Ijora Badia, Nigeria" in Lucy White & Jeremy Perelman eds, *Stones of Hope :How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford :Stanford University Press, 2011) at 23.

legal imperialism of this period facilitated concentration of control over resources by men within the family and a small group of men able to accumulate wealth in capitalist society and in modern private corporations.<sup>533</sup> I have argued that these economic and social changes disenfranchised women economically, politically and legally, depriving them of their traditional full citizenship status in the societies they resided in. Restoring their citizenship – i.e. fuller participation in and benefit from the society in which they live and to which they contribute immensely – will take a different form under new conditions of economic and social organization.

Developments in the world capitalist system - in particular, developments in technology - have significantly affected land use. Mechanized and large-scale production, noise and pollution considerations require new urban planning and zoning arrangements. How do we allocate land resources in these changed contexts? People may have to move from their ancestral homes; they may have to build their homes differently; they may have to access land differently; and they may have to share larger public spaces. Alternatively, societies may choose to restrict mass production in some industries and seek alternatives to large or polluting industrial enterprises. These are practical choices facing modern societies. People in every society should have the opportunity to participate in making these decisions and therefore contributing to the vision of the society they wish to live in. They should decide what the trade-offs should be. Colonial rule limited these options for large numbers of “natives” and in particular for women, ignoring or quelling their resistance. Post-colonial rule by natives is continuing this trend amidst resistance expressed in terms of democratization. Male interest groups in Nigeria have engaged the State

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<sup>533</sup> The primary vehicles of capitalist accumulation.

since 1861, demanding participation in decision making. In our case study of land law we have seen this in relation to the activities of traditional rulers, the emerging new middle class and the military. They indigenized law and used it for their purposes. In my view, a return to the pre-Land Use Act regime of land law in Nigeria is not in the interests of Nigerian women.<sup>534</sup> What they should be advocating for is a new revised Land Use Act – the product of adequate consultations and one which addresses the question of democratization of land regulation by putting in place representative and accountable decision making committees and designing mechanisms for holding them accountable to the public.

As this thesis has demonstrated, women's experiences of engagement with law and legal systems both colonial and post-colonial give us valuable insights into possible directions for democratization of law and guarantees of social justice. We have explored the various ways in which women in Southern Nigeria have engaged with law since the 19<sup>th</sup> century. We have seen how they sought to preserve existing laws in their communities in the face of the transformations of the colonial era,<sup>535</sup> to reject the transformed laws that did not work in their favour, to seek their abolition,<sup>536</sup> and to embrace other national and international laws that appeared to work in their favour.<sup>537</sup> This thesis has argued that given the obstacles they face and the way in which law – whether designated customary or modern - has facilitated their subordination, they need to be more active and creative in engaging in the legal sphere. Such engagement needs to be founded on an understanding of law as social regulation created through political processes in which they

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<sup>534</sup> Groups of women who participated in the national consultations on the reform of the Nigerian Constitution in the Niger Delta area in 2000 shared this view. See Nkoyo Toyo, "Report on Gender and Political Participation in Nigeria" 1999, Unpublished.

<sup>535</sup> See women's revolts in South Eastern Nigeria discussed above at 107 & 108.

<sup>536</sup> Widows rights campaigns discussed above at 147.

<sup>537</sup> Including the constitution and international human rights conventions.



must actively participate, asserting their agency as contemporary actresses on the political, economic and social stage. It is only within the framework of this democratization of law that their interests and rights can be represented and secured. Colonization had economic, political, cultural and legal dimensions which were intertwined although the economic and the political have received the greatest attention. Decolonization must address all these dimensions of domination reflecting the aspirations and struggles of local, national and global constituencies. In relation to law it must involve establishing the space for them to participate in programs of law reform and in law making, implementation and adjudication at all levels of society.

Commenting on the centrality of issues of power and agency in the colonial relationship which persists in Canada, Professor Gordon Christie observes that:

Acknowledgment of the heavy weight of colonialism requires the marriage of cultural and self-determination arguments, as Indigenous nations rightfully take up the daunting task of defining themselves (and their legal traditions), but within a larger package of goals, centred on the project of respecting their ancestors while attempting to find a path out of the situation wrought by generations of oppression.<sup>538</sup>

This statement can be extended beyond the Canadian colonial context. Women in many African societies continue to be colonised through new rules couched in old forms and new legal forms or mechanisms which enforce decontextualised rules and constrain and disenfranchise them. As we have seen, women in the 19<sup>th</sup> century (their ancestors) put up brave resistance in the various ways they were able to. The challenge before the modern African woman in the 21<sup>st</sup> century is how to re-establish their citizenship and rights to land in the face of new global pressures. Representation of women in the legislature, the executive and in the judiciary is an important

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<sup>538</sup> Gordon Christie, "Culture, Self-Determination and Colonialism : Issues around the Revitalisation of Indigenous Legal Traditions" (2007) 6 Indigenous Law Journal 13.

step but far more important is feminist scholarship and advocacy that demystifies rules and processes and that re-contextualizes law. There is a need for feminist legal scholarship and advocacy that can influence the bar, the bench and the public in general. To fail to engage fully with law in all its aspects is to neglect a vital part of the process of decolonization – democratization – and to remain relegated to the realm of the domestic and customary as one of the last colonies.

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## Appendices

### Appendix A

**The Treaty of Cession 1861** (Source: Alan Burns, *History of Nigeria* (London : Allen and Unwin Ltd. 1969) at 319.

Treaty between Norman B. Bedingfield, Commander of her Majesty's Ship "Prometheus", and Senior Officer of the Bights Division, and William McCoskry Esquire, Her Britannic Majesty's Acting Consul, on the part of Her Majesty the Queen of Great Britain; and Docemo, King of Lagos, on the part of himself and chiefs.

#### Article I

In order that the Queen of England may be the better enabled to assist, defend and protect the inhabitants of Lagos, and to put an end to the slave trade in this and the neighbouring countries, and to prevent the destructive wars so frequently undertaken by Dahomey and others, for the capture of slaves, I, Docemo, do, with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the Port and Island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island and premises, with all the royalties thereof, freely, fully, entirely, and absolutely. I do also covenant and grant that the quiet, peaceable possession thereof, shall, with all possible speed, be freely and effectually delivered to the Queen of Great Britain, or such person as Her Majesty shall thereunto appoint for her use in the performance of this grant; the inhabitants of the said island and territories, as the Queen's subjects, and under her sovereignty, Crown, jurisdiction and government, being still suffered to live there.

#### Article II

Docemo will be allowed the use of the title of King in the usual African signification, and will be permitted to decide disputes between natives of Lagos, with their consent, subject to appeal to British laws.

#### Article III

In the transfer of lands, the stamp of Docemo affixed to the document will be proof that there are no other native claims upon it, and for this purpose he will be permitted to use it as hitherto.

In consideration of the Cession as before mentioned of the Port and Island and Territories of Lagos, the Representatives of the Queen of Great Britain, do promise, subject to the approval of Her Majesty, that Docemo shall receive an annual pension from the Queen of Great Britain, equal to the net revenue hitherto annually received by him : such pension to be paid at such periods and in such mode as may hereafter be determined.

Lagos. August 6, 1861

Docemo	His X mark
Telake	His X mark
Rocamena	His X mark
Obalekow	His X mark
Archebong	His X mark

Norman B. Bedingfield  
Her Majesty's Ship "Prometheus"  
Senior Office, Bights Division.

W. McCoskry, Acting Consul.

## **Appendix B**

### **Section 19 of the Supreme Court Ordinance. Cap 3 (Laws of the Colony and Protectorate of Nigeria, 1908)\***

Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any law or custom existing in the said Colony and Protectorate subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature existing at the commencement of this Ordinance, or which may afterwards come into operation. Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives of the said Colony or Protectorate, and particularly, but without derogating from their application in other cases, in causes and matters relating to marriage and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in causes and matters between natives and Europeans where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law. No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law : and in cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience.