ADMINISTRATIVE CONVENIENCE OR DELIBERATE REFORM? THE IMPACTS OF THE COLONIAL JUDICIAL LEGACY ON THE PRE-COLONIAL JUSTICE SYSTEM IN SOUTH-WESTERN NIGERIA

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Abstract

In pre-colonial times, the ethnic groups that independently existed in the territory now called Nigeria had organized systems of government. However, the sweeping force of nineteenth-century colonialism erased most of these pre-colonial governments' institutions and replaced them with the British system. Notably, in South-Western Nigeria (Yorubaland), historical evidence revealed the existence of a constitutional monarchy with organized branches of government. Especially, the pre-colonial judicial branch/justice system of the Yoruba monarchy was radically altered by colonialism.

Using the interdisciplinary methodology, this research answered questions related to the structures and procedures of the pre-colonial justice system in South-Western Nigeria and how it is indelibly impacted by colonialism. In its systematic, and expository narration, this research found an inseparable nexus between lawfare and force as instruments of colonial distortion of the pre-colonial justice system of South-Western Nigeria. Thus, this work augments an aspect of the almost neglected field of African/Nigerian legal history.

Dedication

To my strongest pillars; **Alice Olufunke Adeyeye** (my mother), and **Busurat Bolanle Adewale-St Peters** (my better half).

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CHAPTER ONE

Introduction

A. An Overview

Since the beginning of organized polity, every society's governmental system is known to function through the branches (or arms) of government dubbed, executive, legislature, and judiciary.[1] In some societies, these arms function jointly while in others, they act separately in the performance of their socio-political duties.[2] The rules regulating these arms are organic to the individual society based on the socio-cultural template, and history of such society. That was the reality before the interactions between Africa and the wider world culminated in colonialism. Similar to the present, each pre-colonial African society had branches of government that functioned based on rules of customary law. The functions sometimes overlapped and at other times independent. Despite the overlapping functions of these pre-colonial arms of government, African societies were nevertheless legitimate and civil. The functioning of the three arms rested on the doctrine of traditional checks and balances, a constitutional feature of monarchical and acephalous African societies.[3] Thus, pre-colonial African societies exhibited functional executive, legislative, and judicial arms of government before their contact with colonialists.[4]

Every ethnic entity on the continent of Africa understood the need to maintain societal equilibrium, peace, and sustained interactive harmony. This constituted the main reason for the setting up of adjudicatory systems which catered to the need, based on natural justice and the rule of law.[5] While there existed no uniformity in how the societies organized their systems of adjudication, each understood and prioritized the essence of impartial justice as a prelude to societal cohesion and peace. This necessitated the promotion of rules and regulations that balanced the rights of the citizens, especially in times of friction. In some

[1] T. Olawale Elias, *The Nature of African Customary Law* (United Kingdom: University of Manchester Press, 1956).
[2] DM Davis, "Relationship between Courts and Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What about Separation of Powers" (2012) 15:5 Potchefstroom Elec LJ 1, online: < http://dx.doi.org/10.4314/pelj.v15i5.20 >.
[3] Ian Taylor, *African Politics: A Very Short Introduction,* (United Kingdom: Oxford University Press, 2018) at 11-14. Instances of acephalous African societies included the Igbos, the Somalis, the Maasai, the Tonga etc. These were not necessarily ruled by a central ruler unlike the monarchical entities but had well organized systems with strong emphasis on communal decision making based on wide-ranging consultation.
[4] George B.N. Ayittey, "Traditional Institutions and the State of Accountability in Africa" (2010) 77:4 Soc Research 1183, online: < https://www.jstor.org/stable/23347124 >.
[5] Max Gluckman, "Natural Justice in Africa" (1964) 9 Nat LF 25.

cases, the adjudicating system rests on the religious beliefs of the people and in other cases on the collective efforts of various organs of the states.[6] That remained the order of things till the wave of colonialism swept through and transformed the entire continent of Africa, including Nigeria.

Historically, no unified country was called Nigeria in Africa before 1914 when the colonialists, outside the intent of the indigenous people, amalgamated the pre-colonial tribal societies that had existed independently for thousands of years.[7] Obafemi Awolowo once said, *"...Nigeria is a mere geographical expression. There are no "Nigerians" in the same sense as there are "English or "Welsh" or "French". The word Nigeria is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not"*.[8] The name Nigeria was alleged to have been coined in the late nineteenth century by a British journalist, Flora Shaw.[9] The name was later bequeathed to the area around River Niger where the previously independent tribal societies amalgamated to form the country now called Nigeria had lived before colonialism. The pre-colonial history of Nigeria thus identified tribal societies and ethnic groups now inhabiting the Northern and Southern parts of Nigeria as being over two-hundred-and-fifty (250) independent entities. These entities speak over five hundred languages with English as the official language.[10] The dominant, most populous, and politically influential among these entities are the Hausa-Fulani (twenty-nine percent), Yoruba (twenty-one percent), and Igbo or Ibo (eighteen percent). Others are Ijaw (ten percent), Kanuri (four percent) Ibibio (three-and-half percent), and the Tiv (two-and-half percent).[11]

Of these seven major ethnic groups, the Hausa-Fulani, Yoruba, and Igbo (Ibo) remain the most dominant. There were elements of multifarious pre-colonial inter-group relations among

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[6] Taylor, *supra* note 3.
[7] Toyin Falola and Matthew M. Heaton *A History of Nigeria,* (United Kingdom: Cambridge University Press, 2008) at 158.
[8] Obafemi Awolowo, *Path to Nigeria's Freedom.* (London: Faber and Faber, 1947) at 47-48.
[9] Embassy of the Federal Republic of Nigeria, Mexico Diplomatic Mission, "A brief history of our country" (2020), online: *Miguel Hildalgo Mexico: Embassy of the Federal Republic of Nigeria*, < https://www.nigerianembmexico.org/history-of-nigeria >.
[10] University of Birmingham, "CIFORB Country Profile-Nigeria", online: < https://www.birmingham.ac.uk/Documents/college-artslaw/ptr/ciforb/resources/Nigeria.pdf >.
[11] Ibid.

these major groups.[12] These pre-colonial relations notwithstanding, the Hausa-Fulani dominantly settles in the Northern part of Nigeria, the Yoruba occupies the south-western states, and the Igbo are found mainly in the South-eastern part of Nigeria. Each of these groups had a distinct culture, language, and governmental system that aligned with each historical experience and value. The Hausa-Fulani of Northern Nigeria encountered the Usman Dan Fodio/Islamic Jihad very early in the nineteenth century[13] and that shaped every aspect of the region's institutions including the judiciary. This demarcated the northern system from the systems in the southern part notwithstanding the effort of the colonialists to refocus the northern system for administrative purposes. Both the predominantly Igbo in the south-east and the Yoruba in the south-west had their pre-colonial systems, which were hitherto culturally and historically based altered by colonialism. The latter systems were radically modified, and decades later, both systems showed evidence of retaining the colonial governmental systems and structures, especially the legal system.[14]

In addition to the differences in the pre-colonial, colonial, and post-colonial legal and judicial systems of Southern and Northern Nigeria, the systems of the two divides are emblematic of the same consequences of their colonial history. A wider and more specific review of relevant literature makes the above overview more insightful as it illuminates the findings therein.

B. Literature Review

That colonialism was a reality in most parts of the world including the African continent from the mid-eighteenth to mid-nineteenth century remains an incontrovertible fact of history. Recounting the African, Asian, and American colonial experiences in her book, Ania Loomba noted the ancient nature and penetrative extent of colonialism.[15] She acknowledged this phenomenon as not limited to an area or era but a historical and recurrent feature of

[12] Okpeh Ochayi Okpeh, Jr., "Patterns and Dynamic of Inter-Group Relations in Nigeria, 1800-1900 AD" (2008) 17, J Historical Society Nigeria, 123, online: < https://www.jstor.org/stable/41857151 >.
[13] Patric Nmah & Ebony Amanambu, "A Critical Analysis of the Effects of the 1804 Usman Dan Fodio's Jihad on Inter-Group Relations in the Contemporary Nigerian State", (2017) 9:1 Intl J Religion & Human Relations, 47, online: < https://www.ajol.info/index.php/jrhr/article/download/180086/169428/0 >.
[14] Melvin Mbao & Olusegun Osinibi, "Confronting the Problems of Colonialism, Ethnicity and the Nigerian Legal System: The Need for a Paradigm Shift", (2014) 5:27 Mediterranean Journal of Social Sciences, online: < https://www.researchgate.net/publication/290247201 >.
[15] Ania Loomba, *Colonialism/Postcolonialism*, 2nd ed, (London and New York: Routledge Taylor & Francis Group, 2005) at 8.

human history.[16] Colonialism was the British and other European countries' political and economic policies in which some previously independent countries, beginning from around the fifteenth century, were subjugated under the political governance of Britain and other European powers.[17] However, the changing economic and political realities on the continent of Europe and America in the second half of the nineteenth century changed the pattern, and forms of colonialism. According to Asein, there had been an active presence of Europeans on the coasts of Africa generally and Nigeria in particular before colonialism.[18] However, beginning with the reign of Queen Alexandrina Victoria to that of the immediate past Queen Elizabeth Alexandra, Nigeria was colonized by Britain indirectly (informal colonialism) from 1851 to 1900. By 1900, the British colonial policy in Nigeria changed to direct (formal colonialism) political and administrative hegemony up to 1960.[19]

Similarly, the earlier mutual pre-colonial commercial interactions which served as the forerunner of political domination, were not limited to Africa.[20] In his detailed account of the various commercial activities of the British and Dutch East Indian Companies, Om Prakash dates the relationship between the Europeans and Asians to over three centuries before the changes that led to nineteenth-century colonialism.[21] A major reason that accounted for the changing interactions between the Europeans and the colonized world and which mandated the aggressive incursion into places like Africa in the nineteenth century was the need for natural resources. This fact made the later yearnings for "legitimate" trade and cooperation with Africans an afterthought.[22] The European industrial revolution was at its peak and raw materials were in great demand, hence, the need to look southward for sources of raw materials. The turning to Africa and the eventual colonialism followed the termination of the slave trade[23] which at the time had fulfilled its designed use of providing Europeans with

[16] *Ibid.*

[17] Adewale Adekunle Adeyeye, "Neo-Colonialism and the Nigerian Experience: A Disaster to Dismantle" (2014) 8 IMO Journal of the National Association of History and International Studies Students 40.
[18] John Asein, *Introduction to Nigerian Legal System*, 2d ed (Lagos Nigeria: Ababa Press Ltd, 2005) at 149-150.
[19] *Ibid.*
[20] Om Prakash, *European Commercial Enterprise in Pre-Colonial India* (United Kingdom: Oxford University Press, 1998).
[21] *Ibid.*
[22] Ndubuisi Idejiora-Kalu, "Understanding the effects of the resolutions of the 1884-85 Berlin Conference to Africa's Development and Euro-Africa relations" (2019) 2 Prague Papers on the History Intl Relations, 99.
[23] Stephen Ocheni & Basil Nwankwo, "Analysis of Colonialism and its Impact in Africa", (2012) 8:3 Cross-Cultural Communication, 46, online: < http://dx.doi.org/10.3968/j.ccc.1923670020120803.1189 >.

"primitive capital".[24] The compelling need to invest the accumulated capital produced by slave trading and the accompanying demand for raw materials first led to "legitimate trade". It subsequently culminated in the colonization of Africa, a continent predominantly rich in agricultural produce.

The historical search for overseas investment, a precursor to colonialism and imperialism, though not limited to Africa and Asia alone, was fiercer on these two continents. In the case of America, the "free-standing company" served as a conduit for overseas direct investments in the nineteenth century. Such overseas investments were inroads leading to the colonization of Canada.[25] However, because of its uniqueness, the peculiar nature of the British colonial and imperial activities in Asia, and Africa has been an object of several insightful research and publications. While writing on imperialism and the developing world, Atul Kohli, analyzed two major patterns of British colonialism: these are formal and informal colonialism.[26] These were two different colonial strategies applied by Britain at different places, and epochs, but with almost similar consequences. Thus, instances of British formal colonies included, India, and Nigeria while examples of her informal colonies were Argentina, Egypt, and China.[27]

The foundation of British formal colonialism and imperial activities in India in the mid-eighteenth century had been laid by the English East India Company two centuries earlier. The East India Company commenced its trading activities in India under a royal charter in the early sixteenth century but received direct state backing in the eighteenth century. At the height of its over-a-century trade with the Mughal dynasty, its presence became stronger in the seventeenth century.[28] The main items of trade dealt with by the East India Company

[24] Karl Marx, *Capital, A Critique of Political Economy*, vol. 1 (London: Penguin, 1976) at 774-776. In this classical exposition, Marx explained primitive capital accumulation process to mean the emergence of capitalism from the dispossession of direct producers and subjecting them to wage exploitation through the open extra-economic force of the state. See also, Onur Ince, "Between Equal Rights: Primitive Accumulation and Capital's Violence", (2018) 46:6 Political Theory, 885.

[25] Mira Wilkins, "The Free-Standing Company, 1870-1914: An Important Type of British Foreign Direct Investment" (1988) 41:2 Economic History Rev 259, online: < https://www.jstor.org/stable/2596058 >.

[26] Atul Kohli, *Imperialism, and the Developing World: How Britain and the United States Shaped the Global Periphery* (New York: Oxford, 2020) at 10-205.

[27] *Ibid.*

[28] The Mughal dynasty was a Muslim dynasty that ruled most part of India between the sixteenth and eighteenth century. Just like the British, the dynasty benefited from its trade involvement with the British East Indian Company before it disintegrated in mid eighteenth century. See, Krishan Kumar, *Visions of Empire: How Five Imperial Regimes Shaped the World* (Princeton: Princeton University Press, 2017).

were bullions exported from Britain into India, and calicoes exported from India back to Britain.[29] Differences soon arose between the Mughals dynasty and the East India Company, thereby giving the latter the much-anticipated avenue to unleash its military technology against the Mughals' forces. The Mughals were crushed, and under the strong and ambitious leadership of Lord Robert Clive,[30] the East Indian Company annexed Bengal, the Mughal's seat of government. With strong British royal backing, the East India Company became the exploitative corporate ruler of India for another hundred years.[31] After it fully established a strong and unopposed political and commercial hegemony over India in the first decade of the nineteenth century, the East India Company ruled the region as a state agency. The rule of the British-backed East India Company over India is instructive of an epoch of British colonialism/imperialism during which trade became concentrated in private hands. This was a result of the collaboration between Britain, the East India Company, capitalists, and merchants, in an attempt to convert India to an economic colony. A subservient colony exporting raw materials while importing British textiles, thereby compelling it to contribute to the growth of a key industry in the process of the British Industrial Revolution.[32] The colonial business arrangement was further galvanized by the leveling of huge taxes on Indians, a revenue deployed to the running of the opium and tea trade with the Chinese. The profits from these trades and taxes were deployed to maintain favorable balance-of-payment accounts to pay for British expenses which were majorly charged to Indian incomes.[33] These colonial arrangements had immediate effects. The effects included disruptions of the Indian traditional political and economic patterns and the destruction of the household-based textile production industry. Others were the neglect of food production and the undermining of the power of indigenous ruling classes.[34]

When circumstances within Britain and in the colonial field changed, it was time for the British government to establish direct and formal hegemonic governance over India. A bold

[29] Kohli, *supra* note 26 at 45.
[30] Robert Clive was born into an English family of politicians. He began his career in India as a low-grade clerk in the East Indian Company outpost in Madras in 1744. He later became a soldier and a factor in subjugating India under British imperialism. For comprehensive information on the life and times of Clive, especially in India, see, Lucy S. Sutherland, *The East India Company in Eighteenth-Century Politics* (Oxford: Oxford University Press, 1952); and Brad C. Faught, *Clive: Founder of British India* (Washington DC: Potomac Books, 2013).
[31] Kohli, *supra* note 26 at 22.
[32] *Ibid* at 37.
[33] *Ibid*.
[34] Kohli, *supra* note 26 at 38.

result of over two centuries of accumulated contempt of the Indians against the East India Company and the British was the Indian revolt of 1857.[35] At the time of the Indian aristocracy-led revolt,[36] there was no doubt that the armed resentment was too overwhelming for the East India Company to handle. The inability of the Company to handle the revolt eventually prompted the formal British takeover of India after crushing the revolt. The British seemed to have misinterpreted the earlier helpless acquiescence of Indians as express collaboration in the imperial exploitative process. Thus, the British government was aghast to see the revolt coming and consequently employed its military superiority to ensure that such an uprising never recurred. Richard Cobden, one of the British statesmen of the early nineteenth century expressed a one-sided sentiment about the 1857 revolt. Cobden said, "*One stands aghast and dumbfounded at the reflection that after a century of intercourse with us, the natives of India suddenly exhibit themselves greater savages than any of the North American Indians who have been brought into contact with the white race*."[37] Ronald Hyam sharply countered the latter Richard Cobden statement by stating that, "*Britain's retributive savagery in India between 1857 and 1859 constituted one of the most shameful episodes in Britain's imperial history*."[38]

Thus, Britain took formal and direct control of India in 1857 and ruled the country for another ninety years, using a combination of political, legal, and military strategies. The infrastructure already built and left behind by the defunct East India Company was immediately adopted by the British. That eased the change of power from the Company to the colonial government and maintained continuity. Britain thereafter made some reforms to forestall a recurrence of the revolt and fully fortify its hegemony as a requirement for the continued actualization of its imperial goals in India. It immediately embarked on major reforms of both the Indian military and the civil service. The reform of the Indian military

[35] Irfan Habib, "The Coming of 1857" (1998) 2:1/4 Soc Scientist 6, online: https://www.jstor.org/stable/3517577 >.

[36] The revolt was called "Mutiny" by the British but as "the first war of Independence" by Indians. See, R.A. Geaves, "A Mutiny or A War of Independence? The Muslim Perspective" (1996) 35:1 Islamic Studies 25, online: < https://www.jstor.org/stable/20836926 >.

[37] However, as alleged by Atul Kohli, "*the real savagery, however, was what the British unleashed on the revolting Indians over the next two years (1857-1859), with their guns and cannons, including the recently introduced 80-pounder smoothbore muzzle-loading cannon that could readily blow buildings and humans to smithereens*." He further gave a recorded statistics of the British deaths as a result of the war to be 2,392 while he estimated the unrecorded Indians' death at between 800,000 and probably in the "millions". See, Kohli *supra*, note 26 at 152, and Ronald Hyam, *Britain's Imperial Century, 1815-1914: A Study of Empire and Expansion* (London: B.T. Batsford, 1976) at 72.

[38] Kohli, *supra* note 26 at 152.

was successfully achieved by the British.[39] Thus, to avoid future nationalistic revolts, the military saw a radical increase in the number of British personnel. Also, in furtherance of its divide-and-rule strategy, native[40] Indian soldiers were recruited from regions and strata considered loyal to the British. Thus, Britain was able to build a professionalized army of one hundred and fifty thousand Indians, seventy-four thousand British troops, and two thousand seven hundred British officers. This practically transformed India into the military base of the British colonial empire, funded with revenues and resources exclusively sourced from the Indian economy. About half of the British colonial government budget in India was found to be expended on maintaining the post-1857 army.[41] During the nineteenth century, this army served several colonial purposes. The British' Indian army was engaged in imperial duties in China, and Persia in 1859, and Ethiopia and Singapore in 1867. Other expeditions embarked upon by the newly reformed Indian army were Hong Kong in 1868, Afghanistan in 1878, Egypt in 1882, Burma in 1885, Nyasaland in 1893, and Sudan and Uganda in 1896.[42]

The civil service reform saw the recruitment of young British Oxbridge graduates of about one thousand into the Indian Civil Service (ICS). These recruited young men first wrote a competitive examination, and later learned administrative procedures under more senior officers who served in remote districts of India. They thereafter enter the ICS to perform earmarked imperial assignments. The core tasks of the colonial state performed by the ICS were the collection of revenues, implementation of colonial policies in distant regions of India, and maintenance of law and order.[43] The latter task was collaboratively performed with the joint assistance of the police, and at times with the military.[44] Thus the synergy between the imperial military and the ICS helped Britain to earn huge revenues from India, none of which was expended on building lasting local development. Atul Kohli affirms that "*From half to two-thirds of the public revenues were spent on maintaining the army and on civil administration. In other words, the colonial state extracted significant revenues from India*

[39] Stephen P. Cohen, *The Indian Army: Its Contribution to the Development of a Nation* (Oxford: Oxford University Press, 2001).
[40] While this thesis acknowledges that the word "native" is charged and considered disparaging in some socio-political and academic circles, it is interchangeably used here with the word "indigene" for the purpose of clearer expression of colonial activities. It is never meant to derogate or demean any person, people, culture, or ethnic group.
[41] Kohli, *supra* note 26 at 155.
[42] Hyam, *supra* note 37 at 207.
[43]For comprehensive accounts on the ICS and its nineteenth century activities, see, David C. Potter, *India's Political Administrators: From ICS to IAS* (Delhi: Oxford University Press, 1996); and B.B. Misra, *The Bureaucracy in India: A Historical Analysis of Development up to 1947* (Delhi: Oxford University Press, 1977).
[44] Potter, *supra* note 43.

and then spent most of them on financing its own existence. Thus, the Indians paid for their own colonial domination."[45] The British ruling class was strong on the view that the control of India's political and economic resources was key to preserving British imperial hegemony.

British imperial approach in China, Egypt, and Argentina was different from that of India. In the case of India, there existed a strong consensus within the British government for making India a formal British colony. Negative was the consensus in the case of China. A reason for the latter was that, unlike India, the Ch'ing Empire of China was very strong and intact, as such, conquest would be either very expensive or practically impossible. In addition, the British imperial policymaker held the view that China could still be economically harvested without armed conquest and formal control. This latter view was expressed by Lord Macartney quoted by Atul Kohli that, "*all can be quietly got without it (formal empire) that was expected to be got with it.*"[46] The British prime minister, Henry Temple (Viscount Palmerston) also at the time, preferred an informal empire, especially in Africa. Palmerston also expressed the British imperial intent on Africa, which was that they should be "*well kept*" and "*always accessible*."[47] Thus, the view that if securing economic advantage is possible without a formal empire then the informal approach would suffice, exempted China from British formal imperialism. However, Britain was still able to engage its military prowess to crush every daring competitor and successfully monopolized the opium trade with China, especially in the nineteenth century. Even so, there was initial resistance from Muhammad Ali's Egypt which obstructed the smooth passage of the British trade to China, and similar resistance from the Ch'ing emperors. Through its military power, Britain crushed all opposition along the Egyptian path and opened up China to its opium trade.[48]

In the face of superior military strength, subsequent governments of both China and Egypt were compelled to collaborate with Britain. The words of Peter Ward Fay capture the British imperial profits made from China,

"*What a marvelous interlocking system it was - and at the bottom of it opium! Its sale in Calcutta contributed significantly to the revenue of the Government of India. Its sale at Lintin*

[45] Kohli *supra*, note 26 at 157.
[46] *Ibid* at 204.
[47] P.J. Cain & A.G. Hopkins, *British Imperialism: 1688-2015* (London and New York: Routledge, Taylor & Francis Group, 2016) at 306.
[48] *Ibid* at 203.

financed the purchase of England's teas, while at the same time making it easier for returning English nabobs and the government of India to get Indian rupees home. In England, Whitehall depended upon the tea duty for a considerable part of its revenue…[49]

Fay further noted that the "*Indian rupees then arrived in England concealed, so to speak, inside chests of congou, souchong, and pekoe*."[50]

Similar to China, initially, Egypt was an informal British empire until the Urabi War of 1879 to 1882 and the Anglo-Egyptian crisis of 1881-1882.[51] Egypt emerged from the Ottoman overlordship in the first half of the nineteenth century. And concerted efforts were underway by Mohammed Ali who assumed leadership of Egypt between 1805 and 1848, and his successors, to rebuild the Egyptian economy and strengthen the ancient civilization.[52] Britain had earlier meddled with the nascent Egypt through commerce-related wars required to pry China open to the opium trade, and perhaps to maintain a safe overland route to India. While Britain's imperial policies sought to undermine Mohammed Ali's developmental efforts, Ali conversely believed he could not achieve much without the "goodwill of England."[53] Consequently, to cement their seeming alliance, Ali thereafter promised Britain safe passage to India via Egypt and grains for the British military.[54] This way, both countries had an uneasy and fragile rapport in the early to mid-nineteenth century. From the middle of the nineteenth century, the successors of Mohammed Ali found it difficult to maintain their relationship with Britain.[55] British hold over Egypt was further tightened as the structural adjustment policies designed for Egypt's debt repayment stiffened public investments thereby leading to economic deceleration and eventual stagnation.

Egypt was then caught in a web of disadvantageous economic and political challenges. Its precarious situation prompted the strategizing of how to outmaneuver the British-imposed burdens and expend British and French resources on infrastructural development that included the Suez Canal. It also struggled by banking on restoring the country's wealth

[49] Peter Ward Fay, *The Opium War: 1840-1842* (United States: University of North Carolina, 2000) at 55.
[50] *Ibid.*
[51] Steven A. Cook, "Egypt for the Egyptians" in Steven A. Cook *The Struggle for Egypt: From Nasser to Tahrir Square* (Oxford: Oxford University Press, 2011).
[52] Ninette S. Fahmy, *The Politics of Egypt: State-Society Relationship* (London: Routledge, 2002).
[53] John Marlowe *A History of Modern Egypt and Anglo-Egyptian Relations, 1800-1956* (United States: Archon Books, 1965).
[54] *Ibid* at 35.
[55] Kohli, *supra* note 26 at 98.

through importation.[56] All of these efforts failed as the various economic policies of the British repeatedly placed Egypt in a more disadvantaged financial position that eventually led the country into a higher indebtedness. Thus, Britain was able to maintain an informal hegemony over Egypt until the Urabi revolt of 1879 to 1882. A patriotic revolt perceived by the British as a threat to the operation of its informal empire in Egypt. Britain thus crushed the revolt led by Ahmad Urabi[57] and established a formal British colony under which the Egyptians remained subservient till 1922. Similarly, the sustained British imperial policies further led to the establishment of an informal empire in major Latin American countries which included Argentina and Brazil.[58] Here, Britain sought to expand its commercial interest especially the textile industry, abroad. Hence, through trade treaties, diplomatic manipulations, and overt shows of force,[59] Britain was also able to maintain its economic hold over both Argentina and Brazil.

While other reasons have been adduced as responsible for the British takeover of India, economic exigencies that characterized the beginning of the Industrial Revolution, were the primary factor. By the 1780s the British had emerged from several wars as a global force to reckon with[60] having defeated the French, Dutch, and the Spaniards.[61] The industrial revolution had emerged and accompanying it were money interests which became central to British politics. Britain then re-strategized by making economic policy the central focus of its foreign policy. This led to the aggressive pursuit of profits abroad, especially within the colonial empire that could provide the needed resources. India, which had already been prepared by Clive's company was one of the attractive places to turn. That Britain strongly focused on empire building mainly for economic gains after emerging as a major power in the early nineteenth century is also deducible from P.J. Marshall's comment. Marshall opines that empire was already, "*seen as vital to Britain's economic wellbeing and to her standing as a great power*".[62] This economic motive for British colonial and imperial policy in India and in the rest of her overseas empires was further accentuated by Eric John Hobsbawm. The

[56] *Ibid.*
[57] Donald Reid, "The Urabi Revolution and the British Conquest, 1789-1882" in M.W. Daly (ed), *The Cambridge History of Egypt Volume Two* (Cambridge: Cambridge University Press, 2008).
[58] Alan Knight, "Britain and Latin America" in Andrew Porter & Wm Roger Louis (eds), *The oxford History of Empire: Volume III: The Nineteenth Century* (Oxford: Oxford University Press, 1999).
[59] Kohli, *supra* note 26 at 73.
[60] E.J. Hobsbawm, *Industry and Empire* (New York: The New Press, 1968).
[61] Kohli, *supra* note 26 at 38.
[62] P.J. Marshall, "Introduction" in P.J. Marshall, Alaine Low, & Roger Louis (eds), *The Oxford History of the British Empire*: *Volume II: The Eighteenth Century* (Oxford: Oxford University Press, 2011).

latter affirmed, "*Behind our Industrial Revolution there lies this concentration on the colonial and 'underdeveloped' markets overseas, the successful battle to deny them to anyone else…Our industrial revolution grew out of our commerce, and especially our commerce with the underdeveloped world*".

In his review of Mamdani's "*Citizen and Subject*",[63] Chris Youe[64] demonstrates that the economic motive for British imperialism was always dominant over its cultural/civilization mission. While speaking about the Maori of New Zealand in his analysis, Chris Youe found that the Maori's contact with the British was initially positive. The British thought of them as improvable and they were Christianized in the process. They subsequently interacted with the British as trade partners and were treated as good neighbors. Even when the Maori fought internal wars[65] that could have earned them British condemnation as "savages", they were tolerated. An 1852 comment of a governor about the relationship between the British and the Māori confirms that "*both races form one harmonious community, connected together by commercial and agricultural pursuits, professing the same faith…insensibly forming one people*."[66] However, at the dawn of the Māori War of 1860, the British attitude towards its former allies changed. In the face of the war that coincided with the changes in the political economy, the Māori were, due to the war, no longer considered allies but a hindrance on the path of civilization.[67]

Similar to the circumstance of the Māori people, the Jamaican situation also exemplifies that, in the British imperial blueprint, economic consideration occupied a superior place over and above cultural or civilization exigencies. The British abolition of slavery and liberation of Jamaica in 1834 came with an array of socio-political "freedom". An era of liberalism was initiated; egalitarianism for all, rights to vote for the propertied irrespective of color, etc. The latter notwithstanding, economic marginalization and traces of other forms of discrimination

[63] Mahmood Mamdani, *Citizen, and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton and Oxford: Princeton University Press, 1996).
[64] Chris Youe, "Review: Mamdani's History" (2000) 34:2 Can J African Studies 397.
[65] Andrew P. Vayda, "Maoris and Muskets in New Zealand: Disruption of a War System" (1970) 85:4 Political Science Quarterly 560, online: < https://www.jstor.org/stable/2147596 >.
[66] Keith Sinclair, *A History of New Zealand*, 2nd ed (London: Allen Lane, 1980) at 87.
[67] James Belich, *The Victorian Interpretation of Racial Conflict: The Maori, the British, and the New Zealand Wars* (Canada: McGill-Queen's University Press, 1989).

still existed in the Jamaican system at the time.[68] However, the 1834 intervening Jamaican emancipation was partial. In the words of one British imperial administrator, the Jamaican short-lived freedom was "*to pass from bondage to freedom without overthrowing the existing apparatus of social order in the passage*."[69] Then came the Jamaican uprising (Morant Bay Rebellion) of 1865. It was led by the Christianized, educated, and propertied plantation elites who were disenchanted by the imperial economic policies. That uprising considered an affront by the British ended the Victorian experimentation with political freedom and an abrogation of the Jamaican civilizing mission. In capturing the Jamaican civilizing mission and its outcome, Thomas C. Holt remarks, "*If all things being equal, black men should rule the island, then all things should not be equal*."[70] It seems, therefore, that cultural emancipation and civilization goal of British imperialism could only stand provided the imperial economic interests were not threatened. Chris Youe further affirms that:

"*As long as this liberalism meant that Māori leaders, Indian sepoys, and Jamaican artisans were not a threat to British power, then belief in the civilizing mission remained intact. Once, however, law and order broke down, no matter how trifling (there was not one military casualty in the Jamaica rebellion of 1865), the underlying premises for progress by assimilation and equality also collapsed*."[71]

In continued pursuance of the British mixed socio-economic imperial policies in Africa, following the successful agitations of the abolitionists, the slave trade collapsed thereby facilitating the transition of the African continent to the era of "legitimate trade". Legitimate trade is the term used to differentiate between the trade in African agricultural produce like palm, ivory, hides, and gold dust from the Atlantic slave trade.[72] Beginning in the early

[68] Youe, *supra* note 64 at 400.
[69] Thomas C. Holt, *The Problem of Freedom: Race, Labor, and Politics in Jamaica and Britain 1832-1938*, (Baltimore and London, 1992) at 34.
[70] *Ibid* at 216.
[71] Youe, *supra*, note 64 at 402.
[72] Christopher Chamberlin, "Bulk Exports, Trade Tiers, Regulation, and Development: An Economic Approach to the Study of West Africa's 'Legitimate Trade'", (1979) 39:2 J Economic History, 419. It has been variously questioned that, how legitimate is the legitimate trade? This question is warranted by the actual arrangement of the trade in which only a party to the trade, the Europeans, determined what to be produced and the prices at which the African producers (farmers) sell the produce which was mainly palm oil. As noted by Chima Korieh, the hugeness of this trade is signified by the fact that, as of 1855-1856, the entire African production of palm oil mounted up to about 40,000 to 42,000 tons, all shipped to Europe. Thus, the whole process of the legitimate trade supported Marx's meaning of "primitive accumulation of wealth" in a post-slave trade era. See Marx, *supra* note 24. See also, Chima Korieh, "The Nineteenth Century Commercial Transition in West Africa: The Case of the Biafra Hinterland", (2000) 34:3 Canadian J African Studies, 588, online: < https://www.jstor.org/stable/486214 >.

nineteenth century, Europeans and Americans were involved in legitimate trade on the sea coast of West Africa. Both continents traded with Africans mainly in palm oil, a product required in large quantities by the growing European industries of the time.

Following the identification of its economic goals, the British employed two major strategic instruments, *law, and force*, to achieve the identified colonial goals. Even before the actual political superimposition, law (or lawfare)[73] was employed in terminating the outdated slave trade to usher in the legitimate trade. The campaign for the abolition of the slave trade was heightened by the forceful signing of treaties of abolition between European imperial agents and African leaders. These were the treaties signed to effectively end the slave trade and paved the way for the "legitimate trade".[74] These treaties signed between the British, and Afro-Arab leaders are traceable to the beginning of the nineteenth century. Hundreds of such treaties were concluded before the late nineteenth century which witnessed the signing of multiple similar other treaties.[75] Buttressing the latter, Neil Boister affirms:

> *"Beginning in 1817, British diplomatic, consular, and (especially) naval representatives negotiated scores of bilateral suppression treaties for the abolition of the trade with East and West African leaders (variously described as 'Kings', 'Chiefs' or 'Potentates'), and with Arab leaders (typically 'Sheikhs'). The Treaties were early examples of what, in the 20th century, came to be called 'Suppression Conventions'.*[76]

As later elaborated in chapter two of this thesis, several of such abolition treaties, which were eventually applied by the British in the seizing of territories in South-Western Nigeria were signed with several traditional rulers in Lagos, Ibadan, Ijebu, Ekiti, Oyo, and Abeokuta.

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[73] Jaume Pinos and Mark Hau concisely conceptualized lawfare to include, "*the use of law{fare} by states as a legal instrument to accomplish geo-political objectives…*" More elaborately, they described it as a "*multifaceted law-based instrument that can be used by a wide range of actors in both military and non-military contexts to pursue political objectives*". See Jaume Castan Pinos & Mark Friis Hau, *Lawfare: New Trajectories in Law* (United Kingdom: Routledge, 2022) at 1-6. More on lawfare below.

[74] Inge Van Hulle, "British Legal Strategies and the Abolition of the Slave Trade", in *Britain and International Law in West Africa: The Practice of Empire* (Oxford: Oxford Academic, 2020), 73 at 73-76, online: < https://doi.org/10.1093/oso/9780198869863.003.0003 >.

[75] Roger Clark, "British Anti-Slave Trade Treaties with African and Arab Leaders as Precursors of Modern Suppression Conventions" in Neil Boister et al, eds, *Histories of Transnational Criminal Law* (Oxford: Oxford University Press, 2021) at 128.

[76] Neil Boister, *An Introduction to Transnational Criminal Law* (United Kingdom: Oxford University Press, 2012) at 14.

The sustained engagement of law in realizing British colonial interests in Africa generally and Nigeria specifically did not end with the introduction of legitimate trade. It transcended that era through to the early twentieth century when several proclamations were made to merge the various conquered territories. It also extended to the period of the establishment and running of the colonial governments of the colonized territories. The above prompted Comaroff's statements that *"The 'mode of warfare'—or rather lawfare, the effort to conquer and control indigenous peoples by the coercive use of legal means—had many theatres, many dramatis personae, many scripts"*.[77] The latter statement manifested very swiftly as the termination of the slave trade and commencement of the "legitimate trade" soon led to the emergence and execution of several complicated but ostensibly designed colonial templates. The later mode of execution of the colonial templates confused the expectations of African/Nigerian leaders involved in the treaties' signing and some of whom had supported the British against one another in earlier wars of conquest.

The legitimate trade that had started on the coasts soon extended into the hinterland towards the late nineteenth century. European traders moved inward from the sea ostensibly to beat the middlemen and establish direct commercial links with the locals to enforce their policy of "free trade".[78] The British foray into the hinterlands of Africa soon changed dimension from a commercial voyage to a new form of contact which had political implications. The aftermath of the slave trade precipitated economic crises for many African societies. The crises culminated in political upheavals which in turn provoked imperialist intervention and the eventual annexation.[79] The legitimate trade later carried on by the British in the hinterland weakened the African political system.[80] That created a porosity that enabled the intervention of the colonialists. The shift from the defunct slave trade to legitimate trade had cumulative and far-reaching socio-political consequences on the communities involved.[81] These consequences included the weakening of the indigenous rulers' authority by men who were ex-slaves, and who perchance, traded directly with the Europeans in the hinterland. In their

[77] John Comaroff, "Colonialism, Culture, and the Law: A Foreword" (2001) 26:2 Law & Social Enquiry 304 at 306, online: < https://doi.org/10.1111/j.1747-4469.2001.tb00180.x >.
[78] Korieh, *supra* note 72.
[79] Robin Law, "Introduction" in Robin Law, eds, *From Slave Trade to "Legitimate Commerce: The Commercial Transition in Nineteenth-Century West Africa"* (Cambridge: Cambridge University Press, 1995) at 1. See also Basil Davidson, *Black Mother: Africa, The Years of Trial* (Oxford: Oxford University Press, 1961) at 222-224.
[80] K. Onwuka Dike, *Trade and Politics in the Niger Delta, 1830-1885: An Introduction to the Economic and Political History of Nigeria* (Oxford: Oxford University Press, 1956) at 1-18.
[81] *Ibid.*

quests to acquire political power, these new men acquired wealth and consequently rose to challenge pre-legitimate trade indigenous authorities.[82]

Various revolts and protracted civil wars, like that of Jaja of Opobo,[83] soon spread as the legitimate trade also expanded. The trade shift from slave trade to trade in palm oil was the background cause of the many wars which engulfed, for instance, the pre-colonial states of the Niger Delta and Yorubaland around 1877-1893. The legitimate trade orchestrated the dwindling wealth, power, and consequently, the influence of pre-existing traditional rulers. Some of these rulers then resorted to plundering and warfare to maintain their revenues.[84] For instance, in the process of the British intervention in the settlement of the legitimate trade-motivated wars that engulfed Yorubaland, the instrumentality of law was further engaged. According to Omoniyi Adewoye, the British moved to resolve the protracted wars through a series of peace negotiations starting from mid-1886 through 1893.[85] The Lagos-based colonial government negotiated and signed several treaties with key Yoruba rulers and war chiefs. The warring parties, through their chiefs, undertook to cease fire, allow peaceful trading activities, and abstain from dissensions and acts likely to promote strife.[86] The interest shown by the representatives of the Queen to broker peace among the warring states of Yorubaland endeared the British to the unsuspecting warring parties who embraced the idea of peace settlements.[87] Such treaties were signed by the Ooni of Ife and the Alaafin of Oyo (signing as the "head of Yorubaland") in 1888. By provisions of these treaties, both kings and their lieutenants committed themselves to give "first considerations in all trade transactions" to British Subjects.[88] This implied the surrendering of the right to free trade in Yorubaland to the British. The indigenous signatories also agreed never to cede any of their territories to any

[82] An instance of a rising, and revolting slave was Jaja of Opobo who, after acquiring wealth and garnered support through the trade, seceded from Bonny kingdom to establish the kingdom of Opobo. See, *Ibid* at 182-202.
[83] Henry Louis Gates, Emmanuel Akyeampong & Stephen J. Niven, *Dictionary of African Biography: Jaja of Opobo (1821-1891)* (Oxford: Oxford University Press, 2012), online: < https://www.oxfordreference.com/display/10.1093/acref/9780195382075.001.0001/acref-9780195382075-e-0940;jsessionid=4BE798AC66AF5798AC7A63E626311C8A >.
[84] Antony Hopkins, "Economic Imperialism in West Africa: Lagos, 1880-92 (1968) 21:3 Economic History Rev 580, online: < https://doi.org/10.1111/j.1468-0289.1968.tb01677.x >.
[85] Omoniyi Adewoye, "The Judicial Agreements in Yorubaland 1904-1908" (1971) 12:4 J African History 607, online: < https://www.jstor.org/stable/181017 >. The treaties are as contained in, Ibadan, National Archive of Nigeria (Subsequently "NAN"), (CSO 5/1, XIII).
[86] *Ibid.*
[87] J.A. Atanda, *The New Oyo Empire: Indirect Rule and Change in Western Nigeria, 1894-1934* (London: Longman, 1973) at 53-98.
[88] *Ibid.* See also NAN, CSO 5/I, XV, XVI.

other European power "*without the full understanding and consent of the Governor of the Colony of Lagos on behalf of Her Majesty the Queen*".[89] As further discussed in chapter two, a series of similar treaties were concluded with the elders and chiefs of various territories in Yorubaland.

Following this ostensible interest in preserving peace in Yorubaland, the British backed the peace negotiations, treaties, and agreements with military enforcement. The imperial force was ready to suppress any insurrection inimical to her interests whenever necessary.[90] Aside from the forceful annexation of Lagos in 1861, the Ijebu was the first Yoruba hinterland to encounter the British show of force in 1892. This was the military invasion known historically as the *Ijebu Expedition of 1892*. The latter British expedition against the Yoruba kingdom severely affected its internal politics. The already heated kingdom was further tensed because the military incursion exacerbated the primordial ethnic animosity between the two main groups in the kingdom, the Ijebu-Epe, and Ijebu-Eko. This latter led to administrative polarization between the two Ijebus, a situation that fanned further intra-group conflicts between 1905 and 1921 when a major administrative reorganization doused tension within the Ijebu kingdom.[91]

The Ijebu expedition of 1892 further precipitated a new series of treaties and agreements signed between the various kingdoms on one side and between the individual kingdom and the British on another. As further elaborated in chapter three, aside from the various peace treaties,[92] there were several judicial treaties signed between the various Yoruba kingdoms and the British. Those treaties compelled Yoruba leaders to ostensibly surrender their judicial authorities to the British in a process of persuasion and coercion.[93] For instance, some of the Ijebu treaties were allegedly signed at gun points and at times, by diasporan citizens lacking the authority and locus to append such treaties.[94]

[89] *Ibid.*
[90] Adewoye, *supra,* note 85 at 609.
[91] Oguntomisin G.O., "The Impact of the Ijebu Expedition of 1892 on Politics in Epe 1892-1925" (1995) 19:1-2 African Notes: Bulletin of the Institute of African Studies 1.
[92] Majority of these treaties as expatiated in the following chapter are also contained in NAN, CSO 5/I-X
[93] Adewoye, *supra* note 85 at 610-627.
[94] Siyan Oyeweso & Olasiji Oshin, "British Conquest and Administration of Yoruba" in Deji Ogunremi & Biodun Adediran, eds, *Culture and Society in Yorubaland* (Nigeria: Rex Charles Publication, 1998) at 6 & 7.

The combination of the above circumstances that played out the scripts of the British colonial office led to the forceful annexation of vast areas of land in the pre-colonial states that later formed Nigeria. Starting with Lagos, Yorubaland fell to the British between 1861 to 1890s,[95] the Bight of Benin in 1897,[96] and the Bight of Biafra (Igbo land) following the famous Aro expedition of 1901-1902.[97] Northern Nigeria fell to the British between 1899 to 1903, following the signing of the Anglo-French agreement and the forceful invasion of Kano province which led to the fall of the Sokoto Caliphate.[98] For administrative convenience thereafter, Northern and Southern Nigeria were governed as one entity following the Lord Frederick Lugard amalgamation of 1 January 1914. This was the beginning of the administrative unification and consequential alteration of the pre-existing institutions in both regions of Nigeria.[99]

Consequent upon these conquests and administrative rearrangements that covered all of Nigeria's pre-colonial lands and political entities, all facets of pre-colonial Nigerian governance were subjected to colonial political dictates and modifications. In his writings on the criminal justice system in the West-African pre-colonial Songhai Empire, David Dalgleish debunked the Eurocentric view about the absence of organized systems of law and court before colonialism.[100] Dagleish thus identified a twofold Songhai justice system headed by the king on one hand and the king-appointed Cadi on the other.[101] Similarly, before the colonial subjugation, each of the various tribal societies that at present constitute today's Nigeria had established systems of justice administration. Each of these systems was peculiar to and aligned with the history, political structures, religion, and customary law and practices of each tribal society.[102] The latter was underscored by Niki Tobi that *"it (the various pre-*

[95] Hopkins, *supra* note 47.
[96] Thomas Obinyan, "The Annexation of Benin" (1988) 19:1 J Black Studies 29, online: < https://www.jstor.org/stable/2784423 >.
[97] John Orji, "Developments in Igboland from the 1890s to the 1970s" in *Political Organization in Nigeria since the Late Stone Age* (New York: Palgrave Macmillan, 2011) at 161-162.
[98] Chinedu Ubah, "The British Occupation of the Sokoto Caliphate: The Military Dimension, 1897-1906" (1994) 40 Paideuma 81, online: < https://www.jstor.org/stable/40341677 >.
[99] John Riddick, *Sir Frederick Lugard, World War I and the Amalgamation of Nigeria 1914-1919* (Master's Thesis, Western Michigan University, 1966) [Unpublished[. online: < https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=4858&context=masters_theses >.
[100] David Dalgleish, "Pre-colonial Criminal Justice in West Africa: Eurocentric Thought Versus Afrocentric Evidence" (2005) 1:1 African J Criminology & Justice Studies 55, online: < https://www.umes.edu/uploadedFiles/_WEBSITES/AJCJS/Content/acjavol1no1dagleish.pdf >.
[101] *Ibid.*
[102] Fabian Ajogwu (SAN), *Legal History and Politics*, online: KENNA PARTNERS<https://kennapartners.com/wp-content/uploads/2019/11/LEGAL-HISTORY-AND-POLITICS.pdf> at 3

colonial justice system) was designed to ensure the stability of society and maintenance of social equilibrium. The most important objective was to promote communal welfare by reconciling the divergence of the different people."[103]

In Northern Nigeria, there was the Caliphate/Emirate system[104] where justice was administered based on Islamic law and through the Emir, assisted by the Waziri and Alkali. [105] The Northern Nigeria judicial system predominantly based on the Islamic Shariah law was complex but well structured.[106] The latter also had a system of appeal in which an unsatisfied litigant reserved the right of appeal from the Alkali court to the court of the Emir above it.[107] The Alkali were jurists grounded in Arabic law and language, dispensing justice based on Islamic law texts.[108] Similarly, in the constitutional monarchical Yoruba (South-West) system, the justice administration went up from the family head to the compound head and up to the Oba's (king) court. The latter was assisted in the justice dispensing process by his traditional council of chiefs. In the predominantly acephalous Igbo society, bodies responsible for justice administration ranged from; family groups, village councils, Ozo titleholders, and age grades.[109]

Writing in the early sixties, Anthony Nicholas Allot discovered these organized judicial mechanisms among most ethnic groups in Nigeria. Allot found that these mechanisms were established on customary rules of adjudication. The whole process was targeted towards societal cohesion with substantive justice prioritized and little or no advertence given to formalism.[110] These mechanisms were traced by Allot to the period that predated the colonial modifications of pre-colonial African cultural and systemic living patterns. That these ethnic Nigerian groups had legitimate justice-serving court systems regulated by indigenous

[103] Chukwudifu Oputa, *In the Eyes of the Law*, 2nd ed (Imo, Nigeria: Friends' Law Publishers, 1992) at 50. This connotes the capacity of a citizen to access the courts, the political order and the benefits emanating from economic and social developments in a state for justice purpose.
[104]Asein, *supra* note 18 at 150-152.
[105] Omoniyi Adewoye, *The Legal Profession in Nigeria 1865-1962* (Nigeria: Longman, 1977) at 1-8.
[106] Anthony Diala, "A Butterfly that Thinks Itself A Bird: The Identity of Customary Courts in Nigeria" (2019) 51:3 J Legal Pluralism & Unofficial L 381, online: < https://doi.org/10.1080/07329113.2019.1678281 >.
[107] *Ibid.*
[108] Abdulmumini A. Oba, "Neither Fish nor Fowl: Area Courts in the Ilorin Emirate in Northern Nigeria" (2008) 58 Journal of Legal Pluralism and Unofficial Law 69, online:< https://doi.org/10.1080/07329113.2008.10756624 >.
[109] Asein, *supra* note 18 at 150-152.
[110] Anthony Nicholas Allott, *Judicial and Legal Systems in Africa*, (London: Butterworths, 1962) at 20-75.

customary law had earlier been confirmed by William Balfour Baikie.[111] The latter discovered these systems during his exploration of the pre-colonial Middle-Belt and North-Central Nigeria almost half a century before the active colonial occupation of those territories. That was over a century before Anthony Nicholas Alott's discovery discussed above.[112]

Following the introduction of colonialism, all these pre-colonial court/justice systems were dislocated and reorganized to suit British administrative policies and notions of justice. As opines by Rabiat Akande, in Northern Nigeria, the reorganization of the Shariah-based legal system was felt more in the criminal justice system. The *siyasa* (the discretionary powers of political leaders) was unprecedentedly expanded beyond its pre-colonial connotation to allow for the colonial master's amenability of the system to the colonial state's judicial whims and caprices.[113] The expansion of this previously regulated power of the Emir (*siyasa*) adversely modified the judicial system and the ensuing courts' decisions. The unprecedented wider exercise of the *siyasa* by the emirs led to the constraining of the Alkali judicial duty. This was due to the over-empowerment of Emirs who, strangely, started to exercise both formal and informal control over almost every judicial process.[114]

Similarly, in South-Western Nigeria, (Yorubaland), due to the presence of missionaries, traders, and expanded commercial activities that culminated in the nineteenth-century "legitimate trade", several court systems, laws, and rules of procedure were imported. The purpose of the latter was to create a system that would suit the new situation as deemed by the British. Consequently, the new system created modified, and upturned the pre-existing system. There were established new European-style courts in some parts of southern Nigeria, especially Yorubaland. The new courts included Courts of Equity (1854), Consular Courts (1872), Courts of Royal Niger Company (1886), and the English Style Courts (1862).[115] In addition, there were also created nine other courts of different hierarchies; of the first

[111] William Balfour Baikie, *Narrative of An Exploring Voyage Up the Rivers of Kwo'ra and Binue in 1854*, (London: Bradbury and Evans Printers, 1856).
[112] *Ibid.*
[113] Rabiat Akande, "Secularizing Islam: The Colonial Encounter and the Making of a British Islamic Criminal Law in Northern Nigeria, 1903-58" (2020) 38:2 Law and History Review 459, online:< https://doi.org/10.1017/S0738248019000166 >.
[114] *Ibid.* at 472.
[115] Joseph Diekola Ogundere, *The Nigerian Judge and His Court*, (Ibadan, Nigeria: University Press, 1994) at 1-15.

instance, appeal, and last resort, administered for justice dispensation in Nigeria between 1861 and 1874. These were the Supreme Court (or Police Magistrate Court), Petty Debt Court, Slave Commission Court, Court of Requests, West African Court of Appeal, The Privy Council, etc.[116] The new courts adopted new civil and criminal procedure rules for commencing and sustaining actions. The courts were later structured and restructured and metamorphosed into today's court system now predominantly operated in Nigeria.

These new courts and their procedures contradicted the pre-existing customary court system and rules of adjudication identified by T. Olawale Elias as binding for maintaining societal justice and equilibrium, and upon which the pre-colonial justice system was based.[117] These new courts mainly operated principles of the Received English law; common law, principles of equity, and statute of general application in force in England as of 1st of January, 1900.[118] The new laws then strictly constrained the prior applicable customary law which was subjected to validity tests, if applied at all[119].

Notwithstanding its religious and humanistic inclinations, the new colonial judicial system altered the pre-existing systems, especially the court and justice system.[120] The alteration was for judicial and administrative convenience, meant to execute all colonial policies as designed and pushed through the colonial office.[121] The relics of these colonial judicial modifications included the entrenched rules of English law technicalities embedded in the present Nigerian civil and criminal procedural rules. As severally argued by opinionists and academics, the English law technicalities had robbed and are robbing post-colonial citizens of Nigeria generally and South-Western Nigeria particularly, of substantive justice.[122]

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[116] Others are Court of Civil and Criminal Justice, Divorce Court, and Vice-Admiralty Court. See, T. Olawale Elias, *The Nigerian Legal System* (London: Routledge & Kegan Paul Ltd, 1963) at 44.
[117] *Ibid.* at 35-42.
[118] Omoniyi Adewoye, "Law and Social Change in Nigeria" (1973) 7 (1) J Historical Society Nigeria, online: < https://www.jstor.org/stable/41856993 >.
[119] Hilary Nwaechefu," The Subjection of Customary Laws to Repugnancy Tests by Nigerian Courts; the Need to Broaden the Horizon". (2017) 3:6 Intl JL, online: < https://www.lawjournals.org/archives/2017/vol3/issue6/3-6-15 >.
[120] Noel Otu, "Colonialism and the Criminal Justice System in Nigeria" (1999) 23:2 Intl J Comparative & Applied Crim Justice < DOI: https://doi.org/10.1080/01924036.1999.9678646>.
[121] *Ibid.*
[122] Ebun Olu Adegboruwa, "The Evil of Technical Justice" *The Nigeria Lawyers* (2 February 2021) online < https://thenigerialawyer.com/the-evils-of-technical-justice/ >.

Consequent upon the above, evidence analytically adduced in this thesis negates some Eurocentric views that Africa is unhistorical, lacking political systems or organizational structures before they came in contact with the Europeans. Such views as held by Friedrich Hegel and some of his Eurocentric and non-Eurocentric proponents,[123]are contradicted by the findings of the above-reviewed scholars and the evidence presented in this work. Thus, in the face of these findings, unsubstantiated views such as those held by Friedrich Hegel are discriminatory, derogatory, and unsustainable. While the pre-existing African system was considered traditional and rudimentary by British evaluation, it was adequate in catering to the justice needs of the society in which it operated. It granted ease of access to substantive justice to the citizens. Agreably, every culture and civilization must grow and borrow from others at some point. However, such growth should be organic and be at the pace and need of the relevant culture and not necessarily by external imposition the way it happened to the Nigerian justice system.

The arguments of scholars who had the same notion as Friedrich Hegel about pre-colonial Africa reflect the positions of African modernization missions adduced by Eurocentric authors like Hegel and Trevor-Roper. These authors and their political supporters claim that colonialism was necessitated by the need to modernize the "dark" African system.[124] Such a biased conception borne out of incomprehension of the African system and its workings necessitates scholarships such as this. Thus, this thesis is designed to contribute to discourses aimed at elucidating an aspect of the African past, South-Western Nigeria's (Yorubaland) pre-colonial justice system, and the impact of the colonial judicial system on it.

C. Significance: Why Study the Legal History of South-Western Nigeria's Justice System?

This research is of both **academic and practical significance**. In the academic sense, the significance hinges on the fact that literature is scarce on Nigeria's judicial history especially

[123] The misunderstanding and consequent misrepresentation of pre-colonial Africa is expressed by Hegel in, Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (Ontario, Canada: Batoche Books, 2001) at 117. Hegel's non-Eurocentric disciples include Onyekachi Duru who argues that "*the evolution of contemporary Nigerian judiciary, which follows the British model, was basically a colonial attempt to tackle the defect in the traditional system of adjudication*". Onyekachi Duru, "The Role and Historical Development of the Judiciary in Nigeria" (2012), online: SSRN< https://ssrn.com/abstract=2142928 > at 3.

[124] Fuglestad Finn, "The Trevor-Roper Trap or the Imperialism of History. An Essay" (1992) 19 History of Africa, online: < https://doi.org/10.2307/3172003 >.

those from Afrocentric perspectives. Only a few writers of the 50s, 60s, and 70s (some of whom are deceased) referenced in this work did substantial research on the Nigerian legal system which covered the justice system. Current legal scholars hardly research the pre-colonial history of African/Nigerian courts and their rules of procedure. Unfortunately, the dearth of scholarship on this subject has increased the negative perception of Africa from the outside world. This negative perception is mostly propagated by scholars who are either unable to comprehend the few writings available or find those few writings inadequate for proper interpretation of Africa's legal past. As noted above, such a scholar known for biased disparagement of Africa's history was GWF Hegel. In his *philosophy of History,* Hegel confidently albeit erroneously affirms that,

"At this point we leave Africa, not to mention it again. For it is no historical part of the world; it has no movement or development to exhibit. Historical movements in it -that is in its northern part belong to the Asiatic or European world…What we properly understand by Africa, is the ***Unhistorical***, ***Undeveloped*** *Spirit, still involved in the condition of mere nature, and which had to be presented here only as on the threshold of the World's History."*[125]

The incomprehensiveness of the African past that resulted in the misrepresentation of the true state of things is perhaps, more terribly demonstrated in the Fuglestad Finn quoted comment of Trevor-Roper. Roper, another Eurocentric writer, and a former distinguished Oxford University professor, opines, *"Perhaps in the future, there will be some African history to teach. But at the present there is none-there is only the history of the Europeans in Africa. The rest is darkness…and darkness is not a subject of history."*[126]

As a result of the continuous unavailability of sufficient evidence to prove the contrary, certain academic and non-academic minds of European and American extractions still consider Hegel and Trevor-Roper's lines of arguments as the true position of things. This wrong notion about pre-colonial Africa continues to mislead some students of history as a result of misinformation.

Furthermore, the few available well-researched works on this subject revolve around the general impacts of colonialism. Not much in-depth foray has been made into the legal history of the Nigerian court system and procedures, to determine how external systems impacted its

[125] Georg Wilhelm Friedrich Hegel, *supra*, note 123.
[126] Finn, *supra* note 124.

civil and criminal procedure rules. This seems to reinvigorate the arguments of Hegel, Trevor-Roper, and others. The advertent or inadvertent culture of Afrocentric researchers concentrating on colonial and post-colonial Africa against the negligible research on the pre-colonial times seems to be validating the "dark continent" claims. Consequently, in its argument, this thesis avoids limiting itself to colonial times alone. Thus, it aims to contribute to the few academic pieces of research and debates that will regenerate the almost extinct legal history of the pre-colonial Nigerian court/justice system, and increase scholarship on the subject. Hence, in its process of analyzing the historical evidence of the Yoruba pre-colonial justice system related to rules of civil and criminal procedure, this research builds on such pioneering works like *Omoniyi Adewoye's "The Judicial System in Southern Nigeria, 1854-1954: Law and Justice in a Dependency",*[127] *Taslim Olawale Elias's "The Nigerian Legal System"*[128]*, Anthony Nicholas Allott's "Judicial and Legal System in Africa"*[129] and similar other relevant works.[130] This research then attempts to present nuanced expository discussions to expand existing academic materials necessary for growing sources of debates and references on African legal history. It specifically concentrates on the South-Western Nigeria (Yorubaland) justice system. The thesis aims to be an additional assistance to students and teachers of legal history who might find it useful as one of the more recent works on the subject.

While it avoids deviating from its primary precinct as an academic scholarship, this research is also of practical significance. This thesis contradicts some European and academic submissions, opinions, and debates justifying all forms of colonialism in Africa and Nigeria specifically. It presents analytical and arguable historical evidence that colonialism disrupted most pre-existing legal order in Africa in the last century. Although colonialism impacted all aspects of the life of citizens and governance in South-Western Nigeria while it lasted, however, beyond other aspects of the pre-colonial system, the justice system was radically altered. This alteration indelibly affected Nigerian citizens' capacity to approach the court for substantive justice. This perpetuated injustices as it replaced the notion of justice with several un-African legal procedural formalities. This reality necessitated a new dimension of academic discourse to further illuminate historical facts about judicial colonialism in Nigeria.

[127] (London: Longman, 1977)
[128] (London: Routledge & Kegan Paul, 1963)
[129] (London: Butterworths, 1962)
[130] Adewale Adekunle Adeyeye, *supra*, note 17.

This is to demonstrate the patterns and extent of the modification made to the Yoruba pre-colonial court civil and criminal procedure rules. Hence, this thesis analysis also attempts to provoke a rethinking that might lead to new legislative intervention in the justice system of South-Western Nigeria (Yorubaland).

D. Methodology

This research is conducted using a combination of black letter analysis, law-in-context, and interdisciplinary approaches, as it borrows from history, political science, economics, and sociology. It makes a qualitative analysis of the relevant colonial treaties, agreements, proclamations, ordinances, and selected courts' civil and criminal procedure rules applied in South-Western Nigeria. Being a work of core historico-legal investigations, it contains a copious evaluation of historical materials in addition to other disciplines borrowed from. The latter is necessary because of the nature of the research and the above-listed relevant works it relied on and innovatively built upon. The adopted historical analysis is in addition to situating the thesis within the socio-political and legal milieu of the periods under review. This is to properly locate the research within the "law and society" precinct to which it belongs. This further allows for an external approach to the research in alignment with Brian Simpson's exposition.[131] The work is thus taken out of the limited scope of internal doctrinal legal study. It expatiates legal developments within the context of the relevant circumstantial socio-political realities. It, therefore, relies on multiple sources including legal and non-legal materials.

Consequently, this research was library-based, archives-based, and internet-based. Textbooks and legislations consulted were accessed online, at the York University Libraries; Osgoode Hall Law School Library, and Scott Library. Other online libraries to which Osgoode and York University are subscribed for inter-library loan services through Racer, were also consulted for materials. The National Archive of Nigeria in Ibadan and the United Kingdom National Archive in Richmond served as the sources of the majority of the colonial treaties, agreements, proclamations, and letters patents that formed the basis of this research analysis. I analyzed data gathered through the above methods using qualitative data analysis

[131] Brian Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48:3 University of Chicago Law Review 632, online: < https://chicaunbound.uchicago.edu/uclrev/vol48/iss3/4 >.

techniques.[132] The qualitative method was preferred over the quantitative approach for some reasons. Historical research such as this, not basing its analysis on numerical statistics but on doctrinal and law-in-context approaches, is better done through a dispassionate qualitative evaluation of relevant primary and secondary sources.

E. Definition of Relevant Terms (Terminology)

For clarity, this research considers it necessary to avoid the slippery terrain of assuming that all relevant and key terms running through it are understood by the readers. With readers from all walks of life in mind, this brief section is included here to avoid the inadvertent exclusion of non-African readers who might be unfamiliar with these terms.

Colonialism: In plain language, it is defined as the political practice involving the domination and subjugation of one people by another.[133] In a similar but broader sense, colonialism constitutes a form of domination and control by individuals or groups over the territory and/or behavior of other individuals or groups.[134] As discussed above in the literature review, while cultural/civilizing motive is often presented as a basis for imperialism and colonialism, the arguable primary motive behind every colonial tendency was economic. Of course, economic exploitation of the colonized is usually preceded by political subjugation and subsequently social acculturation. In the words of Karl Marx backed by Max Weber in his explanation of economic determinism, the economic substructure always forms the basis upon which all other superstructures are based.[135] While economics motivated active colonialism in Africa and particularly in Nigeria, the impact remains indelible on all pre-existing institutions, especially the judiciary. The exception here is Ethiopia, the only

[132] Anthony Onwuegbuzie, Nancy Leech, & Kathleen Collins," Qualitative Analysis Techniques for the Review of the Literature", (2012) 17:28 The Qualitative Report 1. Online: ResearchGate < https://doi.org/10.46743/2160-3715/2012.1754 >.
[133] Margaret Kohn and Kavita Reddy, "Colonialism", Edward N. Zalta & Uri Nodelman, eds, *Stanford Encyclopedia of Philosophy* (Stanford: Stanford Encyclopedia of Philosophy, 2023), online: < https://plato.stanford.edu/entries/colonialism/#:~:text=Colonialism%20is%20a%20practice%20of,concepts%20treated%20synonymous. >.
[134] Ronald J. Horvath, "A Definition of Colonialism" (1972) 13:1 University Chicago Press J 45, online:< https://www.journals.uchicago.edu/doi/abs/10.1086/201248# >.
[135] Olu Oyinlade et al, "Thoroughness in Explanation of Substructure-Superstructure Relations in Introductory Sociology Textbooks" (2020) 48:4 American Sociological Association 313, online: < https://doi.org/10.1177/0092055X20942853 >.

African country not colonized, albeit controversially.[136] Thus, within the context of this research, the period before European colonialism is the **pre-colonial**[137] time while the time after it is referred to as the **post-colonial**[138] period.

Lawfare: Although a relatively new concept,[139] lawfare runs through this research as a term used to describe the tactical employment of law as a colonial tool through which the colonialists seized and occupied territories. Lawfare is variously described as a "*method of warfare where the law is used as a means of realizing a military objective*".[140] It is also defined as "*the strategy of using or misusing law as a substitute for traditional military means to achieve a warfighting objective*".[141] In a different and wider sense, lawfare is described as "*a weapon designed to destroy the enemy by using, misusing and abusing the legal system and the media to raise a public outcry against the enemy"*[142]. While the above hardly exhausts the definitions/description of warfare, it is apt and relevant to note that, though recently conceptualized, lawfare was a weaponized instrument of the colonialists in the nineteenth/twentieth-century colonial venture. As demonstrated throughout this thesis, and supported by John Camaroff's findings,[143]the various strategic laws were enacted, imported, and sometimes experimented on the various colonies to actualize colonial objectives. While still potent, perhaps more than in the previous century, lawfare remains a

[136] William Seger, "The 'Independence' of Ethiopia and Liberia" (2018) 2 Africana Studies Student Research Conference 1, online: < https://scholarworks.bgsu.edu/africana_studies_conf/2018/007/2 >. A second African country recognized as not colonized is Liberia. This too is controversial as Liberia was originally a colony of the American Colonization Society that established the Liberian settlement in 1822 for the resettlement of free African American slaves. Literally, the colony later became "independent" in 1847.
[137] Iweriebor Ehiedu, "State Systems in Pre-colonial, Colonial, and Post-Colonial Nigeria: An Overview" (1982) 37:4 Rivista Trimestrale Di Studi e Documentazione Dell'Istituto Italiano per l'Africa e l'Oriente 507, online: < http://www.jstor.org/stable/40759619 >.
[138] *Ibid.*
[139] Lawfare was introduced into the academic lexicon in 1975 by John Carlson and Neville Yeomans. See Carl Rhodes, "Evidence That 'Lawfare' Was First Used in 1975", *Wall Street Journal/Opinion* (27 July 2004), online: < https://www.wsj.com/articles/SB109088190209774401 >, and Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016) at 6.
[140] Charles J. Dunlap Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts" (A paper presented at the Humanitarian Challenges in Military Intervention Conference, Carr Centre for Human Rights Policy, Kennedy School of Government, Harvard University, Washington D.C., 29 November 2001) [Unpublished], online: < http://people.duke.edu/~pfeaver/dunlap.pdf >.
[141] *Ibid.*
[142] Susan Tiefenbrum, "Semiotic Definition of Lawfare" (2010) 43:1 Case Western Reserve J Intl L 29, online: < https://scholarlycommons.law.case.edu/jil/vol43/iss1/3 >.
[143] John Camaroff, *supra*, note 77.

strong instrument of both governmental and non-governmental international actors in post-colonial times.[144]

Africa/Nigeria: Briefly defining Africa within the context of this research, is to differentiate it from Nigeria. This is necessary to avoid interchanging both entities by younger and non-African readers unfamiliar with African scholarship and geographical terrain. Africa, the second largest continent in the world, is a continent of black-colored people. It is bounded by the Mediterranean Sea, the Red Sea, the Indian Ocean, and the Atlantic Ocean. As of Monday, December 5, 2022, Africa has an estimated population of almost 1.5 billion people.[145] Based on the United Nations figure, Africa is a continent of fifty-four (54) countries[146] out of which Nigeria is one. Hence, Nigeria is one of the countries in Africa. Nigeria is reputed as the most populous country on the continent with the largest population of black people on earth. It has an estimated population of over 220 million as of 5 December 2022.[147] Nigeria is a democratic federal state practicing the American-style presidential system of government with a bi-camera legislature.[148] It was granted independence from colonialism by Britain on 1 October 1960.[149] At present, Nigeria is composed of thirty-six federating states and a federal capital territory. Broadly, the country is divided into two, the North and the South. The North is predominantly occupied by the Hausa/Fulani and Kanuri groups who are mostly Muslims. Dominant in the South-East are the Igbo who are mostly Christians. Prepotent among other groups in the South-West are the Yoruba having a balance of adherents of Christianity and the Islamic faith.[150] Notably, in these three main divisions of Nigeria, certain sub-groups of the major ethnic groups still practice one form of African

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[144] Sundhya Pahuja, "Beheading the Hydra: Legal Positivism and Development" (2007) 1 L Soc Justice & Global Development 1, online: < https://www.researchgate.net/publication/322382749 >.

[145] Worldometer, "Africa Population Live" (5 December 2022), online: *Worldometer* < https://www.worldometers.info/world-population/africa-population/ >.

[146] United Nations, "How Many African Countries are members of the United Nations?" (2020), online: *DAG HAMMARSKJOLD LIBRARY* < https://ask.un.org/faq/22882 >. Although, controversy trailed this figure as the African Union (AU) was of the opinion that the continent has fifty-five countries and not fifty-four. See Saxafi Media Network, "UN Says Africa Has 54 Countries While AU Says It's 55" (30 November 2019), online: *Media Saxafi* < https://saxafimedia.com/un-says-africa-has-54-countries-while-au-says-its-55/ >

[147] Worldometer, *supra* note 145.

[148] Dhikru Yagboyaju & Adeoye Adewale, "Nigerian State and the Crisis of Governance: A Critical Exposition" (2019) SAGE Open J 1, online: < https://doi.org/10.1177/2158244019865810 >.

[149] *Ibid.*

[150] For an official source on this, see, Ministry of Foreign Affairs, Nigeria, "Nigeria Culture and Heritage" (2023), online: < https://nigeria.gov.ng/about-nigeria/nigerian-culture/ >. University of Birmingham, *supra* note 9. Nigeria is further divided into six geo-political zones viz; North-East, North-Central, North-West, South-South, South-East, and South-West.

traditional religion or another.[151] For certain reasons clarified below, the South-Western part of Nigeria (Yorubaland) is the core geographical scope of this research.

Judicial Legal History: Broadly, the field in which this research is conducted is legal history. Otherwise known as the "history of law", legal history is a broad discipline that entails the study of the emergence and evolution of a law regulating a socio-political, or economic phenomenon in a particular society. It also means the study of the emergence of the law without an external connection.[152] David Ibbetson offered a broader meaning of legal history and possible approaches to its study which are internal and external legal history approaches.[153] While working with both approaches above, but with more inclination to the external approach, this thesis reiterates that its geographical scope is South-Western Nigeria, and its contextual scope is the judicial history of the latter.

F. Scope of The Study

The focus of this research is threefold; geographic, periodic, and contextual. As mentioned above, geographically, this research covers and is limited to South-Western Nigeria. South-Western Nigeria, otherwise known as Yorubaland, is a vast area of land mainly inhabited by the Yoruba ethnic group and several ethnic sub-groups speaking diverse languages of one family. Thus, treating South-Western Nigeria in this research as an entity stems from the closely homogeneous culture and history of the Yoruba sub-groups with their justice systems having associating similarities. Consequently, due to historical, cultural, and religious differences that distinguish the justice systems of Northern Nigeria from that of Southern Nigeria, this work only focuses on the western part of Southern Nigeria. Introductory and circumstantial references are however made to the North and other Southern parts. This is mainly to emphasize the few similarities and differences existing between both divides. It is

[151] Innocent Nweke, "African Traditional Religion in the Context of Christian and Islamic Encounter" (2020) 15:15 Spriritan Horizons 42, online: < https://dsc.duq.edu/spiritan-horizons/vol15/iss15/10 >.
[152] Paul Vinogradoff, "The Meaning of Legal History" (1922) 22:8 Columbia Law Review 693, online: < https://www.jstor.org/stable/1112733 >.
[153] David Ibbetson, "What is Legal History A History Of?" in Andrew Lewis & Michael Lobban, eds, *Law and History: Current Legal Issues 2003 Volume 6* (Oxford: Oxford Academic, 2012) 33 at 33-37, online: < https://doi.org/10.1093/acprof:oso/9780199264148.003.0002 >. As clarified by Ibbetson, external legal history is the "*history of law embedded in its context, typically its social or economic context*" while internal legal history deals with, "*law on its own terms, its sources are predominantly those thrown up by the legal process…*".

also for demonstrating the patterns adopted by the British for the penetration of both sides of Nigeria.

The period covered by this research is pre-colonial and colonial times. These periods are first analyzed separately, and the impacts made by the latter on the former are later examined. While the pre-colonial time extends from the periods of early states and societies to the early nineteenth century (BCE -1800), the colonial period covers the timeframe of the mid-nineteenth century to the mid-twentieth century (1850-1960).[154] Due to the impossibility of exhausting every historical judicial occurrence during the selected period within the few pages of this thesis, the civil and criminal procedures of both periods are consequently focused on. Questions answered by this thesis are; ***How did the Yoruba pre-colonial society in South-Western Nigeria organize the administration of civil and criminal justice for its citizens before 1851? How did the various colonial judicial and administrative interventions alter the pre-colonial civil and criminal procedure rules applicable in South-Western Nigeria? What impacts did the colonial judicial system have on the pre-colonial justice system of South-Western Nigeria?*** While it is built on the identified works, this thesis avoids extending its scope beyond the fundamental civil and criminal procedure rules applied in pre-colonial and colonial South-Western Nigeria. The scope of the thesis is this way delimited, its external legal history approach notwithstanding.

[154] Toyin Falola & Matthew Heaton, *A History of Nigeria* (Cambridge: Cambridge University Press, 2008).

CHAPTER TWO

Historical Analysis of the Background and Evolution of Colonialism in Africa, Nigeria, and South-Western Nigeria

A. Introduction

Following the foundation laid by chapter one, this thesis proceeds to make an intermediate analysis of colonial experiences in Africa generally and Nigeria particularly. This analysis focuses on the beginning of colonialism, its evolution, systems of government, and the various impacts made on pre-colonial African governance and administrative systems. Seven European powers colonized Africa[155] starting in the nineteenth century. The colonization by the European countries occurred at different times but with similar techniques. Particularly, Britain colonized Nigeria.[156] Although the whole of Nigeria, North, and South, were merged under one administration in the Lugardian amalgamation of 1 January 1914, territories on both divides were subjugated at different times, and phases but with similar techniques.

While it lasted, the British pattern of colonialism in Africa was of four different types/patterns. These were settler colonialism, indirect colonialism, direct colonialism, and hybrid colonialism.[157] At the conquests and occupation of the African territories towards the end of the nineteenth century, one, but at times, a combination of these patterns of colonialism was employed by Britain in administering its territories. Once it commenced in the 1880s, political colonialism endured in Africa up until the late twentieth century. The Republic of South Africa was the last colonized African state to secure independence in April

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[155] John Parker & Richard Rathbone, "Colonialism in Africa" in John Parker & Richard Rathbone (eds) *African History: A Very Short Introduction* (Oxford: Oxford University Press, 2007); South Africa History Online (SAHO Collections in the Archives), " The Scramble for Africa: late 19th Century" (2019), online: < https://www.sahistory.org.za/article/grade-8-term-3-scramble-africa-late-19th-century. > The European powers that struggled for spheres of influence in Africa in the historic "Scramble for Africa" perfected during the 1884-1885 Berlin conference included Britain, France, Germany, Belgium, Spain, Portugal, and Italy.

[156] Nelarine Cornelius, Olusanmi Amujo & Eric Pezet, "British 'Colonial governmentality': slave, forced and waged worker policies in colonial Nigeria, 1896–1930" (2019) 14:1 Management & Organizational History 10, online: < 10.1080/17449359.2019.1578669 >; The Ohio State University, "History of the British Takeover of Nigeria" *in Comparative Studies 1100: Introduction to The Humanities, Spring 2020* (United States: The Ohio State University, 2020), online: < https://u.osu.edu/introhumanitiesonline/2020/02/04/history-of-the-british-takeover-of-nigeria/

[157] Matthew Lange, James Mahoney & Mathias Hau, "Colonialism and Development: A Comparative Analysis of Spanish and British Colonies" (2006) 111:5 American J Sociology 1412, online: < http://www.jstor.com/stable/10.1086/499510 >. According to these latter authors, Settler Colonialism involved the transplanting of the institutional patterns from Britain into the colony with no cognizance given to the preservation of the pre-colonial indigenous system. Indirect Colonialism allowed the pre-colonial leader exercised their hitherto held political and legal power over their territories but were compelled to pay taxes and make reports to the colonial office. In Direct Colonialism, Britain established certain trade-oriented colonial states infused with unitary system that were bureaucratically organized under colonial leadership. And Hybrid Colonialism simply combined indirect colonialism with either of settler colonialism or the direct form.

1994.[158] Certain factors motivated the European advancement toward Africa, the forceful conquests and political/governmental restructuring.

B. Factors that Motivated Colonialism in Africa

Considering its sensitive nature as it evinces a master-servant relationship, reference to colonialism often arouses strong emotions, especially from the colonized. The unarguable master-servant interactions that transpired between Europeans and Africans were motivated by certain factors grounded in Western European ideas. The holders of these motivating ideas that related to social policy, religion, politics, and ultimately, economics, came in contact with Africans that held distinct social-economic ideas. Africans operated different political systems which were in contrast to the Europeans' and quite strange that they were considered barbarous and deserving of modernization.[159] However, not too long after, realities revealed that beyond the ostensible "modernization" intent of Europeans were certain political and economic exigencies that necessitated the historic occupation of Africa.

Early on in the continent of Europe were the quests and agitations for European expansion beyond Europe. This was originally claimed to be for the exploration and projection of European ideologies and technologies into other parts of the world. In the process, the searchlight was again beamed in the direction of Africa. Colonialism then arrived at the peak of the campaign for the abolition of the slave trade. The abolition ushered in the "legitimate trade" in the late eighteenth and early nineteenth century. The trade was motivated by the industrial revolution rapidly occurring on the continent of Europe at the time.[160] The emerging and growing European industries were in high and constant demand for raw materials which the European agricultural system could not satisfy. The massive churning out

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[158] Nancy Clark & William Worger, *The Rise and Fall of Apartheid*, 2nd ed, (London: Routledge, 2011). See also, Irving Hexham, *Irony of Apartheid. The Struggle for National Independence of Afrikaner Calvinism Against British Imperialism* (New York: Edwin Mellen Pr, 1981).

[159] Joseph Anene & Godfrey Brown, "Africa in the Nineteenth & Twentieth Centuries", ed, (Ibadan and London: Ibadan University Press and Nelson, 1966) at 308; David E. Wilkins, "Modernization, Colonialism, Dependency: How Appropriate are these models for Providing an Explanation of North America India 'Underdevelopment'?" (1993) 16:3 Ethnic & Racial Studies 390, online: < DOI: 10.1080/01419870.1993.9993789 >; Gurminder K. Bhambra, "Reframing Colonialism and Modernity: An Endeavour through Sociology and Literature" online: *The Global South Project* < http://www.globalsouthproject.cornell.edu/reframing-colonialism-and-modernity.html >.

[160] J. R. Ward, "The Industrial Revolution and British Imperialism, 1750-1850" (1994) 47:1 Economic History Rev 44, online: https://www.jstor.org/stable/2598220 >; M. Sahid Alam, "Colonialism and Industrialization: A Critique of Lewis", (2004) 36:2 Rev Radical Political Economics 217.

of industrial products also required a larger market beyond Europe as local populations could not exhaustively consume all the manufactured products. Equally important was the increase in populations in the urban centers. This population increase was pulled by the availability of industrial jobs leading to a corresponding decrease in agricultural practices and food production. This resulted in a shortage of food required to cater to the growing urban population.[161]

In his effort to justify colonialism in 1885, Jules Ferry, the Foreign Minister of France from 1883 to 1885,[162] summarized the various factors that motivated the European expansion to other continents which included Africa. These factors Ferry itemized to include the need for raw materials of the colonized countries, the need to create markets for the consumption of manufactured goods emanating from growing European industries, and to carve out fields for investment of surplus capital. Notwithstanding the past and ongoing argument for or against the factors for colonizing Africa, it seems incontrovertible judging from Jules Ferry's statements and similar others that, the late nineteenth-century colonialism was economically motivated. The colonizers politically tied Africa to their home countries while openly promoting their economic interests.[163] This is true considering that every economic goal is achieved through the instrument of politics and administration. Consequently, Europeans adopted and executed policies that influenced every organ of government of the colony including the judiciary.

[161] Ahmad Faosiy Ogunbado, "Impact of Colonialism on Religion: An Experience of South-Western Nigeria" (2012) 5:6 J Humanities & Soc Science 51.

[162] Perhaps, no French leader believed in the necessity and rightfulness of colonialism than Jules Ferry. Throughout his political career, he undisguisedly advocated it. See, Thomas E. Ennis, "Jules Ferry and the Renaissance of French Imperialism. By Thomas F. Power, Jr. (New York: King' Crown Press, 1994 222)" (1945) 50:2 American Historical Rev 326, online: < https://doi.org/10.1086/ahr/50.2.326 >; and Prof. Qualls' Course Blogs, "Jules Ferry: On French Colonial Expansion" (2014), online: < https://blogs.dickinson.edu/quallsk/2014/03/01/jules-ferry-on-french-colonial-expansion/ >.

[163] Ayandele Ayankanmi, "External Relations with Europeans in the 19th Century: Explorers, Missionaries, and Traders" in Obaro Ikime, ed, *Groundwork of Nigerian History* (Ibadan: Heinemann Education Book, 1980) at 288.

C. Background and Evolution of Colonialism in Africa: Scramble for Africa and the Berlin Conference

The slave trade and the controversial "legitimate trade"[164] foreshadowed and eventually culminated in the direct occupation of Africa in the late nineteenth century. However, analysis of colonialism in Africa seems incomplete without a glance at the Berlin Conference of 1884-1885. During this historic convergence of the colonizing powers and some quasi-neutral observers,[165] the boundaries of the entire pre-colonial states of Africa were redrawn.[166] To date, the redrawn boundaries' and artificial demarcations made by the colonialists at the Berlin Conference were left in place.[167] The penetration of the hinterland of Africa had its roots in the sixteenth-century Portuguese exploration of the Zambezi[168] and expanded at the time of the Egyptian invasion of the Nile territories in 1821.[169] Meanwhile, the rush among European powers to secure and possess political and economic territories on the continent was heightened and consolidated during the Berlin Conference of 1884-1885.

Since the 1860s when the British and French began the exploration and signing of treaties in Africa, internal turmoil and disagreement had arisen among the competing European powers on the issue of individual spheres of influence on the continent. Forty years later, several bilateral and multilateral treaties for the shredding of the African continent into trade areas, protectorates, and later colonies, were signed among the scrambling European powers. To consolidate all of the previously signed treaties and avoid recurring scuffles, a conference that ratified the partitioning of Africa was organized by the then Chancellor of Germany, Otto Von Bismarck.[170]

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[164] Paul E. Lovejoy, "Slavery and 'Legitimate Trade' on the West African Coast", in *Transformations in Slavery: A History of Slavery in Africa*, 3rd ed, (Cambridge: Cambridge University Press, 2011) 160.

[165] The observers at the Conference included representatives from the United States and Turkey who played notable roles during the conference and in the adoption of its General Act, though not signatory to the latter. See, G. Macharia Munene, "The United States and the Berlin Conference on the Partition of Africa, 1884-1885" (1990) 19 Transafrican J History 73, online: < https://www.jstor.org/stable/24328676 >.

[166] Harrison Church, "African Boundaries" in W. Gordon East & A.E. Moodie, eds, *The Changing World: Studies in Political Geography* (London: George G. Harrap, 1956) at 739-740.

[167] Jeffrey Herbst, "The Creation and Maintenance of National Boundaries in Africa" (1989) 43:4 Intl Organization 673, online: < https://www.jstor.org/stable/2706803 >.

[168] M.D.D. Newitt, *The Zambezi: A History* (London: C Hurst & Co Publishers Ltd, 2022).

[169] Ahmed Tayia et al, "The Evolution of the Nile Regulatory Regime: a History of Cooperation and Conflict" (2021) 13 Water History 293 at 306, online: < https://doi.org/10.1007/s12685-021-00287-3 >.

[170] Gustaf Karsten, "Bismarck" (1908) 7:2 J English & Germanic Philology 85, online: < https://www.jstor.org/stable/27699916 >. Otto Von Bismarck was a high-handed German leader who served as the pioneer German Chancellor from 1871 to 1890. Like Jules Ferry of France, Bismarck was a believer in the right and the entitlement of the world's "superpowers" to overseas territories. See also, H.P. Meritt, "Bismark

While the November 1884 to February 1885 Berlin conference majorly dealt with the boundaries of the Congo Free State of Central Africa,[171] it also reestablished the earlier adopted principles for sharing African lands and redrawing the continent's map with Africans in absentia. The conference was of strategic, economic, peace-keeping, and political importance to the participating European powers. They were concerned about how to avoid a recurrence of the eighteenth-nineteenth-century European war experience and sought to use the conference as an avenue to preserve the African territorial claims of the participating powers. In the conference where no African was present, the overriding interests of the European powers over Africa were the central themes. Thus, the pre-existing African land borders were redrawn without paying necessary attention to local peculiarities that included the history, culture, language, and ethnic identity of the indigenous African peoples. As far as the conference went, the interests of Africans were unimportant and consequently secondary to the discussions. Issues of African interests were seldom mentioned during the conference only if aligned with the strategic, political, and economic interests of the sharing European powers.[172]

Lord Robert Cecil acknowledged the fact that the European powers hurriedly shared and occupied the African continent during the Berlin conference. These they did without waiting for relevant explorers' reports that reflected the interests of Africans. The British prime minister said:

"*We have been engaged in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were."*[173]

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and the German Interest in East Africa, 1884-1885" (1978) 21:1 Historical J 97, online: < https://www.jstor.org/stable/2638450 >.

[171] The actual division of the lands took place before the conference as most of the territories were bombarded and occupied by the colonialists long before Bismarck's conference. For instance, Lagos Nigeria was bombarded in 1851 and occupied fully in 1861. Similar was the fate of most African countries before the conference. See Adekoya Preye, "The Succession Dispute to the Throne of Lagos and the British Conquest and Occupation of Lagos" (2016) 10:3.42 African Research Rev 207, online: < http://dx.doi.org/10.4314/afrrev.v10i3.14 >.

[172] Anthony Asiwaju, "The Conceptual Framework" in A.I. Asiwaju, ed, *Partitioned Africa: Ethnic Relations Across Africa's International Boundaries, 1884-1984* (New York: St Martin Press, 1985) at 1-16.

[173] Stelois Michalopoulos & Elias Papaioannou, "The Long-Run Effects of the Scramble for Africa" (2016) 106:7 American Economic Rev 1802, online: < https://www.jstor.org/stable/43861113 >.

The direct and primary implication of the partitioning was that the colonized African territories had every aspect of their private and public institutions substantially altered unconsulted and consequently unconsented. The end of the Berlin Conference held over Africa's future was the beginning of direct political colonization of the continent. Similar to the piecemeal way by which African countries were granted independence from colonialism, starting with Ghana in 1957,[174] so also was the emergence of active political colonialism on the continent beginning from the end of the nineteenth century. The way by which Britain penetrated Nigeria was not radically different from the experience of other African countries.

D. Colonialism in Nigeria: The North Experience

The scope of this thesis is South-Western Nigeria otherwise known and interchangeably called "Yorubaland" throughout this thesis.[175] Analysis of the region's colonial experience is incomplete without a few reflections on the Northern Nigeria experience. This is to briefly note how treaty-making (lawfare) was extensively deployed as an instrument of penetration into other places in Nigeria beyond Yorubaland. The British used similar strategies to occupy the two divides of North and South that later became Nigeria in 1914. Suddenly, a rampant relocation of Europeans from the coast into the hinterland started. This situation caused apprehension in the various pre-colonial communities visited by these European groups which included explorers and Christian missionaries.[176] In an act that would perhaps be classified today as espionage, several British-sponsored exploratory missions moved hinterland[177] and gathered information on sensitive issues. Information on the peoples'

[174] John Mbaku, "Africa after more than Thirty Years of Independence: Still Poor and Deprived" (1994) 11:2 J Third World Studies 13, online: < https://www.jstor.org/stable/45197482 >. While Ghana (then Gold Coast) emerged from colonialism in 1957 followed by other Africa countries through to the 70s, South Africa had to wait till as near as 1994.

[175] Although the Yoruba speaking Nigerian' territories transcend the South-West, a geographical delimitation occasioned by geo-political divisions, yet main Yorubaland of today's Nigeria span the six states in South-Western Nigeria which are; Ekiti, Lagos, Ogun, Ondo, Osun, and Oyo.

[176] Etim Okon, "Christian Missions and Colonial Rule in Africa: Objective and Contemporary Analysis" (2014) 10:17 European Scientific J 192, online: < https://eujournal.org/index.php/esj/article/view/3557/3397 >.

[177] Abubakar Sani, "The Conquest of Nigeria" in Toyin Falola & Mathew Heaton, eds, *The Oxford Handbook of Nigerian History* (Oxford: Oxford Academic, 2022) at 262, online: < https://doi.org/10.1093/oxfordhb/9780190050092.013.20 >. Some of these explorers that traversed the Nigerian landscape from the early nineteenth century up to the twentieth century included Mungo Park (1820s), the Lander brothers (1826-1827), Heinrich Barth (1853-1854), Thompson (1885), Robinson (1826), Wallace (1894), Cazemajou (1898), to mention only a few. These explorers who later published most of their findings in journals are of varying backgrounds ranging from geographers, medical doctors, traders, and anthropologists. Others were military intelligence officers assigned specifically to obtain information necessary for the eventual conquests. For broader discussions on this, see Philip Afeadie, *The Hidden Hand of Overrule: Political Agents and the Establishment of the British Colonial Rule in Northern Nigeria, 1886-1914*, (PhD Dissertation, York University,1996) [Unpublished].

topography, political alliances and adversities, mineral, and agricultural resources were gathered. The British agents also subtly gathered information on political situations, military strength, local, regional, and international trade links, the general economic systems, and all else they could find. Reports of these findings were delivered to the British colonial office. Britain thus employed a combination of strategies that included unofficial intelligence gathering, treaty signing (legal diplomacy), and force in subduing the various pre-Nigeria ethnic societies, including Northern Nigeria.

(i) Treaty-Making and the Penetration of Northern Nigeria

Before and after the Berlin conference, the British negotiated and ratified three classes of treaties. These treaties were either preceded or succeeded by military expeditions carried out against the various Nigerian communities conquered. These classes of treaties were itemized by Akin Oyebode as; anti-slave trade treaties, commercial treaties, and treaties of "protection" and subjugation.[178] Till the 1880s, the majority of the treaties signed by Europeans in Northern Nigeria were commercial treaties. Essentially, these were trading agreements signed between the Europeans and either the Caliph or Emir, who had no intent to concede their political rights to foreign sovereigns.[179] Like in the South, the various reports of the explorers armed the British government with important information. These were required to gauge the prospects of the commerce of the states around the Benue River and west of the Niger/Benue River at Lokoja. The information available to the British first prompted a treaty of commerce between Borno and Britain as far back as 1851. By 1853, similar treaties were negotiated and signed with the Sokoto Caliphate by Heinrich Barth, a European explorer of German extraction. Barth later stationed a British merchant in Kano, thereby opening up Sokoto to British commercial activities carried on along the Niger River route to the coast. [180]

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[178] Akin Oyebode, "Treaties and the Colonial Enterprise: The Case of Nigeria." (1990) 2:1 African J Intl & Comparative L 17. See also, Carl Landauer, "Taslim Olawale Elias: From British Colonial Law to Modern International Law" in Jochen von Bernstorff & Philipp Dan, eds, *The Battle for International Law: South-North Perspectives on the Decolonization Era, The History and Theory of International Law* (Oxford: Oxford University Press, 2019), online: < https://doi.org/10.1093/oso/9780198849636.003.0015 >; Mieke van der Linden, *The Acquisition of Africa (1870-1914): The Nature of International Law* (Leiden: Brill, 2017); Saadia Touval, "Treaties, Borders, and the Partition of Africa" (1996) 7:2 J African History 279.

[179] Obaro Ikime, *The Fall of Nigeria* (London: Heinemann, 1977) at 66.

[180] Heinrich Barth, *Travels and Discoveries in North and Central Africa in 1849-1855*, (London: Frank Cass, 1969) at 542-545. Although German by birth, ironically, Heinrich Barth was employed by Britain to facilitate its interest and foothold in that part of Nigeria.

Notwithstanding the earlier Berlin conference resolution of 1885, between 1885 and 1900, there continued to be tension between Britain and Germany on the one hand and Britain and France on the other, on their respective spheres of influence in Nigeria. That prompted the National African Company (NAC), which acted as an agent of the British government, to embark on an accelerated use of treaty-signing and military force in securing spheres of influence for Britain in the territories north of the Niger and Benue. Taubman Goldie's National African Company[181] was active in Northern Nigeria as a commercial entity that operated in the Bida area of the Niger and Benue Rivers. Goldie and his company concluded almost three-hundred and sixty (360) treaties of different types with the leaders of the territories in which the companies had commercial interests.[182] This quasi-official treaty-signing role of the NAC, a business concern, was often in confrontation against the Consul's power. Being the official representative of the imperial government, the Consul expected himself to solely play the roles assumed by Goldie and his company.[183] Notwithstanding, the Consul and Goldie had a common goal; the realization of the imperial policy. Common to all of the Consul and Goldie's treaties was the clause supposedly ceding the territories covered by the treaties to the company, and *"their heirs and assigns forever in exchange for the benefit accorded to our country and the people by the intercourse with the company*."[184]

Thus Goldie was the chief negotiator of the highest volume of colonial treaties in Northern Nigeria. Born on the Isle of Man as George Dashwood Taubman Goldie in 1846, Goldie enlisted in the Royal Military Academy at Woolwich where he was commissioned as a royal engineer in 1865. In his quest for commercial investment, following his resignation as a royal engineer in 1867, Goldie embarked on the Niger River trading in 1877 and subsequently formed the United African Company (UAC) in 1879. The latter dominated trade on the entire stretch of the lower Niger River and later metamorphosed into the National African Company

[181] Doreen Lustig, "Setting the Scene: The Facilitative Failure of the Chartered Company" in *Veiled Power: International Law and the Private Corporation 1886-1891* (Oxford: Oxford Academic Press, 2020) 15. See also, Ed Keazor, "Nigeria and the Royal Niger Company-Full Story" (03 August 2014), online: *SlideShare a cribd company* < https://www.slideshare.net/EdKeazor/nigeria-and-the-royal-niger-company-full-story >.

[182] Agreement between the King and Chiefs of Onitsha and the National African Company. August 20, 1884, reprinted in Hertslet Edward & Hertslet Lewis *Hertslet's Commercial Treaties: A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations, at Present Subsisting between Great Britain and Foreign Powers*, vol 17, (London: His Majesty's Stationeries Office, 1840-1925; New York: Johnson Reprint Corporation, 1970) at 158-162 (subsequently cited as H.T. with corresponding treaty name, volume, and date added)).

[183] Oyebode, *supra* note 178 at 28.

[184] Agreement between the King, Queen, and Chiefs of Atani and the National African Company, September 20, 1884, reprinted in H.T., vol. 17 at 158-162.

(NAC).[185] On acquiring the British Royal Charter in 1886, the NAC became the "Royal Niger Company Chartered & Limited (RNC)". The company was thereafter saddled with the authority and power of political and economic control over the territories it occupied.[186] By deploying his astuteness and sense of purpose, Goldie successfully frustrated German and French attempts at establishing posts in Nigeria. He subsequently solidified and expanded the British hold over lands around the Niger River. To appreciate Goldie's effort, the British knighted him in 1887 and was subsequently elected as the president of the Royal Geographical Society before his demise in 1925.[187]

Notable among the several contentious Goldie's and Consuls' treaties included those signed between the NAC and Sokoto represented by the Caliph (ruler) in June 1885,[188] and between NAC and Gandu (or Gwandu) represented by the Emir (ruler) also in June 1885. There was also another treaty signed between the RNC and Sokoto represented by the King (Caliph) in April 1890. A similar transfer-of-rights treaty made with the Emir of Gandu in June 1885 is of similar content to the one signed with Sokoto sovereign except that the value of the yearly goods in bags of cowries granted to the Emir for the said transfer of rights was lesser.[189]

All of the treaties thus signed by the British agents with Northern Nigeria leaders towards subjecting the region to direct colonial control contained similar controversial clauses. The clauses were suggestive of duress, inequality, and lack of willful execution on the part of the signatories. Some of the questionable clauses of these treaties included the purported transfer of *"my entire rights"* by the Caliph and Emir, the *"unchangeable and irrevocable"* nature of the treaties, granting exclusive "*full power and jurisdiction"* to a commercial company to levy and collect taxes, etc. These are strong indications of coercion; grounds for invalidating a treaty under contemporary international law.[190] Besides, to claim that a ruler agreed to surrender his authority and sovereignty and that of his future generations to a foreign business

[185] Goldie George Dashwood 1846-1925, Sir George Goldie collection (1901-1907) Cambridge, Scott Polar Research Institute Archives University of Cambridge (GB 15 SIR GEORGE GOLDIE).
[186] *Ibid.*
[187] *Ibid.*
[188] TREATY. National African Company and Sokoto. Transfer of Rights, &c. 1st June 1885, reprinted in Sir E. Hertslet, *The Map of Africa By Treaty,* vol. 1 Nos 1 to 94, 3rd ed (London and New York: Routledge Taylor & Francis Group, 1909) at 116-130.
[189] TREATY. National African Company and Gandu. Transfer of Rights, &c. 13th June 1885, reprinted in Sir E. Hertslet, *The Map of Africa By Treaty,* vol. 1 Nos 1 to 94, 3rd ed (London and New York: Routledge Taylor & Francis Group, 1909) at 124.
[190] T.O. Elias, *The Modern Law of Treaties* (Dobbs Ferry, N.Y.: Oceana Publications, 1974) at 165-176.

enterprise (later British colonial government) in exchange for 3000 bags of cowries in the case of Sokoto, and 2000 bags in the case of Gandu without more, raises further questions about the treaties.[191]

Notwithstanding the various confrontations that greeted the signing of those contentious treaties between 1893 to 1900, Lord Lugard assumed the office of the High Commissioner of Nigeria on 1 January 1900.[192] By sustained diplomacy and warfare, Lugard subsequently proclaimed the territories under his control as the Protectorate of Northern Nigeria.[193] Thus Britain successfully conquered and occupied Northern Nigeria and the highly organized Uthman Dan Fodio's Sokoto Caliphate.[194] This was realized by treaty-making and superior military power.[195] Only the Borno Empire in North-Eastern Nigeria withstood the British until subdued in 1904.[196]

The conquest and occupation of Northern Nigeria had administrative implications. The coopted caliphate/emirate system and the pre-colonial rules of governance underwent unprecedented radical alterations. Thus, Northern Nigeria was indirectly ruled through the well-organized and relatively sophisticated caliphate/emirate institution that administered the Sharia law. Islamic law of the Maliki School of jurisprudence which was later modified by the colonial government to suit the administrative demands of the imperial system, was

[191] R.A. Adeleye, *Power, and Diplomacy in Northern Nigeria* (London: Longman, 1971). See also, Captain C. W. J. Orr, *The Making of Northern Nigeria* (London: Macmillan, 1911).
[192] He served as High Commissioner in the Northern Nigeria Protectorate, later became the Governor-General in 1912 after doing six years in Hong Kong. Lugard was responsible for the Nigeria's amalgamation of 1914.
[193] David Muffet, *Concerning Brave Captains: Being a History of the Occupation of Kano and Sokoto and the Last Standing of the Fulani Forces* (London: Andre Deutsch, 1963) at 33.
[194] Sa'ad Abubakar, "The Emirate-Type of Government in the Sokoto Caliphate" (1974) 7:2 J Historical Society Nigeria 211, online: < https://www.jstor.org/stable/41857009 >. The well-organized caliphate/emirate system of government served as a suitable template for the indirect rule system of the British when the region was eventually occupied in 1907. See also, Hamza Maishanu & Isa Maishanu, "The Jihad and the Formation of the Sokoto Caliphate" (1999) 38:1 Islamic Studies 119, online: < https://www.jstor.org/stable/20837029 >. It is also noteworthy that, in terms of land mass, the Sokoto caliphate was the second largest single polity in Africa after the Zulu kingdom of today's South Africa and the largest in nineteenth century West Africa.
[195] For more comprehensive accounts on the British conquest and rule over Northern Nigeria, see, Chinedu Ubah, "The British Occupation of the Sokoto Caliphate: The Military Dimension, 1897-1906" (1994) 40 Paideuma 81, online: < https://www.jstor.org/stable/40341677 >. Though not an object of this research, questions as to why a trading company had an army of expedition remains a curious subject of colonial history debate. See, Colonel A. Haywood & Brigadier F.A.S Clarke, *The History of the Royal West African Frontier Force*, 1st ed (United Kingdom: Gale & Polden, Aldershot, Hants, 1964); and Edho Ekoko, "The West African Frontier Force Revisited" (1979) 10:1 J Historical Society Nigeria 47, online: < https://www.jstor.org/stable/41971313 >.
[196] John Lavers, "The Awlad Rabih: 22 April 1900-23 August 1901." (1994) 40 Paideuma 215.

applied in ruling the conquered territory.[197] The whole process of the colonial remodification of the precolonial Northern Nigeria institutions that was predicated upon Islamic law warranted the untoward remaking of the agelong and sacred Islamic jurisprudence. A remodification that did not simply entrench Islam but also remade it to render it susceptible to colonial governance.[198] This colonial approach to Islamic law and associated pre-colonial institutions of Northern Nigeria, bending both to make them receptive to imperial control, contradicted the non-interference claim of the colonial state. The enactment of secularism necessarily requires a state to "*define, constitute and regulate religion*".[199] All these latter steps were taken by the British colonial government in establishing its rule over Northern Nigeria. The handling of the *siyasa* is instructive on this point.

Siyasa, defined as the "*discretionary power of the ruler*"[200] which "*constituted the realm of policy*"[201] or "*statecraft*"[202] was balanced in application with the tenets of the *Fiqh* (diverse body of legal opinions produced by legal scholars)[203] and *shariah*. This changed at the coming of Lord Lugard and subsequent Lugardians also remodified it. Before the colonial experimentation, Islamic leaders (Caliph and Emir) led under the guidance of Islamic law. Their discretionary power (*siyasa)* was thus exercised in subjection to the rules of *Shariah* law and quite often, the *Fiqh*. The caliph who headed the Shariah-based government was a steward of the law. He was under an obligation to provide an environment that allowed the unhindered application of Shariah norms.[204] Hence, the exercise of the *siyasa* should conform to the Shariah and not be construed as an "unfettered power of political governance."[205] It was a form of political power restrained in such a manner that the executive arm of government was separated from both the legislature and the judicial authorities headed by

[197] Akande, *supra* note 113.
[198] *Ibid* at 463.
[199] See, *ibid*; and Catherine S. Adcock, *The Limits of Tolerance: Indian Secularism and the Politics of Religious Freedom* (New York: Oxford University Press, 2013).
[200]Akande *supra*, note 113 at 466. *Siyasa* has been a subject of copious debates and several definitions/descriptions. For more on *Siyasa*, see also, Ebrahim Moosa, "Colonialism and Islamic Law" in Muhammad Masud, Armando Salvatore & Martin van Bruinessen, *Islam and Modernity: Key Issues and Debates* (Edinburgh: Edinburgh University Press, 2009).
[201] Tamir Moustafa, "Judging in God's Name: State Power, Secularism, and the Politics of Islamic Law in Malaysia" in Lorenzo Zucca (ed) *Religious Rights* (London: Routledge, 2015) at 156.
[202] Bernard Lewis, "Siyasa" in Muhammad Nuwayhi & Arnold H. Green (eds), *In Quest of an Islamic Humanism: Arabic and Islamic Studies in Memory of Mohamed al-Nowaihi* (Cairo Egypt: American University in Cairo Press, 1986) at 3.
[203] Moustafa, *supra* note 201 at 156.
[204] Moosa, *supra* note 200.
[205] Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University, 2014) at 69.

judges.[206] While there was a possibility that, in pre-colonial times, the *siyasa* was not strictly applied as it should have, it was nevertheless an ideal strictly held by the pre-imperial caliphate leaders of Northern Nigeria. According to Rabiat Akande, while there seemed to be no uniform understanding of the *siyasa* among the founding leaders of the Sokoto Caliphate, however, they construed it as "*siyasa shar'iyya."*[207] Thus, the knowledge that *siyasa* must be applied in subjection to the shariah helped to contain the extent of the regulatory and judicial powers of the caliphate leaders. In his effort to regulate those aspects of the *siyasa* which were unchecked, Uthman Dan Fodio regulated the *alkali's* judicial powers by placing him under a chief judge to be appointed by the caliph. That restricted the level of control exercisable by the caliph over the alkali. Emirs, who occupied lesser offices than the caliph, had their judicial powers more retrained.

The arrival of the Lugardian[208] administrative ideology effaced the pre-colonial notion and exercise of the *siyasa* through an unprecedented expansion of it. The Lugardian experimentation radically reconstructed both the political and judicial authorities of the caliph and emirs. The process of colonial governance led to situations where there was a distinction between the *alkali's* knowledge of the Shariah and what they were instructed by the emirs to do. The emirs in turn carried out the instruction of colonial administrators whose mandate was the actualization of imperial policies regardless of whether pre-colonial norms were violated or not. While the colonial version of the *siyasa* seemed to be conferred on the emirs, the colonial government practically expropriated this power by granting supervisory power over Islamic courts to colonial administrators.[209] On assumption of office by Donald Cameron, the governor of Nigeria between 1931 and 1935, more drastic and different reforms that redefined the source of the *siyasa* were introduced. Cameron created an appellate link that connected the native courts to the English courts.[210] He was unsympathetic to the Lugardian idea of concentrating executive and judicial authority in the same office. Consequently, instead of colonial administrators, Cameron conferred the power of reform

[206] Moustafa, *supra* note 201 at 156.
[207] Akande, *supra* note 113 at 468.
[208] Lord Frederick Lugard served the British imperial government as the Governor-General of Nigeria from 1914 to 1919. More discussions on him below.
[209] *Ibid* at 470.
[210] For a moderate but instructive elaboration of the nature of the British direct and indirect rule systems, see, Mahmood Mamdani, "Historicizing Power and Responses to Power: Indirect Rule and its Reform," (1999) 66:3 Soc Research 859.

upon the judiciary that was manned by English law-trained jurists.[211] At the end of Cameron's reform, the *siyasa* completely changed source as it moved from the emirs to the colonial government. Thus, colonial reforms unprecedentedly reshaped the precolonial roles of the emirs, *alkali*, vis-à-vis those of the colonial judges trained in English law. In Rabiat Akande's words, "*It was in this way that the colonial state's secularization of Islamic law subverted its core essence*."[212]

E. Colonialism in Nigeria: The South Experience

The aftermath of the Berlin Conference was the official cession of Nigeria to Britain although, skirmishes continued to trail the relationship between Britain, France, and Germany over most of the territories in Northern Nigeria. What followed after February 1885 was the strategic, brazen, and active consolidation of a series of colonial programs that commenced earlier in the century. Like in Northern Nigeria, treaty-signing and military strategies were employed in the process that eventually brought Southern Nigeria under colonial governance. Just as in the South-Western (Yorubaland) part, the twin strategies were also used by the British in subjugating the now South-Eastern and South-Southern Nigeria.

(i). Colonial Penetration of South-South and South-East Nigeria

As the legitimate trade expanded, there was an accelerated movement into the hinterland of the Niger Valley and the Delta by European traders who had earlier traded from the coasts.[213] From the 1850s up to the 1870s, this precipitated the establishment of trading posts at places like Aboh, Akasa, Onitsha, Ndoni, and Lokoja. Companies involved in establishing the outposts included Macgregor Laird, the West Africa Company, Messrs Millers Brothers and Co., the Central African Trading Company, James Pinnock, and Co., etc.[214] Trading activities across communities in these areas soon generated friction and turbulence which affected British commercial interests in the region. The friction became volatile as one of the

[211] Akande, *supra* note 113 at 470.
[212] *Ibid*, at 492.
[213] Femi J. Kolapo, "Nineteenth Century Niger River Trade and the 1844-1862 Aboh Interregnum" (2002) 30 African Economic History 1, online: < https://www.jstor.org/stable/3601600 >. See also, Nimi Wariboko, "Liverpool Merchants in 19th Century Niger-Delta" (2018) 31:3/4 Soc Science Missions 310, online: < https://doi.org/10.1163/18748945-03103001 >. The trade between the Europeans and Niger-Deltans and the Igbos on the coast in the nineteenth century mainly involved palm oil and other farm produce that replaced slaves as objects of trade following the campaign against trade in human cargoes and the eventual abolition.
[214] Anietie A. Inyang, "Imperial Treaties and the Origins of British Colonial Rule in Southern Nigeria, 1860-1890" (2014) 5:20 Mediterranean J Soc Sciences 1946.

outbreaks of violence that ensued led to the signing of the Aboh Treaty aimed at securing British commerce following an insurrection.[215]

Further effort was made to completely stem the tide of the socio-political resistance considered detrimental to the commercial and potential political interests of the British government in this part of Nigeria. Between 1879 and 1881, Taubman Goldie, the grand architect of British treaty-making in Northern Nigeria, similarly employed his NAC (later UAC) to buy off and amalgamate all the British and French companies operating in this area. Goldie consequently secured the entire Delta and Niger Valley (present-day south-south Nigeria) under exclusive British influence. As noted above, by its Royal Charter of 1886, the UAC became RNC with wider political powers to represent the British government in the Oil Rivers Districts and Lower Niger in matters beyond commerce. According to Obaro Ikime;

"The Royal Charter which it obtained in 1886 gave the Company authority to have its own fighting force as well as the authority to make laws for the improvement of its trading activities in the Niger-Delta as well as the Niger proper."[216]

The comprehensive content of the Royal Charter justified Ikime's assertions about the extra-commercial powers, authorities, and influence wielded by the RNC over the whole of the territories later declared as the Niger Coast Protectorate.[217]

The astuteness and exploits of Goldie notwithstanding, the business of actualizing the British colonial policies was not left exclusively to him. The British Consul, Edward Hewett, was equally active in appropriating territories for the British government through a series of treaties signed even before the RNC was chartered. Consul Hewett also affixed his official seal on those treaties concluded by Goldie's RNC.[218] Some of the important treaties

[215] Tekena N. Tamuno, "Some Aspects of Nigerian Reaction to the Imposition of British Rule" (1965) 3:2 J Historical Society Nigeria 271.
[216] Ikime, *supra*, note 179 at 136.
[217] ROYAL CHARTER granted to the National African Company, 10th July 1886, *H.T.* vol 17, 4 at 118-125. As provided by the Charter, the general power of the company is stated thus; "The Company is hereby further authorized and empowered, subject to the approval of our Secretary of State, to acquire and take by purchase, cession, or other lawful means, other rights, interests, authorities, or powers of any kind or nature whatever, in, over, or affecting the territories, lands, or properties comprised in the several treaties aforesaid, or any rights, interests, authorities, or powers of any kind or nature whatever in, over, or affecting other territories, lands, or property in the region aforesaid, and to hold, use, enjoy, and exercise the same for the purposes of the Company and on the terms of this our Charter".
[218] Sir E. Hertslet, *The Map of Africa By Treaty*, vol. 1 Nos 1 to 94, 3rd ed (London and New York: Routledge Taylor & Francis Group, 1909) at 131-138. The comprehensive list of the treaties concluded between the Royal

concluded in the Oil Rivers (areas along the present-day South-East and South-South) included that with King Jaja of Opobo, [219] rulers of New Calabar, [220] and Chiefs of Onitsha.[221] Several other relevant treaties were made in the Oil Rivers and Lower Niger area before the various military expeditions. These were either between the NAC (later RNC) or Consul Hewett on one side and the leaders of communities like; Creek Town, Old Calabar River,[222] Bonny,[223] Okut Qua Ibo River,[224]Eket Qua Ibo River,[225] Endoni,[226] etc., on the other side.

The seemingly lopsided diplomacy that these treaties represented was inherent in their provisions. Thus, while it lasted, the content of these treaties made the relationship between the signatories more volatile. The treaties' provisions were not only repugnant to the rule of law relating to "equality before the law",[227] but also sounded coercive of self-determination rights which either of the signatories should be free to exercise. Revolting against the contentious provisions of the treaties then became a question of "when" and not "if". All the contentious treaties and their subsequent executions by the representatives of the Queen soon manifested their inherent weaknesses which led to a series of resistance. The ensuing resistance in turn catalyzed the eventual subjugation of the entire Oil Rivers and Lower Niger under the British colonial administration. By an Official Notification published in the London

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Niger Company and Native Chiefs between 1884-1892 and endorsed by Consul Hewett are contained in the latter.

[219] PRELIMINARY TREATY with King and Chiefs of Opobo, July1, 1884, reprinted in *H.T. supra* note 44, vol 17, 4 at 130-131; *Ibid* at 198-199. See also, Martin Lynn, "Law and Imperial Expansion: The Niger-Delta Courts of Equity, C. 1850-85" (1995) 23:1 J. Imperial Commonwealth History 54, online: < https://doi.org/10.1080/03086539508582944 >. The earliest Court of Equity in the region was headed by a British judicial officer called "Chairman".

[220] TREATY with Kings and Chiefs of New Calabar, July 4 1884, *H.T.* vol 17 at 131-133. Notably, copious provisions of this treaty ostensibly stripped the traditional rulers of their judicial authorities by making several references to submission of cases to British officials for "arbitration or arrangement". Similarly, article vii which somewhat compels the native signatories to provide protection for Christian ministers was also a potential ground for religious crisis in the region. All of these factors culminated in the acrimonious oppositions mounted against the British agents during the execution of the treaties.

[221] TREATY with the King, Queen, and Chiefs of Onitsha (Niger Left Bank, No. 2), October 9, 1884, *H.T.* Vol 17 at 161; Agreement between the King and Chiefs of Onitsha and the National African Company (Limited), August 20, 1884, *H.T.* vol 17 at 162.

[222] TREATY with Kings and Chiefs of Old Calabar, September 10, 1884, *H.T.* vol 17 at 154-158.

[223] PRELIMINARY TREATY with Kings and Chiefs of Bonny, July 24, 1884, *H.T.* vol 17 at 135-136; TREATY with Chiefs of Bonny, August 22, 1884, *H.T.* vol 17 at 141.

[224] TREATY with the King and Chiefs of Okut, Qua Ibo River, September 8, 1884, *H.T.* vol 17 at 152.

[225] TREATY with King and Chiefs of Eket, Qua Ibo River, September 8, 1884, *H.T.* vol 17 at 152-153.

[226] TREATY with the King and Chiefs of Endoni (Niger Left Bank No. 14) November 6, 1884, *H.T.* vol 17 at 180-181.

[227] Daron Acemoglu & Alexander Wolitzky, "A Theory of Equality Before the Law", (2021) 131:636 Economic J 1429, online: < https://doi.org/10.1093/ej/ueaa116 >; Paul M. Taylor, "Article 26: Equality before the Law Equal Protection of the Law" in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, ed (Cambridge: Cambridge University Press, 2020) 729, online: < https://doi.org/10.1017/9781108689458.029 >.

Gazette dated 5 June 1885 and 18 October 1887, the government announced the creation of the British protectorate called the "Niger District Protectorate".[228] This was later administratively referred to as the "Oil Rivers Protectorate" as it partially included the Oil Rivers. Subsequently, in 1893, a new notification was issued by the British government to consolidate the entire Niger District and Oil Rivers as a separate protectorate called the "Niger Coast Protectorate". [229] This was placed under the British Commissioner and Consul-General, Sir Claude Macdonald. This process of the conquest of the tribal areas of South-South and South-Eastern Nigeria generated trade and political issues between local traders and British agents. These issues conflagrated between 1896 and 1901 and, on 28 November 1901, finally led to the famous and brutal Aro expedition against the Arochukwu people and god.[230] The kingdom of Benin which was also part of the newly created protectorate suffered a similar fate. The ancient kingdom was militarily crushed in the February 1897 expedition. The expedition resulted from an earlier bloody confrontation between Benin leaders and British agents. Though not without a heroic resistance, Benin eventually fell in the face of the British superior military weapon unleashed by the British agents.[231]

As the above chains of events unfolded, the British government intended joint and direct administration of the whole of Southern Nigeria beyond the Niger Coasts Protectorate. Consequently, on 28 December 1899, the British government by another Notification[232]

[228] NOTIFICATION of the British Protectorate over the Niger Districts, London, June 5, 1885, reprinted in *H.T.* vol 17 at 108-109; NOTIFICATION of the British Protectorate over the Niger Districts, London, October 18, 1887, reprinted in *H.T.* vol 17 at 126.

[229] NOTIFICATION of the British Protectorate of the Niger Coast; to be known as the "Niger Coast Protectorate" and no longer as "Oil Rivers Protectorate", 13th May 1893, reprinted in Sir E. Hertslet, *The Map of Africa By Treaty,* vol. 1 Nos 1 to 94, 3rd ed (London and New York: Routledge Taylor & Francis Group, 1909) at 154.

[230] *Ibid* at 161-168. In a military operation led by the British commander, Lt. Colonel H.F. Motanaro, the shrine of the revered god of the Arochukwu, "Ibini Ukpabi (or Long Juju) was blown off while surrounding communities were conquered. This was however a reprisal against an earlier guerrilla attack launched by the Aro against Obegu, a British government centre where the Aro people allegedly killed four-hundred people.

[231] Captain Alan Boisragon, *The Benin Massacre,* 2nd ed (London: Methuen & Co., 1898). Account of the brutal Benin expedition in the latter book can be compared with the more objective analysis of Ryder in A.F.C Ryder *Benin and the Europeans* (Harlow: Longmans, 1969). In the former, the Bini were perhaps misrepresented as bloodthirsty folks whose avocation were to launch attacks on "innocent" British. In fact, the "massacre" mentioned in the latter book referred to the less than two-hundred white men killed in the earlier fight of January 1897 leading to the brutal expedition while the death of countless Binis was ignored. As argued by Obaro Ikime, "*if the killing of Philips (the British officer who led the expedition) and his party was a massacre, the expedition against Benin by the British was an even greater massacre-indeed that, not what happened in January, should be regarded as the Benin massacre*".--Ikime, *supra* note 179 at 159.

[232] NOTIFICATION of the Revocation of the Charter of the Royal Niger Company, London, 28th December 1899, reprinted in Sir E. Hertslet, *The Map of Africa By Treaty,* vol. 1 Nos 1 to 94, 3rd ed (London and New York: Routledge Taylor & Francis Group, 1909) at 156. The Notification read, "Foreign Office, 28 December

revoked the RNC Charter. A publication in the London Gazette of the same day pronounced the merger of the Niger Coast Protectorate with the former RNC's territories south of Idah to form the Protectorate of Southern Nigeria in 1900.[233] Perhaps, all these events that transpired between 1885 to 1900 were hastened by the resolution of the historic Berlin Conference and the adoption of its General Act on 26 February 1885.[234] The Act legalized the possession of the various European powers' spheres of influence in Africa. Consequently, the British entertained no further risky procrastination in consolidating its century-long efforts around Niger. Efforts that the Berlin Act helped legalized.

F. Colonialism in Nigeria: The South-West (Yorubaland) Experience

(i) Lagos

About three decades before the Bismarck-powered Berlin conference, the Yorubaland of South-Western Nigeria was penetrated and politically conquered through Lagos. The coastal city of Lagos was subsequently established as a West Africa Crown Colony in 1861. The occupation of Lagos was preceded by an earlier bombardment of 1851 and the subsequent establishment of a Consulate in the town almost a year later.[235] Notably, the Yorubaland contact with the Europeans in the early nineteenth century, especially the British, is traceable to the earlier activities of both traders and Christian missionaries in nearby towns. Traders and missionaries landed in Badagry and Egbaland and from there penetrated other hinterlands of the Yorubaland starting from Lagos.[236] On arriving in Lagos, the activities of the

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1899. THE QUEEN has been pleased, by Letters Patent under the Great Seal, dated 28th December 1899, to revoke the Royal Niger Charter dated 10th July 1886, granted to the Royal Niger Company Limited".

[233] A.E. Afigbo, "Sir Ralph Moor and the Economic Development of Southern Nigeria: 1896-1903" (1970) 5:3 J Historical Society Nigeria 371.

[234] GENERAL ACT of the Conference at Berlin of the Plenipotentiary of Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden, and Norway, Turkey [and the United States] respecting : (1) Freedom of Trade in the Basin of the Congo; (2) The Slave Trade; (3) Neutrality of the Territories in the Basin of the Congo; (4) Navigation of the Congo; (5) Navigation of the Niger; and (6) Rules for future Occupation on the Coast of the African Continent. Signed at Berlin, February 26, 1885.

[235] Robert Smith, "The Lagos Consulate, 1851-1861: An Outline" (1974) 15:3 J African History 393, online: < https://www.jstor.org/stable/180667 >. In all, four British Crown Colonies were established in West Africa. The included, Gold Coast, The Gambia, Sierra Leone, and Lagos. See also, Mary Kingsley, "The Crown Colony in West Africa" in *West Africa Studies*, Cambridge Library Collection-African Studies, ed (Cambridge: Cambridge University Press, 2010) 314, online: < https://doi.org/10.1017/CBO9780511701375 >; Toyin Falola & Raphael Chijioke Njoku "From Land of Freedom to Crown Colony of Sierra Leone" in *United States and Africa Relations, 1400s to the Present* (United States: Yale University Press, 2020) 63, online: < https://doi.org/10.12987/9780300255911-005 >.

[236] Full account of Christian missionaries' activities in connection to colonial enterprise in Nigeria are contained in E.A. Ayandele, *The Missionary Impact on Nigeria 1842-1914* (London: Longman, 1965); and J.F. Ade Ajayi, *Christian Missions in Nigeria 1841-1891* (London: Longman, 1965).

missionaries within the coastal town were not restricted to evangelism. Most of the Christian groups spearheaded the heightened campaign against the slave trade. An act with an ostensible philanthropic but more obvious economic undertone[237] that pitched the missionaries against the socio-political and economic interests of the native leaders of Lagos and surrounding towns.[238]

The royal stool crises between Akitoye and Kosoko, two Princes of Lagos, and the refusal of the latter to cooperate with the British in ending the slave trade ostensibly paved the way for the smooth intervention of the British in the politics of the town. These crises were the immediate cause of the occupation of Lagos. Kosoko,[239] the Oba of Lagos between 1845 and 1851, was brazenly strong in his insistence on not compromising his sovereignty and economic interests. He was, in the process, mandated to effectively end the shipments of slave trade cargoes still going on under his watch. Kosoko ignored the British ultimatum, an act reminiscent of his sustained refusal to execute no treaty with the British since he ascended the throne in 1845. This and consequential socio-political and economic differences between Kosoko and the British were accumulating to the dislike of the latter who tactically sought an opportunity to eliminate the menacing obstacle represented by Kosoko.

This opportunity surfaced through the royal stool crises between the ruling Kosoko and the unseated Akitoye his rival who, through a successful palace coup,[240] lost the throne to Kosoko. Unlike Kosoko, Akitoye was inclined toward executing the British-intended anti-slave and commercial treaties.[241] In the process, Kosoko was confronted by multiple forces; the British imperial interest, supporting missionaries who were bent on evangelizing against the slave trade in support of the spread of legitimate trade, and the liberated slaves. The liberated slaves were denied settlement in Lagos and consequently sought the removal of Kosoko to be able to settle in the town. The Egba returnees at Abeokuta who needed access

[237] Eric Williams, *Capitalism and Slavery* (Chapel Hill: University of North Carolina Press, 1944).
[238] Robert Smith, *The Lagos Consulate, 1851-1861* (London: Macmillan, 1978) at 17-35.
[239] P.D. Cole, "Lagos Society in the 19th Century" in A.G. Aderibigbe, ed, *Lagos: The Development of an African City* (Lagos: Longman, 1971) at 32-33.
[240] For full accounts of the kingship tussle between Akitoye and Kosoko and the British intervention, see, Robert Smith, "To the Palaver Islands: War and Diplomacy on the Lagos Lagoon in 1852-1854" (1969) 5:1 J Historical Society Nigeria 3; and, Oshin Sheriff O, "Oba Kosoko: His Military Strength and the Struggle for Lagos Kingship" (18 April 2018), online: *Medium* < https://medium.com/@OGBENISKILLA/oba-kosoko-his-military-strength-and-the-struggle-for-lagos-kingship-e3e43bc86f7f >.
[241] Smith, *supra* note 238 at 22.

to the Port of Lagos for an unhindered supply of arms required to douse the onslaught of Dahomey also supported the British against Kosoko.[242] All these forces fiercely backed the British in their effort to subdue Kosoko and execute the British imperial mission in Lagos.[243] As these circumstances unfolded, the British government appointed John Beecroft in 1849 as the Consul for the Bight of Benin and Biafra. Beecroft was mandated to assess and report on the Lagos situation for the appropriate step. Against the caution and advice of Commodore Henry Bruce,[244] Beecroft entertained no diplomatic nuances as soon as he arrived. He cashed in on the ongoing chieftaincy crises to carry out his mission.

A glance at Beecroft's biographical profile illuminates the reason for his appointment as the British agent considered suitable for the British colonial operation in the Bight of Benin and Biafra, and Lagos, in the first half of the nineteenth century. Beecroft was born in 1790 near Whitby,[245] England. While serving an apprenticeship at the age of fifteen on a coasting vessel, he was captured and imprisoned for nine years (1805-1814) by a French Privateer. When he gained his freedom in 1814, he entered the Merchant Service during which he severally volunteered without pay. In one of his volunteering services in 1829, Beecroft went with General Edward Nicolls (then Colonel) to the British settlement at Fernando Po and there he was appointed as the Superintendent of Works.[246] While serving at his post, Beecroft displayed excellent diplomatic skills, especially in settling a previous dispute between the natives of the Old Calabar and the ex-Consul Captain Owen. This he did to the admiration and commendation of General Nicolls, the Consul.[247] Beecroft successfully endeared himself to the Natives and by 1830,[248] he, in an acting capacity, effortlessly replaced the Consul who left for England on a sick leave.

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[242] Siyan Oyeweso & Olasiji Oshin, *supra* note 94 at 4-5.
[243] Ikime, *supra* note 179 at 93-101.
[244] *Ibid.* Commodore Bruce, the then commander of the British Navy in West-Africa, advised the British government against enthroning Akitoye by force because his weakness discredited him as a potential able leader. He was emphatic that enthroning him by force might eventually necessitated keeping him on the throne by force at an expensive cost to the British. This Beecroft shunned and swung into action against this advice as soon as he was appointed in 1849.
[245] A. Hamilton, *The River Niger and the Progress of Discovery and Commerce in Central Africa* (London: Dalton & Morgan, 1862) at 13-54.
[246] K.O. Dike, "JOHN BEECROFT, 1790-1854: Her Britannic Majesty's Consul to the Bight of Benin and Biafra 1849-1854 (1956) 1:1 J Historical Society Nigeria.
[247] Fernando Po, Nicolls to Hay (20 February 1829), Ibadan, National Archives of Nigeria (subsequently cited as "NAN") (C.O. 82/2); Fernando Po, Nicolls to Hay (30 January 1832) Ibadan, NAN (C.O. 82/5).
[248] John R. Milsome & Great Britain, *The Story of John Beecroft: First British Consul in Nigeria* (Liverpool: West African Review, 1959).

The British had to withdraw from Fernando Po in 1833 as the Spanish overlords of the territory declined to sell it to the British.[249] That halted Beecroft's official career for the next fifteen years during which he lived on the island as a merchant and an explorer, his unpaid governorship appointment by the Spanish in 1843 notwithstanding.[250] In his capacity as an acting governor and a merchant, Beecroft's charismatic leadership brought thousands of natives and liberated slaves from Sierra Leone and Fernando Po under his leadership. He governed the people judicially through the establishment of a court of justice with three notable merchants of the island appointed as members of his governing council. Following the bankruptcy of Messrs Dillon, Tenant, and Co., a company in which Beecroft had his business investments, he concentrated more on his governance and exploration activities. Two tasks to which he had proven himself more suited.

Beecroft embarked on several expeditions into the Nigerian hinterlands, ventures that were either sponsored by affluent private merchants or the British Government. These exposed him more to the political realities and economic potentialities of the Niger territories. This experience garnered in the hinterlands tipped him as qualified for the soon-to-be British assignment. Notwithstanding the admiration that chiefs on the coasts earlier had for Beecroft, his several expeditions which exposed him to the knowledge of the hinterland made him an object of suspicion to the chiefs. The latter were apprehensive of the negative impact such knowledge garnered by Beecroft could have on their sovereignty and communities.[251] Beecroft thus grew in influence and understanding of the African systems and geographical topography, thus becoming an institutional figure with an admirable reputation among the indigenes. When the British considered appointing a permanent official to the Bight of Benin, the vastly experienced Beecroft, who had been employed severally by the British Navy in a series of diplomatic disputes settlements, appeared the right candidate.[252] Beecroft's credibility around the Niger-Delta was so towering that one of his contemporaries confessed that, *"he is well-known, highly respected, and possesses influence such as no white man on the coast has ever obtained"*.[253] On 30th June 1849, the British government, through Lord

[249] K.O. Dike, *Trade and Politics in the Niger Delta, 1830-1835* (Oxford: Oxford University Press, 1956) at 47-64.
[250] Dike, *supra* note 246 at 8.
[251] Dike, *supra* note 246 at 12.
[252] Martin Robert Stuart Lynn, *John Beecroft, and West Africa 1829-54* (PhD Dissertation, King's College University of London, 1978) [Unpublished].
[253] Nicolls to Barrow (5 June 1844) Ibadan, NAN (F.O. 84/549).

Palmerston heading the British foreign office, appointed Beecroft as the Consul representing British interest in the Bight of Benin and Biafra. The latter stretched to the Kingdom of Dahomey, the Niger Delta, and Lagos.

Thus, Beecroft was mandated to visit Lagos during the ongoing socio-economic imbroglio heightened by the royal stool crises. He then applied two diplomatic ruses; first, he visited Akitoye in Badagry and concluded the latter was in danger and needed protection. For this, Beecroft took Akitoye back with him to Fernando Po. This had the effect of exposing Akitoye's supporters in Badagry to attacks and assaults from the pro-Kosoko group in the town. The attacks culminated in a civil war that propelled the British deployment of a naval squadron to Badagry in support of the pro-Akitoye group. Second, Beecroft tactically sought to portray Kosoko who had persistently refused to negotiate and sign treaties with the British as uncivilized. In 1851-1852, Beecroft negotiated and signed an anti-slave and protection treaty[254] with the Egba against Dahomey. While the Anglo-Egba treaty actualized Egba's aim of defense against Dahomey, Beecroft used the treaty as an argument to accuse Kosoko of savagery.

With the Anglo-Egba treaty handy and Akitoye secured in his custody, Beecroft in the company of four British warships again visited Kosoko for an anti-slave treaty. Kosoko again refused to sign the treaty. The several refusals of Kosoko to sign British anti-slave trade treaties and the insistence of the British to actualize the signing of the treaties had a political undertone. Generally, antislavery was a transcontinental phenomenon in the early nineteenth century, specifically the abolition of the slave trade was a major British foreign policy at the time. This is evident by the British abolition of the slave trade in 1807,[255] and the banning of slavery in its colonial territories in 1833.[256] In addition to forcible treaty signing, Britain enforced this abolition by deploying a Royal Navy squadron to haunt slave ships, and by

[254] TREATY with the Chiefs of the Egba Nation Abeokuta, January 5, 1852, *H.T.* vol 9 at 29-30. The full content of this treaty is in alignment with the TREATY with the King and Chiefs of Lagos, January 1, 1852, *H.T.* vol 9 at 33-35. Although signed earlier, for reasons only explainable by Beecroft and the parties to the treaty, it was dated 1852 as found on record.

[255] David Richardson, " The Ending of the British Slave Trade in 1807: The Economic Context" (2007) 26 Parliamentary History 127.

[256] Izhak Gross, The Abolition of Negro Slavery and British Parliamentary Politics 1832-1833" (1980) 23:1 Historical J 63, online: < https://www.jstor.org/stable/2638708 >. See also the Slavery Abolition Act, 1833.

coordinating a network of anti-slave trade courts.[257] However, the abolition was covertly targeted at increasing commercial opportunities for the British through the growing of the "legitimate trade" which at the time was affected by pockets of slave trade still going on at the coast of Lagos and other African territories. Early eighteenth-century critics of the slave trade forecast through their arguments that Africa promised a strong commercial and imperial opportunity.[258] Such potential opportunities were rated as more promising than the profits realized from the British Americas plantations where slaves shipped from Africa worked. With enough investments put into slave trading regions, there would be a more lucrative enterprise for the British. It was also calculated that, if Britain was able to become the first European power to abolish the slave trade, it would have the opportunity of being among the first set of scrambling European powers to gain a colonial foothold in Africa.[259] On the other hand, some African leaders were suspicious of the British and were consequently radically opposed to entering any form of agreement with her. For the African leaders, the slave trade in question was introduced by the British, but when it thought to abolish it, it did not provide enough justification for the sudden abolition. They consequently hoped to end the trade on their terms and not by suspicious and capricious British treaties.[260] Some of them also realized that the so-called "legitimate trade" would subject them to imperial control by making them subservient producers of raw materials,[261] to be exported for foreign countries' benefit. As some of these African leaders suspected, the series of executed British anti-slave trade, and anti-slavery treaties were instrumental to the eventual conquest of most colonized African territories towards the end of the nineteenth century, including Yorubaland.

Consequently, the last visit of Consul Beecroft and his four warships to Kosoko's palace for the signing of the anti-slave trade treaty ended in a brawl. The Consul and his forces were successfully repelled and forced to withdraw on that occasion. Considering the latter event as ridicule, Beecroft reinforced and set out on a reprisal attack which culminated in the bombardment of Lagos that lasted between 24 and 28 of December 1851. Beecroft, in concert with the Royal Navy, cheered by some missionaries, bombarded the town twice. The

[257] Jenny S. Martinez, "Antislavery Courts and the Dawn of International Human Rights Law" (2008) 117:4 Yale LJ 550, online: < https://doi.org/10.2307/20455804 >.
[258] Padraic Scanlan, "British Antislavery and West Africa" (2021), online: Oxford Research Encyclopedia< https://doi.org/10.1093/acrefore/9780190277734.103.742 >.
[259] *Ibid.*
[260] Aakanksha Gaur *et al*, eds, "The Abolition of Slavery" *Encyclopedia Britannica*, online: Encyclopedia Britannica< https://www.britannica.com/place/western-Africa/The-abolition-of-slavery >.
[261] *Ibid.*

bombardment destroyed Kosoko's magazine and crippled the determined resistance mounted by the Oba and his men.[262]

Consequent to the bombardment, Kosoko abdicated the throne. Early in 1852, Akitoye was installed to replace him as the Oba of Lagos. The new Oba of Lagos was "persuaded" to sign a treaty to effectively end slave exportation and grant free trade rights to every "subject of the Queen" residing in Lagos. The provisions of the treaty which included, mandatory protection for Christian missionaries and converts[263] read;

"TREATY with the King and Chiefs of Lagos. January 1, 1852.

COMMODORE HENRY WILLIAM BRUCE, Commander-in-chief of Her Majesty's ships and vessels on the West Coast of Africa, and John Beecroft, Esquire, Her Majesty's Consul in the Bights of Benin, and Biafra, on the part of Her Majesty the Queen of England, and the King and Chiefs of Lagos and of the Neighborhood, on the part of themselves and of their country, have agreed upon the following Articles and Conditions:

ART. I. *The export of slaves to foreign countries is forever abolished in the territories of the King and Chiefs of Lagos; and the King and Chiefs of Lagos engage to make and to proclaim a law prohibiting any of their subjects, or any person within their jurisdiction, from selling or assisting in the sale of any slave for transportation to a foreign country; and the King and Chiefs of Lagos promise to inflict severe punishment on any person who shall break this law.*

II. *No European or other person whatever shall be permitted to reside within the territory of the King and Chiefs of Lagos for the purpose of carrying on in any way the Traffic in Slaves; and no houses, or stores, or buildings of any kind whatever shall be erected for Slave Trade within the territory of the King and Chiefs of Lagos; and if any such houses, stores, or buildings shall at any future time be erected, and the King and Chiefs of Lagos shall fail or be unable to destroy them, they may be destroyed by any British officers employed for the suppression of Slave Trade.*

III. *If at any time it shall appear that Slave Trade has been carried on through or from the territory of the King and Chiefs of Lagos, the Slave Trade may be put down by Great Britain by force upon that territory, and British officers may seize the boats of Lagos found anywhere carrying on the Slave Trade, and the King and Chiefs of Lagos will be subject to a severe act of displeasure on the part of the Queen of England.*

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[262] Smith, *supra* note 238 at 3-25. See also, Antony G. Hopkins, "Property Rights and Empire Building: Britain's Annexation of Lagos, 1861" (1980) 40:4 J Economic History 777, online: < https://www.jstor.org/stable/2120001 >; Kola Folayan, "Egbado and the Expansion of British Power in Western Nigeria" (1974) 13:2 Geneve Afrique/Geneve-Africa 70; The New York Times, "British Agressions in Africa Annexation of Lagos", *The New York Times* (20 October 1861), online: < https://www.nytimes.com/1861/10/20/archives/british-aggressions-in-africa-annexation-of-lagos.html >; Cynado Ezeogidi, *British Conquest, Colonization and Administration in Nigeria* (Electronic article, SSRN, 2020) [Unpublished], online: < https://ssrn.com/abstract=3563173 >.

[263] Smith, *supra*, note 235 at 400.

IV. *The slaves now held for exportation shall be delivered up to any British officer duly authorized to receive them, for the purpose of being carried to a British colony and there liberated; and all the implements of Slave Trade, and the barracoons or buildings exclusively used in the Slave Trade shall be forthwith destroyed.*

V. *Europeans or other persons now engaged in the Slave Trade are to be expelled [out of] the country; the houses, stores, or buildings hitherto employed as slave-factories, if not converted to lawful purposes within 3 months of the conclusion of this Engagement, are to be destroyed.*

VI. *The subjects of the Queen of England may always trade freely with the people of Lagos in every article they may wish to buy and sell in all places, and ports, and rivers within the territories of the King and Chiefs of Lagos, and throughout the whole of their dominions; and the King and Chiefs of Lagos pledge themselves to show no favour, and give no privilege to the ships and traders of other countries which they do not show to those of England.*

VII. The King and Chiefs of Lagos declare that no human being shall at any time be sacrificed within their territories on account of religious or other ceremonies*; and that they will prevent the barbarous practice of murdering prisoners captured in war.*

VIII. Complete protection shall be afforded to missionaries or ministers of the Gospel, of whatever nation or country, following their vocation of spreading the knowledge and doctrines of Christianity, and extending the benefits of Civilization within the territory of the King and Chiefs of Lagos.

Encouragement shall be given to such missionaries or ministers in the pursuit of industry, in building houses for their residence, and schools and chapels. They shall not be hindered or molested in their endeavours to teach the doctrines of Christianity to all persons willing and desirous to be taught; nor shall any subjects of the King and Chiefs of Lagos who may embrace the Christian faith, be, on that account, or on account of the teaching or exercise thereof, molested or troubled in any manner whatsoever.

The King and Chiefs of Lagos further agree to set apart a piece of land, within a convenient distance as the principal towns, to be used as a burial-ground for Christian persons*. And the funerals and the sepulchres of the dead shall not be disturbed in any way or upon any account.*

IX. *Power is hereby expressly reserved to the Government of France to become a party to this Treaty, if it shall think fit, agreeably with the provisions contained in Article V of the Convention between Her Majesty and the King of the French for the suppression of the Traffic in Slaves, signed at London, May 29, 1845.*

In faith of which we have hereunto set our hands and seals, at Lagos, on board Her Britannic Majesty's ship "Penelope" 1st January 1852.

(L.S.) H.W. BRUCE. *KING AKITOYE*

(L.S.) JOHN BEECROFT. *KOSAE.* *ATCHOBOO"*[264]

(Word in bold italics mine for emphasis).

[264] TREATY with the King and Chiefs of Lagos, January 1, 1852, *H.T.* vol 9 at 33-35. Subsequent other treaties concluded with Akitoye and his chiefs included the; TREATY with the King and Chiefs of Lagos, February 28, 1852, *H.T,* vol 9 at 35-37, etc.

Within the same year, twelve other anti-slaving treaties were concluded with neighboring Yoruba towns including Ijebu Ode where the deposed Kosoko had sought asylum.[265] Though the British Foreign Office proclaimed Lagos a quasi-territory in August 1852, the town became well-established as a crown colony under the consular tenure of Benjamin Campbell (July 1853-April 1859). This laid the foundation for the British system of government and administration established in the Colony and extended to the Yoruba hinterland.[266]

Following the demise of Oba Akitoye in 1853, his son Dosunmu[267] immediately succeeded him as the new Oba of Lagos. During Dosunmu's reign, British commercial activities in Lagos soared. The imperial plan of connecting other areas of the Yoruba hinterland and the Niger through a constructed land route also became feasible. Oba Dosunmu was thus requested to sign a treaty of cession to surrender the territory of Lagos to the British. A request he demonstratively loathed so much but was practically optionless in the face of a British man-of-war stationed so close to the palace, ready to fire at the slightest command. After an initial refusal trailed by a series of persuasion, and undisguised coercion, Oba Dosunmu signed a treaty of cession at the Lagos consulate on 6 August 1861. A unique imperial accomplishment that was celebrated by witnessing colonial office representatives and their supporters, some of whom were Christian missionaries and their converts.[268] The Treaty of Cession provided that;

"TREATY with the King of Lagos, for the Cession of the Port and Island of Lagos to Great Britain. Lagos, August 6, 1861.

TREATY between Norman B. Bedingfeld, Commander of H.M. ship "Prometheus", and Senior Officer of the Bights Division, and William McCoskey, 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.

ART. 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,

[265]Wilmot to Bruce (11 February 1852) London, United Kingdom National Archive (FO84/893). See also, Caroline Sorensen-Gilmour, *Badagry 1784-1863. The Political and Commercial History of a Pre-Colonial Lagoonside Community in South-West Nigeria* (PhD Dissertation, University of Stirling, 1995) at Appendix A.
[266] The minute of 28 August on Admiralty to Stanley (28 August, 1852) United Kingdom, National Archive (FO84/895).
[267] Referred to in British documents as "Docemo" and reigned as Oba of Lagos between 1853 and 1885.
[268] Richard Burton, *Wanderings in West Africa* (London: Tinsley Brother, 1863) at 216-218.

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 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.*

II. *Docemo will be allowed the use of the title of King in its usual African signi{f}ication and will be permitted to decide disputes between natives of Lagos with their consent,* ***subject to appeal to British laws.***

III. *In the transfer of lands, the stamp of Docemo affixed to the document will be proof{s} 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 modes as may hereafter be determined.

Lagos, August 6, 1861.

DOCEMO. *TELAKE.* *ROCAMENA*

OBALEKOW. *ACHEBONG.*

NORMAN B. BEDINGFELD, H.M. ship "Prometheus," Senior Officer, Bights Division.

W. MCCOSKEY, Acting Consul."[269] (words in bold mine for emphasis).

Immediately annexed to this treaty is the British Proclamation for the instantaneous taking over of Lagos which reads;

"British Proclamation, on taking possession of Lagos.

August 6, 1861.

Docemo, King of Lagos, having ceded the sovereignty of Lagos to the Queen of Great Britain, her heirs, and successors for ever, we Norman B. Bedingfeld, Commander of H.M. ship "Prometheus," and Senior Officer of the Bights Division, and William McCoskey, Esquire, Her Britannic Majesty's Acting Consul, do this day formally take possession in the name of Her most gracious Majesty Queen Victoria.

GOD SAVE THE QUEEN.

[269] TREATY with the King of Lagos, for the Cession of the Port and Island of Lagos to Great Britain, Lagos (August 6, 1861), *H.T.* vol 11 at 41-42; Treaty between H.M. the Queen and Docemo, King of Lagos (1861), Ibadan, NAN (CSO5/1/3).

British Consulate, Lagos, August 6, 1861."[270]

The two preceding Lagos treaties concluded with Akitoye and Dosunmu (called Docemo by the British) were exceptionally significant in the colonial master's political overthrow of Nigeria. The ensuing acrimonious character of the British rule over Nigeria from 1861 was a reflection of the problems inherent in the provisions of these treaties. These treaties compelled Akitoye, a traditional African, to provide protection and lands for Christian missionaries and adherents of the faith.[271] This stripped him of his lands and also affronted his religious beliefs. Notably, too, the treaty mentioned no consideration for granting lands to the Christians or why Christians alone with no provision for granting such privilege to other religions existing in Lagos at the time. The latter ostensibly constituted the root of the Nigerian government and the United Nations' entanglements with religion. The United Nations intervened in the global religious spheres through the Universal Declaration of Human Rights.[272] An intervention that is inimical to the security and unity of several countries of the world today.

Judging by the reluctance of Dosunmu in signing the 1861 treaty, it was obvious that he didn't seek British support to secure the throne only to eventually cede his territory away when it was time to rule over it. He was, unfortunately, only allowed the power to adjudicate inter-party disputes, if the parties desired, and subject to appeal to British laws.[273] This provision formed parts of the ordinances eventually used in setting the template for the colonial judicialization of Nigeria. With a firm grip over Lagos, subjugating other parts of South-Western Nigeria thus occurred piecemeal until the entire Yorubaland came under the British unified system in 1914.

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[270] British Proclamation on taking possession of Lagos (August 6, 1861), *H.T.* vol 11 at 42.
[271] TREATY with the King and Chiefs of Lagos, *supra* note 264 at articles vii & viii.
[272] Rabiat Akande, "Neutralizing Secularism: Religious Antiliberalism and the Twentieth-Century Global Ecumenical Project" (2022) 37:2 JL & Religion 284. See also, Osita Nnamani Ogbu, "Is Nigeria a Secular State? Law, Human Rights and Religion in Context", (2014) 1:1 Transnational Human Rights Rev 135, online: < https://digitalcommons.osgoode.yorku.ca/thr/vol1/iss1/4 >; Judd Devermont & Alexander Thurston, "The Perils of U.S. Support for Religion Regulation in Nigeria" (16 August 2019), online: *Center for Strategic & International Studies*, < https://www.csis.org/analysis/perils-us-support-religion-regulation-nigeria >.
[273] TREATY with the King of Lagos, for the Cession of the Port and Island of Lagos to Great Britain, *supra* note 269 at article ii.

(ii) The South-West Hinterland

Generally, other areas of the South-West (Yorubaland) were conquered in ways similar to Lagos but with a few differences. After putting a foothold in Lagos and some neighboring towns like Abeokuta, the British remained poised to extend their trade. Britain consequently pushed into the Yoruba hinterland that was already engulfed by internal strife and protracted civil wars that lasted from 1820 to 1886.[274] In a series of scenarios that appeared like mutual exhaustion, following monumental wastes of human and material resources, especially during the Ekitiparapo (or Kiriji) war,[275] the major warring parties in the Yoruba inter-state wars became prone to ending the wars. The Ekitis, Ibadan, and Ijesa demonstrated a joint need for third-party intervention. This intervention the missionaries who evangelized in the area and encountered obstruction occasioned by the wars were ready to offer. Hence, a peace treaty was negotiated between the two blocs in the Yoruba wars by the joint efforts of the British in Lagos, missionaries, and traders, who acted as brokers. In 1886, a peace agreement[276] was drafted and signed by the warring parties. However, either by an instrument of nonobvious manipulations or diplomatic stratagem, by some provisions of this treaty and others subsequently signed in 1888[277] and 1893,[278] all the Yoruba leaders inadvertently surrendered their sovereignty to the Queen and Governor of Lagos. The surrender clause signed by the leaders was in addition to an agreement to end the war and promote peace necessary for enhancing economic activities within their respective domains. In the words of Dike, *"Naturally, all the signatories promised to promote trade and commerce. Contained in the*

[274] Michael Crowther, *The Story of Nigeria* (London: Faber, 1978) at 184.
[275] Olawale Idowu & Oluremi Britto, "Foreign Policy and Public Opinion: An Assessment of Ijebu Involvement in the Kiriji War", (2014) 17:2 African J Intl Affairs Development 68, online: < https://ezproxy.library.yorku.ca/login?url=https://www.proquest.com/scholarly-journals/foreign-policy-public-opinion-assessment-ijebu/docview/1724503630/se-2 >
[276] Treaty of Peace, Friendship, and Commerce between the Various Yoruba Chiefs, Ending the Kiriji War (July 1886), Ibadan, NAN (CSO 5/1/13). This treaty signed between 2nd and the 29th of July 1886 had nine representatives (Kings and Chiefs) from Oyo, Ibadan, and Ijesa appending their signature to it. Hence the original document bears the names and signatures of; "Adeyemi the Alafin of Oyo, Ajayi the Balogun of Ibadan, Osuntoki the Maye of Ibadan, Fijabi the Abesi of Ibadan, Fajinmi the Abakin (or agbakin?) of Ibadan, Lajo the Otun Bale of Ibadan, Agunloye the Owa of Ilesa, Okinbaloye the Ore of Otun, and Oyiyasoye the Ajero of Ijero. On the 23rd of September 1886, this treaty was further ratified in a subsequent treaty titled, "Ratification of the Treaty of Peace and Friendship and Commerce concluded between the Ibadan and Ekitiparapo", (CSO 5/1/14).
[277] Treaty of Peace and Friendship between Adeyemi, Alafin of Oyo and Head of Yorubaland and H.M., The Queen of Great Britain (1888), Ibadan, NAN (CSO 5/1/16).
[278] Treaty of Friendship and Commerce between the Egbas and H.M. The Queen (January 1893), Ibadan, NAN (CSO 5/1/18); Treaty of Peace and Friendship between King (Alafin) of Oyo and Head of Yorubaland and H.E., G.T. Carter on behalf of H.M. The Queen (February 1893), Ibadan, NAN (CSO 5/1/19).

provisions here indicated were all the excuses the British needed for their future onslaught on the sovereignty of the Yoruba."[279]

A subsequent result of the Yoruba peace accord was the resolve of the British to move further hinterland for trade expansion and interactions with indigenous traders, using the land route to link the Niger. This move was vehemently opposed by some of the Yoruba states like the Ijebu. The latter consequently disallowed the missionaries, then categorized as British colonial agents, from coming into its territory but ironically allowed other European traders into the area. The British reacted to the Ijebu's action by bypassing them and creating a trade route via the Lagos-Lagoon into the hinterland. With the new route, dominant states like Ibadan could access arms and other products without necessarily going through Ijebu. This acrimonious relationship between the Ijebu and the British led to a political brouhaha in 1891. The Ijebu apologized for confronting the British in January 1892 but was compelled to sign a treaty of free trade and the abolition of tolls. Ijebu leaders rejected the treaty which was allegedly later signed by certain Ijebu men in the diaspora.[280] This brazen confrontation of the determined and stronger colonial lord and the missionaries by the Ijebu finally condensed and rained the ultimate consequence of an outright invasion of the land in the Ijebu military expedition of 1892.[281] In the reprisal battle that lasted for only four days, the Ijebu army, though they outnumbered the British side, was quickly defeated by the more tactical, fewer but better-armed British army.[282]

Following the fall of Lagos and the Ijebu, the coast was clearer for the British to move further hinterland to secure more territories in the Yorubaland. Ibadan who had served in the British army against the Ijebu in the hope of securing a favorable direct link to the Lagos trade soon discovered that the mission of the British was not limited to the coast. To the chagrin of Ibadan, the British sent a resident, Captain R.L. Bower, with a garrison station to occupy

[279] Kenneth Dike, *100 years of British Rule, 1851-1951*. (Lagos: The University of Lagos Press, 1957) at 16-18.
[280] Oyeweso & Oshin, *supra* note 94 at 7. The controversial treaty which these authors alleged the Ijebu were compelled to sign "at gun point" is documented as, Agreement between G.T. Carter, Governor, and Commander-in-Chief of the Colony of Lagos on behalf of the Queen and the Awujale, Chiefs, Elders and People of Jebu to open free to traffic roads and rivers passing through Jebu country, (1892), Ibadan, NAN (CSO 5/2/5).
[281] Smith, *supra* note 238 at 24.
[282] The expedition spanned the 12th to 15th of May 1892. See Sani, *supra* note 177 at 269.

Ibadan in 1893.[283] The non-negotiable British mission was clear, the occupation of other Yorubaland including Ibadan, Oyo, Ekiti, Ijesa, and other Yoruba towns of the South-West. Following the final fall and occupation of Ibadan in 1897, was the appointment of a resident for the Ekiti-Ijesa axis, and a military expedition undertaken against Oyo town. Unlike the valiant resistance mounted by Ijebu, the conquests of other areas in Yorubaland up to 1900 were relatively peaceful and easier. This was because, after the fall of Ibadan in 1897, there appeared no viable resistance to the wave of British occupation.[284] Then the swift signing of more treaties and ratifications of earlier signed treaties and agreements of cession and protectorate became rampant. Thus, key Yoruba towns and sub-groups like; Ijebu,[285] Ijebu Remo,[286] Idanre,[287] Ijesa,[288] Ondo,[289] Mahin,[290] and several others were conquered with treaties and barrels of guns.

It seems that none of the above treaties and agreements were willingly signed by any of the Yoruba leaders. Arguably, the accompanying strategic show of force which was adequately employed by the British compelled the leaders into signing those treaties. Although Lord Lugard was correct in his statement that, African leaders would have refused to sign the treaties if they had understood its full implications on their sovereign rights,[291] it is doubtful if any of the leaders would have summoned courage for such refusal. Such a refusal to sign in the face of, for instance, Captain R.L. Bower's display of force and readiness for bombardment would have been disastrous. Oyo Empire under Alaafin Adeyemi was already bombarded by Captain Bower on November the 12th 1894, an experience that other Yoruba leaders wouldn't want to have. Notable leaders like Chief Ogedengbe of Ilesa, Chief Aduloju,

[283] B. Awe, "The End of an Experiment: The Collapse of the Ibadan Empire 1877-1893" (1965) 3:2 J Historical Society Nigeria 221, online: < https://www.jstor.org/stable/41971159 >.
[284] S.A. Akintoye, *Revolution and Power Politics in Yorubaland, 1840-1893: Ibadan Expansion and the Rise of Ekitiparapo* (London: Longman, 1971) at 117-132. See also Bolanle Awe, *The Rise of Ibadan as a Yoruba Power in the Nineteenth Century* (PhD Dissertation, University of Oxford, 1964) [Unpublished].
[285] Treaty for the Cession of Ijebu Country to H.M. The Queen (1894), Ibadan, NAN (CSO 5/1/20).
[286] Treaty for the Cession of certain territory in the Ijebu-Remo Country to Great Britain (1894), Ibadan, NAN (CSO 5/1/21).
[287] Treaty of Peace and Friendship between H.E., Gilbert Thomas on behalf of The Queen and Arubiefi, The Owa of Idanre Country (4/9/1894), Ibadan, NAN (CSO 5/1/22).
[288] Agreement to open and keep open and free to peaceful trade between Keni Seriki of Ilesha and Frank Rohrweger on behalf of the Government of Lagos (1899), Ibadan, NAN (CSO 5/2/11).
[289] TREATY with the King, Chiefs, Elders, and people of Ondo (February 20, 1889) *H.T.* vol 18 at 201.
[290] TREATY of Friendship and Protection with the King of Mahin (October 24, 1885) *H.T.* vol 18 at 180; TREATY with the King of Mahin, for the Cession of the Mahin Beach (October 24, 1885) *H.T.* vol 18 at 177-179.
[291] Sir F.D. Lugard, *The Dual Mandate in Tropical Africa* (Edinburgh and London: William Blackwood and Sons, 1922) at 15-20.

and Chief Fabunmi of Ekiti, all Yoruba war heroes, who made the slightest show of honor-redeeming defiance were either arrested and detained or humiliatingly ridiculed by the Resident.[292]

While the military conquest of Yorubaland by the British seemed completed by 1897, the first decade of the twentieth century, witnessed the continuous signing of a series of agreements of absolute surrender.[293] That was the situation till the time of the amalgamation of 1914. As noted above, at the revocation of the Charter of the Royal Niger Company in 1899, the business concern effectively ceased to function as a political entity. The control of the Niger Coast Protectorate was then transferred from the Foreign Office to the Colonial Office. The territories south of Ida hitherto controlled by the RNC were merged with the Niger Coast Protectorate to birth an expanded territory christened the "Protectorate of Southern Nigeria" in 1900. The latter extended to the conquered Yorubaland of the South-West and was administered by the Colonial Office.[294] In 1906, the Lagos Crown Colony was merged with the Protectorate of Southern Nigeria.[295] On 1 January 1914, both the British Northern and Southern Nigeria Protectorates were eventually amalgamated[296] under a unified colonial administration.

[292] Oyeweso & Oshin, *supra* note 94 at 10-11.
[293] Examples of such agreements which additionally provided for the surrender of territorial and jurisdictional powers by African leaders included Agreement for absolute surrender of judicial power to H.M. The King of Great Britain, between Sir William MacGregor, Governor of Lagos and the Alake and Authorities of Egba (13/1/1904), Ibadan, NAN (CSO 5/2/18); Agreement for the surrender of power of jurisdiction to H.M. The King of Great Britain between-the Acting Governor C.H.H. Moseley and Baale, and Authorities of Ibadan Province (8/8/1904), Ibadan, NAN (CSO 5/2/19); Agreement-for absolute surrender of Power of Jurisdiction over the Yoruba Country to H.M. The King of Great Britain (1904), Ibadan, NAN (CSO 5/2/20); Agreement entered into by the Oni and the people of the Province of Ife vesting Power of Jurisdiction in the Province in H.M. Edward VII, King of Great Britain (1904), Ibadan, NAN (CSO 5/2/21); Agreement with Native Chiefs of [re Oil] Aiye, Irele, Jebu-Ode, Epe, Ondo, Ikale, Ijebu, Aiyesan, Ibu, Ikorodu, Jebu-Remo (1906), Ibadan, NAN (CSO 5/2/23); Agreement with the Alake and Authorities of Egba Annulling the Treaty of 1903 and further placing the Egba Kingdom under the Government of the Protectorate of Nigeria (1914), Ibadan, NAN (CSO 5/2/25), and several others.
[294] J.C. Anene, "The Protectorate Government of Southern Nigeria and the Aros 1900-1902" (1956) 1:1 J Historical Society Nigeria 20.
[295] S.H. Steinberg, "Federation of Nigeria" in S.H. Steinberg, ed, *The Statesman's Yearbook.* (London: Palgrave Macmillan, 1965) at 494.
[296] Emmanuel Oladapo Ojo, "Nigeria, 1914-2014: From Creation to Cremation" (2014) 23 J Historical Society Nigeria 67, online: < https://www.jstor.org/stable/24768942 >.

G. Colonial System of Government and Administration in South-Western Nigeria-1861-1914

(i) Background

To avoid tautology, discourse on systems of government in this sub-topic is mainly on the executive and legislative arms during the period under study. This is because chapters three and four focus on judicial systems during the period under study. As established above, the British conquests of the Yorubaland, like every other part of the country, were in phases. So, is the constitution of the governmental and administrative systems employed in governing the conquered territories. Three phases of this system; 1861 to 1891, 1891 to 1914, and 1914 to 1954 are discussed below. Lagos which was subdued in 1851 had its administrative system fully established as a Crown Colony in 1861. The Yoruba hinterland was later subjected to colonial protectorate rule with Ilaro coming as the first Yoruba hinterland to be made a British protectorate in 1888[297] and added to the colony of Lagos in 1891. Thus, Britain adopted two administrative systems to govern South-Western Nigeria at the initial stage. Lagos with other territories[298] placed under it was governed as a British Crown Colony while other parts of Yorubaland were ruled under the protectorate system.[299] Similarly, the civil status of persons under both systems of administration differed. Under the Crown Colony of Lagos, the Yorubas were treated as British subjects but those resident in the protectorates were regarded as British-protected persons. The most important implication of this polarization was the differences in the laws applicable in both administrative settings.[300] Notwithstanding, the officials who worked in the Lagos Colony were cross-appointed to the protectorate's administrative offices. Lagos remained the center of the administration for both

[297] The second clause of the Agreement confirming the British declaration of Ilaro as a protectorate (the first Yorubaland to be so declared) made by the King and some Chiefs of the town reads, "We and the rest of the people of Ilaro earnestly solicit Her Britannic Majesty to accord to ourselves and our country her gracious protection; and we entreat Her said Majesty to take our territory under her gracious protection; accordingly, and to include it in the protectorate of her Colony of Lagos". See British Protectorate over Ilaro, 21st July 1888 reprinted in Sir E. Hertslet, *The Map of Africa By Treaty,* vol. 1 Nos 1 to 94, 3rd ed (London and New York: Routledge Taylor & Francis Group, 1909) at 108.

[298] The territories included in the Lagos government are Badagry, Lagos Island, Ikorodu, and Epe. See Oyeweso & Oshin, *supra* note 94 at 12.

[299] See generally, Tamuno Tekena N. *The Evolution of the Nigeria State; the Southern Phase, 1898-1914* (New York: Humanities Press, 1972).

[300] While the British law was applicable in the Crown Colony, it was inapplicable to the Protectorate as the residents of the Colony owed allegiance only to the Queen and to no Native authority. See A.I. Asiwaju, "The Western Provinces under Colonial Rule", in Obaro Ikime, ed, *Groundwork of Nigerian History,* (Ibadan, Nigeria: Heinemann Educational Books) at 431-437.

the colony and the protectorate, but administrators served simultaneously as officials of the protectorate and in the Colony's Administration.[301]

(ii) Official and Administrative Structure

Administratively, the colonial government is similarly organized both in the Colony and the protectorates. The official cadre of the colony was hierarchically divided into five layers while the hinterland was divided into four administrative districts. The officials responsible for the running of the government under the control of the Colonial Office included; The Governor who headed the Colony and Protectorate government, assisted by the Lieutenant-Governor in charge of the Southern Protectorate. The latter was hierarchically followed by the Residents of Provinces,[302] District Officers, and Assistant District officers who assisted the former in the administration of the various Districts.[303] The four administrative districts into which the hinterland/protectorate was segmented were; the Central District comprising Ibadan (the headquarters), Oyo, and Ife communities, and the Western District which comprised Badagry, Egbado, and Imeko. There was the Northeastern District in which Ilesa and Ado-Ekiti were the headquarters and comprised Ekiti and Ijesaland, and the Eastern District which comprised Akure, Idanre, Owo, Ondo, Okitipupa, and Ilaje headquartered at Ode-Ondo.[304]

(iii) Lagos Colonial Administration: 1861-1891

At the annexation of the bombarded Lagos in 1861, the Colonial Office appointed Mr. Henry Stanhope Freeman as the Governor of Lagos.[305] The latter was assisted by a Lieutenant-Governor, Captain Wiliam Rice Mulliner who was appointed in 1863. Freeman lasted a year

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[301] Usman Aribidesi & Toyin Falola "Colonial Rule, Economy, Education, and Identity" in Usman Aribidesi & Toyin Falola, eds, *The Yoruba from Prehistory to the Present* (Cambridge: Cambridge University Press, 2019) at 323-324.

[302] The Residents were earlier referred to as "Travelling Commissioners" before renamed. *Ibid* at 429-445.

[303] I.F. Nicolson, *The Administration of Nigeria, 1900-1960: Men, Methods, and Myths* (Oxford, England: Clarendon Press, 1969). The latter contained a fuller analysis of the governmental structures detailing the roles and official power of each administrative officer covering the entire Nigeria. For an additional account, see also, I.M. Okonjo, *British Administration in Nigeria, 1900-1950: A Nigerian View* (New York: NOK Publishers, 1974).

[304] Akintoye, *supra* note 284.

[305] It is notable that, at the commencement of the Colony's administration, the Governor performed several governmental roles which included judicial functions. He settled disputes among the Colony's inhabitants. See T.O. Elias, *Nigeria: The Development of its Laws and Constitution* (London: Stevens & Sons, 1967) at 18.

in office before he was replaced by Captain John Hawley Glover in 1864.[306] As the British settlement expanded along the coast and in the hinterland, so also was the legitimate trade transacted within the territories. That necessitated the expansion of the administrative organs of the colonial government.[307] Thus, to assist the executive arm headed by the Governor, a Legislative Council was set up in 1862. Starting from 1863 the latter immediately enacted some Ordinances. The two most important Ordinances enacted by the Council were *Ordinance No. 3 of 1863* and the *Supreme Court Ordinance No. 11 of April 9, 1863*. By the former, the English laws in force in England on 1 January 1863 were made applicable to the Colony of Lagos. The Supreme Court Ordinance, by its provision, provided for the better administration of justice within the Colony.[308]

Four years following the constitution of the Legislative Council in Lagos, the British attempted a mega West African government. By the new government, a central administration was created for Lagos, Gold Coast (now Ghana), Gambia, and Sierra Leone between 1866 and 1874 with the latter as the headquarters. The Legislative Council of the mega government functioned under a chief executive officer named "Administrator". The latter was responsible to the Governor-in-Chief who headed the West African Settlements mega government in Freetown, Sierra Leone.[309] Thus, Lagos remained under the mega government until 24 July 1874 when it was separated and administered as the Eastern Province of the Gold Coast under the leadership of a Lieutenant-Governor till 1886. In response to agitations of Lagos dwellers and merchants along the Niger and Benue Rivers, by a Charter and Letters Patent, Lagos was again separated from Gold Coast in 1886. It again became an independent Colony. Sir Cornelius Alfred Moloney was sworn in on 13 February 1886 as the first Governor of a reconstituted Lagos government.[310] Moloney was later succeeded in 1891 by Sir Gilbert Thomas Carter.[311]

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[306] W.D. Mcintyre, "Commander Glover and the Colony of Lagos, 1861-73" (1963) 4:1 J African History 57.
[307] Elias, *supra* note 305.
[308] *Ibid.*
[309] The merger of the four West-African British Crown Colonies under one government was occasioned by the Report of the Select Committee of the British House of Commons. See T.O. Elias, *Ghana, and Sierra Leone: The Development of their Laws and Constitution* (London: Stevens, 1962) at 24-26.
[310] For the full account of the governance and policies of Moloney in Lagos between 1886 and 1891, see, Olufemi Omosini, "Alfred Moloney and His Strategies for Economic Development in Lagos Colony and Hinterland, 1886-1891" (1975) 7:4 J Historical Society Nigeria 657, online: < https://www.jstor.org/stable/41971220 >.
[311] Z.O. Apata, "Ilorin-Lagos Relations in the Nineteenth Century: A Study of British Imperial Struggle in Yorubaland" (1991) 20 Transafrican J History 145, online: https://www.jstor.org/stable/24520307 >.

(iv) Lagos and South-Western Nigeria Colonial Administration: 1891-1914

The Oil Rivers Protectorate created in 1885 was not directly administered by the British until 1891. It was later renamed "Niger Coast Protectorate" in 1893. When the latter was merged with the territories previously governed by the RNC, there was formed the Protectorate of Southern Nigeria jointly administered under the supervision of the Colonial Office.[312] Between 1891 and 1897, the four districts into which Yorubaland was divided, and formed part of the eventually created Protectorate of Southern Nigeria, were under the control of "Residents or Traveling Commissioners". Though the latter ruled with relative force, it allowed a measure of independence to the indigenous rulers who were permitted to administer their local territories as they did before colonialism. The Residents reported to Lagos which, though governed separately, remained the seat of the administration of the entire Yorubaland.[313]

With the establishment of the Native Council System in 1897, the British became more involved in the internal administration of the hinterland districts. This Council system expanded the supervisory role of British officials over the hinterland. At the inception of the administration of Mr. McCallum, the Governor of Lagos from 1897, the Councils of Chiefs presided over by the Travelling Residents. Though similar in name to the pre-colonial council system in which either the Oba or the Baale governed with the assistance of the Council of Chiefs, this new system radically differed in function. The new council system stripped the Obas and other indigenous rulers of their agelong role which was then performed by the Residents. The new Council was thus established in Ibadan in 1897, Oyo, in 1898, Abeokuta in 1898, and subsequently in Ondo, Ijebu Ode, Ijebu-Remo and Ijesa-Ekiti districts between 1898 and 1900.[314]

Saddled with combined legislative, executive, and judicial responsibilities, and other duties of government, the constitution of the Council varies from district to district. At Ibadan, the

[312] A.E. Afigbo, "The Consolidation of British Imperial Administration in Nigeria", (1971) 21:4 Civilisations 436. Sir Fredrick Lugard served as the High Commissioner of Northern Nigeria at the same time. See Elias, *supra* note 305 at 21.
[313] Obaro Ikime, *Groundwork of Nigerian History* (Ibadan: Heinemann Educational Books, 1980) at 435.
[314] Olufemi Vaughan, "Chieftaincy Politics and Communal Identity in Western Nigeria, 1893-1951" (2003) 44:2 J African History 283, online: < https://www.jstor.org/stable/4100867 >.

members were usually eleven, did not at any time exceed seven in Oyo, and eight at Abeokuta. It admitted larger membership in the Ijesa-Ekiti North-Eastern District as the latter Council comprised the Owa of Ijesaland, prominent chiefs in the land, and fifteen Obas from Ekiti.[315] Notably, while other districts' councils were presided over by the Residents, perhaps due to the subsisting Anglo-Egba Treaty of 1892 that guaranteed a measure of internal self-rule to the Egba, the latter Council was then presided over by the Oba.[316] Due to certain reasons, especially communication and finance, within a few years of its institution, the unworkability of the British Council system became obvious. Towns and villages governed from the various headquarters and coordinated from the Lagos Colony were large and complex. This led to administrative difficulties that eventually warranted a restructuring.

Following the appointment of Sir William McGregor[317] as the Governor of Lagos in 1899, the colonial administrative system in Lagos and at the protectorate level was expanded through the Native Council Ordinance introduced by the Governor.[318] The Ordinance acknowledged the importance of bringing the government down to the grassroots as a panacea for administrative ineffectiveness and inefficiency. On the requests of the natives and the approval of the Governor, there were established additional, provincial, town, and village councils which further decentralized administrative functions. More than the pre-1899 system, the Ordinance somewhat restored the authorities of the Obas throughout the districts. From 1899, the old and the newly established Councils were presided over by the Obas, thereby leaving British officials in advisory capacities. In addition, the decentralization feature of the Ordinance expanded the responsibilities of the Obas within the colonial system. It empowered Obas to attend to and dispose of matters within their local jurisdictions. Consequently, it restored a measure of the Obas' pre-colonial powers and influence, especially under William MacGregor's government.[319] However, only the recognized paramount Obas had their powers restored and enhanced. The roles played by lower chiefs

[315] S.A. Akintoye, "Obas of the Ekitiparapo Confederation under Colonial Rule and Independence" in Michael Crowther & Obaro Ikime, eds, *West African Chiefs; Their Changing Status under Colonial Rule and Independence* (New York: African Pub. Corp., 1970).
[316] Oyeweso & Oshin, *supra* note 94 at 14.
[317] Sir William McGregor replaced Sir McCallum who departed for England in 1899. For full accounts of the memoirs of both ex-administrators of colonial government and their activities in Nigeria, see, Nicolson, *supra* note 303 at 46-99.
[318] The 4th of November 1901 Native Council Ordinance applied to both Lagos and the Protectorate. The Ordinance set up a Central Native Council for Lagos and saddled it with the duty of advising the Governors "*concerning the good government and the well-being of the native population*", see, Afigbo, *supra* note 312 at 440.
[319] J.A. Atanda, *An Introduction to Yoruba History* (Ibadan, Nigeria: Ibadan University Press) at 50-54.

were keenly regulated to prevent power friction that might result from hierarchical conflicts.[320]

Regarding finance, the native administration under the Council System was hardly stable as it depended only on court fines as its only source of revenue. The mono-sourced revenue was divided into two and shared between the native rulers and the prison authority. Thus, the system lacked the financial means to execute capital projects required for societal growth and development.[321]

The ineffectively structured, financially weak, but strictly monitored British administrative systems in South-Western Nigeria wobbled in this manner until another restructuring commenced on 1 January 1900. Following the hoisting of the British Union Jack in Lokoja, the colonial government started to administer the whole of Nigeria in three units. These units were; the Colony of Lagos and its protectorate which covered Yorubaland, the Protectorate of Southern Nigeria, and the Protectorate of Northern Nigeria.[322] On the south side, in 1906, the Colony and Protectorate of Lagos and the Protectorate of Southern Nigeria were merged to form the "Colony and Protectorate of Southern Nigeria" placed under one administrative unit.[323] The new Protectorate was then divided into the Western, Central, and Eastern Provinces. Each of the two latter Provinces was placed under a Provincial Commissioner. [324] South-Western Nigeria which fell under the Western Province was subdivided into smaller administrative Provinces such as; Abeokuta, Benin, Ondo, Oyo, and Warri. The latter were in

[320] The paramount rulers who had their powers restored and enhanced included the Alaafin of Oyo, Osemawe of Ondo, Alake of Egba, and the Awujale of Ijebu. This aligned with the primordial power primacy enjoyed by these Obas as paramount rulers who directly descended from Oduduwa, the progenitor of the Yoruba people. See, Vaughan, *supra* note 314 at 287. See also, Toyin Falola & Michael R. Doortmont, "Iwe Itan Oyo: A Traditional Yoruba History and Its Author" (1989) 30:2 J African History 301, online: < https://www.jstor.org/stable/183070 >.

[321] Oyeweso & Oshin, *supra* note 94 at 16.

[322] Ehimika A. Ifidon, "The Appropriated State: Political Structure and Cycles of Conflict in Nigeria, 1900-1993" (1998) 3:2 African J Political Science 1.

[323] Arthur Norton Cook, *British Enterprise in Nigeria* (United States: University of Pennsylvania Press, 1943) at 190-211. See also Nicolson, *supra* note 303 at 100-123.

[324] Elias, *supra* note 305 at 21. The British administration in the new Protectorate was placed under Sir Walter Egerton, the Governor of Lagos and High Commissioner of Southern Nigeria, and the architect of the sub-amalgamation of 1906. See also, John M. Carland, "Public Expenditure and Development in a Crown Colony: The Colonial Office, Sir Walter Egerton, and Southern Nigeria, 1900-1912" (1980) 12:4 Albion: A Q J Concerned with British Studies 368, online: < https://www.jstor.org/stable/4049016 >.

turn polarized into districts.[325] Each Province was headed by a British Resident who directed the affairs of administrative officers in charge of the districts. The districts' administrative officers oversaw the various traditional rulers and head chiefs who were allowed a measure of authority and control over their local communities. The Residents received instructions from and reported back to the Governor in Lagos, the Capital of the Nigerian colonial administration.

In 1912, Lord Fredrick Lugard who had served as an administrator in Northern Nigeria and deployed to Hong Kong in 1906, was returned to Nigeria.[326] In the gradual execution of his designs for actualizing the merger of Nigeria, he first set up the Nigerian Council in 1913. The thirty-one-member Council was constituted by the Governor, Executive Council members, the Senior Resident, and other unofficial members part of whom were two African leaders. Notwithstanding its establishment and constitution, the Council was a figurehead with no defined legislative power, a sole precinct of the Governor. It only harnessed public opinion and discussed the Governor's speech. Perhaps, its only real essence was that it served as a connecting cord between the people and the government.[327] Lord Lugard retained his unwavering focus on actualizing the ultimate mandate of amalgamating both sides of Nigeria. In this assignment, Lugard was strongly supported by the Chief Justices of both Southern and Northern Protectorates and senior administrative personnel of the government. On 1 January 1914, Lugard successfully amalgamated both Protectorates of Nigeria and subsequently inaugurated it as a unified Nigeria. Lugard became the Governor-General of the amalgamated entity.[328] What followed was the Lugardian Indirect Rule System introduced into the newly

[325] Efiong Isaac Utuk, *Britain's Colonial Administrations and Developments, 1861-1960: An Analysis of Britain's Colonial Administrations and Developments in Nigeria* (Master of Science in Teaching in History Thesis, Portland State University, 1975) [Unpublished].

[326] Lugard earlier headed the British government of the Protectorate of Northern Nigeria until he was transferred to Hong Kong in 1906 but returned to Nigeria to work out the feasibility of merging the administrations of both the Northern and Southern Protectorate, a task he accomplished in 1914. See Elias, *supra* note 305 at 22. Also see, Papers of Fredrick Dealtry Lugard, Baron Lugard of Arbinger: 1871-1969 (1871-1969), Oxford, Bodleian Library University of Oxford (GB 161 MSS. LUGARD).

[327] Margery Perham, *Native Administration in Nigeria* (Oxford: Oxford University Press, 1962).

[328] Fredrick Lugard, "Excerpt from the Diaries of Lugard: Nigeria", in B. Harlow & M. Carter, eds, *Archives of Empire: Volume 2. The Scramble for Africa* (New York, USA: Duke University Press) at 388-401. For full details of the amalgamation, see also, Sam Momah, *Nigeria Beyond Divorce* (Nigeria: Safari Books, 2013); Paul Ilesanmi Akanmidu, "The British's Contact with Nigeria's Peoples, Amalgamation and the Question of Minority Agitation, 1914-1999" (2018) 12:1 J Pan African Studies 421; Nnamdi Elleh, "The Amalgamation of Nigeria and the Search for Capital City Location, 1900-1960" in Nnamdi Elleh, *Architecture and Politics in Nigeria: The Study of a Late Twentieth-Century Enlightenment-Inspired Modernism at Abuja, 1900-2016* (United States: Routledge, 2016) 101.

formed government.[329] The indirect rule system of government was comparatively successful in Northern Nigeria, partially successful in South-Western Nigeria (Yorubaland), but comparatively failed in the South-East (Igboland). Notwithstanding its imperfection, it constituted the fundamental principle underlining every governmental and administrative system practiced in Nigeria until the reforms of the 1930s and 1940s. Between the 40s and 1960, Nigeria was prepared for the transition to the Federal System of Government[330] handed over to its leaders on 1 October 1960.

(v) Indirect Rule in South-Western Nigeria 1914-1954

Aptly described as "*decentralized despotism*" by Mahmood Mamdani,[331] indirect rule truly manifested itself as an administrative instrument of bifurcation used by the British in the process of colonial governance. Indirect rule was a British-adopted method of administration, and "*By this method, the chiefs continued to administer the area, subject to the guidance and overall authority of the British officials*."[332] The simplicity of the above-quoted definition notwithstanding, the indirect rule system eventually turned out as a complex and highly contentious colonial administrative strategy. For instance, the aftermath of the indirect rule in Yorubaland exemplified by the unconstitutional rearrangement of power structures in the Oyo Empire/Province vis-à-vis other Yoruba states confirmed Mamdani's claim that indirect rule was a form of "decentralized despotism". The despotism that resulted from the overconcentration of power in the hands of the Alaafin of Oyo at the expense of other hitherto autonomous towns practically bifurcated Yorubaland during the colonial era.

In capturing the meaning of the two complementary systems of colonial administration, Mamdani explains that:

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[329] This system was successfully practiced in Northern Nigeria before transplanted to Southern Nigeria by Lord Lugard following the amalgamation of 1914. See, J.A. Atanda, *The New Oyo Empire: Indirect Rule and Change in Western Nigeria, 1894-1934* (London; Longman, 1973); Edwin W. Smith, "Indirect Rule in Nigeria: Miss Perham's Great Book" (1937) 36:144 African Affairs 371, online: https://doi-org.ezproxy.library.yorku.ca/10.1093/oxfordjournals.afraf.a101461 >.

[330] Benjamin Obi Nwabueze, *A Constitutional History of Nigeria* (Essex; New York: Longman, 1982); Abdul Lateef, "The Federal System of Nigeria", (1963) 16:2 Pakistan Horizon 133, online: < https://www.jstor.org/stable/41392763 >. Throughout the whole of this period up to the 1960, Nigeria experimented with five different British-enacted/influenced constitutions. These included Clifford (1922), Richard (1946), McPherson (1951), Lyttleton (1954), and the 1960 Independence Constitution.

[331] Mahmood Mamdani, *supra* note 63 at 62-137.

[332] Atanda *supra*, note 329 at 85.

"*Direct rule was the form of urban civil power. It was about the exclusion of natives from civil freedoms guaranteed to citizens in civil society. Indirect rule, however, signified a rural tribal authority. It was about incorporating natives into a state-enforced customary order. Reformulated, direct, and indirect rules are better understood as variants of despotism: the former centralized, the latter decentralized.*

After the Indian experience heightened by the "mutiny" of 1857, the British concluded that direct rule which involved interference in the traditional customs and authorities was not a durable administrative strategy.[333] Thus, when the forcible occupation of Africa was completed, the lesson of the need to advance governance/administrative strategy from direct to indirect rule had been learned. However, this is not a portrayal of direct and indirect rule as incongruous as both systems complemented each other. Both systems are "*complimentary ways of native control*".[334] William Hailey buttressed the interrelatedness that existed between direct and indirect rule systems by cautioning his readers against the wrong and misleading representation of "direct and "indirect" forms of administration. To Hailey, both systems melded in "*numberless gradations*," that no distinction existed between them.[335]

Beyond the lessons learned from the Indian situation and its successful, though contentious, implementation in Northern Nigeria, Lugard and the colonial office were doubtless of the need for indirect rule in every part of Nigeria. Exigencies of the time and strong advocacy for its implementation within the British government constituted other reasons for extending the indirect rule to places like Yorubaland. British direct administration of its acquired colonies was hampered by inadequate personnel required in major cities and various hinterlands. Administering Nigeria directly would have necessitated the bringing of a large number of British officials down to Nigeria. This was practically impossible considering its financial and medical implications. Even if enough British administrative officers had been brought to Nigeria at the time, the administration would have been chaotic. British officers lacked knowledge of local laws and circumstances. Nigerians too were unacquainted with the British system. These realities would have resulted in a gross administrative error. In this circumstance, the less disruptive and cheaper indirect rule administrative system became the

[333] Chris Youe, "Mamdani's History" (2000) 34:2 Can J African Studies 397 at 399, online: < https://www.jstor.org/stable/486422 >.
[334] Mamdani, *supra* note 63 at 18.
[335] William Malcolm Hailey, *An African Survey: Revised 1956* (Oxford: Oxford University Press, 1957) at 415.

colonialist only reasonable option. History has shown that expediency such as the above had compelled colonialists of all times to adopt one form of indirect governance or another.[336]

In addition, since the 1890s, there existed in Britain a strong advocacy for the adoption of the indirect rule system. The advocacy was religiously spearheaded by Lugard and strongly backed by Lord Stanmore.[337] Thus, the campaign for the adoption of the indirect rule system was launched by Lugard in his two-volume book, "*The Rise of Our East African Empire*"[338] published in 1893. In this book, Lugard defended the use of the indirect rule method in the internal governance of territories acquired[339] and those to be later conquered. Concerning Africa generally, Lugard opines in this book that, "*An arbitrary and despotic rule, which takes no account of native customs, traditions, and prejudices, is not suited to the successful development of an infant civilization, nor, in my view, is it in accordance with the spirit of British colonial rule*."[340] However, as seen above in the case of Northern Nigeria and as shall be seen later in the situation of Yorubaland, it remains controversial the extent to which indirect rule took "account of native customs, traditions, and prejudices" of places colonized. The wide press reviews given to Lugard's book popularized his advocacy for the indirect rule system.[341] Besides, the support of Lord Stanmore, a member of the British parliament[342] and a former colonial governor of Fiji, also accorded great weight to Lugard's advocacy for the adoption of the indirect rule system.

Moreover, the local press in Lagos also aided the call for the formal adoption of the indirect rule system. For instance, between the years 1896 and 1897, the *Lagos Weekly Record* was replete with articles urging the adoption of the indirect rule system in governing hinterland communities acquired by the British in Yorubaland.[343] Some of the newspapers' articles

[336] Perham, *supra* note 327 at 345.
[337] Atanda, *supra* note 329 at 86.
[338] Frederick D. Lugard, *The Rise of Our East African Empire: Early Efforts in Nyasaland and Uganda*, Vols. 1 & 2 (London and New York: Routledge Taylor and Francis, 1893 and 1968).
[339] While making a specific reference to Uganda on page 649 of volume two of this book, Lugard affirmed, "*With regard to internal control in Uganda, in my opinion the object to be aimed at in the administration of this country is to rule through its own executive government. The people are singularly intelligent and have a wonderful appreciation of justice and of legal procedure, and our aim should be to educate and develop this sense of justice*." See, Lugard, *ibid* at 649.
[340] Lugard *supra*, note 338 at 651.
[341] Margery Perham, *Lugard: The Years of Adventure 1858-1898* (London: Collins, 1960) at 370-372.
[342] *Ibid*.
[343] Relevant issues of the *Lagos Weekly Record* included "Native Institution" of 21 March 1896, "The Aboriginal Native in British Crown Colonies" of 24 October 1896, "Her Majesty's Government and the

recommended to the British the use of indigenous institutions and an avoidance of the imposition of a foreign system capable of engendering negative consequences in the polity. Another reason adduced for the adoption of the indirect rule system was the need to normalize the hitherto strained relationship between colonial officials who served in the hinterland and some Yoruba traditional leaders. In the course of establishing colonial rule, British officials were accused of high-handedness in their efforts to forcibly conquer the territories. In the process of the conquest, some of the chiefs were dethroned while the authorities of others were undermined. An example of these was the bombardment of Oyo and the dethronement of Alaafin Adeyemi I by Captain Bower in 1895.[344] Another instance was the illegal removal of Baale of Ogbomoso from under the Ibadan control and placed under the Oyo authority.[345] All these factors jointly propelled the need for the formalization of the indirect rule system in areas such as Yorubaland.

While basking in the euphoria of its comparative success in Northern Nigeria,[346] Lord Lugard extended the application of the indirect rule system to Southern Nigeria after the amalgamation of 1914. Although, a finding suggests that indirect rule had been introduced into Yorubaland during Major Henry E. McCallum's government from 1897 to 1899 and that of Sir William MacGregor from 1899 to 1904.[347] While this is true judging by the semblance of an indirect approach to governance employed by both McCallum and MacGregor, the form of the indirect rule system espoused by Lord Lugard is more instructive here. To build on what his predecessors (i.e., MacCallum and MacGregor) already started, Lugard commenced the formal experimentation of the indirect rule system in Yorubaland. The precolonial decentralized monarchy of the Yoruba people provided a suitable but misunderstood condition for the experimentation of the indirect rule system. The Northern Nigeria caliphate system was relatively centralized[348] and perfectly fitted the command structure required for

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Protectorate of Natives States in West Africa" published on 16 January 1897 and several others. See, Atanda *supra*, note 329 at 88.

[344] See the details of Atanda *supra*, note 329 at 56-76.

[345] Atanda, *ibid.* at 113. Ogbomoso was later occupied by troops under the command of a British officer deployed by Captain Bower. Orders were issued to the Baale in a disrespectful manner and the latter pleas for the removal of the military occupation was unheeded until 1898.

[346] Robert Wilfred Hannah, *The Origins of Indirect Rule in Nigeria, 1890-1904* (PhD Dissertation, Michigan State University, 1969) [Unpublished].

[347] Atanda *supra*, note 329 at 89-99.

[348] Sa'ad Abubakar, "The Emirate-Type of government in the Sokoto Caliphate" (1974) 7:2 J Historical Society Nigeria 211, online: < https://www.jstor.org/stable/41857009 >.

the indirect rule system. In contrast, Yorubaland practiced a highly decentralized monarchy[349] to which the indirect rule system was misapplied.

Provisions of the Native Courts Ordinance 1914, and the Native Authority Ordinance 1918 allocated increased administrative and judicial responsibilities to some recognized Obas (kings) and Baales (village heads).[350] These new laws also authorized the collection of direct tax, an innovation that placed the works of traditional leaders on a sound financial footing.[351] A unique feature of the new dispensation was the further restoration of power and prestige that the Yoruba traditional leaders had lost during the British military conquests era. McCallum and MacGregor's administrations had a semblance of this power restoration. Recognized Obas and Baales then designated as "Native Authorities", replaced British Commissioners as presidents and heads of Native Courts and Councils. Notwithstanding the seeming restoration of the Obas and Baales to their precolonial positions, the Lugardian system retained the superstructure of the preceding colonial administrations. By this superstructure, the Governor of the whole of Nigeria, who ruled from Lagos, remained at the head of the administrative structure and the helm of colonial affairs. Beneath the Governor was the Lieutenant-Governor of Southern Nigeria, followed by Residents of Provinces. Then, there were District Officers who headed divisions, and Assistant District Officers, all assisted by the army and police officers of European extraction.[352]

At the central seat of government in Lagos were established administrative departments that handled duties related to finance, education, health, forestry, and agriculture. Administrative and technical staff were employed to perform specific duties to which they were assigned at the center. Some of this staff were occasionally seconded to perform the same or similar duties at the hinterland whenever necessary.[353] There were also appointed for communities in the hinterland local administrators-in-charge. The latter were saddled with the responsibilities of coordinating the affairs of the central departments at local levels. Hence, the indirect rule

[349] R.C.C. Law, "Anthropological Models in Yoruba History" (1973) 43: 1 Africa: J Intl African Institute 18.
[350] Asiwaju, *supra* note 300 at 437.
[351] *Ibid*.
[352] *Ibid* at 438.
[353] T. Walter Wallbank, "The Principles and Organization of British Native Rule in Tropical Africa" (1934) 3: 2 Pacific Historical Rev 142, online: < https://www.jstor.org/stable/3633375 >.

in the Yoruba Province was grounded on the duty of local administrators to act through a validated Oba or Baale known as "native authority."[354]

The Lugardian indirect rule system in Yorubaland was based on the above administrative design until the 1930s when some factors prompted an overhauling and a reorganization. Factors that necessitated the reorganization and democratization of the Lugardian system included the taking over of governance of Nigeria by Donald Cameron. Others were the exigency to avoid a recurrence of revolts like the Anti-Tax Riot of 1927-1928,[355] and the Aba Women Riot of 1929.[356] There was also the important factor of reducing the heat within Yorubaland due to the unprecedented overconcentration of powers and authorities in the hands of certain Yoruba Obas. Educated elites also intensified agitations against their exclusion from colonial governance. The last two preceding factors that were more relevant to situations in Yorubaland, led to volatile friction within the Province, the unknown consequence of which was a priority for the new Governor to avoid. On assuming office as the Governor in 1931, Sir Donald Cameron did not disguise his opposition to the Lugardian style of the indirect rule system. He consequently embarked on his reform process which substantially overhauled the pre-1931 system, though not completely.[357]

An instance of a "decentralized despotism" created by the Lugardian-type of indirect rule system and led to constitutional and leadership friction within the Yoruba Province was the forcible and divisive actualization of Ross's administrative and political ambition. Captain W.A. Ross was appointed the Resident of the Yoruba Province where he served between 1914 and 1931. For reasons that included his ambition, limited study of the Yoruba history, and his long-time friendship with the then Alaafin Siyanbola Ladugbolu,[358] Captain Ross sought and actualized the creation of a new Oyo. This he realized through the expansion of

[354] Asiwaju, *supra* note 300 at 438. Due to the decentralized nature of Yoruba monarchical system, there might be more than one Oba or Baale within a locality. Under the indirect rule system, the British colonial government and their administrative officials merely acted through any of the Oba or Baale recognized or validated by the government. This often times disorganized the pre-colonial hierarchical structure of the monarchy in which there were seniorities among the Obas and the Baales.

[355] Obaro Ikime, "The Anti-Tax Riots in Warri Province, 1927-1928" (1966) 3:3 J Historical Society Nigeria 559, online: < https://www.jstor.org/stable/41856713 >.

[356] A.E. Afigbo, "Revolution and Reactions in Eastern Nigeria: 1900-1929 (The Background to the Women's Riot of 1929)" (1966) 3:3 J Historical Society Nigeria, 539, online: < https://www.jstor.org/stable/41856712 >.

[357] Akande *supra*, note 113 at 470.

[358] For a broad analysis of the thirty-three-year reigned (1911-1944) of Alaafin Siyanbola Ladugbolu, his friendship with Captain Ross, and the history of his "overrule", see, Atanda, *supra* note 329 at 106-176.

Alaafin's authorities and territories beyond their pre-colonial scope. The beginning was when the Lagos government decided to create the Oyo Province. As an administrative practice, serving colonial officers were relied upon for recommendations on the local realities prevalent where the new Province was to be created. The Lagos government consequently contacted Ross, the serving officer around the Oyo and Ibadan areas. Ross's recommendation not only contradicted the political history and practice of Yorubaland but also the pre-Lugardian indirect rule system experimented on by McCallum and MacGregor. Ross recommended that the proposed Oyo Province should not be made to cover only Oyo and Ibadan but should be extended to include hitherto autonomous historical towns like Ile-Ife, Ilesa, and Ila. And to also include the latters' vassal states, with Oyo as the overall headquarters.[359] By implication, the ancient town of Ile-Ife regarded as the cradle of the Yoruba ethnic group was to be subsumed under the controlling authority of Oyo, a town later established centuries after Ile-Ife had existed.

A reason, why Ross intended the incorporation of Oyo, Ibadan, and other nearby towns, into a Province under the headship of Alaafin, was partly due to his limited research[360] of the History of Yorubaland. The acclaimed Yoruba history studied by Ross revealed to him that, "*In the early ages the king of the Yoruba sat on his throne in the old city of Oyo. All the different tribes were represented at the King's courts daily, to hear orders from the Alaafin and to inform the various towns, cities subkings, and states*."[361] This seemingly conjectural research made by Ross erroneously convinced him that in earlier centuries, Alaafin's powers extended over other Yoruba sub-groups, aside from the central Oyo people. What Ross failed to discover was that, while the Old Oyo Empire truly wielded enormous power and control over vast areas of land that extended to Dahomey,[362]Oyo hegemony did not cover the whole of Yorubaland. Ross then concluded that lands and vassal states under Ibadan were previous territories of Oyo and as such, must be restored under Alaafin's control. Ross went on to convince the Lagos government that the Ile-Ife, Ilesa, and Ila Orangun areas must be

[359] Atanda, *ibid* at 129.
[360] Commissioner (Ross) Ibadan Province to Mr. Oke (28 February 1914) Ibadan, NAN (Oyo Prof. 4/2, File No. 167/1914, Memo No. C.3/1914).
[361] E.H. Oke to D.O. Ibadan with an Enclosure (5 March 1914) Ibadan, NAN (Oyo Prof. 4/2, File No. 167/1914, Memo No. C.3/1914).
[362] Dahomey is the present-day Benin Republic. The country is the western border country to Lagos state Nigeria. For more on the history of the hegemony of the Old Oyo Empire over Dahomey, see, Femi Adegbulu, "Hard and Soft Power Politics: The Dynamics of Oyo-Dahomey Diplomatic Relations1708-1791 (2014) 1:2 Intl JL Political Science Administration 11, online: < https://www.gbjournals.org/wp-content/uploads/hard-and-soft-power-politics-the-dynamics-of-oyo-dahomey.pdf >.

incorporated into the new Oyo Province placed under the leadership of Alaafin. He consequently stated in one of his memoranda, "*In what is known as the Oyo District the Alaafin is regarded as sacred and is still revered and obeyed to an extraordinary extent and his influence in other parts of Yorubaland is still great*."[363] Ross was, more than anyone else, convinced that it was the nineteenth-century breakup of the Oyo Empire that disrupted the subservience of other Yoruba sub-groups to Oyo and made them independent.[364] To the Lagos government Ross painted a picture of how, despite the nineteenth-century disruption, strong and unbroken ties still existed between the Alaafin, and other towns that sought to be incorporated. Ross argued, "*Ethnologically, these places (referring to Ile-Ife, Ilesa, and Ila) are bound up with Oyo*." [365]

In addition to his acclaimed research, in his bid to establish an enlarged Oyo Province under the paramount rulership of the Alaafin, Ross must have been influenced by his discussion and rapport with the Alaafin.[366] While Joseph Atanda acknowledged there was no documented record to support the above claim, he disagreed with any view that attempted to deny Alaafin's involvement in the whole of Ross's political scheming. According to Atanda,

> "*Indeed it is known that Ross often went into private discussions with Alaafin Siyanbola Ladugbolu before taking any step affecting the position of Oyo Province in general and the power of the Alaafin in particular. At such discussions in which officialdom was usually absent, Alaafin Siyanbola Ladugbolu often expressed to his friend, Ross, what he wanted…Thus, contrary to what the documents tend to suggest, the Alaafin was not just a cipher, while Ross kept on taking the initiative"*[367]

In these complicated processes, Ross eventually achieved the creation of a centralized structure for the implementation of the Lugardian indirect rule system in Yorubaland. This sub-amalgam did not only expand the land territory then covered by Oyo Province, but it also extended the authority of Alaafin Siyanbola Ladugbolu unprecedentedly. Oyo Province then became the largest Province in colonial Southern Nigeria. It covered an area of land

[363] Memo dealing with the "Position of Alaafin as Head of Yorubaland", Ross to Lagos Governor (26 January 1914) Ibadan, NAN (Oyo Prof. 1, File No. 189).
[364] *Ibid.*
[365] Resident (Ross) to Colonial Secretary Lagos (14 June 1918) Ibadan, NAN (Oyo Prof. 1, File No. 133, Memo. No. C.11/5/18).
[366] Atanda, *supra* note 329 at 130-131.
[367] *Ibid.*

measuring, Fourteen Thousand Three Hundred, and Eighty-One (14, 381) square miles.[368] This covered towns that included Ibadan, Ile-Ife, Ilesa, and Ila. As the Oyo Province was expanded so was the power of the Alaafin Siyanbola Ladugbolu over the territories, their Obas, and Baale. When the Lagos government requested from Ross a ranking list of chiefs to be recognized in the Province, Ross responded in writing that,

"*The Alaafin stands in relation to the other crowned chiefs as {the} elder brother. The Oni of Ife is more concerned with religious matters than the politics of the Yorubas. The Alaafin is far and away senior to all and was and is more powerful. I consider the Owa (of Ilesa) next to the Alaafin as a potentate and the Oni next and the Orangun (of Ila) after him. I recognize and know of no other crowned heads in the Province.*"[369]

Ross's list above neither recognized nor mentioned the Baale of Ibadan, the head of the largest town in the Province. This was because Ross considered him a subordinate chief appointed by the Alaafin, and consequently not entitled to any royal recognition.[370] Thus the Alaafin, in concert with Captain Ross, ruled the Oyo Province in an imperious manner that Mahmood Mamdani rightly described as "decentralized despotism". The colonial master doled out his unquestionable decree and passed it down to Captain Ross, the Resident. The latter then passed the decree to the Alaafin who was compelled to execute it over territories that naturally lay beyond his authority. Any traces of insubordination, non-alignment, or disloyalty to the authority of either Ross or the Alaafin had grave consequences. Instances of a joint show of authority and intolerance for disloyalty by Ross and Alaafin Siyanbola Ladugbolu was the controversial deposition of Irefin, the Baale of Ibadan, and Baale Layode of Ogbomoso in 1914.[371]

Thus, Captain Ross and Alaafin exercised excessive influence over the Oyo Province of Yorubaland between 1914 and 1931 when Sir Donald Cameron effected his reform. The Ross saga accounted for why Cameron's reform commenced with the Oyo Province in the 1930s. The reform later moved to other parts of Yorubaland in the 1940s up to the early 1950s. Cameron's reforms institutionalized democratized local councils that were based on the

[368] Oyo Province Annual Report 1920, Ibadan, NAN (CSO 21/599, File No. 1617).
[369] Acting Commissioner Oyo Province to Secretary Southern Provinces (11 December 1914) Ibadan, NAN (Letter No. C.924/1914).
[370] Atanda, *supra*, note 329 at 134.
[371] For a full account of the deposition of the Baale of Ibadan, and that of Ogbomoso, see, *ibid* at 135-138.

provisions of a new colonial ordinance, the Western Nigeria Local Government Law of 1952.[372]

H. Conclusion

Buttressing the analysis under the literature review in chapter one, this chapter argues that economic interest, actualized by political stratagem, motivated British colonialism globally, in Africa and Nigeria particularly. While other motives[373] have been adduced as constituting factors that motivated British colonialism and imperialism, the economic motive preponderated over other factors. The two processes of actualizing British colonialism were legal and military diplomacy. From the Berlin Conference of 1884-1885 which legalized the takeover of Africa to the conclusion of the various colonial treaties and the governing of the colonies and protectorates, law and force were potent instruments employed at every stage. When Britain laboriously secured the land territories that eventually became Nigeria for herself, she established and experimented with several systems of law, government, and administrative structures at every colonial epoch starting from 1861 up to 1960. These colonial systems of government were majorly grounded on the indirect rule system formalized under the Lord Lugard administration. The various colonial experiments, no doubt, impacted the indigenous system, especially the pre-colonial Yoruba justice system. Expository analysis of this Yoruba civil and criminal justice system preoccupies the next chapter of this thesis.

[372] W.A. Ajibola & T.A. Oyejide, "The Local government System in Western Nigeria: A comparative Evaluation of Performance under Civilian and Military Regimes" (1975) 3:4 Bangladesh Development Studies 465; and Asiwaju *supra*, note 300 at 438.

[373] These other motivating factors included civilization/acculturation, and Christianizing missions. For these and other views on this point, see, Toyin Falola, *Colonialism and Violence in Nigeria* (United States: Indiana University Press, 2009); and Matthew Lange, James Mahoney & Matthias vom Hau, "Colonialism and Development: A Comparative Analysis of Spanish and British Colonies" (2006) 111:5 American J Sociology 1412, online: < https://www.jstor.org/stable/10.1086/499510 > .

CHAPTER THREE

The Pre-Colonial Court and Justice Administration in South-Western Nigeria

A. Introduction

The area known today as South-Western Nigeria is occupied by the ethnic group called Yoruba. Hence, the words Yorubaland and South-Western Nigeria are interchangeably used throughout this thesis. At present, Yorubaland extends to six states in the South-Western Nigeria geo-political zone. These are; Ogun, Oyo, Osun, Ondo, Lagos, and Ekiti. Pockets of other Yoruba sub-groups are additionally found in the South-South state of Edo and the North-Central states of Kwara and Kogi. A substantial number of Yoruba-speaking people are domiciled in these latter states.[374] Yorubaland lies within latitudes 6° and 9° north and longitudes 2°30' and 6°30' east. Its boundary is delineated by Niger State in the northwest, the Atlantic Ocean in the south, and Benin Republic in the east. Yorubaland is majorly covered by rainforest stretching to about 181,300 square kilometers.[375] According to the statistics of the 2006 census, the last official headcount conducted in Nigeria, the population of the Yoruba people is estimated at thirty million (30 million).[376] Aside from the spread of the Yoruba people across the various Nigerian states, people whose ancestry is traceable to Yorubaland are also found in the Republic of Benin and Togo.[377] Although they speak the same "Yoruba" language belonging to the broader Niger-Congo language family[378] which branched out into several dialects, the Yoruba people are divided into several sub-groups.[379] Notwithstanding the diversity of groups and dialects, the Yoruba people have a lot in common. Chiefs of these commonalities that had forged and kept forging unity among

[374] Tunde Onadeko, "Yoruba Traditional Adjudicatory Systems" (200) 29:1 African Study Monograph 15.

[375] Usman Aribidesi & Toyin Falola, "Geography and Society" in Usman Aribidesi & Toyin Falola, eds, *The Yoruba from prehistory to the present* (Cambridge: Cambridge University Press, 2019) at 1-7. See also, Atanda J.A., *An Introduction to Yoruba History* (Ibadan: University Press Ibadan, 1980), and Buchanan K.M & Pugh J.C., *Land and People in Nigeria: The Human Geography of Nigeria and Its Environmental Background* (London: University Press London, 1955).

[376] "Report of Nigeria's National Population Commission on the 2006 Census" (2007) 33:1 Population & Development Rev 206, online: < https://www.jstor.org/stable/25434601 >. The 2006 census was the last national headcount held in Nigeria. The next is slated for 2023. Although, this thesis has no official record on this, as of 2022 the population of the Yoruba people is estimated by Wikipedia editors to be over fifty-five million (55,000,000). See, Wikipedia, "Yorubaland", online: < https://en.m.wikipedia.org/wiki/Yorubaland >.

[377] S. Adebanji Akintoye, *A History of the Yoruba People* (Dakar: Amalion Publishing, 2010).

[378] John T. Bendor-Samuel, "Yoruba Language" in Tracy Grant, ed, *Encyclopaedia Britannica*, online: < https://www.britannica.com/topic/Yoruba-language >. Some of the dialects of the Yoruba language are so complex that some of the sub-groups do not understand each other's language. For instance, dialects spoken in Ishua and Okeagbe towns in Akoko area of Ondo State are so difficult that, other towns in the Akoko area find it hard to communicate with the Ishua and Okeagbe people. However, almost every Yoruba man and woman could speak and understands the central Yoruba language spoken in cities like Lagos and Ibadan.

[379] Some of the Yoruba sub-groups are Oyo, Ondo, Ife, Owo, Ijebu, Ekiti, Ijesa, Awori, Akoko, Egba, Egbado, Ibarapa, Ilaje, Ikale, Ketu, Sabe, Itsekiri, Igbomina, Okun, among others. See Akintoye, *supra* note 377 at 8.

Yoruba sub-groups are; common ancestry, point of origin, urbanization, and geographical contiguity. As analyzed below, another unique common factor among the Yoruba people is their well-organized and democratically decentralized monarchical system of government.[380]

There are two versions of the history of the origin of the Yoruba people, both affirming Oduduwa as the progenitor of the Yoruba people. The first traced the origin of the Yoruba to the North-Eastern area of Africa[381] from where they migrated and, after a very long journey spanning several centuries, settled at Ile-Ife in the present-day Osun State Nigeria. While some of the migrating parties settled at Gobir in Northern Nigeria, a party led by Oduduwa settled at Ile-Ife. After founding a flourishing kingdom at Ile-Ife, Oduduwa sent out his sons and grandsons to establish other similarly large and prosperous Yoruba kingdoms.[382] The second version of the history of the origin of the Yoruba people claims that the whole world emanated from Ile-Ife. It recounts a time when the entire world was covered by pluvial water and "Olodumare" (a Yoruba name for God) dispatched a party to go and establish farmlands on the mass of water. This party was led by Obatala and sixteen other immortals who were given some sand tied in a white piece of cloth, five pieces of iron, and a cockerel.[383] At a point on the way, the party leader drank palm wine into a stupor and lost his leadership role. Oduduwa took over from this party's leader and led them to *Oke Oramfe* in the present-day Ile-Ife.[384] The five pieces of iron were laid on the water body, the sand spread over it while the cockerel was made to spread the sand with its spurs. Then, farmlands appeared and spread to become the whole world, hence the name, "*Ile-Ife*" (House of Spreading).[385] By radio-carboned archaeological excavations, the Oduduwa leadership period is put between the mid-tenth and mid-eleventeenth centuries.[386] Subsequently, the monarchical or kingship system of

[380] Tunde Akinwumi, "Ifa and the Northern Factor in Okun-Yoruba's Choice of Red Burial Cloth Tradition" in A. Olukoju & Z.O. Apata, eds, *Northeast Yorubaland: Studies in the History and Culture of a Frontier Zone* (Ibadan: Rex Charles Publication, 2003) at 85-104. See also, Asiwaju, A.I., "Dynamics of Yoruba Studies" in G.O. Olusanya, ed, *Studies in Yoruba History and Culture: Essays in Honour of Professor S.O. Biobaku* (Ibadan: University Press Limited, 1983) at 26-41.

[381] The part of North-Eastern Africa from where the Yoruba migrated has been diversely supposed to be Egypt, Yemen, Meroe, and Arabia. Notwithstanding the two versions of the history of origin, there is no question as to the common ancestry of all Yoruba kingdom which is contentiously linked to Oduduwa's leadership. See, Samuel Johnson, *The History of the Yorubas from the Earliest times to the Beginning of the British Protectorate* (London: G. Routledge, 1921; London: Routledge & Kegan Paul, 1966).

[382] I.A. Akinjogbin, *Dahomey and Its Neighbours 1708-1818* (Cambridge: Cambridge University Press, 1967).

[383] Obaro Ikime, *Groundwork of Nigerian History* (Ibadan: Heinemann Educational Books, 1980) at 122-123.

[384] *Ibid.*

[385] *Ibid*

[386] Frank Willet, "Ife and Its Archaeology" (1960) 1:2 J African History 231, online: < https://www.jstor.org/stable/180242 >.

government sustained to date among the Yoruba developed and became sophisticated under the leadership of Oduduwa. The Yoruba kingship system spread and reached its peak under the constitutional monarchy of the Old Oyo empire (called the "Oyo Kingdom" from the nineteenth century). To date, Oyo remains one of the greatest and most ancient Yoruba Empire/Kingdom founded by Oranyan (or Oramiyan), the last child of Oduduwa.

Following his dispatch, all the sons[387] and grandsons of Oduduwa, including Oranyan moved out of Ile-Ife to found other Yoruba Kingdoms which constitute the present Yoruba sub-groups.[388] After leaving Ile-Ife, Oranyan established the extant Benin Kingdom's[389] monarchy[390] and then moved northward towards the River Niger. Following his conquests of a series of opposition and attacks from the Nupe warriors, Oranyan settled on a stretch of land around the Niger which was later named "*Oyo Ajaka*".[391] The latter became the capital of the Oyo Empire, and from where other tributary kingdoms, towns, and villages established and conquered were governed.[392] Notwithstanding that Oranyan did not live in Oyo for long

[387] The sons of Oduduwa are said to include; the Ooni of Ife, the Alaafin of Oyo, the Onishabe of Shabe, the Alaketu of Ketu, the Oshemowe of Ondo, the Owa of Ilesha, the Orangun of Ila, the Alaaye of Efon Alaaye, the Alara of Aramoko, the Olojudo of Ido, the Elekole of Ikole, the Oba of Ado (King of Benin), the Onipopo of Popo, the Onidada of Fon, and the Oninana of Gan. This list is however contentious as some other Yoruba towns who are not included in the list continue to claim direct descendancy from Oduduwa. For fuller analysis on this, see, William Bascom, *The Yoruba of South-Western Nigeria* (United States: Waveland Press, Inc, 1969) at 11.

[388] J.A. Atanda, "The Yoruba People: Their Origin, Culture, and Civilization" in Olatunde O. Olatunji, ed, *The Yoruba: History, Culture, and Language* (Ibadan: Ibadan University Press, 1996) at 4.

[389] Benin Kingdom was one of the major historic and powerful kingdoms in West Africa and at present located in Edo State South-Southern Nigeria. For a comprehensive narrative of the origin of this kingdom from pre-history times to the nineteenth century, see, Dmitri M. Bondarenko & Peter M. Roese, "Benin Prehistory: The Origin and Settling Down of the Edo" (1999) 94:4/6 Anthropos 542, online: < https://www.jstor.org/stable/40465021 >; Dmitri M. Bondarenko, "Advent of the Second (Oba) Dynasty: Another Assessment of a Benin History Key Point" (2003) 30 History in Africa 63, online: < https://www.jstor.org/stable/3172082 >, and Jacob U. Egharevba, *A Short History of Benin*, 4th ed (Ibadan: Ibadan University Press, 1968) at 5-7.

[390] *Ibid* at 63.

[391] Henry John Drewal, John Pemberton III & Rowland Abiodun, in Allen Wardwell *ed* "Yoruba: Nine Centuries of African Art and Thought (New York: The Centre for African Art & Harry N Abrahams Inc. Publishers, 1989).

[392] On the growth, development, and hegemony of Oyo Empire from the seventeenth century, see, Isaac Samuel, "Empire Building and Government in the Yorubaland: a History of Oyo (1600-1836)" (18 December 2022), online: *African History Extra* < https://isaacsamuel.substack.com/p/empire-building-and-government-in >; Kamarl Maxine Clarke, "Governmentality, Modernity, and the Historical Politics of Oyo-Hegemony in Yoruba Transnational Revivalism" (2002) 44:2 Canadian Anthropology Society 271, online: https://www.jstor.org/stable/25606086 >. At the heights of its power in the eighteenth century, Oyo tributaries included the Nupe, the Bariba countries, parts of Ashanti and Tapa, and the Dahomey. Before its decline and eventual fall in early nineteenth century, the vassal kings and ruling princes under Oyo Empire were numbered around 1,600. See also, O.S. Osadola, "Warfare and Diplomacy in the Pre-Colonial Ekiti Land" (2018) J Humanities & Soc Science Letters 30.

as he subsequently moved back to Ile-Ife where he died and was buried,[393] he established the kingdom on a strong political template. That template made Oyo one of the strongest kingdoms in Yoruba history, reputed as the "*political headquarters of Yorubaland*".[394] Describing the complexity and political sophistication of the Yoruba model state before the colonial interruption, Isaac Adeagbo Akinjogbin notes that Oyo Empire is the "*largest and the most powerful of the 'forest states' of West Africa*".[395] The power and strength of the Oyo Empire are predicated on its ancient and well-organized constitutional monarchy. This monarchy served as the pre-colonial socio-political model for all Yoruba kingdoms, admitting minor local variations. The pre-colonial Yoruba judiciary, the analysis of which is the thrust of this thesis, was a key organ of the Yoruba monarchical system of government epitomized by the old Oyo Empire.

B. The Oyo/Yoruba Pre-Colonial Governmental Structure

In pre-colonial times, the Oyo Empire, and by extension, other Yoruba kingdoms, practiced a constitutional monarchical system of government. Though not based on a watertight dichotomy, the Oyo system of government had a practical separation of power galvanized by an effective system of checks and balances.[396] This ensured that no leader/ruler became tyrannic as each of the arms of government served as a watchdog on the other. This facilitated governmental effectiveness, efficiency, societal peace, and harmony. Hence, in the old Oyo Empire, there existed traditional political leaders who performed functions of the executive, legislative, and judicial arms of government. All the arms collaboratively worked for the smooth running of the state. Notably, the Yorubas were/are urbanized people. The Oyo Empire was made up of the *Olu Ilu* (headquarters) which was a densely urbanized center, and subordinate towns and villages. Consequently, there existed a central administration with its administrators and subordinate villages governed by *Baales* (village heads) under the control and dictates of central administrators.

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[393] As evidence of his return to Ile-Ife after establishing Oyo Kingdom, Oranyan's tomb exist to date in Ile-Ife in the present-day Osun State Nigeria. On the tomb is erected a high-rise memorial staff known in Yoruba language as *Opa Orayan.* For further details, see, Johnson, *supra* note 381.

[394] Osadola Oluwaseun Samuel & Adeleye Oluwafunke Adeola, "A Re-assessment of the Exceptional Indigenous Political Setting of the Yorubas: Historicizing the Formation of Old Oyo Empire" (2019) 19:6 London J Research in Humanities & Soc Sciences 27.

[395] I.A. Akinjogbin, "The Oyo Empire in the 18th Century- Reassessment" (1966) 3:3 J Historical Society Nigeria 449, online: < https://www.jstor.org/stable/41856706 >.

[396] Timothy Ubelejit Nte, "Monarchical Government and Checks and Balances Systems: The International Legacy of Oyo Empire" (2018) 8:2 Intl J Soc Sciences & Humanities Rev 403.

(i) The Leadership Structure

Notwithstanding its perceived theoretical centrality, the pre-colonial Oyo empire practiced constitutional monarchy, a structure kept to date.[397] By this system, even though the central authority resided in the monarch (*Oba*) ("*Alaafin* was the specific title of Oba of Oyo), there were other lieutenants in the administrative hierarchy who assisted him. In the case of Oyo, *Alaafin*, the *Oba* of Oyo, had several lieutenants who ran the government with him. He was practically assisted in running both the headquarters' administration and the various vassal states and villages. This ensured the practicality of constitutionalism, galvanized by effective checks and balances. It thus prevented the central authority from becoming tyrannic. Those officials subordinate to the Alaafin and who assisted him in the empire's administration included the Aremo, the Oyomesi, the Ogboni, the Eso, the three Eunuchs, and the Baales. Other lesser chiefs also aided both the Alaafin in administering the center and the Baales in the vassals respectively. The devolution system that characterized the pre-colonial Oyo empire demonstrates that though, the system was central in theory but decentralized in practice.

(a) Alaafin

At the helm of the political affairs of the pre-colonial Oyo Empire was the Alaafin, a constitutional monarch. While he remains the central authority controlling the administrative running of both the headquarters and the vassal states, he was also reputed, albeit controversially, as the political head of all Obas and princes in Yorubaland.[398] The succession to the throne of Alaafin was by a direct patrilineal descendant. The Oyomesi, in consultation

[397] Victor Osaro Edo, "The Practice of Democracy in Nigeria: The Pre-Colonial Antecedent" (2010) 21:2 LUMINA 1, online: < https://www.ejournals.ph/article.php?id=7308 >. For a comparison of monarchies, see, Sam Jones, et. al. " 'On the throne till I drop': How does British Monarchy Compare with European Royals?", *The Guardian* (2 June 2022), online: < https://www.theguardian.com/uk-news/2022/jun/02/on-the-throne-till-i-drop-how-does-british-monarchy-compare-with-european-royals >, and J.H. Elliott, "A Europe of Composite Monarchies" (1992) 137 Past & Present 48, online: < https://www.jstor.org/stable/650851 >.

[398] Kolawole Balogun, *Government in Old Oyo Empire* (Lagos: Africans Publishers and Co, 1985) at 64. The controversy trailing this claim stem from the contentious argument of the Ooni of Ife that he, and not the Alaafin, is the head of all kings and princes in Yorubaland. This argument is based on the fact that, historically, Oduduwa, the father of Oranyan founded Ile-Ife and reigned first as the Ooni before Oranyan founded the Oyo empire and reigned as the first Alaafin. See also, Gbenga Olarinoye & Ola Ajayi, "Ooni visits Alaafin, as monarchs end 79-year-old supremacy battle" *Vanguard* (18 January 2016), online: < https://www.vanguardngr.com/2016/01/ooni-visits-alaafin-as-monarchs-end-79-yr-old-supremacy-battle/ >.

with the *Ifa* (oracle), were responsible for electing a new Alaafin in case of the demise of a substantive one. As a paramount Oba in Yorubaland, Alaafin was regarded as having absolute dominion over persons and things under his jurisdiction. That justifies his generic title "*Oba*" meaning "one who has dominion", a title also borne by other crowned kings in Yorubaland. He is greeted by men prostrating and women kneeling and saying, "*kabiesi o*" meaning, "the unquestionable".[399]

Due to the absence of a watertight separation of political powers, Alaafin performed all the functions of the three arms of government. He oversaw the executives which included his Council of States and lesser chiefs. He was recognized as the lawgiver, and also as the chief judge in his court which was the highest tribunal in his realm. Notably, a historical discovery revealed that the Alaafin was highly revered and sacred that he only appeared in public three times a year; during the celebration of some important traditional festivals.[400] This is ostensibly true because, Obas in Yorubaland are generally regarded as divine, wielding both spiritual and temporal powers. Toyin Falola aptly captures the personhood and institution of the Alaafin in these words;

"*The Alaafin combined spiritual and temporal powers in his office. In his spiritual capacity, the Alaafin was seen by his subjects as the companion of the gods. As far as temporal powers were concerned, he exercised political control over central administration; designated administrative officers reported to him as well as owed him allegiance in exercising powers over provincial matters.* ***But whilst in theory, the Alaafin's power was absolute because he was 'Ekeji Orisa' that is to say, the companion of the gods and owner of the land, in practice, the Alaafin was circumscribed by a system of checks and balances which greatly limited his influence and power****. "*[401]

(b) Aremo

In the pre-colonial Yoruba political and administrative setting, *Aremo*, the first male child of the Alaafin, was the heir apparent to the throne. Unlike now that every male adult of Oyo

[399] On the processes of selecting a new Oba in Yorubaland and the incidences of the office, see, Oluwasegun Oladosu & Adetokunbo Olaiya, "Kingship and Integrity in Yoruba Traditional Society" (2021) 4:2 Nigerian J Christian Studies 168, online: < https://www.ajol.info/index.php/njcs/article/view/220867 >.
[400] Osadola & Adeleye, *supra* note 394 at 29.
[401] Toyin Falola et. al. *History of Nigeria 2: Nigeria in the Nineteenth Century* (London: Longman Publishers, 1991) at 87.

ruling houses is qualified to contest for the office of the Alaafin, at the earliest times, and in the second half of the nineteenth century, the Aremo of the demised Alaafin naturally succeeded him. It is in preparation for this succession that, the Aremo was constitutionally positioned close to his father in the running of the government. That enabled the Aremo to acquire administrative skills in the process of performing substantial administrative duties during the life of the Alaafin, especially when the monarch became feeble due to age.[402] Thus, Aremo had his official residence close to the Alaafin's palace. He performed royal duties, and the citizens held him in awe as one having the powers of death and life over them like his father.

At the time in Yoruba history when the Aremo could succeed his father as the new Alaafin, he must be found worthy in character and knowledge before he could be elected by the Oyomesi. As a Yoruba traditional practice, any Aremo who was not so worthy and consequently rejected by the Oyomesi must leave the headquarters to live in one of the external Provinces. This was to prevent a situation where the rejected Aremo became insubordinate to the new Alaafin, a situation which could foment power friction within the polity.[403]

(c) The Oyomesi

Among the traditional chiefs who assisted the Alaafin in administering his realm, the Oyomesi occupied a prime position. As found by Joseph A. Atanda, contrary to the popular knowledge that the Oyomesi are seven in number, this group of highly-placed Oyo

[402] Funso Afolayan, "Kingdoms of the Yoruba: Socio-Political Developments Before 1800" in Deji Ogunremi & Biodun Adediran, eds, *Culture and Society in Yorubaland* (Ibadan: Cornel Publications, 1998) at 73. At a point in Yoruba history before the nineteenth century, some previous Aremo were suspected of patricide and it was for this reason made a law that an Aremo reigns and dies with the Alaafin, his father. That was the law till 1858 when Alaafin Atiba abrogated it in favour of his son, Aremo Adelu. That law again changed. The present way of electing an Alaafin is for eligible and interested princes of the royal families to contest while the Oyomesi, following consultation with the Ifa oracle, makes the election. Thus, at present, the highly exalted traditional office rotates among the recognized ruling houses. See also, Edeh Samuel Chukwuemeka, "Yoruba Pre-Colonial Political Administration in Nigeria" (22 January 2021), online: *Bscholarly* < https://bscholarly.com/yoruba-pre-colonial-political-administration/ >.

[403] S.A. Akintoye, *Revolution and Power Politics in Yorubaland, 1840-1993* (London: Longman Group Limited, 1971).

quarterheads actually consisted of eight[404] hereditary chiefs. The Oyomesi formed the Council of State and were the constitutional kingmakers of the Oyo Empire from pre-colonial times to date. The title and hierarchical order of the Oyomesi was/is; i. *The Osorun (Basorun)* ii. *Agbaakin* iii. *Samu* iv. *Alapini* v. *Laguna* vi. *Akiniku*, vii. *Asipa*, and viii. *Modeke*.[405] Each of the offices of the Oyomesi was hereditary to the family of each person occupying it but not necessarily passed from father to son. As he wielded the political power to select which member of the entitling family should occupy any of the offices when vacant, the Alaafin also exercised the authority to alter the succession pattern when necessary.[406] The Oyomesi were very important and esteemed as they represented the interest of the citizens in their capacity as kingmakers, king councilors, and lawmakers. Importantly, on matters of importance to the kingdom, the Alaafin is obliged to take counsel from the Oyomesi before making certain decisions. Hence, the Oyomesi played the intertwined roles of the executive and legislature, performed judicial functions in their families and wards, and served as deputies at the Alaafin's court.[407] They were also responsible for raising troops for the kingdom in times of war. Notably, the Oyomesi cannot be collectively deprived of their offices, notwithstanding the kingdom's constitutional checks and balances.[408]

Of unique importance among the Oyomesi was the "*Osorun*", otherwise called "*Basorun*". He was the president of the Oyomesi and the Empire's Chancellor and Prime Minister. Constitutionally, the Basorun was next to Alaafin in power and authority. He ranks above all chiefs, princes, and vassal kings. A History of Yoruba bears records of some Basorun who unconstitutionally exercised powers over the Alaafin.[409] Similar to the Alaafin, the Basorun had a personal palace adorned with a specially made throne, coronet crown, and strings of beads, including the "*Ejigba*" (a specially-made bead) which he wore.[410] He wielded enormous political power greater in force than those of other Council members put together.

[404]J.A. Atanda, *The New Oyo Empire: Indirect Rule and Change in Western Nigeria, 1894-1934* (London; Longman, 1973) at 16.
[405] Oladapo Kayode Opasina, "Traditional Institutions and the Challenge of Modernity in Nigeria and Cote D'ivoire" (2016) 33:2 Intl J on World Peace 43.
[406] Balogun, *supra* note 398.
[407] S.O. Biobaku, ed, *Sources of Yoruba History* (New York: Clarendon Press, 1973).
[408] Peter Morton-Williams, "The Yoruba Ogboni Cult in Oyo" (1960) 30:4 Africa: J Intl African Institute 362.
[409] One of the tyrannic Basorun in the history of Oyo empire was Basorun Gaa who served in that capacity from 1750 to 1774. He was so tyrannic that, records described him as having compelled some Alaafin of his time to pay daily homage to him in his house. See, Rashidi Akanji Okunola & Mathias Olufemi Dada Ojo, "Socio-Historical Crime Review on Efunsetan Aniwura, Bashorun Gaa and Aare-Ago Ogunrinde Aje" (2012) 5:22 J Intl Soc Research 404, online: < https://journals.indexcopernicus.com/api/file/viewByField/211491.pdf >.
[410] Osadola, *supra* note 392.

He was the people's voice against a tyrannic Alaafin who dared to act ultra vires the constitution. While the whole Council commanded the army of the headquarters, Basorun was the Commander-in-Chief of the army and the Regent between the demise of an Alaafin and the coronation of another.

By Yoruba constitutional rules of checks and balances, the Basorun had the power to challenge and call for the abdication of a misruling Alaafin.[411] Mostly, such a call could happen on two occasions. The first was during the annual "*Orun*" festival. After the festive divination, the Basorun could declare that the king's fortune would be bad in the coming years and his "*orun*" disapproved of his continued stay on earth. That signaled his unfitness to continue to rule and thus, must take poison and die. On the second occasion, the Basorun could make a pronouncement in the presence of the Council that, "*awon orisa ko, Oyo ko, ile ko*" (the gods reject you; the people reject you; the earth reject you). Such a pronouncement was to be followed by the Alaafin's suicide.[412] In essence, the Basorun occupied a powerful and important office in the administration of the pre-colonial Oyo empire. This power and that collectively wielded by the Oyomesi Council members were in turn checked and balanced by the Ogboni.

(d) The Ogboni

The Ogboni constituted a group of noblemen secret society saddled with socio-political and religious duties in the government of the pre-colonial Yorubaland. Though introduced into the new Oyo in the nineteenth century by Alaafin *Atiba*, the Ogboni society originated from Ile-Ife. It later spread through Ijebu, Egba, and Egbado kingdoms where it performed both judicial and legislative functions.[413] Considering the security benefits it afforded its members,

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[411] Atanda, *supra* note 319.
[412] Morton-Williams, *supra* note 408 at 364.
[413] J.A. Atanda, "The Yoruba Ogboni Cult: Did it Exist in Old Oyo?" (1973) 6:4 J Historical Society Nigeria 365, online: < https://www.jstor.org/stable/41856969 >. However, it must be noted that, the Ogboni which functioned in socio-political and religious capacities in historical Oyo and other Yoruba kingdoms and referred to in this thesis differs from the present "Reformed Ogboni Fraternity (ROF)". The latter was recently formed in the early twentieth century by Rev. T.A.J. Ogunbiyi. For the little known information about the modern Ogboni see, Immigration and Refugee Board of Canada, "Responses to Information Requests (RIRs)" (12 July 2005), online: *Department of Justice Research Directorate, Immigration and Refugee Board, Ottawa* < https://www.justice.gov/sites/default/files/eoir/legacy/2013/12/18/NGA100376.E.pdf > and, S.C. Phillips, *Egbe Ogboni Keferi* (Ibadan: Temidayo Press, 1969).

and as a strategy to ensure that the Oyomesi did not constitute a danger to him, Alaafin Atiba introduced the society into the new Oyo in the nineteenth century.[414] However, throughout his reign, Atiba was circumspect in dealing with the Ogboni society. He guarded against Ogboni's activities to prevent it from taking political control of his kingdom.

As a secret society with religious and ritualistic functions, most of the Ogboni activities were shrouded in mystery, hidden from the uninitiated. The Ogboni mainly worshiped "*Ile*" (the Earth). They believed the Earth was a spirit that had been in existence even before the gods, and as such, the Earth was regarded by them as the mother to whom every mortal returns. The society's shrine was in a lodge called "*Iledi*" (a tied house) located in front of the Alaafin's palace (*Tapa Ogboni*). They were highly secretive that, even the Alaafin only heard about their activities through the report of a delegated woman who attended their meetings on Alaafin's behalf. Unlike the Oyomesi who were high-ranking members of the society, Alaafin didn't attend Ogboni's meetings except during the yearly Basorun's Orun festival. On this occasion, the Alaafin visited the Ogboni's lodge to make his yearly rite to the Earth (*Ile*). This Alaafin did through divination in the course of which he confirmed whether the Earth was still pleased with his rule or otherwise.[415]

The society had an executive body that consisted of six hereditary chiefs called the "*Iwarefa*" (the Just Six). The six were the "*Oluwo*", "*Apena*", "*Lisa*", "*Aro*", "*Odofin*", and "*Iya Abiye*". The two most prominent of these officials were the "Oluwo" (Lord of the Mystery) and "Apena" (Maker of the Way); the latter served as the secretary of the society.[416] There were also two grades of membership within the society. The "*Ogboni we-we-we*" (children or younger members) and "*Ologboni*" or "*Alawo*" (the elderly members or Owners of the Mystery/Secret). Some of the Ologboni were the society's executive members. To appoint any of the executive members, representatives of the entitled family proposed a successor to the society. If the proposed successor was acceptable to them, the society would then consult

[414] Philips, *supra* note 413 at 371. Atiba (Alaafin Adewimbi Oge Latubosun Atobatele Atiba) reigned as Alaafin in the New Oyo Kingdom between 1837 and 1859. He served as the bridge between the old Oyo Empire and the new Oyo Kingdom having served as the latter's first king.
[415] Morton-Williams, *supra* note 408 at 364.
[416] A.P. Anyebe, *Ogboni: the Birth and Growth of the Reformed Ogboni Fraternity* (Lagos: Sam Lao Publishers, 1989).

the *Ifa* to sanction the successor. Such an appointment was always subject to the Alaafin's approval.[417]

Two democratic and checks and balances practices are also noteworthy about the membership of the Ogboni secret society. First, the Oyomesi were admitted as senior members of the society but were not allowed to hold any executive office within the group. Consequently, none of the Oyomesi could officiate at any of the society's rites or perform judicial inquiries within the society. The Oyomesi must however attend the society's scheduled meetings every sixteenth day known as "*Jakuta*". The latter coincided with the day earmarked for the worship of *Sango*, an Alaafin's deified ancestor. Secondly, in their meetings, the Ogboni made unanimous decisions on issues but in cases of an impasse, the minority was obliged to ritually bind themselves to uphold majority decisions. That made it practically difficult for the Oyomesi to adopt policies without the support of the elders, most of whom belonged to the Ogboni society. While the society admitted young members of the junior grade (*we-we-we*), these were not allowed to partake in the society's rite and were only allowed to eat the society's sacrificial meat, if they desired to. Notwithstanding their marginal membership, like every other member, young members were equally bound by an oath of secrecy. The oath precluded them from divulging anything heard or seen of the activities of senior members.[418] As fully elaborated subsequently, the main judicial functions of the Ogboni touches on matters that were related to bloodshed.

(e) The Eso

Another body of noblemen who served as the military strength and guardians of the Oyo Empire and performed certain political functions was the *Eso*.[419] These were the Empire's soldiers of the rank and file who fought for and protected the realm from internal and external threats that attempted to undermine the peace and safety of the empire. Heading this group was the "*Kakanfo*" (Field Marshal/Generalissimo) supported by seventy (70) high-ranking captains. The latter were specialist soldiers who supplied trained cavalry and archers that

[417] *Ibid.*
[418] *Ibid* at 365.
[419] Robin Law, "A West African Calvary State: The Kingdom of Oyo" (1975) 16:1 J African History 1, online: < https://www.jstor.org/stable/181095 >.

galvanized the Oyo army. The seventy were divided into seven groups of ten members with each of the groups placed under seven of the eight-member Oyomesi, the Council of State. As a symbol of valor and bravery, each of the seventy habitually wore a coronet called "*Akoro*" and instead of a weapon, carried a staff of war dubbed "The Invincible".[420]

Occupying a prime military and political position in Oyo as the head of the Eso was the "*Kakanfo*" fully called, "*Are-Ona-Kakanfo*". This titular office was introduced by Alaafin Ajagbo (who reigned in the 1600s) and subsequently conferred on the most exceptional and tactical leader of the Empire's army.[421] The kakanfo was installed in this capacity during a special ritualistic ceremony. Some traditional ingredients were made into powder and kept in vials numbered two-hundred-and-one (201). On the day rounding off his grandeur installation, the Kakanfo hair would be shaved off and two-hundred-and-one (201) incisions made on his occiput. The number of incisions corresponded to the number of vials into which the traditional ingredients had earlier been kept. The ingredients in each of the vials were then rubbed on each of the incisions. The aim of this ritual was for further spiritual fortification, arming him with extreme boldness and courage to embark on and confront any battle in defense of the Alaafin's realm.[422] The invulnerability, indubitable strength, and military exploits of the Kakanfos were attributed to this ritualistic inoculation performed during their installations. The formidability of the Kakanfos was, at a time, intimidating and some of them attained status in which they became too strong for the Alaafin to control.[423] This accounted for why later Kakanfos lived outside the Oyo headquarters to avoid insubordination clashes with the Alaafin, his master.[424] Notable as a constitutional incident of his office was that the Kakanfo must fight a war at least once every three years. The enemy to fight or a rival empire/kingdom to attack was a duty of the Alaafin to name. The Kakanfo was expected to

[420] Atanda, *supra* note 319.
[421] Afolayan, *supra* note 402 at 73.
[422] Biobaku, *supra* note 407.
[423] One notable Are-Ona-Kakanfo in Yoruba history who, being too formidable for an Alaafin's control, and revolted against the Alaafin was Afonja. Following a heated and unresolved disagreement with his master, Alaafin Awole (reigned as Alaafin in 1789-1796), Afonja plotted a coup d'état that overthrew Awole around 1796. For details on this, see, R. C. C. Law, "IWERE" (1972) 6:2 J Historical Society Nigeria 239, online: https://www.jstor.com/stable/41856947 >, and R. C. C. Law, "The Constitutional Troubles of Oyo in the Eighteenth Century" (1971) 12:1 J African History 25, online: < https://www.jstor.org/stable/180565 >.
[424] Osadola & Adeleye, *supra* note 394.

conquer the enemy and only to return home a victor or be brought back a corpse within three months if defeated.[425]

(f) The Three Eunuchs and other Officials

Decisions of the Alaafin required execution. To carry out this duty were staff of slaves attached to the palace. Heading this staff were three prominent hierarchical slaves which were; the "*Ona Efa*" (Eunuch of the Middle), the "*Otun Efa*" (Eunuch of the Right), and the "*Osi Efa*" (Eunuch of the left). These were, respectively, responsible for judicial, religious, and administrative/political errands.[426] While acting as the Alaafin's representative and spokesman, the Ona Efa also adjudicated disputes between vassals and between subjects. The Otun Efa who oversaw Alaafin's religious affairs was the priest of Sango, Alaafin's personal "*Orisa*" (god). Other religious officials/priests connected to the Alaafin through the Otun Efa. The Osi Efa represented the Alaafin in battles, regulated tributes and tolls, and were allowed to impersonate the Alaafin.[427] Of significance was the unique social honor death role played by the Osi Efa. Before its abolition, the practice was for the latter to die and be buried with a deceased Alaafin. Hence, he was alternatively called the "*Abobaku*" (one who dies with the king).[428]

Other notable officials that performed political duties in the pre-colonial Oyo Empire included the "*Baale*", "*Ilari*" "*Ajele*", and other titled chiefs. The Ajele were Alaafin's representatives who lived in and collected tributes from vassal towns under the Empire. The Ilari performed a similar function but over Alaafin's subjects outside the Empire. The Ilari conducted Oyo's foreign affairs and external diplomacy.[429] The Baales were lesser chiefs appointed as administrative heads of subordinate units and villages under the Empire. While they controlled political affairs within their restricted domain, they functioned under the directives of the Alaafin or his representatives. They too had chiefs who assisted them in their administrative duties. Baales were obligated to pay "*isakole*" (tribute) to the Alaafin, the

[425] Atanda, *supra* note 319.
[426] Law, *supra* note 423 "The Constitutional Troubles of Oyo…" at 29.
[427] Morton-Williams, *supra* note 408 at 363.
[428] Olufunke Adeboye, "Iku Ya J'esin: Politically Motivated Suicide, Social Honor, and Chieftaincy Politics in Early Colonial Ibadan" (2013) Can J African Studies 189.
[429] Law, *supra* note 419 at 30-31.

failure of which attracted severe sanctions.[430] In addition to these officials, the Alaafin had several other lesser chiefs who headed clans and wards. These chiefs also assisted the Alaafin in the governance and maintenance of peace and order, especially within their assigned domains.[431]

C. The Oyo/Yoruba Pre-Colonial Court System

As mentioned in the first chapter, before colonialism, the pre-colonial Yoruba polity, epitomized by the Old Oyo Empire system, was not devoid of a dispute-resolving and peace-promoting justice system.[432] This justice system which was formal and informal was hierarchical. Hence, the appeal system from the lowest to the highest court was fluid and less cumbersome. As echoed by Teslim Olawale Elias[433] and Jack Herbert Driberg, the main objective of law's administration in the pre-colonial Yorubaland was for the maintenance of social equilibrium and peacekeeping.[434]

(i) Hierarchy of Courts and Jurisdictions

The Oyo Empire/Yorubaland courts' hierarchy and jurisdiction aligned with the socio-political strata into which the Yoruba society was divided. The first stratum was the nuclear family which consisted of the father, mother, and their children. Since polygamy[435] was a type of marriage under African customary law, a nuclear family[436] could contain more than

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[430] Adedayo Emmanuel Afe & Ibitayo Oluwasola Adubuola, "The Travails of Kingship Institution in Yorubaland: a Case Study of Isinkan in Akureland" (2009) 6:4 Nebula 114, online: < https://www.semanticscholar.org/paper/The-Travails-of-Kingship-Institution-in-Yorubaland%3A-Afe-Adubuola/a245b2b98fe5ee2d4b5d7e8142970e238eefd73e >.

[431] Oladosu & Olaiya, *supra* note 399.

[432] This was confirmed by both Baikie and Allot. For reference, see, William Balfour Baikie, *Narrative of An Exploring Voyage Up the Rivers of Kwo'ra and Binue in 1854*, (London: Bradbury and Evans Printers, 1856); and Anthony Nicholas Allott, *Judicial and Legal Systems in Africa*, (London: Butterworths, 1962) at 20-75.

[433] T. Olawale Elias, *Government and Politics in Africa* (Bombay: Asia Publishing House, 1963) at 212-218.

[434] J.H. Driberg, "The African Conception of Law" (1934) 16:4 J Comparative Legislation & Intl L 230, online: < https://www.jstor.org/stable/753856 >. As rightly stated by Driberg in the latter article, "*to them* (Africans generally) *law comprises all those rules of conduct which regulate the behaviour of individuals and communities, and which by maintaining the equilibrium of society are necessary for its continuance as a corporate whole*" (at 231).

[435] Yasuko Hayase & Kao-Lee Liaw, "Factors on Polygamy in Sub-Saharan Africa: Findings Based on the Demographic and Health Surveys" (1997) 35:3 The Developing Economics 293.

[436] Bridget O'Laughlin, "Myth of the African Family in the World of Development" in Deborah Bryceson, ed, *Women Wielding the Hoe: Lessons from Rural Africa for Feminist Theory and Development Practice* (United Kingdom: Routledge, 1995, online edition: 2020), online: < https://doi.org/10.4324/9781003135685 >.

one mother as a man could legally marry two wives and more. In the nuclear family, which constituted the basic/fundamental unit of the Yoruba society, every member of the family had assigned duties. These included the very sacrosanct responsibility of the parents to train their children to conform to social order. As the head of the family, the "*Baba*" (father) had the duty to ensure peace within his household by settling disputes arising among his family members. Thus, through his informal court, Baba's pronouncement on disputes that occurred in his family was binding on the disputing parties. He may however pass the settlement of a more serious quarrel over to the "*Olori Ebi*" (Extended or Compound Family Head).[437] That way, the pre-colonial family system served the dual purposes of familial and judicial administration.

The *Olori Ebi* headed the extended family or compound. The extended family ("*Agbo Ile*") as a Yoruba social stratum constituted the second hierarchy in the pre-colonial court system. The extended family consisted of a web of nuclear families connected by blood through an acknowledged common progenitor. Kinship solidarity formed the basis of and served to unite the extended family members under the leadership of the Olori Ebi. The latter was appointed by the head of each nuclear family and, until recently, the Olori Ebi was the oldest male in the extended family.[438] Considering that it was an internal affair of the extended family, the Alaafin/Oba consent was normally not required to appoint an Olori Ebi. Within the Agbo Ile, the Olori Ebi presided over the informal court that settled civil disputes arising among the various nuclear families. He sat with other nuclear family heads in hearing and deciding matters. Since his primary concern was to ensure harmony within his jurisdiction, he mostly sanctioned the erring party by compelling him/her to tender a verbal apology or make necessary restitution. As subsequently discussed, the civil justice system of the Yoruba people hardly apportioned guilt to either of the parties to a dispute. Instead, mistakes committed by each party were pointed out while the adjudicator tried to bring both parties to an amicable settlement. The emphasis was not much on establishing the right of one party or the other but "*to assuage injured feelings, to restore peace, to reach a compromise*

[437] Onadeko, *supra* note 374 at 17.
[438] P. C. Lloyd, "Some Notes on the Yoruba Rules of Succession and on Family Property" (1959) 3:1 J Afr L 7, online: < https://www.jstor.org/stable/744987 >.

acceptable to both disputants".[439] That served to preserve friendliness between erstwhile adversaries following the settlement of their dispute.

Next in the hierarchy was the "*Olori Adugbo's*" court. "*Adugbo*" or "*Itun*" is a ward, or quarter inhabited by several extended families that were not necessarily related by blood. The quarter was headed by "Olori Adugbo" (Quarter Head) who were usually traditional chiefs born into one of the extended families in the quarter. His appointment, which was an elaborate installation ceremony, must be ratified by the Alaafin/Oba before taking office. Disputes coming before the Quarter Heads for settlement were those involving parties belonging to different extended families within the quarters. Although the extended families involved in the dispute might resolve disputes among themselves, inter-extended family disputes were under the jurisdiction of the Olori Adugbo who had a duty to ensure peace within his quarter. In addition, appeals from Olori Ebi's court naturally went to Olori Adugbo's court.[440]

Mainly, Olori Adugbo's jurisdiction was limited to hearing and deciding civil matters within his quarter with such matters appealable to the Alaafin/Oba's court. However, he was additionally allowed to entertain preliminary hearings of criminal matters but lacked the power to decide such matters.[441] Because his court enjoyed the recognition and approval of the Alaafin/Oba, subject to the approval of the Alaafin/Oba and his Council, the Olori Adugbo could fine, sanction, and even banish the guilty from his quarter and, from the town. In cases where a party was dissatisfied with the decision of the Olori Adugbo, an appeal was allowed, as of right, to the Alaafin/Oba's court, the highest court in the judicial hierarchy.[442]

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[439] J.N. Matson, "The Supreme Court and the Customary Judicial Process in the Gold Coast " (1953) 2:1 Intl & Comparative LQ 47, online: < https://www.jstor.org/stable/755721 >. Notably, in some Yoruba towns like Ibadan and others, the Olori Ebi was also called "*Mogaji*" or "*Bale*". It depends on the nomenclature adopted by each town or family. All of the names describe the leadership of the family head.

[440] Oluwaseun Foluso Phillips, "Peacemaking and Proverbs in Urhobo and Yoruba Marital Conflicts: Part 2" (2011) 1:2 African Conflict & Peacebuilding Rev 136, online: < https://www.jstor.org/stable/10.2979/africonfpeacrevi.1.2.136 >

[441] *Ibid.*

[442] Onadeko, *supra* note 374 at 18.

Being the highest court of the land which served as the central tribunal, the Alaafin/Oba's court jurisdiction covered the whole Empire (or town as the case may be for other Yoruba towns) in both civil and criminal matters. During hearings held at his palace,[443] the Alaafin presided over the sittings. He was assisted by his Council of Chiefs (the Oyomesi in pre-colonial Oyo and the "*Igbimo* or *Ijoye*" in other Yoruba towns) and the Ona Efa.[444] On occasions, chiefs who were Quarter Heads (Olori Adugbo) were allowed to assist in the hearing process. As subsequently elaborated, hearings in the Alaafin's court could be done in the open or behind closed doors.[445] The determining factor was the nature of the matter and the parties involved. The Alaafin/Oba decision was final and unchallengeable. This gives credence to his customary salutation- "*Kabiesi o*" (the unquestionable). Only his court could pass a capital judgment on his subject, even sometimes without trial. Due to the possibility of backfiring, however, this power was sparingly exercised. In most cases, matters that could attract capital punishment were passed on to the Ogboni, a society to which the Alaafin and his Council constitutionally belonged.

Notable is the special court of the Ogboni Society which did not belong to the above-analyzed hierarchy but was somewhat an appendage to the Oba's court. Although this society mainly performed socio-spiritual functions, through its court, the Ogboni additionally exercised judicial power which was contributory to the Yoruba's justice administration. Special matters that came before the Ogboni's court for adjudication were those that involved the spilling of human blood. Even if such blood was spilled during a minor fight, once it touched the ground and was reported to Apena (the Society's secretary), then the Ogboni had jurisdiction to hear and decide such matters. Cases that involved members of the Ogboni Society, influential offenders, murderers, treason, and arsonists were also tried at this court. The Ogboni court session was held at the Iledi, mostly presided over by the Oluwo and attended by the Society's executives and the Oyomesi.[446] Matters were investigated by some

[443] Mohammad Masood, "The Traditional Organization of a Yoruba Town: A Study of Ijebu-Ode" (1978) 45:271 Ekistics 307, online: < https://www.jstor.org/stable/43620812 >.
[444] Adedayo Emmanuel Afe, "Indigenous Judicial System and Governance in the Old Ondo Province, South-Western Nigeria" (2013) 20 JL Policy & Globalization 100.
[445] Onadeko, *supra* note 374 at 20.
[446] In the nineteenth century Abeokuta, the present-day capital of Ogun State of South-Western Nigeria, Ogboni's court constituted the highest judicial tribunal of the land. Dignitaries like the Oluwo, Apena, Asipa and selected war leaders, guild of traders, hunters, women leaders, and Ifa chief priests, sat over matters in the court with the Oba, "*Alake*" presiding. For more on this, see, T.N. Tamuno, *The Evolution of the Nigerian State* (London: Longman, 1978).

delegated members of the Society and during trials, its spiritual symbol called "*Edan*" (a male-and-female-like brass sculpture) played key roles. Like all of its activities, the Ogboni's judicial functions were performed in the secrecy of the Iledi, and non-initiates were not admitted into the conclave during deliberations.

In the villages headed by "*Baales*" (Village Heads), similar but lesser political/administrative structures, which included a court system, were erected. Thus, the Baale, assisted by his council of lesser chiefs, had jurisdiction to hear cases that involved his subjects. Cases that could not be resolved by the Baale were transferred to the Alaafin/Oba's court at the headquarters.[447] As noted above and further explained below, the relationship between the various pre-colonial Yoruba courts was not only hierarchical but also appellate. Hence, an appeal from *Baba's* court went to the *Olori Ebi's* court, from there to the *Olori Adugbo's* Court, and finally to the *Alaafin/Oba's* court. Notably, due to the prime place given to respect for elders and orderliness, no party interested in a matter was allowed by the Yoruba justice system to skip the hierarchy of courts. Since none of the courts was found to exercise concurrent jurisdiction, a party who wrongly or intentionally commenced an action in the wrong court was redirected to the appropriate court. Even the *Ogboni's* court which exercised similar jurisdiction to the *Alaafin's* Court was restricted to criminal matters that involved the spilling of blood and disputes among its members. One clear matter over which the Ogboni's court was found to have exercised concurrent jurisdiction with the Alaafin's court was witchcraft. However, uncommon cases that could not be resolved at the Ogboni's court ended up at the Alaafin's table. On rare occasions when, to the knowledge of heads of the courts, parties to an action approached different courts for justice, both parties were guided to take their cases to one of the different fora that had jurisdiction over their disputes.[448] If unsatisfied, either of the parties could later appeal the decision to a higher court.

[447] Adedayo Emmanuel Afe, "A Historical Survey of Socio-Political Administration in Akure Region up to the Contemporary Period" (2012) 8:18 European Scientific J 196, online: < https://eujournal.org/index.php/esj/article/view/294 >.

[448] See generally, Adeola A. Oluwabiyi, "An Overview of Similarities between Customary Arbitration and Native Courts as Platforms of Administration of Justice in Pre-Colonial Nigeria" (2015) 1:1 J Asian & African Soc Science & Humanities 129; Alabi M.O.A., "Law Making in Pre-Colonial Yorubaland" in T. Falola and A. Genova, eds, *The Yoruba in Transition: History, Values and Modernity* (Durham, NC: Carolina Academic Press, 2006).

(ii) Applicable Law

The Yoruba justice administration was not baseless. Neither were cases heard on conjecture nor judgments dispensed without reference to standards set by relevant Customary Laws of the land. These rules of law were obligatory for the legitimacy of judgments dispensed by adjudicators. Hence, the availability of applicable customary laws nullified John Austin's and other legal positivists'[449] narrow conception of law prompting them to erroneously conclude that customary law is a "positive morality". To Austin and some positivists, for a custom to be properly so-called, it must be issued from a sovereign and must have been applied to a judicial decision. Otherwise, it lacks the binding feature of law.[450] Austin emphatically affirmed, "*Those who maintain that it existed as a law before it was enforced by legal sanction, or that it was established as law consensu utentium confound law with positive morality*."[451] Justice administration in pre-colonial Yorubaland was regulated by identified rules embedded in a complex and legitimate legal system. That customary law satisfies basic criteria for it to be regarded as law proper is evident in its definition, nature, sources, and classification of matters/cases into civil and criminal.

Defining law generally, including customary law, T. Olawale Elias said, "*The law of a given community is the body of rules which are recognized as obligatory by its members…in accordance with the principles of their social imperative…an acceptable norm of behavior which the vast majority of its members regard as absolutely necessary for the common weal"*.[452] Elias's definition above clearly shows the danger in generalizing the meaning of law by extrapolating what it means in one particular polity to another. This is important because what determines the law and ethos of a given society is her social imperative and not that of other polities. In *Kharie Zaidan v. Fatima Khalil Mohssen,*[453] the Nigerian Supreme Court captured the meaning of customary law in these words: "*Customary law is a system of*

[449] Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Cambridge Massachusetts: Harvard University Press, 1962) at 90-103. Other Positivists and Austinians who limited the meaning of law as to disqualify categories like customary law from being regarded as law included John William Salmond, and John Chipman Gray. For a comprehensive analytical argument against their limited conception of the meaning of law, see, T. Olawale Elias, *supra* note 1 at 37-55.
[450] John Austin, *The Province of Jurisprudence Determined* (United Kingdom: Weidenfeld and Nicolson, 1954) at 163.
[451] Samuel E. Stumpf, "Austin's Theory of the Separation of Law and Morals" (1960) 14:1 Vand L Rev 117 at 135.
[452] Elias, *supra* note 1 at 55.
[453] (1973) ANLR 740 at 753.

law, not being the common law [of England], and not being a law enacted by a competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between the parties subject to its sway". In similar but more direct words, the Nigerian Supreme Court (Per Obaseki, JSC) in *Bilewu Oyewunmi v. Amos Owoade Ogunesan*[454] again described customary law in Nigeria as:

> *"…the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static; it is regulatory in that it controls the lives and transactions of the community subject to it. It is said that the custom is a mirror of the culture of the people".*

The latter two definitions given by the Supreme Court of Nigeria affirmed the regulatory function and binding nature of customary law. Notwithstanding its organic nature as it emanated from the customs of those it regulates, customary law, especially in Yorubaland, carries the force of sanction against those subject to it. Thus, its relegation as "*merely rules set by opinions of the governed and sanctioned or enforced morally*"[455] is inaccurate. Even in the face of other limited and Euro-American definitions of law like those of the Black's Law Dictionary and Justice Latham, customary law is a law properly called. According to the Black's Law Dictionary, law means, "*the regime that orders human activities and relations through the systematic application of the force of politically organized society, or through social pressure, backed by force…*"[456] In *Arthur Yates & Co. Property Ltd. v. The Vegetables Seed Committee,*[457] Justice Latham defined Law as *"…enforceable rules of conduct prescribed by a law-making authority*".

If the above two definitions are distilled, deducible are three elements required for any rule to wear the garb of law. These three elements are identified in the customary law applied in judicial processes in pre-colonial Yorubaland. First, it must stipulate conduct acceptable and those which are unacceptable. Second, it must be prescribed by an empowered legitimate authority recognized as capable of making such rules. And, third, its violation must be accompanied by sanctions. Political structures existed in pre-colonial Yorubaland to actualize

[454] (1990) 3 NWLR (Pt 137) 182 at 207.
[455] Omoniyi Adewoye, *The Judicial System in Southern Nigeria, 1854-1954* (London: Longman, 1977) at 1.
[456] Bryan A. Garner, ed, *Black's Law Dictionary*, 9th ed (United States: Thomson Reuters, 2004) *sub verbo* "Law" at 962.
[457] (1945) 72 CLR 37; [1945] HCA 55; 19 ALJR 276; [1945] ALR 474.

these three elements. The first element was a phenomenon undoubtedly attributable to customary law because rules of customary law in pre-colonial Yorubaland identified anti-social behaviors that were detrimental to the peace and well-being of the society. Such behaviors were punishable if anyone was found guilty of them. Those identifying rules were described as "a *mirror of accepted usage*".[458] Such usage is that which, over time, has crystalized into an enforceable and accepted custom. On the second element of its prescription and legitimacy of its origin, customary law in pre-colonial Yorubaland, like in most African pre-colonial systems, came into existence through traditional legislative processes. These included decrees by constitutional authorities, or by repeated pronouncements of a customary tribunal.[459] Recognized authorities who performed legislative functions of creating customary law or giving the effect of law to accepted customs/usages in pre-colonial Oyo/Yorubaland were mentioned previously. They included Alaafin/Oba in concert with his Council of State, and the Ogboni secret society. On its element of sanction, which demonstrated that not all customs or usages were customary law, the pre-colonial Yorubaland enforced aspects of its customs that passed for law through sanction. For instance, in civil cases, such sanctions could be as simple as the payment of fines, and in criminal matters could be as severe as capital punishments.

Furthermore, six peculiar features characterized the customary law applied to justice administration in pre-colonial Yorubaland. It was unwritten, it was derived from customs and usages of a group of people, it was territorial, flexible, popular among those bound by it, and also passed as a moral law based on justice and fair play.[460] Unlike now that some aspects of it are being codified,[461] like the English common law, customary law was wholly unwritten.

[458] *Omidokun Owonyin v. Omotosho* (1961) 1 All NLR 304 at 309.
[459] Akintunde Emiola, *Emiola's African Customary law*, 3rd ed (Nigeria: Emiola Publishers Limited, 2011).
[460] *Ibid* at 11. To maintain its independence and pure status as a body of law indigenous to Africa, the customary law applied in justice administration in pre-colonial Yorubaland must be differentiated from Islamic Shariah law. While customary law was unwritten and emanated from the customs and usages of the people, Islamic law, wholly written, derived from the Holy Quaran, and introduced with Islam to the tribal societies now constituting the present Nigeria in the 11th/12th century. It was consolidated following the Uthman Dan Fodio Jihad, and subsequent establishment of the Sokoto Caliphate in the nineteenth century. There are several schools of the Islamic law but that prominent in Nigeria and sometimes categorized as customary law is the "Maliki School". For more on this, see, J.N.D Anderson, "Relationship between Islamic and Customary Law in Africa" (1960) 12:4 J African Administration 228, and A.A. Oba, "Islamic Law as Customary law: The Changing Perspective in Nigeria" (2002) 51:4 ICLQ 817, online: https://www.jstor.org/stable/3663189 >.
[461] T.W. Bennet & T. Vermeulen, "Codification of Customary Law" (1980) 24:2 J Afr L 206, online: < https://www.jstor.org/stable/744883 >.

However, it was ascertainable[462] and sustained in the memory of its custodians/administrators. It was thus passed from one generation to another. Some of its principles were couched and expressed in proverbs.[463] This feature did not diminish the effect and validity of the law in any way as it effectively catered to the justice needs of the Yoruba people. The law organically grew from the customs,[464] conduct, and time-tested traditions of the people it governed. Consequently, it is transgenerational and only lost its juridical value and was abandoned whenever it outlived its purpose and stopped commanding adequate obedience from those it ordered. Then, it becomes unenforceable. The territorial nature of customary law stems from the fact that it emanates from the practices of a group of people within a territory. It's the life of the people living within its territory of origin that it mainly regulates. Notwithstanding that African customary law has some general rules applicable to almost all African ethnic nationalities, its peculiar provisions are as diverse as there are ethnic nationalities on the continent.[465]

The flexibility of Yoruba customary law is evident by its susceptibility to amendments and modifications. The people lived by the standard that the law was for men and not the other way around. Hence, any rule of the customary law found obsolete or inapplicable to current circumstances was abandoned. In *Lewis v. Bankole,*[466] this unique feature of customary law was acknowledged by Osborne C.J. when he said, "*One of the most striking features of West African native custom is its flexibility: it appears to have been always subject to motives of expediency and shows unquestionable adaptability to altered circumstances without entirely losing its character*". By this statement, Osborne C.J. alluded to the amenability of customary law as the Yoruba were conscious of relegating aspects of it that were outdated for current development and civilization. Similarly, the main source of the law's validity and strength among the Yorubas was its popular acceptance by the people. A rule of customary law that has become socially unacceptable and no longer enjoys people's support loses its potency and

[462] Rebecca Emiene Badejogbin, "Judicial Discretion: Problematizing the Ascertainment and Application of Customary Law by Formal Courts and Relevant Theories (Nigeria and South Africa) (2022) 54:2-3 Leg Pluralism & Critical Soc Analysis 252, online: < https://doi.org/10.1080/27706869.2022.2119024 >.
[463] James Boyd Christensen, "The Role of Proverbs in Fante Culture" (1958) 28:3 Africa: J Intl African Institute 232, online: < https://www.jstor.org/stable/1157980 >.
[464] That it grows organically from the people's traditions and customs was why the court succinctly described it as, "*a mirror of accepted usage which cannot be decreed or legislated out of or into existence*". See, *Lasisi Ogunlowo v. Oyesunle Ogundare & Ors* (1993) 7 NWLR (Pt. 307) 610 at 624.
[465] Emiola, *supra* note 459 at 14.
[466] (1908) 1 NLR 81 at 100; NLR (Volume I-V) at 81.

is discarded into oblivion. Lastly, the Yoruba customary law was largely moral.[467] In essence, it was a law applied based on wider principles of equity and natural justice. It reflected the values and ideals prevalent in a community at a given time.[468] To sustain its popular acceptability, its pre-colonial administrators ensured to rid Yoruba customary law of every element of inequity by ensuring impartiality and transparency. Analysis of the sources of the Yoruba customary law sheds further light on its validity and its nature as law proper.

(a) Sources of Yoruba Pre-Colonial Customary Law

Perhaps, the Austinian Positivists would have postulated otherwise about African customary law if exposed to how the law was derived. Like in every pre-colonial African ethnic society, the Yoruba customary laws were unwritten but how were they made? It emanated from two primary sources; Traditional Legislation and Customary Case law.

1. Traditional Legislation

Long before the introduction of the European political and legal systems to Yorubaland, the people enacted their laws through traditional legislative processes. In addition to their executive and judicial functions, the Alaafin, and his Council of State, also performed legislative functions. The Ogboni Society too performed a legislative role in addition to its religious and judicial duties. While mindful of the prevailing customs of the time, when it was exigent and on his prerogative, the Alaafin/Oba, could enact a new or repeal an old law that regulated a circumstance, including the declaration of war and peace.[469] Notwithstanding

[467] On the nature/features of customary law generally, see, Amanda Perreau-Saussine & James Bernard Murphy, *The Nature of Customary Law* (Cambridge: University of Cambridge Press, 2009), online: < https://doi.org/10.1017/CBO9780511493744 >.

[468] See *Okonkwo v. Okagbue* (1994) 9 NWLR (Pt. 368) 301 at 335 for the Nigerian Supreme Court explanation as to what constitutes "public policy", "public interest" and how these influence an acceptable customary law in a given society at a given time. Also compare decisions in, Mayaki *v. Nda*, and *Mariyama v. Sadiku Ejo.* In the latter case, the lower court gave the paternity and custody of a child to the former husband of the mother who the customary law of the time recognized as the father against the claim of the natural father who the law saw as being in an adulterous relationship with the child's mother when the child was born. That judgement reflected the values and public policy of the time as legalized by the applicable customary law. That this case was later struck down was not because the applied customary law was unjust but because the society changed its values and consequently its public policy. For more elaboration on the morality and acceptability features of customary law, see, J. Ademola Yakubu, "The Application of the Repugnancy Doctrine to Paternity Cases in Nigeria" (1995) 7 African J Intl & Comparative L 129.

[469] Jacob U. Egharebva, *Benin Law and Custom*, 3rd ed (Nigeria: C.M.S. Niger Press, 1949).

his power to decree a law into existence, the Alaafin was constitutionally bound to conform to procedural norms[470] of informing his Council of State of the need for a new law. Alaafin was therefore assisted in the process of the enactment by the Council. Once the law was enacted, it would be communicated to the community through the town crier. From that moment onward, it carried the force of law.[471] In circumstances where the Council of State was responsible for the enactment of a rule of customary law, a proposal was set before the whole Council. For this purpose, the Council at times included more than the Oyomesi but also other lesser chiefs. The Council then thoroughly and exhaustively discussed the proposal. Once a consensus was reached, it became a joint resolution to be forwarded to Alaafin/Oba for ratification or disapproval. The power of the Alaafin to overrule such a resolution was sparingly exercised as that would amount to a disapproval of the collective wisdom of the community's elders.

In performing its legislative function, the Ogboni also followed a similar process to that of the Council of State. The difference was that the procedure could take place at the Iledi, the restricted conclave to which only the initiate had access. Considering that, in the pre-colonial days, the Alaafin/Oba was, by default, a member of the Ogboni Society, such an enactment made by the Ogboni received his approval. Notably, laws made by the Ogboni were recognized as subsidiary legislations which, in most cases, applied to the members of the society and were subject to Alafin/Oba's enactments.[472]

2. Customary Case Law

The pre-colonial Yoruba societies also enacted some of their laws through judicial processes, similar to the English Case Law and doctrine of *stare decisis*. A pronouncement made by a court or tribunal was noted by both judicial officers and witnesses who often spread the details of the courts' decisions until it was assimilated into the community's legal system.[473]

[470] Bronislaw Malinowski, *Crime and Custom in Savage Society*, 1st ed (London/New York: Routledge, 2013), online: < https://doi.org/10.4324/9780203794449 >. The constitutional norms compelling an Alaafin/Oba to inform his Council Of Chiefs before enacting a law is one of the Checks and Balances. This were mechanisms by which the power of a substantive Alaafin was regulated for him not to become tyrannic.
[471] Emiola, *supra* note 459 at 22.
[472] Elias, *supra* note 1 at 198.
[473] Emiola, *supra* note 459 at 24.

Mainly, town criers were used to communicate the courts' decisions to the public and that included when the decisions made substantial changes to an extant law. This enabled the practice of judicial precedent notwithstanding that the Yoruba people, at the time, had yet to adopt a writing culture by which written law reports could be accessed. For guidance, and uniformity of decision which assisted in ensuring impartiality, judges and judicial administrators alluded to previous cases to decide a new one. Especially when facts were closely similar. The earlier case could have been one decided by the same court or another. Such a previous case was given credence especially when the deciding judges were men of recognized exceptional wisdom and repute. Court remembrancers were also engaged in prompting the court about previous but relevant cases. Similarly, the inquisitorial nature of the pre-colonial Yoruba justice system allowed the court to call witnesses to give reminder evidence of what transpired in a previous case. This prompted the judge who might base his judgment on the previous case.[474]

For reasons of either incomprehension of its ethos or racial prejudice, some Euro-American scholars, especially social scientists, and legal theorists denied that Africa had what could be termed "law properly so-called".[475] Chief among these theorists are the Positivists mentioned earlier. Denying customary law as true law is more often expressed through the prejudiced opinion that Africa had neither law nor authorities to adjudicate cases or enforce verdicts. Some of the critics were mild enough to characterize African customary law as mere custom. In *Re Southern Rhodesia*,[476] the court openly expressed this bias when Lord Summer said, "*Some tribes [in Africa] are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society…*". This Lord Summer's description apparently left out the fact that the terms "legal ideas" and "civilized society" are relative terms that depend on the values and need of the society in question.

[474] *Ibid* at 27.
[475] John Austin, "The Province of Jurisprudence Determined, Excerpt" (1832), online: *The Witherspoon Institute* < https://www.nlnrac.org/node/255 >.
[476] (1919) AC 211 (PC) at 233. See also, *Mbowela v. R* (1960) R & N 12 FSC.

Even those who accepted that what was operational in pre-colonial Africa was "mere custom" and not law skipped the fact that describing customary law as "custom" does not strip it of the attribute of law. As discussed above, the procedure of enactment and substance of African customary law derived mainly from customs. These are customs "*which by common adoption and acquiescence, and by long and unvarying habit, have become compulsory, and have acquired the force of law with respect to the place or subject matter to which it relates*".[477] Besides, the pre-colonial Yoruba people demarcated between what was law and mere customs. While custom was only made obligatory by social pressure, it was not applied in judicial hearings. Rules of customary law were legally obligatory and backed by sanction. Thus, the Yoruba justice system was based on customarily derived laws with legitimate, effective, and efficient institutional arrangements for their adjudication and execution.

D. Civil Justice Administration in Yorubaland

In pre-colonial Yorubaland, customary laws applied in justice administration were categorized into Private and Public law. Private law applied to acts that were likely to alter peaceful co-existence among members of a community. Public law regulated anti-social behaviors which were held as "*subversive of the whole fabric of the society*".[478] Such anti-social behaviors included witchcraft, treason, murder, rebellion, and religious offenses. It could consequently be inferred that private law applied to civil matters while public law dealt with crimes. By this, the Yoruba justice system demarcated between civil and criminal wrongs. In underscoring this demarcation, Kofi Quashigah affirms that "*a particular behavior joined the category of crime when it threatened the interest and peaceful survival of the society as a whole; until an act was regarded as threatening to the whole social fabric, the society did not elevate it to the level of crime*".[479] However, occasionally, an act could constitute both civil and criminal wrongs.

[477] This opinion was expressed in a line of decisions which included *Yinka Folawiyo & Sons v. Y.A. Hammond Projects Limited* FRCR (1978) 26 at 30.
[478] Adewoye, *supra* note 455 at 2.
[479] Kofi Quashigah, "Justice in the Traditional African Societies within the Modern Constitutional Set-Up" (2016) 7:1 *Jurisprudence* 93, online: < https://doi.org/10.1080/20403313.2016.1150640 >.

(i) The Demarcation between Civil Wrongs and Crimes

a. Civil Wrongs

The first notable act that was categorized as a civil wrong under the Yoruba justice system was the infliction of bodily injury on another person. While this might amount to a crime depending on the fact, they ordinarily constituted a civil wrong for which the injured party or his relative might seek and obtain compensation. A second category of civil wrong included general defamation. The acts that constituted this were the wrongful accusation of witchcraft (not actual witchcraft), injurious gossip, and seduction. Customary law's recognition of defamation was restated by the court in *Ugboko v. Anakaonye*.[480] It was held in the latter that, customary action for "disgrace" is not different from "slander" under common law. It was held further that the customary court had the jurisdiction to hear an action for "disgrace" notwithstanding that the common law term "slander" was used in the case description. Under the Yoruba system, seduction involved an unlawful taking of a married woman away from the husband or a girl from the father. That injured the emotion and honor of both the victims and the husband and father respectively and could amount to "disgrace". This wrong also known as "psychic wrong" could become an aggravated crime if the act involved nonconsensual sexual intercourse i.e. rape of the victim.

Thirdly, contravention of property rights was another category of customary civil wrong. The overt acts necessary to ground a court action on this included voluntary trespass to land or other properties and theft. That the act was unintended was not a defense in cases of trespass once there was proof of an *actus reus*. Once the act was sufficiently proved, the victim received compensation from the trespasser. An additional category of civil wrongs was a breach of contract. Traditional contracts in the Yoruba system included "*aaro*"[481] (cooperative labor).[482] Parties to this contract agreed to tilling, sowing, and harvesting on one another's farm or build houses for one another on a rotational basis. The contract consideration was in kind as parties only worked to benefit one another. In pre-colonial

[480] (1971) 1 UILR 8 at 10

[481] T.O. Elias, *Groundwork of Nigerian Law* (London: Routledge & Kegan and Paul, 1954).

[482] C. A. Folorunso, "The History and Anthropology of Labor Mobilization for Agricultural Production among the Yoruba" (1998) 28:2 West African J Archaeology 65. This labor system was organized in a way that a group of men of the same age grades agreed to work on one another's projects, mainly agricultural, on a rotational basis. Anyone in the group who failed to honor the agreement, especially after benefitting from it, could be liable to pay damages following an admissible proof before a court.

Yorubaland, a breach of this contract by any of the parties to it was actionable before the appropriate court. There was also a contractual agreement known as "*livestock tenancy*" or "*agistment*" (*agbasin*)[483] and "*traditional guaranteeship*" (*Oniduro*). While the former involved the rearing of livestock belonging to the other party for a future share in the livestock's offspring, the latter involved a third party guaranteeing a loan. Notwithstanding that contracts in pre-colonial Yorubaland were unwritten, parties were able to prove their existence or breach of it before the court by oral evidence or proof of part-performance. On clearly adduced evidence, the breach of any of these forms of traditional contracts attracted corresponding, proportional, and fair sanctions.[484] Other civil wrongs that existed under the Yoruba pre-colonial justice system, included divorce and action for recovery of debt.[485] By its very nature and substance, it seems safe to conclude that civil wrongs under the pre-colonial Yoruba justice system were akin to the English law related to torts, property, and contracts, with slight differences.

b. Crimes

Every act or omission that was not categorizable as a civil wrong was treated by the Yoruba pre-colonial justice system as a crime. This was frowned upon as a threat to the survival of the community.[486] To the Yorubas, crimes were actions and inactions that fundamentally conflicted with the beliefs and taboos of their society. Hence, the system broadly classified crime into two categories: social and spiritual crimes. Acts or omissions that constituted social crimes were violent or bloody fights, lying, burglary, stealing, egocentrism, and adultery committed with an Oba's or a noble's wife.[487] Others included banditry, provocation likely to incite public disorder and constitute a menace to society,[488] and related acts capable of invoking social disaffection or subverting public order. Spiritual crimes were graver in

[483] Lawrence Momoh Balogun, *The Educational Potential of Traditional Agriculture in Building a New Nigeria: A Philosophical Analysis* (PhD Dissertation, Loyola University Chicago, 1985) [Unpublished].
[484] Emiola, *supra* note 459 at 37-40.
[485] N.A. Fadipe, *The Sociology of the Yoruba* (Ibadan: Ibadan University Press, 1970) at 227.
[486] Aborisade Olasunkanmi, "Interrogating Capital Punishment and Indigenous Yoruba African Culture" (2016) 4:2 Intl J History & Philosophical Research 23, online: < https://www.ejournals.org/wp-content/uploads/interrogating-Capital-Punishment-and-Indigenous-Yoruba-African-Culture.pdf >.
[487] Adultery committed with the wife of a commoner, though ordinarily a civil wrong, could transform into a crime if a guilty adulterer refused to pay a fine awarded against him by a competent court. Such refusal was viewed as an act potentially detrimental to the peace of the whole community. See, Mason A. Begho, *Law and Culture in the Nigerian and Roman World: Being a Comparative Study of Nigerian & ancient Roman Law, Art, and Culture* (Benin City, Nigeria: Midwest Newspapers Corp.,1971) at 104.
[488] Emiola, *supra* note 459 at 36.

implication and punishment. These involved acts or omissions against the unseen gods/goddesses that were capable of inviting evil consequences on both the offender and the entire society.[489] The gods/goddesses were acknowledged and revered as spiritual benefactors of the land who must not be offended. Crimes in this category were; murder,[490] suicide, witchcraft, treason, incest, unmasking masquerades in public, the killing of sacred animals, speaking evil of elders, and similar acts capable of desecrating the sanctity of the land.

Given this demarcation made between civil wrongs and crimes by the pre-colonial African systems and the Yoruba justice system specifically, the opinions of Euro-American scholars like Henry Maine are untenable. Maine's opinion that "*the penal law of ancient communities is not the law of crime; it is the law of wrongs and, to use the English technical word, of tort*"[491] appears like a demonstration of sparse knowledge of the African law and justice systems.

(ii) Commencement and Hearing of Civil Suits

The demarcation that existed between civil wrongs and crimes in the pre-colonial Yoruba justice system extended to the mode of adjudicating cases falling under both. These differences in the mode of adjudication were apparent in the way actions were commenced, heard, decided, and judgment executed. Again, the main essence of justice administration in the pre-colonial Yoruba justice system, whether civil or criminal, was the keeping of peace between parties in conflict. It also included the intervention in acts and misunderstandings that might breach the society's peace and maintain social equilibrium.[492] The four strata of courts highlighted above handled civil matters in the pre-colonial Yoruba towns and villages.

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[489] Andrew F. Uduigwomen, *Footmark on African Philosophy*, ed (Lagos: Obaron and Ogbinaka Publishers, 1995) at 64-65.

[490] It should be noted that, murders that constituted crimes under the Yoruba pre-colonial justice system did not include the killing of a slave by a nobleman or a chief. Such killing was viewed by customary law as a violation of property right of another because, slaves were categorized as properties. It is thus treated as a civil wrong for which the accused could only be liable for restitution through a replacement or payment of damages. See, Emiola, *supra* note 459 at 35.

[491] Henry Sumner Maine, *Ancient Law* (Cambridge: Cambridge University Press, 1861, 2012).

[492] Olukayode O. Taiwo, "Traditional Versus Modern Judicial Practices: A Comparative Analysis of Dispute Resolution Among the Yoruba of South-West Nigeria" (1998) 23:2 Africa Development 209, online: < https://www.jstor.org/stable/43658024 >.

The commencement of a civil action depended on the parties involved in a dispute. The parties were usually the victim or complainant and the defendant/accused person. While two parties were usually involved in a dispute, three parties were paramount to the Yoruba pre-colonial courts and their decisions. The three parties were the victims, the accused, and the society.[493] If the dispute involved members of a nuclear family household, the matter was promptly reported to "*Baba*" (the father) by the affected person or a third party within the household. Baba would proceed to patiently consider whether or not the report was worthy of intervention. If it was, both parties were summoned to Baba's court, usually, his living room, where cases were heard. Depending on the nature, urgency, and gravity of the dispute, hearings in this court were always slated for a convenient time of the day, usually after the day's activities.[494] Following the explanation of the complainant, the defendant would thereafter be allowed to make his/her defense. Listening to both parties was a sacrosanct procedure of civil hearings. This was because the Yoruba legal system prioritized a legal maxim similar to the Latin's, *Audi alteram partem* (let the other side be heard as well). This maxim was corroborated through the Yoruba proverb, "*Agbo ejo enikan da, agba osika ni*" (He who gives judgment on one side story is a wicked/an unjust elder).[495]

If required, witnesses were called. Once sufficient facts and evidence were in, Baba would analyze both facts and evidence and ask questions for clarification. In giving fair judgment, it was a substantive and procedural law for Baba to avoid identifying a party as strictly guilty. In most cases, both parties might not be absolvable to blame. That warranted identifying a party guiltier than the other. Individual faults would be stated, and the guiltier party could be asked to apologize to the other party. In certain cases, both parties were simply discharged and warned to desist from acts capable of leading to a future recurrence of such a dispute. If a party had erroneously claimed or taken what belonged to the other, he would be mandated to return it to the rightful owner.

[493] Elias, *supra* note 1; Elias, *supra* note 433.
[494] Elias, *supra* note 1 at 217. According to Elias, if the matter was trivial as not to warrant the family head's intervention, it was simply discarded, "*for the principle of throwing a case out of court on the ground that it is de minimis non curat lex is as much true of African legal procedure as is of English; little patience is spared for the mere grouser or the slow-witted…*".
[495] Onadeko, *supra* note 374 at 23.

At the *Olori Ebi's* (Compound or Extended Family Head) court, cases that involved nuclear families bound by consanguinity or affinity within the same compound were heard. This was in addition to appeals from Baba's court. The *Agbo Ile* (compound or extended family) living culture of the Yoruba people was borne out of their revered and agelong belief in kinship, ancestry, and the "common blood" bond that kept them together. To avoid the destruction of this lineal bond and keep the families together, disputes that could threaten unity were settled at the Olori Ebi's court.[496] While the Olori Ebi presided as the judge over cases brought before his court, every married and unmarried adult in the compound was entitled to sit and contribute to the hearings. The venue of the court could either be at the joint compound family house or the Olori Ebi's house. Like in the nuclear family court, the complaint would have been made to Olori Ebi before the day of the hearing. The complainant or the appellant was first heard, followed by his witness(es), if there was any, and if necessary. The witnesses could be present on the day of the first hearing or be summoned thereafter, if not informed of the first hearing. In some instances, parties to the dispute could be obliged to swear by the name of their ancestors.[497] This was done to ensure the parties' truthfulness in the process of stating their cases.

As a mark of respect to elders who sat on cases at the Olori Ebi's court, the parties, and sometimes their witnesses, would squat (man), or kneel (woman) while making their explanations. After listening to all sides, Olori Ebi, the presiding judge, would ask adult family members present for their comments. Such comment might include clarification of facts through questioning. Olori Ebi would subsequently summarize all contributions, clarifications, and questions and then pass his judgment, primarily targeted at an amicable

[496] William B. Schwab, "Kinship and Lineage among the Yoruba" (2012) 25: 4 Africa 352; Matthias Olufemi Dada Ojo et al, "Alajobi: Revisiting the Spirit of Kinship on Mission Reward and Punishment among Yoruba People of Nigeria" (2017) 14 Global J Applied Management & Soc Science 238; Akinsola A. Akiwowo, *Ajobi and Ajogbe: Variation on the Theme of Sociation* (Nigeria: University of Ife Press, 1983).

[497] Lai Olurode & P. Olufemi Olusanya, *Nigerian Heritage-The Yoruba Example* (Lagos: Rebonik Publications, 1994) at 145-146. This is akin to post-colonial Statement of Claims and Witness Statement on Oath which, by provisions of rules of courts, must be attached to a Writ of Summon whenever a claimant is filing a civil suit in a High Court and in some Magistrate Courts. Similarly, witnesses in all Nigerian courts today are statutorily obligated to swear an oath or affirm to tell the truth. For detailed elaboration of these, see, Abdulmumini A. Oba, "Juju Oaths in Customary Law Arbitration and their Legal Validity in Nigerian Courts" (2008) 52:1 J Afr L 139, online: < https://www.jstor.org/stable/27608001 >; Colton Fehr, "Re-thinking the Process for Administering Oaths and Affirmations" (2020) 43:2 Dal LJ 637, online: < https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2140&context=dlj >.

resolution of the dispute. The amicable intent and purpose of the dispute resolution were marked by some merriment and lunch/dinner that usually ended most hearings held at the Olori Ebi's court. As noted by Omoniyi Adewoye, in some instances, "*the successful party, if he/she was financially capable, and if the seriousness of the dispute warranted him doing so, might furnish food and drinks for the whole court as a token of his appreciation for their patience and wisdom*."[498] To appease their progenitors, the court/family members first pour libations before they begin sharing the food and drinks provided.[499] These helped to strengthen the pre-existing bond and peace among the extended family members. Notwithstanding the Olori Ebi's court resolution and judgment, an unsatisfied party reserved the right to appeal to the "*Olori Adugbo's*" court.

As noted above, an "*Adugbo*" (Ward or Quarter) in pre-colonial Yorubaland was a conglomeration of several compounds or extended families ("*Agbole*") who might and might not be related by blood. The Ward Head, who was a chief in Alaafin's cabinet presided over those civil matters that involved two extended families. These were mostly cases that could not be resolved within the disputing compounds. In addition to his civil jurisdiction, the Olori Adugbo was allowed to conduct preliminary hearings on minor criminal cases that occurred within his ward. He thereafter referred the cases and outcome of his investigation to the central tribunal (Alaafin/Oba's court).[500] Adult members of the ward or outside it were allowed to attend the hearings.[501] Similar to the procedure in the Olori Ebi's court, parties and witnesses showed reverence to elders seated as they presented their cases by kneeling (women), and squatting (men) and not on their feet. At the end of each party's case presentation, elders and adults sitting with the Olori Adugbo could cross-examine any of the parties and their witnesses. The contributions of the elders and adults were then summarized by the Olori Adugbo who as the presiding judge, had the final say. He then identified the guiltier party which he could fine or be ordered to make certain restitution or pay compensation. The less guilty party was then acquitted.

[498] Adewoye, *supra* note 455 at 4.
[499] O.B. Olaoba, "Yoruba Traditional Court Model" (1997) 1 & 2 J Humanities 76.
[500] Taiwo, *supra* note 492 at 219.
[501] Onadeko, *supra* note 374 at 24.

The Alaafin/Oba's court served as the pre-colonial Yoruba central tribunal. It has overall jurisdiction over all categories of cases. Like the Supreme Courts of today, its decision was the final except the presiding Oba was a lesser king under a sovereign Oba. In the latter case, the appeal went to the sovereign Oba from the subordinate Oba's court. Alaafin/Oba presided over his court and the Oyomesi and other chiefs who could be Quarter Heads were members of the court. The court was the most formal judicial sitting of the Council of State. Appeal from Olori Adugbo constitutionally went to the Oba's court. As a chief in the kingdom, the Olori Adugbo was a member of the Oba's court but was barred from adjudicating over matters that arose from his quarter. In such a matter that arose from his quarter, a particular Olori Adugbo was only allowed to introduce the case and observed the contributions of other chiefs as the hearings proceeded. The venue of the Oba's court was either a designated room in his extensive palace or the central marketplace which, by Yoruba tradition, was located right in front of the Oba's palace.[502] While it functioned as a court of first instance, it also exercised its appellate jurisdiction over subordinate Olori Adugbo and vassal villages' courts.[503] Civil cases adjudicated in this court included unresolved disputes between parties belonging to different wards, cases that emanated from subordinate or vassal villages that could not be resolved at the village level, and those involving two major or sub-chiefs. The latter went to the central tribunal if the chiefs could not resolve among themselves.[504]

Once the complaint is formally lodged[505] with the Oba or the Council of State, a date would be fixed for the hearing and the disputants were summoned to attend the court. On the day of the hearing, parties state the facts of their cases, and witnesses are called if present or summoned for the next adjourned date if absent. The summons of the court were executed by some of the Alaafin's numerous palace guards and could be backed by force in cases of stubborn accused/defendants.

[502] *Ibid*.
[503] Fadipe, *supra* note 485 at 229.
[504] Elias, *supra* note 1 at 217 to 218.
[505] Except in very rare cases where there were no ward heads, individual's direct complaints made to the Alaafin/Oba were not the norms. Report of complaints were made to the Oba's court by chiefs (ward heads) heading the jurisdictions where the disputes emanated after the latter might have been informed by the complainant. See, Emiola, *supra* note 459 at 82.

Notably, at the trial, parties were allowed to make legal representation. According to Akintunde Emiola, "*the most common form of representation is by the head or elder of the family*".[506] This was true about both civil and criminal cases in which the representer acted similarly to today's legal counsel. At the end of the hearings, which could last for days or weeks, the Oba or a senior council member would summarize the salient points in the facts. He then proceeded to apply relevant customary law, make references to previous cases on all fours with the case at hand, and pass the judgment. Like in lesser courts, the judgment passed at the Alaafin's/Oba's court was always targeted at assuaging both parties' feelings, hence the judge was circumspect of being harsh on the guilty. The court was conscious of the danger inherent in the strict pronouncement of the guilty verdict as it was capable of breeding bad blood within the society. It was common for admonitory homilies to be delivered by the judges at the end of a typical hearing. In this, they restated the right behavior expected of the members of the society, condemned a departure from it, and praised acts that tend to enhance the collective well-being of the community. The homilies "*are invariably as instructive as they are edifying*".[507]

E. Criminal Justice Administration in Yorubaland

Notwithstanding that the differences in the trial and adjudicating procedures of civil and criminal matters in the pre-colonial Yoruba justice system were almost imperceptible, yet differences existed. As mentioned above, the trial of criminal offenses was outside the jurisdictions of both the "Baba's" (Family Head) and "Olori Ebi's" (Extended or Compound Family) courts. Even the "Olori Adugbo" (Ward or Quarter Head) was only allowed to conduct preliminary hearings and investigations into criminal cases reported to him. Depending on the nature and gravity of the crimes, and parties involved, criminal matters were tried in the Alaafin/Oba's court or at the special court of the Ogboni Secret Society.

(i) Commencement and Hearing of Criminal Matters: The Central Tribunal

Every act that was disruptive of the social order and threatened the collective peace of a Yoruba community, was treated as a crime. Before trial proper, the commission of a crime or

[506] Emiola, *supra* note 459 at 90.
[507] Elias, *supra* note 1 at 271-272. See also, J.D., Krige, "Some Aspects of Lovehedu Judicial Arrangements" (1939) 13:1 Bantu Studies 113, online: < https://doi.org/10.1080/02561751.1939.9676094 >.

a complaint would be reported to sub-chiefs or Quarter Heads of the jurisdiction where the offense was committed. The complaints could be made by either the victim, his family member, or a resident of the jurisdiction where the crime was committed. The Olori Adugbo would thereafter pass the complaint or report on to the Alaafin/Oba or his Council of State. As a corporate duty, every member of the community was expected to help in bringing a defiant to justice. Anyone who failed in this duty might be considered as shielding culprits; such an act was considered morally reprehensible.[508] Hence, if a culprit is found committing an offense, for instance, stealing others' property, everyone present is expected to call people's attention in an attempt to apprehend him and hand him over to a nearby chief.[509]

In addition to the moral duty of all members of the society to apprehend an offender and hand him over to the appropriate authority, the Yoruba had a police system.[510] Amidst other security duties, the police were responsible for arresting and presenting a stubborn offender to the court for trial. Court orderlies and palace guards majorly performed this duty. In some instances, members of the army also functioned as police officers. This policing system was effective enough as it "*met the basic needs of crime-prevention, detection, and punishment*".[511]

While some crimes were tried behind closed doors, most trials were held in Alaafin's open court like ordinary civil matters. In open court trials, the Oba's seat was specially placed at a vantage point with those of the Council of State arranged close to him usually in a semi-circular form. The accused was arraigned before the court, stooping respectfully before the seated Oba and his Council, as the case against him was stated by the complainant/victim. After the latter concluded his side of the story and called all his witnesses, the accused was then given the chance to defend himself in person or by traditional legal representation. Similar to modern constitutional provisions of presumption of innocence, the pre-colonial

[508] Elias, *supra* note 1 at 215.
[509] Theodore F.T. Plucknett, *A Concise History of the Common Law*, 5th ed (Indianapolis: Liberty Fund, 1956). In page 406 of this book, an act similar to the apprehension of a felon caught in the act was a practice under the common law similar to the practice under the pre-colonial Yoruba system. In the English system, the felon was pursued with a horn and shout.
[510] Elias, *supra* note 1 at 216. See also, Etannibi E.O. Alemika, "Police Practice and Police Research in Africa" (2009) 10:5-6 Police Practice & Research 483, online: < https://doi.org/10.1080/15614260903378467 >.
[511] Tamuno T.N., "Crime and Security in Pre-Colonial Nigeria" in T.N. Tamuno, I.L. Bashir, E.E. Alemika, & A. Akano, eds, *Policing Nigeria: Past, Present, and Future* (Lagos: Malthouse Press, 1993) at 123.

Yoruba justice system regarded an accused as innocent until proven guilty.[512] This was ensured by following the due process of law established for a fair trial and required to prove the innocence or guilt of an accused. In the trial process, decorum was maintained by "*the court crier or orderly's tireless appeals to the audience to keep calm and quiet as witnesses give their respective testimonies*."[513]

The rules of evidence dealing with admissibility during a criminal trial in the Alaafin's/Oba's court mainly centered on the relevance of the evidence presented. While the court would not normally admit descriptive evidence when tangible one could be produced, it would not reject hearsay or circumstantial evidence provided it is relevant and could assist in the case fact-finding.[514] Witnesses were placed on oath to avoid perjury that could lead to injustice. Considering that the adjudicatory system was inquisitorial,[515] during the cross-examination of witnesses, the court could interject by asking questions or stating facts that could illuminate a knotty position.[516] In situations where oral and material evidence presented was insufficient to prove the facts of a case, the accused, and at times, the complainant could be subjected to certain truth-establishing spiritual procedures. These included oath-taking, divination, and/or a trial by ordeal.[517] This underscores the spiritual dimension of the pre-colonial Yoruba judicial system.

Oath-taking:[518] This particular oath-taking differed from the modern court type of oath administration in which a witness merely affirms or swears to speak the truth. The oath was taken in the name of some gods or sacred objects that were traditionally proven to have the

[512] Soyombo O., "Traditional Approaches to Curbing Deviant Behaviour in Nigeria" in Akintunde Olusegun Obilade & Gloria J. Braxton, eds, *Due Process of Law* (Lagos: University of Lagos, 1994).
[513] Elias, *supra* note 1 at 244.
[514] Emiko A.A. "The Judicial System" in T. Falola & A. Adediran, eds, *A New History of Nigeria for Colleges* (Lagos: John West Publications, 1986) at 318.
[515] Adeyemi A. A., "The Place of Customary Law in Criminal Justice Administration in Nigeria" in Osinbajo Y. & Kalu A., eds, *Towards a Restatement of Nigerian Customary* Laws (Nigeria: Federal Ministry of Justice, 1991) at 212.
[516] Emiola, *supra* note 459 at 91.
[517] Adewoye, *supra* note 455 at 7-8.
[518] Oath-taking was recognized by post-colonial courts as a form of proof in certain customary judicature. See, *Ofomota & Ors v. Amoka & Ors* (1974) 4 ECSLR 251, 254. Also in *Ume v. Okoronkwo* (1996) 12 SCNJ 404, 412, the Nigerian Supreme Court said, "*Oath-taking was one of the methods of establishing the truth of a matter and was known to the customary law…*".

potential power to inflict grievous punishment on a person who dared to swear falsely.[519] The oath-taking procedure was majorly adopted when available evidence was not weighty enough to establish the truth of a matter. If after a short while following the oath-taking no misfortune befell the swearer(s), he is exonerated and reintegrated back into society. If otherwise, he was pronounced guilty and faced societal opprobrium, if not killed by the effect of the oath.

The proper criminal trial described above worked in situations where the offender was known and physically brought before the court. In cases where the offender was unknown, the main procedures were oath-taking described above, and, possibly, divination. In this instance, the Alaafin/Oba's court had no particular accused to try. Hence, a traditional priest was consulted in his shrine or invited to the palace to invoke religious-magical power by which suspects of a crime were made to swear. There was also a prominent oath-taking procedure in Yorubaland known as "*aje*".[520] In the latter procedure, if the culprit was unknown, every suspect was summoned before a traditional priest. The latter administered a liquid potion for suspects to drink. Whoever was affected by the potency of the potion was simply identified as the offender.[521]

Divination: Sometimes before the case was reported for trial, the victim and his family could consult a diviner to spiritually detect the offender. William Bascom confirmed "*Ifa*" (Oracle) as a very prominent medium of divination in the pre-colonial Yorubaland. *Ifa* often revealed the offender through the "*Babalawo's*" (Ifa priest) reading of the *Ifa's* sixteen kernels. However, most times before the divination proper could be made, out of fright, the culprit could confess to committing the crime.[522] In some Yoruba towns, divination could be by placing some spiritual water in a bowl. Following the invocation of certain spirits by the diviner, the face of the offender appears on the surface of the water. This diviner's art was

[519] See, Onadeko, *supra* note 374 at 25; Oba, *supra* note 497; Oluwabusola Tunde Shemudara, "African Legal Thought: A Reflection on Yoruba Legal Culture" (2022) 4:1 Intl J Comparative L & Leg Philosophy 74, online: < https://www.nigerianjournalsonline.com/index.php/IJOCLLEP/article/download/2683/2608 >
[520] Emiola, *supra* note 459 at 85.
[521] Emiola, *supra* note 459 at 86.
[522] Bascom, *supra* note 387.

purely spiritual and did not lend itself to any scientific or empirical claim. Yet, it was satisfactorily taken as authentic in the pre-colonial Yoruba crime detection procedure.[523]

Trial by Ordeal: This method of crime detection was used in the Yoruba justice administration process for serious crimes like witchcraft, murder, and similar grave offenses. The procedure exposed the accused to some arduous tasks or, similar to oath-taking, ingestion of some hard potion. The latter could be some magical or natural/herbal liquid into which spiritual powers have been invoked. T. Olawale Elias compared the Yoruba type of trial by ordeal to a similar procedure in the United States. According to Elias, while "*truth serums*" were used by US law enforcement agents to obtain a confession from crime suspects, in the pre-colonial African context, the accuser and the accused may be made to go through physical combat or swear by any of the deities.[524] Such deities included "*Ogun*" (the Yoruba god of iron), or "*Sango*" (the god of thunder). The accused alone could also be made to hold a heated iron rod.[525] The rationale was that the innocent would be rescued from physical harm by some spiritual intervention. Meanwhile, there are copious arguments against the fairness or otherwise of this procedure. While it is expressed that failing the ordeal is inconclusive of the guilt of a person subjected to it, Charles Clifton Robert opines that, where it was practiced, the decisions were not necessarily unfair.[526] By the description of the Black's Law Dictionary, this procedure was not peculiar to Africa as it is "*the most ancient specie of trial in Saxon and old English Law, being peculiarly distinguished by the application of judicium Dei or 'judgment of God*'".[527]

The belief in supernatural assistance in the judicial process, especially in the use of trial by ordeal had a moral effect on the Yoruba people. It bred conformity with the law because hardly anyone who witnessed the gory and undesirable outcome of the procedure dared to lie or indulge in anti-social acts. The consciousness of the application of trial by ordeal in

[523] Emiola, *supra* note 459 at 85.
[524] Elias, *supra* note 1 at 237-238.
[525] *Ibid.*
[526] Charles Clifton Roberts, *Tangled Justice: Some Reasons for a Change of Policy In Africa* (New York: Macmillan, 1937) at 79.
[527] Garner, ed, *supra* note 456 *sub verbo* "Ordeal" at 1205.

dispute settlement "*was assuredly one of the greatest safeguards of justice*".[528] Trial by ordeal as a judicial procedure made perjury a rare occurrence in pre-colonial Yorubaland.[529]

Worthy of note was the leniency with which the pre-colonial Yoruba rules of the criminal justice system treated women. Rarely would a woman be arraigned before the Oba's court except in cases of the grave allegation of witchcraft and similar crimes. On an allegation of lesser crimes, rather than tried in the open Alaafin/Oba's court, a female offender would be handed over to either the husband or the father for appropriate punishment. Such punishment could earn her a divorce if the husband found her habitually non-conforming and intolerable. Minor disputes involving two or more women were mostly referred to and resolved by elderly women who acted as judges on matters that related to markets and women's associations.[530] It was a different approach if the allegation bothered witchcraft. In such a case, a woman could be arraigned and tried by either the Alaafin/Oba's or Ogboni's court. Because of its heinous nature, a woman found guilty of witchcraft in pre-colonial Yorubaland could be decapitated or stoned to death.[531]

(ii) Trial of Crimes at Ogboni's Court

A somewhat special and appendage tribunal was the Ogboni's court. As highlighted previously, in pre-colonial Yorubaland, the Ogboni was a Secret Society that performed religious, legislative, and judicial functions. Meanwhile, only a few special civil and criminal cases came before this court. The list of such cases included matters that involved state officials like the Alaafin/Oba and other important dignitaries, and general matters that involved the spilling of human blood.[532] The slightness of the blood spillage was irrelevant. If it was established that altercations between persons or other circumstances led to blood spillage, the matter came under Ogboni's court jurisdiction.

[528] Percy A. Talbot, *The Peoples of Southern Nigeria* (Oxford: Oxford University Press, 1926) at 620.
[529] Intelligence Report on Ijebu Remo District, Ibadan, National Archive of Nigeria (NAN), CSO 26/3.
[530] M.M. Green, *Ibo Village Affairs* (United Kingdom: Sidgwick and Jackson, 1947) at 111-112, 143.
[531] Charles K. Meek, *The Northern Tribes of Nigeria* (London: Frank Cass, 1971) at 270.
[532] Onadeko, *supra* note 374 at 25; Morton-Williams, *supra* note 408 at 366.

To commence a criminal trial in Ogboni's court, information would be sent to the *Apena* through either the Alaafin or persons in the area where the spillage occurred. The *Apena* then directed his messenger, bearing the *Edan* (the sacred brass-like sculpture), to the scene of the spillage where the messenger was to lay down the Edan beside the shed blood. This was a sign of mandate for the parties involved in the spillage to immediately report to the messenger at the scene of the incident. The hearing of the matter to be held at the *Iledi* (the Ogboni meeting conclave) was then set in motion by the *Apena*. The latter immediately summoned a meeting of the Ogboni officials and senior members. The messenger was to bring the parties before the meeting. Both parties were given a chance to state their sides of the issues that caused the dispute which led to the shedding of blood. The assembling officials and elders of Ogboni then make contributions by clarifying both the facts stated by the parties and the evidence adduced. If necessary, further investigation could then be conducted by designated Ogboni officials.[533]

If sufficient, *Apena* could decide the matter on facts and evidence before him. The judgment could be the payment of fines by both parties. Additionally, the parties would be mandated to provide a sacrificial animal. The blood of the animal would be sprinkled over the Edan to appease the earth which had been profaned through the blood spilled by the parties. When a decision could not be made on a matter owing to the suspicion that either of the parties lied, or the facts raised the possibility of false charges, an ordeal could be resorted to. The Edan is then placed in a bowl of water with a little sand sprinkled over it. The parties would then be required to drink the water. The belief was that the liar would be "*cast aside by the Earth*"[534] because if he truly lied, would be dead within two days of taking the potion.

Matters involving the Alaafin/Oba, like cases of misrule or the commission of a heinous crime, were tried at the Ogboni's court. Once information about the allegation reached the *Apena*, the society officials and the Council of State, who were members of the society, were required to sit over the allegation at the *Iledi.* In such a trial, the king was rarely afforded the chance to present his defense. If found guilty in the process of the Ogboni's deliberations,

[533] Oyebade Kunle Oyerinde, *The Constitution of Order among the Yoruba of Nigeria* (PhD Dissertation, Indiana University, 2006) [Unpublished].
[534] Morton-Williams, *supra* note 408 at 366.

standing at the palace gate, the Council of State would send a message of corporate rejection to the Alaafin. The Council then stopped attending subsequent palace Council meetings called by the Alaafin/Oba. In such a rare situation, the Alaafin was expected to commit suicide in what was traditionally known as "*Oba si'gba wo*" (the king opened the calabash). Symbolically, a calabash containing some parrot eggs mixed with charms would be presented to the Alaafin by the Basorun. Once he opens it, he goes into his inner chamber and commits suicide. No king opened the figurative calabash and survived.[535]

Disputes that involved chiefs and senior Ogboni officials were also adjudicated at the Ogboni's court. On an accusation of theft or wife seduction/snatching by one dignitary against the other, a meeting would be called where the Edan is put into fact-finding use. The Edan would be laid on the ground, and the accused asked about the truthfulness of the allegation. If pleaded guilty to the accusation, the matter would be resolved, and friendly relations between the parties restored. If the accused dignitary denied the allegation, he would be instructed to declare before the Edan that, "*if I am innocent, I will come to no harm. If I did the thing they are inquiring into, may I die in two days*".[536] A sacred brass bell would be rung by the *Apena* and all members present chorused "*Ase*" (so be it). If he was guilty, the accused died within two days. Otherwise, he survived and friendly relations between the accused and the accuser would be restored through the intervention of other Ogboni members.

Street Ad Hoc Tribunal: Aside from these formal courts discussed and their procedures, the pre-colonial Yoruba justice system provided for on-the-spot dispute settlement mechanisms, especially for minor civil matters. Since crimes fell under the Alaafin's/Oba's court jurisdiction, the best an elder or a chief confronted by an on-the-spot criminal matter could do was to pacify the victim. He was also obligated to shield the accused from mob action and then refer the matter to Alaafin's/Oba's palace. As found by William Bascom in his narrative of the pre-colonial legal system in Ile-Ife, such an ad-hoc settlement of civil disputes was a common feature in all of Yorubaland.[537] In this dispute settlement procedure, a matter

[535] Osadola & Adeleye, *supra* note 394 at 29.
[536] Morton-Williams, *supra* note 408 at 366-367.
[537] Bascom, *supra* note 387 at 38-41.

between two persons was resolved at the place and time where it occurred. Such a matter would have been brought to the notice of an elder or the Ward/Quarter Head of the jurisdiction where it occurred. To avoid an escalation of such disputes which were usually mild, the Ward Head would intervene, hear both parties, and resolve the disagreement. The purpose of this specialized tribunal was to reach a decision acceptable to both parties as fair and enough to end the dispute on the spot.[538] Notwithstanding the ad hoc intervention, an unsatisfied party reserved the right to appeal to higher courts in the hierarchy.

F. Judgment and Execution

That the pre-colonial Yoruba jurisprudence prioritized reparative and reintegrative justice over punitive justice does not mean the system lacked adequate punishment mechanisms. Different forms of commensurate judgments were given to; execute the law, preserve the social fabric, protect individual rights, ensure civil obedience, and minimize the possibility of social defiance. What determined the type of punishment depended on whether the matter was civil or criminal. While civil matters attracted lesser punishments, crimes could attract as high as capital punishment.

In giving judgment in a civil suit, pre-colonial courts in Yorubaland were very flexible. The three categories of judgment courts could give in civil matters included; award of compensation, order of restitution, and/or tendering of apology. A determining factor of the court's judgment included the capacity of the guilty to pay the fine or compensation awarded against him. Other factors were the tendency of the judgment creditor to accept a lesser payment in place of a higher award, and the possibility of the judge making erroneous awards.[539] These factors were responsible for the courts' flexibility and exorability in the process of giving judgment. Essentially, the Yoruba pre-colonial court could consider the capacity of the judgment debtor to pay compensation awarded against him. This was to avoid the court acting in vain. Similarly, a judgment of the court could be based on an amount acceptable to a judgment creditor. This notwithstanding that the latter earlier claimed a higher amount. Lastly, a Yoruba pre-colonial court could vary its earlier judgment considered

[538] *Ibid.* at 39.
[539] Elias, *supra* note 1 at 260.

erroneous if new facts or circumstances later emerged before the same court or on appeal. This flexibility allowed for an award of compensation or a fine decreed by a competent court to be increased or decreased if new circumstances called for it. As opposed to the opinions of certain critics,[540] this flexibility of judgment inherent in the pre-colonial Yoruba justice system did not translate to an imprecision of the applicable customary law. That this approach to judgment was not an exclusive peculiarity of the Yoruba justice system is underscored by the evidence of a similar approach under the English judicial procedure. The English procedure demonstrates this flexibility in decision-making by varying an award or compensation of a lower court if an unsatisfied party appeals to a higher court. Compensations and fines in a pre-colonial Yoruba court could be decreed as payable in cash, by goods, and/or in kind, in cases of breach of a part-performed contract.

Punishment for crimes was approached differently. Persons convicted of highly opprobrious offenses like; witchcraft, sorcery, treason, intentional murder, incest, rape, and similar other crimes which threatened the peace and essence of the community, attracted capital punishment. Such punishment could be death by hanging, shooting, spearing, drowning, or impalement.[541] Lesser crimes that included unintentional murder (manslaughter) attracted the payment of huge and rigidly enforced fines. This was intended to assuage the complainant/victim on his loss of material possession or a blood relative. Juvenile offenders were mainly punished by flogging.[542]

Percy A. Talbot found the practice of imprisonment in the pre-colonial Yorubaland.[543] He stated in his account that, Obas and prominent personalities had prisons where they incarcerated suspects. These included suspects who committed offenses like; civil disobedience, drunkenness, indebtedness, and similar others. Temple also alluded to cases

[540] M.J., Field, *Akim Kotoku: An Oman of the Gold Coast* (London: Crown Agent for the Colonies on behalf of the Government of the Gold Coast, 1948) at 49. The reason of adjusting an earlier award made could be the unavoidable difficulty in assessing an adequate quantity of compensation, especially in intangible tort cases. This cannot suggest a weakness or porosity of the applicable customary law and rules of procedure. Besides, the flexibility of judgement was not watertight. T. Olawale Elias gave instances of where an earlier award made might not be varied even on an appeal. Such situation included where a party sworn during the course of the trial to accept whatever is awarded by the court at the end of the proceedings.
[541] Elias, *supra* note 1 at 261.
[542] Emiola, *supra* note 459 at 93.
[543] Talbot, *supra* note 528.

where those who committed heinous crimes and notorious habitual offenders were locked up in the prison of the Ogboni.[544] In 1853, three hitherto detained criminals were later executed by a member of the Ogboni Society called Jaguna. The execution was carried out at the society's Council House in Abeokuta, a Yoruba town in the present-day Ogun state.[545] In cases of crimes like stealing and burglary, there were instances where offenders were executed while some caught in the act, were either shot dead, exiled, or sold into slavery. Some thieves were paraded around town semi-naked and smeared with specks of dirt of all kinds, and the crowd shouting and spitting on them.[546] Perhaps, the deterring effect of the use of this public disgrace punishment was the reduction in stealing in most pre-colonial African societies.[547]

Formal execution of the courts' judgment in a civil matter was needless in a situation of prompt compliance by the judgment debtor. Otherwise, certain mechanisms existed to enforce the decisions of courts. In cases where compensation, fine, or a decree for recovery of debt was made, judgment creditors usually resorted to self-help if the debtors refused to voluntarily comply. Then, the creditor may in person, or by appointed representatives, distrain the personal properties of the debtor. If the distrained properties were inadequate, the judgment creditor could resort to following the judgment debtor around and interrupt his interactions with others until he complied with the court's judgment and paid his debt. The latter practice was a common feature among the Ijesa traders of Yorubaland. It was called, "*osho-maalo*" (I will stoop till my money is paid).[548] The judgment creditor would go to the debtor's residence early in the morning and obstruct him from doing his daily activities while insisting that he be paid before giving him a breeding space. According to T. Olawale Elias, until the debt was paid, the debtor was legally bound to "*accommodate and feed his unwanted guest who enjoys unlimited license... to obstruct his work or movement as and when he likes,*

[544] O. Temple, *Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria* (Lagos: The C.M.S. Bookshop, 1922). This book contains a broad and detailed analysis of offences and various categories of punishment they attracted. The socio-historical facts discovered, and analysis made by the author was by no means exclusive to Northern Nigeria. Most of the legal procedures explained in the book were also applied in pre-colonial Yorubaland.
[545] R.E. Dennett, *Nigerian Studies: The Religious and Political System of the Yoruba* (London: Macmillan, 1910).
[546] Begho, *supra* note 487 at 105.
[547] Emiola, *supra* note 459 at 93.
[548] *Ibid* at 69. See also, Talbot, *supra* note 528 at 632, and 698.

and to plague him in every way".[549] This process was skipped if, on arrival at the debtor's residence, the creditor found valuable properties which he could seize, and sell, to offset the debt once and for all.

Execution of judgments passed on crimes was carried out by the body of men who performed police duties in the community. These were the palace guards and the Eso, who aside from their military role occasionally performed police duties. Anyone to be executed was led to the designated execution point by a group of palace guards or a selected number of the Eso. The executioners and the condemned criminal were accompanied to the point of execution by young men and other interested persons who were mostly spectators. In executing judgments of banishment, the guards, or a group of Eso, followed by a mass of on-lookers, would drag a condemned person to the boundary of the town. From that point, the condemned was expected to journey far away from the town and never return, unless pardoned. Notably, capital punishments and banishment as a mode of ridding the Yoruba society of recidivists or habitual offenders were only used when efforts to reintegrate them back into society failed. Banishment and other capital punishments were few and rarely the first option; "*only in these few cases is the judicial process prompt, definite and inexorable*.[550]

G. Conclusion

The thrust of this chapter is the analysis of historical evidence that the Yoruba people of South-Western Nigeria exhibited a well-established judicial system and procedures before being colonized. While the system was less formal than the English system, it was nevertheless functional and adequately served the purpose of maintaining peaceful co-existence within Yorubaland. The socio-political system that powered the justice administration was well-structured and backed by substantive and procedural rules of customary law. This socio-political structure which had the Alaafin/Oba at the helm of the affairs provided strong legitimacy and support for the layers of the court. These layers included the Baba, Olori Ebi, Olori Adugbo, and the Alaafin/Oba courts. As the central tribunal, the latter was the highest court in the hierarchy. Special courts like the Ogboni

[549] Elias, *supra* note 1 at 264.
[550] *Ibid* at 271.

Society's court and the Ad Hoc Tribunal also aided the dispensation of criminal and on-the-spot justice respectively. Though not in a watertight form, the substantive customary law demarcated between civil disputes and crimes, and that allowed for the identification of the procedure to adopt in redressing either of the two. The demarcation also informed the courts' judgment and mode of judgment execution. Whatever form the pre-colonial Yoruba justice administration took, its priority and underlying philosophy remained constant. This was the maintenance of societal peace and social equilibrium; a philosophy that was sacrosanct, unwavering, and actualized by appropriate authorities.

CHAPTER FOUR

The Colonial Court and Justice Administration in South-Western Nigeria

A. Introduction

This chapter analyzes the colonial court system in South-Western Nigeria (Yorubaland) with the main focus on the civil and criminal procedural rules administered by the courts. It begins by discussing the background factors that necessitated the relegation of the Yoruba pre-colonial justice systems and prompted the ostensible need for a foreign system. It thereafter proceeds to describe, albeit summarily, the types and hierarchy of the English-style courts established in South-Western Nigeria between 1854 and 1954. The latter is segmented into three phases: 1854-1900, 1900-1914, and 1914-1954. This is followed by a highlight of the governing laws that were applied by these courts and the series of modifications and amendments made to them up to 1954. An attempt is then made to examine the civil and criminal justice procedures adopted by the colonial courts in the process of justice administration.

B. Background to the Introduction of the English-Style Courts in Yorubaland

As demonstrated in chapter three, the Yoruba people of South-Western Nigeria had a well-structured and organized civil and criminal justice system before the arrival of colonialism. This pre-existing system changed from what it was as soon as the British commenced its annexation/occupation of Lagos in 1861. Some political, cultural, and more importantly, economic factors were responsible for these judicial changes. On the political factor, following the bombardment of Lagos in 1851, the British Foreign Office in England, in July 1853, appointed Benjamin Campbell as the Consul of Lagos.[551] The governance role assumed by the Consul precipitated the call for a judicial system required to stabilize the polity to avoid anarchy. This notwithstanding that, the early consulate period witnessed an irregular

[551] Robert Smith, "The Lagos Consulate, 1851-1861: An Outline" (1974) 15:3 J African History 393, online: < https://www.jstor.org/stable/180667 >. Campbell, who also doubled as a trader, was fifty-two years of age when he was appointed as Lagos Consul. He was in office from July 1853 to April 1859. Despite his personal business endeavors, Campbell dedicated his time to British imperial assignment of the time. He was reputed as being responsible for laying the foundation for the colony of Lagos and the eventual merged Colony and Southern Nigeria Protectorate created in 1906. See also, Robert S. Smith, "Mr. Consul Campbell" in *The Lagos Consulate 1851-1861* (Berkeley: University of California Press, 1979) at 70.

and feeble exercise of jurisdictions by the Consul over several state matters, including justice.[552]

The rudimentary, and tentative efforts of Consul Campbell at administering justice in the growing Lagos metropolis at the time, were considered inadequate in meeting the needs of the surging commercial activities. Then, the pre-colonial justice system suffered a hit. It was castigated and relegated as limited, and inapplicable to the new commercial issues arising at the time. The commerce of the new colony was expanding, and more traders of European extractions settled as permanent residents of the growing metropolis. The rising population of European traders in Lagos was evident as of 1862 when there were twenty-two mixed British and European traders in Lagos.[553] By the 1881 census, this number had risen and was estimated at 117.[554] By 1912, 1,648 white men and women who engaged in various kinds of trade and interpersonal activities lived in the colony of Lagos.[555] In addition to the increasing indigenous and white population of Lagos were the liberated former slaves and descendants of former slaves. These included Sierra Leoneans and Brazilians- who also settled in the colony beginning in the 1850s.[556]

This expanding non-African population strengthened the colonial master's agents' agitation and push for a new legal system. The agitation was predicated on the ground that, the existing pre-colonial system was unknown to the new settlers who only understood the Western legal system.[557] Consequently, without any attempt at refining or adapting it to emerging realities, the pre-existing Yoruba justice system was condemned as inadequate in the face of the new circumstances and was restricted in application. It was alleged that commercial activities were generally stiffened and that there were difficulties in debt recovery and enforcement of undisputed credit. These situations were alleged to have compelled certain foreign traders to

[552] Campbell to Clarendon (2 June 1857) Ibadan, NAN (F.O. 2/20).
[553] Alan Burns, *History of Nigeria* (London: George Allen and Unwin Ltd, 1929) at 131.
[554] Griffith to Sir Samuel Rowe (14 July 1881) Ibadan, NAN (CSO 1/10 34).
[555] British Foreign and Commonwealth Office, *Blue Book, Colony of Southern Nigeria 1912*, (Lagos: The Government Printer, 1913) at 62-64.
[556] Adewoye, *supra* note 455 at 46.
[557] That the traditional justice system applicable in Lagos at the time was not embraced by the new residents was evidenced by the separate court established by the settlers. This new court was located at Bankole Street, Olowogbowo Lagos. See, John Otonba Payne, *A History of the Old Lagos Law Courts* (1905) [unpublished, archived at National Archive of Nigeria Ibadan] at 1.

withdraw their businesses and relocate back to Europe.[558] Based on these grounds and more, in 1860, the then Consul of Lagos, George Brand, called on the British government to occupy the Island of Lagos. Brand calculated that establishing a colonial administration in the Colony would necessitate the birth of new arms of government. To him, that would include a justice system, required for European business expansion and property protection.[559]

Lagos was occupied and formally declared a British Colony in 1861. As calculated by Brand, the establishment of a British administration in Lagos ushered in the English legal system and courts, based on the Received English Law. However, as noted by Omoniyi Adewoye, the importation of the English-style courts into Lagos and, subsequently, other areas of Yorubaland, was in phases, complicated, and by no means a straightforward affair.[560] While the British colonial administration replicated the fledgling English court system of the Niger-Delta region in Lagos and the rest of Yorubaland, as Adewoye rightly noted, the introduction of the new system was initially rudimentary, experimental, and gradual. Several reasons accounted for the piecemeal approach to the new judicialization of Lagos and the rest of Yorubaland. Prominent among these reasons were the usual lack of adequate personnel to man new courts, and the unfamiliarity with the new but comparatively slow procedure of the English court system by the majority of the colony's residents.[561] One other reason was the uncertain hold of the British over Lagos and other Yorubaland in the 1860s and 1870s. The latter was evident in the unhidden distrust of and resistance against the colonial government by the indigenous population. The latter were at that point nostalgic and yearned for the "*old state of things*".[562] This practically stalled every far-reaching judicial innovation of the British as that could deepen the already existing ill feelings harbored against the colonial government by the indigenous population.

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[558] As alleged Jay Gordon, a British merchant, on the ground of difficulties of debt collections due to the absence of English-style court, withdrew his trading activities from the Island and relocated. See, Jay Gordon, *The Development of the Legal System in the Colony of Lagos, 1862-1905* (PhD Dissertation, University of London, 1967) at 50.

[559] Great Britain. Parliament. House of Common, *Papers Relating to the Occupation of Lagos: Presented to the House of Commons by Command of Her Majesty, in Pursuance of their address* (London: Harrison and Sons, 1862); *Papers Relating to the Occupation of Lagos* (1862), Ibadan, NAN at 4.

[560] Adewoye, *supra* note 455 at 47.

[561] John Glover to Captain Kendall (16 November 1869) Ibadan, NAN (CSO 1/8, 5B). The legal technicalities introduced by the English-style court was strange to the masses of the indigenous population. The was not only delaying, but also expensive compared to the faster and relatively cheap pre-colonial justice system. This disenchanted the indigenes about the imported system as it hardly catered for their justice need. This reality slowed down the new colonial judicialization process.

[562] Fowler to Pope Hennessy (8 November 1872) Ibadan, NAN (1/8, 13B).

C. Introduction of the English-Style Courts to Yorubaland

(i) 1854-1900

Notwithstanding that the colonial court system in Yorubaland during the early years of the British occupation of Lagos was largely an improvisation, a certain number of new courts were established. These new courts had their roots in earlier courts established in other Southern Nigeria colonial dominions outside Yorubaland. The first set of English-style courts was experimented with in the Niger-Delta States, an area that later formed part of the Niger Coast Protectorate. Thus, "*Courts of Equity*" were established first in Bonny in 1854 and later in Brass, Benin, Calabar, Okrika, and Opobo in 1870.[563] Initially, these were not officially established courts, but judicial improvisations meant to handle commercial dispute resolution between European supercargoes trading along the Niger River and Africans. They were officially recognized in 1872 but couldn't function beyond 1885 when they were replaced by other forms of courts.[564]

These pioneering courts were meant to keep commercial transactions between African and European traders on a proper basis of justice and honesty to "*hold the Natives true to the principles of fair and honest dealing*".[565] The courts administered justice with little emphasis on procedural technicalities but were more focused on substantive fairness and honesty, judging each case on its merit. They administered no particular body of law but operated by trade customs prevalent in any of the court's territorial jurisdictions. The irregular hearing sessions of the courts were presided over by chief agents of trading companies. Some local rulers and heads of trading houses were occasionally allowed to sit on the court when matters at hand were deemed to require their presence. However, the courts were reputed as instruments of the European community.[566] Despite that these courts of equity mainly served the interests of the foreigners up to 1885, it was as strong or weak as local circumstances permitted. Mainly, its one-sidedness aroused local contempt and revolts against it. For instance, during hearings in *Oko Epella v. Goosey* on 13 May 1874, King Jaja of Opobo, backed by his supporters, was recorded to have blatantly defied the court and the consul

[563] A.E. Afigbo, *The Warrant Chief System in Eastern Nigeria, 1900-1929* (PhD Dissertation, University of Ibadan, 1964) at 47.
[564] Burns, *supra* note 553 at 321-327. See also, Order-in-Council of February 1872.
[565] Thomas Joseph *Hutchinson, Impressions of West Africa* (London: Longman, 1858) at 108.
[566] G.I. Jones, "The Trading States of the Oil Rivers" (London: Oxford University Press, 1963) at 79.

presiding over it.[567] Given its unofficial nature and the constant challenge of their legitimacy, these early courts were practically powerless in taking action against deviants. This also affected the execution of most of their judgments. Notwithstanding its challenges and rudimentary nature, these courts were able to maintain law and order to a certain extent and prevented a series of looming anarchy at the time.[568]

Similar commercial pressure and related factors in the Niger Delta areas that precipitated the establishment of the Courts of Equity were also showing up in Lagos. This led to the establishment of new courts in Lagos. According to T. Olawale Elias, between 1862 and 1874, eleven courts were prominent out of all the courts established for Lagos within this timeframe. These eleven were the *Supreme Court (also called Police Magistrate Court), Petty Debt Court, Slave Commission Court, Court of Civil and Criminal Justice, West Africa Court of Appeal, Court of Requests, Divorce Court, Vice-Admiralty Court, Equity Court, Consular Court, and The Privy Council*.[569] Four of these courts were functional as of March 1862. These were the Police Magistrate Court, the Criminal Court, the Slave Commission Court, and the Commercial Court.[570]

The jurisdiction of the Police Court included the settling of minor disputes and the conduction of preliminary hearings in more serious crimes. Trials of crimes that could only be investigated preliminarily by the Police Court were reserved for the Criminal Court. The Slave Commission Court handled cases related to runaway slaves and their emancipation, their apprenticeship, and the determination of the amount of compensation to be paid to their ex-masters.[571] The Commercial Court had jurisdiction in matters related to commercial contracts, trades, debts, and similar others. In 1863, the Supreme Court was established by the Supreme Court Ordinance No. 11 of 1863. Perhaps, because, up to 1863, previous courts established only exercised rudimentary jurisdiction, the new Supreme Court Ordinance was titled "*an Ordinance to provide for the better Administration of Justice within the Settlement*

[567] It was not only Africans who defied and challenged the authority of these early courts of equity. Even some Europeans did. For instance, when, before the Calabar court of equity in October 1975, certain allegations involving fraud was instituted against one European trader called George Watts, he flagrantly challenged the authority and jurisdiction of the court over his case. See, Proceedings of Court of Equity, Opobo (13 May 1874), Enugu, NAN (Cal Prof 3/1).
[568] Adewoye, *supra* note 455 at 35.
[569] T. Olawale Elias, *The Nigerian Legal System* (London: Routledge & Kegan Paul Ltd, 1954) at 44.
[570] H.S. Freeman to Newcastle (8 March 1862) Ibadan, NAN (CSO 1/1, 1).
[571] The main duties of this court were captured in the preamble to Ordinance No. 13 of 28 October 1864.

of Lagos." While the Supreme Court was initially presided over by a Chief Magistrate or his deputy, by 1864, the Chief Magistrate was substituted for a Chief Justice. The latter also served as the president of the Supreme Court. Although, the court had jurisdiction over civil and criminal matters like the High Court of England, appeals from it go to the Governor-in-Council, an administrative organ of the colonial government. The jurisdiction and procedural rules of this Supreme Court were later expanded in July 1864 when it was renamed "*The Chief Magistrate Court*". Then it adopted the jury system as a trial procedure. Beginning in 1865, the new Chief Magistrate Court jury system was limited and applied only in the trial of criminal matters.[572]

The Slave Commission and Commercial Courts also went through a series of transformations. In 1864, the Slave Commission Court was formalized by an Ordinance enacted on 28 October 1864. By this Ordinance, regulations were also made for executing the functions of the Slave Court. By the Ordinance of 1863 that established the Supreme Court, the Commercial Court was renamed, "*Petty Debt Court*". Its monetary jurisdiction in matters related to debt and compensation was initially limited to one hundred Pounds maximum but, subsequently trimmed down to forty Pounds. An appeal from the Petty Debt Court lay to the Supreme Court (later renamed "Chief Magistrate Court").[573] The lifespan of the Petty Debt Court ended in 1870 when it was replaced by the Court of Requests which inherited its jurisdictions, powers, and functions.[574]

An outcome of the unification of all British settlements in West Africa with the headquarters and seat of government in Sierra Leone, was the establishment of the Court of Civil and Criminal Justice. By Ordinance No. 7 of 1866 that established the latter court, it was empowered to supersede the Chief Magistrate Court (former Supreme Court). However, the power of the Court of Civil and Criminal Justice in both civil and criminal matters was restricted. Its jurisdiction and decisions remained subject to the review and approval of the colonial Governor in Sierra Leone.[575]

[572] Ordinance No. 5 of 1865.
[573] Ordinance No. 6 of 1864.
[574] Adewoye, *supra* note 455 at 49.
[575] For instance, any judgement of the court that sentenced an accused to more than twelve months with hard labor must not be executed until a complete report of the proceedings in the case was submitted to the Governor for review and approval. See, Adewoye, *supra* note 455 at 49.

Established in 1867 for hearing appeals in civil and criminal matters arising from all superior courts in British colonies throughout West Africa was the West African Court of Appeal (WACA). Similarly, the existence of this court was also truncated in 1874 when Lagos and the Gold Coast (now Ghana) were pulled from the 1866 administrative unification to form a separate colony. Between 1874 and 1886 when Lagos was again separated from the Gold Coast, this new colony (Lagos and Gold Coast) existed under an independent judicial system that had no connection to the government in Sierra Leone.[576] From 1867 onward, appeals in some classes of cases lie from the superior courts of the colonies to the Judicial Committee of the Privy Council in London (JCPC).[577] Thus, a system of joint appeal was created for all the then-British West African Colonies. Consequently, from 1867 to 1874, appeals moved from the Court of Civil and Criminal Justice of the Settlement of Lagos to WACA, and thereafter to the JCPC.

Two other notable courts that were established and functioned in Lagos before 1874 were the Vice-Admiralty Court and the Court of Divorce and Matrimonial Causes. The former was presided over by the Governor who was appointed as the Vice-Admiral of the court and assisted by Chief Justice of the Settlement who also served as the *ex officio* of the court. The court had jurisdiction over matters related to the breach of the regulations and instructions of Her Majesty's Navy at the sea and all matters arising out of Droits of Admiralty.[578] The Court of Divorce and Matrimonial Causes established in 1872 was given jurisdiction over matters that involved marriage contracts and solemnization made within Her Majesty's West African Settlements. At least, one of the parties to matters before the latter court must have, before the marriage, domiciled within the West African Settlement for not less than two years. Depending on the prayers/claims of the parties before it, the Court of Divorce and Matrimonial Causes had the power to make a decree of judicial separation, nullity, or dissolution of marriage.[579]

[576] According to T. Olawale Elias, the old WACA established in 1867, though collapsed in 1874, served as the reference point and precedent for a reintroduction of a similar court with the same name in 1928. See, Elias, *supra* note 569 at 52-53.
[577] Cases allowed to come up to the JCPC included civil matters in respect of properties or civil right claims of up to three hundred pounds sterling. Such appeals must be made within fourteen days of the judgement delivered on the matter by WACA (the Sierra Leone Supreme Court). See, Elias *ibid* at 53.
[578] Appeal from this court went to Her Majesty the Queen of England in Council. See Vice-Admiralty Court Act,1863 and Colonial Court of Admiralty Act, 1890 for the later modification of the court's composition and jurisdiction. See also, Elias, *supra* note 569 at 56-57.
[579] Divorce and Matrimonial Causes Ordinance No. 2, 1872.

As mentioned above, the creation in 1874 of the Gold Coast Colony which comprised Lagos and the then Gold Coast, brought about the systematization of the justice system in the whole of the new Colony and Lagos particularly. A new Ordinance[580] established a Supreme Court for the Colony. The court was composed of a Chief Justice assisted by four other junior judges.[581] While formal recognition was accorded indigenous law,[582] the Ordinance was specific about the laws to be applied by this court. These were the Common Law, the Doctrines of Equity, and Statutes of General Application in force in England as of 24 July 1874.[583] For ease of transaction, divisions of the Supreme Court were established in each of the Provinces under the Colony. The divisions were headed by District Commissioners who were empowered to exercise the powers of the judges of the Supreme Court in the districts.[584] This court was made a court of superior record with civil and criminal jurisdictions over all matters, except those under the jurisdiction of the High Court of Admiralty. Within the colony, it had powers and jurisdiction similar to the High Court of Justice in England.[585] Appeals from the divisions of this court went to the Full Court of the Supreme Court which consisted of the Chief Justice and two other judges. The Full Court sat, at least, once a year.[586] Lagos was separated from the Gold Coast Colony in 1886. Before the 1889 Order in Council that made provisions for direct appeal from the Lagos Supreme Court to the Privy Council, appeals from the Lagos divisions of the Supreme Court lay to the Gold Coast Supreme Court.

Until 1886, the pre-colonial judicial system discussed in chapter three remained the norm in the Yoruba hinterland while the above judicial experiments in Lagos went on. By 1886, the British interest in extending their trade beyond the Lagos coastline necessitated some intervention in the civil war raging in the heart of the Yorubaland. The intervention led to the signing of a series of treaties that ostensibly "guaranteed" the independence of the warring Yoruba states. This local strife in the hinterland initially made it difficult for the British to

[580] Supreme Court Ordinance No 4, 1876.
[581] *Ibid* section 4.
[582] By the provision of section 19 of this Ordinance, the indigenous African customary law was subjected to repugnancy test. Hence, only such indigenous law that "*were not repugnant to justice, equity and good conscience*" were allowed to be applied by the court. See also, Elias, *supra* note 567 at 69.
[583] Supreme Court Ordinance No 4, 1876, section 14.
[584] Adewoye, *supra* note 455 at 50.
[585] Supreme Court Ordinance No 4, 1876, section 11.
[586] Supreme Court Ordinance No 4, 1876, section 51. In the latter section, the Full court was required to sit for a minimum of four times annually. This was later amended by the Supreme Court Ordinance No 4 of 1905 to become one sitting per annum.

establish direct governance that would have implied the establishment of an English judicial system or extend the colonial template existing in Lagos. Notwithstanding this reality, commercial contacts between the hinterland and Europeans were expanding just as the British were gradually assuming political footholds over most of the Yorubaland. As summed up by Omoniyi Adewoye, "*the need was arising for some judico-administrative machinery to underpin the jurisdiction she (Britain) was de facto assuming*".[587]

Before 1899, the above-stated need necessitated the exercising of some judicial authorities by some British officials, before being legally empowered to do so. Thus, the Resident at Ijebu-Ode District held some irregular court sessions twice a week, in line with the Ijebu custom which the Resident stated he did not interfere with unless "probably unjust".[588] Due to his lack of knowledge of the applied Ijebu customs, the Resident played a presiding role over the Ijebu court sessions where indigenous leaders who knew Ijebu customs participated. Similarly, by 1899, the Resident in Ibadan, his agents at other towns, and traveling commissioners had devised an appeal system by which cases heard in the existing pre-colonial courts came to them for rehearing.[589] It was the practice of the Residents to visit some towns under Ibadan to preside over petty cases.[590] These "illegal" judicial improvisations were the trends in most of Yorubaland up until the early years of the twentieth century.[591]

The display of an array of courts in the history of Lagos and the various improvisations in other parts of Yorubaland between 1854 and 1900 does not imply stability and certainty of the judicial system. At the time, the whole system worked largely on improvisation, especially before 1876.[592] Most of the courts were constantly modified and remodified in name, power, jurisdiction, composition, venue, and structure. While the courts did not sit regularly, most did not have a permanent venue. As confirmed by Otonba Payne, the then

[587] Adewoye, *supra* note 455 at 54.
[588] *Ibid.*
[589] *Ibid.*
[590] The Resident's Travelling Journal (1897-1899) Ibadan, NAN. (Prof. 3/6).
[591] Even in Abeokuta, a town that signed treaties of political independence with the British, the Resident Commissioner claimed to have been hearing cases and insisted he must continue doing so "*to prevent the country from falling into a state of anarchy*". See, H. W. A. Cumming to Colonial Secretary, Lagos Meeting Minute (19 May 1903) Ibadan, NAN (Prof. 9/3).
[592] Notwithstanding that several Orders-in-Council were passed extending the jurisdictions of the Supreme Court and its subordinate others, no radical judicial changes were made before 1900 by either the Supreme Court Ordinance 1876 or the various Orders-in-Council.

infamous British court clerk, most of the courts held their sittings in a thatched roof structure at the Corner of Broad and Kakawa streets in Lagos.[593] To worsen the situation, some of the Supreme Court judges who served in Lagos were either on leave in England or filling in for ailing colleagues in the Gold Coast courts.[594] Aside from that the British were experimenting with the judicial system in most of their colonies at the time, the limited functioning and stunted growth of these courts were also partly due to an important reason. The indigenes who were the majority preferred to approach either the Obas' or the Chiefs' courts; two indigenous judicial tribunals faster and cheaper in monetary cost.[595]

(ii) 1900-1914

The administration of justice in Yorubaland between 1900 and 1914 was largely governed by a series of judicial agreements made between the Governor of Lagos and the paramount rulers of the key Yoruba communities. The signing of these judicial treaties was compelled by some earlier treaties of independence signed by the British with the Yoruba leaders. The earlier treaties somewhat restrained the British from the forceful establishment of a political/judicial system over the Yoruba territories. These series of judicial treaties, signed between 1904 and 1908, had similar contents. Central provisions of these treaties purportedly granted the British:

"Power and jurisdiction over all persons not being natives for the repression and punishment of all crimes and offences.

Power and jurisdiction over all persons whomsoever for the repression and punishment of the crimes of murder and manslaughter.

Power and jurisdiction for the administration and control of the property and persons of all persons not being natives.

Power and jurisdiction for the judicial hearing and determination of matters in difference where one or both of the parties is not a native".[596]

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[593] Otonba Payne, "A History of the Old Lagos Law Courts" (Ibadan: NAN) at 1-3.
[594] The intermittent nature of the court was evident in the fact that, for five long years, (between 1881 and 1886), no court of appeal sat in Lagos. See, Gordon, *supra* note 558 at 184.
[595] Payne, *supra* note 593 at 1.
[596] Agreement- For Absolute Surrender of Judicial Power to H.M. the King of Britain- between Sir William MacGregor, the Governor of Lagos and the Alake and Authorities of Egba (13 January 1904), Ibadan, NAN (CSO 5/2/18); Agreement- for Absolute Surrender of Power of Jurisdiction to H.M. the King of Britain- between the Acting Governor of Lagos, C.H.H. Moseley and the Bale, and Authorities of Ibadan Province (8

The impacts of these judicial agreements were far-reaching. It subtly conferred further authority and control over Yorubaland on the British. Before analyzing the impacts, and relevance of these agreements to the legal history of Yorubaland, it is indirectly relevant to note that, between 1900 and 1914 three main courts were established for other divisions and districts of the Protectorate of Southern Nigeria. The courts were the *Supreme Court*,[597] *the Commissioners' Courts*,[598] and the *Native Courts*.[599]

Notwithstanding the British colonial judicial innovations in other parts of Southern Nigeria up to 1914, the pre-colonial indigenous judicial mechanisms continued to function both in

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August 1904), Ibadan, NAN (CSO 5/2/19); Agreement Entered into by the Oni and the People of the Province of Ife vesting the Power of Jurisdiction in the Province in H.M. Edward VII, King of Great Britain (1904), Ibadan, NAN (CSO 5/2/21); Agreement with the Awujale and the Authorities of Ijebu-Ode vesting the Power of Jurisdiction in King Edward VII of Great Britain (1908), Ibadan, NAN (CSO 5/2/24), and similar other judicial agreements signed with other Yoruba leaders of the time. See also, Agreement with the Alake and Authorities of Egba Annulling the Treaty of 1893 and Placing the Egba Kingdom under the Government of the Protectorate of Nigeria (1914), Ibadan, NAN (CSO 5/2/25). In all the relevant judicial agreements that involved the Egba kingdom, the latter was treated differently from other Yoruba countries because of the earlier 1893 treaty that granted political independence to Egba Kingdom. This treaty was annulled by the latter agreement with the Alake, abrogating the independence of the Egba Kingdom and placing it under the Protectorate of Southern Nigeria.

[597] For more on this Supreme Court established for other parts of Southern Nigeria, see, Supreme Court Proclamation No 6, 1900; Elias, *supra* note 567 at 95; Supreme Court Ordinance 1876, Sections 71-80; Supreme Court Divorce Jurisdiction Proclamation No. 18, 1903,

[598] The Commissioners Proclamation No. 8, 1900, section 14. Commissioners in the context of this court included Divisional and Travelling Commissioners, Residents, District and Assistant District Commissioners. See, Commissioners Proclamation No. 13, 1901, section 1.

[599] For the two types of Native Courts (Minor Court and Native Council) established for other parts of Southern Nigeria, see, the Native Courts Proclamation No. 9 of 1900, section 6 & 17. See also section 19 of the Supreme Court Ordinance 1876 that allowed the courts to apply such local law and custom, "*not repugnant to natural justice, equity and good conscience*". Minor Court specifically applied local law and custom "*not opposed to natural morality and humanity*". This subjection of African customary law to the English defined repugnancy test continued even after active political colonialism till date. Similar to the provision under the Supreme Court Proclamation, Attorneys, Counsel, Advocates, Solicitors, or Proctors were also not allowed to appear before any of the Native Courts except by a leave granted by either the Commissioner or the Court. See, the Native Courts Proclamation No. 9 of 1900, section 23. See also, sections 26 & 28 of the latter Proclamation. Minor Courts and Native Council additionally performed administrative and legislative functions. On the latter, see the Schedule to Proclamation No. 9 of 1900. Adding administrative and legislative duties to the statutory judicial role of Minor Courts and Native Council demonstrated the experimental nature of the judicialization process of Southern Nigeria during the period under study. This clearly shows that the colonial master lacked definite legal template and adequate personnel to perform his governance role. That necessitated the non-compartmentalization and non-separation of powers of the colonial organs of government. With this and similar other legal experimentation of the colonial masters in almost all their colonies in Africa and Asia, it remains questionable that the pre-colonial systems were condemned on this same ground of non-separation of powers. For more on various subsequent modifications made to these courts, see generally, the Native Courts Proclamation No. 25, 1901 sections 30 & 31; the Supreme Court Ordinance No. 17, 1906; the Native Courts Proclamation, 1906; the Native Courts Proclamation No. 8, 1914; the Native Courts Proclamation No. 9, 1900, section 28. By the provisions of section 12 of the 1906 Proclamation, the judicial functions of the Native Courts were to be performed under the guidance of the Chief Justice or other Judges of the Supreme Court. See also, Elias, *ibid* at 104.

Lagos and the Yorubaland hinterland. Although, the Ordinance of 1876 operational in Lagos was silent about the paralleling judicial mechanisms. As noted by Omoniyi Adewoye, the Native Court Proclamation 1900 and subsequent amendments referenced above did not directly or actively apply to Yorubaland as it did to other parts of Southern Nigeria Protectorate.[600] As noted earlier, aside from the Supreme Court of Lagos Colony's jurisdiction extended to the core states of Yorubaland, some judicial agreements and ordinances majorly regulated the judicialization of this part of Southern Nigeria between 1900 and 1914. The judicial agreements of 1904-1908 were signed between the representatives of the King of Britain and paramount Obas and chiefs of key Yoruba states. These key Yoruba states included Ile-Ife, Ibadan, Oyo, Egba, and Ijebu. Because these five Yoruba states were the epicenters of the whole of Yorubaland, the judicial agreements thus had impacts on all of Yorubaland while they lasted. In the pre-colonial Yoruba system, the power and responsibility for dispute settlement and maintenance of peace were solely conferred on the traditional leaders, the apex of whom was the Oba. This power and responsibility were undermined by these judicial agreements. They substantially stripped the traditional leaders of their sovereignty, powers, and duties. The British officials were empowered and broke the ranks of traditional authorities as they continued to try civil and criminal cases in the towns and villages organized into colonial districts and divisions.

Three categories of powers and authorities were acquired by the British under the various Yoruba judicial agreements. These were powers to try serious criminal matters, especially murder, and manslaughter that involved natives who were subjects of the traditional rulers, and power over "the administration and control of the property…of all persons not being natives". The third power acquired by the British under these judicial agreements subjected the Yoruba customary law to the supremacy and standard of English law. A clear term of the treaties was that African laws and customs could only be applied to dispute settlement if they were not "*repugnant to natural justice, equity, and good conscience*.[601]

[600] Adewoye, *supra* note 455 at 58.
[601] Adewoye, *supra* note 455 at 56 & 57.

By the combined terms of the judicial agreements and the provisions of four major ordinances[602] signed between 1904 and 1909, the jurisdictional power of the Supreme Court operating in the Lagos Colony was extended to core Yoruba territories. These included Ibadan, Oyo, Ife, Ijebu, and Abeokuta. Then the Supreme Court was granted exclusive jurisdiction in homicide cases, and wide jurisdiction over criminal matters involving non-Yorubas. These in addition to its civil jurisdiction over "mixed cases" in which one of the parties was a non-Yoruba. For juristic purposes, a Yoruba was recognized by colonial courts as a person indigenous to any of the communities in Yorubaland and who was subject to local laws. Other persons were legally treated as non-Yoruba. In adjudicating the cases before it, the Supreme Court was to apply the principles of English law as may be modified by local circumstances.[603] However, the judicial agreements compelled the judges to subject any applicable native law and custom to the repugnancy test.

In some of the nerve centers of Yorubaland like Ibadan, Oyo, and Ife, the political and advisory Native Council, established mainly for administrative purposes, continued to perform judicial functions amidst other duties. By the "Native Council Ordinance No. 15, 1901", more Native Councils that expanded the authority of traditional rulers only for administrative efficiency[604] were established for the province, districts, towns, and villages. The hierarchy was such that councils at both the village and town levels were subordinates of the Provincial and District councils. The Native Councils were empowered to run internal administrations and adjudicate matters for settlement. While allowed to be presided over by a traditional ruler, the Native Council was subjected to a British officer who was empowered to "guide and counsel"[605] the council during any of its sittings. Notwithstanding that the council could not be successfully established throughout Yorubaland, as of 1905, its presence and judicial/administrative activities were visible in key Yoruba towns that included Ile-Ife, Ibadan, Ijebu-Ode, Ilesha, Oyo, Epe, and Ila. Theoretically, the councils were said to exercise

[602] These ordinances were, Yoruba Jurisdiction Ordinance No. 17 1904, Egba Jurisdiction Ordinance No. 14 1904, Ife Jurisdiction Ordinance No. 20 1904, and Jebu Ode Jurisdiction Ordinance No. 3 1909.
[603] Adewoye, *supra* note 455 at 57.
[604] J.A. Atanda, *The New Oyo Empire: A Study of British Indirect Rule in Oyo Province, 1894-1934* (PhD Dissertation, University of Ibadan, 1967) [Unpublished].
[605] "Guide" or "Counsel" are two ambiguous words capable of being interpreted to justify extensive powers of the British administrative officers over the Native Council. No matter the extent to which the powers of the council was expanded by the various ordinances, its deliberations and activities were still subject to overriding whims and caprices of British officers. See, Adewoye, *supra* note 455 at 58.

an absolute jurisdiction not subject to appeal, or revision by the Supreme Court.[606] In practice, this was not the reality in cases that were considered inimical to British interest or in which the Lagos colonial government was interested.

For several reasons that included the sabotaging of their traditional authorities, the Yoruba Obas, especially in Abeokuta, disputed the jurisdiction of the Supreme Court and the terms of the four Ordinances.[607] For instance, Abeokuta leaders protested[608] against the powers/authorities of a division of the Lagos Supreme Court in Abeokuta. The leaders argued that it negated the letters of the Egba judicial agreement which provided for collaborative jurisdiction in cases where one of the parties was a non-Egba.[609] The opposition and active protests of all the Yoruba states during this period could not prevent the colonial judicialization of the entire Yorubaland. The Yoruba states were eventually forced to capitulate to the judicial policy and dictates of the Lagos colonial government up to 1914 when new amendments were made to extant laws that regulated the judicial system.

(iii) 1914-1954

Based on the subsequent Donald Cameron's reform of 1933, this study period could further be subdivided into two; 1914 to 1933, and 1933 to 1954.

(a) 1914-1933

As discussed in chapter two, the two political divides of Northern and Southern Nigeria were merged in 1914 and named "Colony and Protectorate of Nigeria". This necessitated the unification and reorganization of the hitherto separate legal systems of the amalgamated entities. This task fell on Sir Edwin Speed who had, before the amalgamation, served as the Chief Justice of Northern Nigeria, and was appointed as the Chief Justice of Nigeria after the

[606] Frederick D. Lugard Report on the Amalgamation and Administration of Northern and Southern Nigeria, 1912-1919 (April 9, 1919) Kew, The United Kingdom National Archive (CO 879/119/8, African No. 1070).

[607] Yoruba Jurisdiction Ordinance No. 17 1904, Egba Jurisdiction Ordinance No. 14 1904, Ife Jurisdiction Ordinance No. 20 1904, and Jebu Ode Jurisdiction Ordinance No. 3 1909.

[608] One of the protests was evidenced by a letter written by the Egba traditional government to the colonial government in Lagos on hearing that the Lagos Colony Supreme Court was to be opened in Abeokuta on 15 June 1904. See, Egerton to Lyttleton (29 October 1904), Ibadan, NAN (CSO 1/7/24).

[609] Gbadebo Alake to Moseley (13 September 1904), Ibadan, NAN (CSO 1/7/24).

amalgamation. After due consultation with other colonial officials, Justice Speed coordinated the drafting of legal instruments "*to evolve a system applicable to the whole country, with only such disturbance of existing conditions as was necessary in the interest of good government*".[610] The outcome of the various instruments was the creation of three major types of courts between 1914 and 1933. The courts were the Supreme Court, Provincial Court, and the Native Courts.

One of the instruments enacted for this judicial reorganization was the Supreme Court Ordinance No. 6 of 1914. This ordinance re-established and reconstituted the existing Supreme Court in such a way that its jurisdiction was extended to cover the whole of Nigeria. Under this instrument, the Chief Justice held office at His Majesty, the King of England's pleasure.[611] In addition to the Chief Justice, during hearings of appeals, the new Supreme Court was constituted by two or three judges, and for other businesses by three judges. Judges who manned superior colonial courts up to 1955 were staff of the Colonial Legal/Judicial Service.[612] The majority of them were expatriates and a few Africans, some of whom were trained in English law. Appointment of the Chief Justice and other puisne judges of the colonial Supreme Court was made by the Colonial Office and the judges held "*office during His Majesty's pleasure*."[613] Like in the previous Supreme Court Ordinances 1863, 1874, and 1900, the law to be applied under the Supreme Court Ordinance 1914 remained the Common Law, Doctrines of Equity, and Statutes of General Application in force in England as of 1 January 1900.[614] The Supreme Court's powers and jurisdiction were exercised in two divisions: the Western Circuit (part of which Yorubaland was), and the Eastern Circuit. For at least two times a year, assizes were held in each of these two divisions.[615]

[610] Elias, *supra* note 569 at 126.
[611] Supreme Court Ordinance No. 6, 1914, section 4.
[612] Sir Ademola Adetokunbo, "Personnel Problems in the Administration of Justice in Nigeria" Duke Law Scholarship Repository at 576, online: Duke University School of Law < https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2939&context=lcp >.
[613] Elias, *supra* note 116 at 127; and Adewoye, *supra* note 455 at 254.
[614] *Ibid*, section 14. This section, for the first time, extended the application of the Received English law to cover the whole of Nigeria.
[615] Supreme Court Ordinance No. 6, 1914, sections 23 and 25 (2).

The second court established for the whole of Nigeria after 1914 was the Provincial Court.[616] In terms of organization, this court was a replica of the Provincial Court established for the Protectorate of Northern Nigeria under the Protectorate Courts Proclamation No. 4 of 1900. Unlike the Supreme Court, Provincial Courts have fewer legally trained judges. Residents who were colonial administrative/political officers served as judges who presided over the Provincial Court. In the absence of the Resident, the court could also be presided over by such other proper persons that the High Commissioner might deem fit to appoint.[617] The court had both civil and criminal jurisdictions. Its civil jurisdiction covered matters that included personal suits of a value of not more than one hundred Pounds,[618] and tenancy matters not exceeding one hundred pounds.[619] The rest of its civil jurisdictions were the issuance of the writ of Habeas Corpus, granting of injunctions, and appointment of guardians. The Provincial Courts' criminal jurisdiction covered crimes that attracted terms of imprisonment not exceeding five years with or without a fine of up to one hundred pounds.[620] Any sentence of the Provincial court beyond a six-month term, twelve strokes of the cane, or a fine of fifty pounds was subject to the Governor-General's confirmation. The Governor-General reserved the power to modify such sentencing or order the case to be retried by the same or another court.[621] Notable was the provision of the Proclamation which conferred concurrent original jurisdiction in civil matters held by Provincial Courts, on the Supreme Court. However, the jurisdiction of Provincial Courts must not be exercised in ways that clash with the Supreme Court.[622] During the years under review, appeals from Provincial Courts in civil cases of a sum over fifty pounds went directly to the Supreme Court. No such appeal existed in criminal matters.

[616] The Governor was empowered to establish this court at provincial level. See, Provincial Courts Ordinance No. 7 of 1914 (as amended in 1922). By virtue of the latter proclamation, the jurisdiction of the new Provincial Courts established for the whole of the newly amalgamated Nigeria was expanded and consequently broader than what was obtainable in Northern Nigeria between 1900 and 1914.
[617] Elias, *supra* note 116 at 116 & 128. See also, the Provincial Courts Ordinance No. 7, 1914.
[618] If the matter was adjudicated by a Justice of the Peace, the monetary limit was twenty-five pounds, the limit was fifty-pounds in matters handled by District Officers or his Assistant in charge of a Division and one-hundred pounds if handled by a Resident.
[619] The monetary limit in tenancy matters was the same as above.
[620] Provincial Courts Ordinance No. 7 of 1914, section 12. Notably, subject to the authority of the Governor and Governor-General, Residents in charge of the Provinces had practically unlimited judicial powers over cases adjudicated in their Provinces.
[621] Provincial Courts Ordinance No. 7 of 1914, section 22. This power was delegated to the various Lieutenant-Governors. However, in the Provinces of Southern Nigeria under which Yorubaland existed, this role was regularly performed by the Chief Justice.
[622] Provincial Courts Ordinance No. 7 of 1914, section 25.

While legal representation was not allowed at the Provincial Courts, it was only allowed in cases on appeal from Provincial Courts to the Supreme. Such an appeal required the consent of the Chief Justice or a Judge of the Supreme Court. Provided, in the opinion of the appeal judge, the appeal/matter raised a question of law that cannot be determined without legal arguments.[623] That legal representation was not allowed at the Provincial and Native Courts was one of the bases for the criticisms raised at the time by members of the Nigerian Bar against Provincial Courts and the colonial regime generally. For most of the colonial administrations in the whole of Nigeria, and Yorubaland specifically, starting from the 1860s up to the 1950s, professional legal representation in courts was substantially disallowed. It was only in the Supreme Court that limited legal representation was allowed in cases involving literate litigants. Hence, an Order made under the Supreme Court Ordinance 1876 provided that where parties in a legal action were illiterate, "*the employment of Barristers or Solicitors shall not be allowed*" except in some special situations.[624] Two major considerations; historical and administrative, were responsible for the substantial abrogation of legal representation from colonial courts. Between 1874 and 1886 when Lagos was administered jointly with the Gold Coast, colonial administrators experienced difficulties on account of the activities of some self-taught attorneys.[625]

Most of these attorneys were not only found incompetent but they were also accused of exploiting clients, instigating litigation, and inciting local discontent thereby making colonial administration difficult.[626] Particularly in Lagos, some attorneys suffered disrepute due to allegations of corruption to the extent of being derobed. Allan MacIver and George Ernest Moss were accused of engaging an ex-convict to tout cases for them and being involved in professional misconduct. Both MacIver and Moss were consequently struck off the roll of the Supreme Court solicitors in 1879 and 1881 respectively.[627] The anxiety of the colonial administration about the danger that the attitudes of these attorneys portended was echoed by Chief Justice D.P. Chalmers in 1873. The Chief Justice said, "*The actual injury done {by the Gold Coast attorneys} consists mainly, first, in exacting excessive remuneration, and second*

[623] *Ibid*, section 33.
[624] See, the Supreme Court Ordinance, No 4, 1876, Order VIII, section 5.
[625] Adewoye, *supra* note 455 at 114.
[626] Conran to Cardwell (7 October 1865) United Kingdom, National Archive (CO 96/68).
[627] HCA, Lagos, Payne to Foresythe (13 July 1877) (Letter Book April 1877- August 1881).

stirring up unnecessary litigation {that could} aggravate class feelings and animosities."[628] The government then thought unless they were controlled, legal professionals could become harmful elements capable of threatening the political stability of the colonial order. They were considered dangerous to the peaceful colonial administration and a threat to the British hold on the colonies. "*It is not far-fetched to argue that such fears underlay the restrictions placed on professional advocates…*"[629] A major effect of the above situation in the Gold Coast and Lagos was the inclusion in the Supreme Court Ordinance 1876 and Order VIII of the court, a provision that restricted legal representation in colonial courts.[630]

The administrative consideration responsible for excluding attorneys from colonial courts specifically in Yorubaland included certain clauses contained in the judicial agreements of 1904 to 1908 signed between the British and Yoruba leaders. Certain clauses in the various agreements excluded legal practitioners from appearing in colonial courts which were to operate in Yorubaland. In these agreements,[631] the Yoruba leaders were alleged to have expressed their opposition to lawyers coming to practice in colonial courts established for their communities. However, considering that at the time, most of these Yoruba leaders did not know how legal practitioners function within the context of the British justice administration, it remains debatable that they truly expressed such opposition to legal representation. Ironically, most of these leaders, and some of their community associations were discovered to have legal advisers.[632] Arguably, the real reason for including the legal representation exclusion clauses in the various judicial agreements with the Yoruba leaders was to initially persuade these leaders by not radically altering the indigenous system of justice administration. At the time, the British were just beginning to find their administrative foothold on the land and instantly allowing professional advocates in the justice system might disrupt the indigenous judicial order. This they thought might invoke animosity against the then-nascent colonial regime. Notably, the weight of the influence of the emerging qualified African lawyers was threatening to the colonial authorities. Unlike other professionals, a lawyer of the colonial era in Nigeria and Yorubaland particularly had non-subservient

[628] Chalmers to Administrator-in-Chiefs, Sierra Leone (3 June 1873) United Kingdom, National Archive (CO 96/114).
[629] Adewoye, *supra* note 455 at 114.
[630] Secretary of State for the Colonies to Officer Adminstrating the Government, Gold Coast (17 July 1874) United Kingdom, National Archive (CO 96/114).
[631] See, Clause 6 of the Judicial Agreements with the authorities of Egba, Ibadan, and Ijebu. Ibadadan, NAN (CSO 5/2, 19, 20, 24).
[632] Adewoye, *supra* note 455 at 113.

freedom and social prestige. In the eyes of the non-literate masses, he was a hero fighting for justice in the face of colonial persecution.[633] He also possessed the knowledge to make the non-literate aware of his rights. A lawyer appearing before them could easily undermine the authorities of political officers manning the various courts by raising technical points of law capable of embarrassing the judges most of whom had only rudimentary knowledge of the law.[634] This reality was a potential threat to the smooth running of the colonial government. Consequently, professional advocates had to be curtailed through the provisions of the law limiting their socio-political and legal responsibilities.

Besides the fact that lawyers were, by law, not allowed to appear before these courts, officials who presided over them were mostly men of political interests not trained in the art of law. The fact that appeals in criminal matters were also not allowed to the Supreme Court, tainted some judgments of the Provincial Courts. Instead of subjecting criminal matters to the review of the Supreme Court, political executives decided the outcomes of such matters. Notwithstanding these and other shortcomings of the Provincial Court, it remained as the middle layer of the Nigerian judicial system until abolished by the judicial reform of 1933.[635]

The Native Court occupied the third layer of the colonial court system in Yorubaland from 1914 to 1933. By the new Native Courts Ordinance,[636] holistic structural adjustment was made to the previously existing Native Courts (Native Councils and Minor Courts) throughout the newly amalgamated Nigeria. A grading system was introduced, as the Court was structured into four grades: A to D. The powers and constitution of these courts were provided for in the warrant that constituted the courts. Jurisdiction of grade A covered both civil and criminal matters with a requirement that every death sentence be confirmed by the Governor before execution. Grade B had jurisdiction in civil matters of claims not exceeding fifty pounds. It adjudicated over criminal matters in which the punishment did not exceed two years imprisonment. It also punished with twenty-four strokes of the cane, a fine of fifty pounds or the equivalent under native law and custom. Grade C jurisdiction in civil matters was limited to ten pounds. This grade had criminal jurisdiction of up to twelve months

[633] "Editorial", *Lagos Weekly Record* (2 February 1907).
[634] Adewoye, *supra* note 455 at 117.
[635] Elias, *supra* note 569 at 134.
[636] Native Courts Ordinance No. 5, 1918 (as amended in 1922). The new Ordinance was, from the date of its enactment, made applicable to the whole of Nigeria.

imprisonment, twelve strokes of the cane, or a fine of ten pounds or the equivalent under native law and custom. The jurisdiction of Grade D in civil matters was five pounds. Its criminal jurisdiction was on matters in which punishment did not exceed three months imprisonment, twelve strokes of the cane, or a fine of five pounds or the equivalent under native law and custom.[637]

In Southern Nigeria Province, and Yorubaland specifically, the civil jurisdictions of grades B, C, and D were subsequently increased in October 1928.[638] Land matters were added to the jurisdiction of these three grades of the Native Court. The monetary limit of the courts was also increased to; one hundred pounds, fifty pounds, and twenty-five pounds respectively.

In the whole of Southern Nigeria Province which included Yorubaland, the Native Courts were composed of; a single native judge, a Head Chief (with or without other persons sitting as judges or assessors) or chiefs or other persons representing the native communities inhabiting the area over which the court exercised jurisdiction.[639] Because it applied more of native law and custom, judges of the Native Courts were mainly indigenous leaders, most of whom were knowledgeable in local law and customs. They were appointed by the Resident in consultation with local authorities.[640] No Native Court was allowed to exercise jurisdiction or serve summonses outside its geographical territory. For a court to serve an extra-territorial process, the matter must be transferred to the Provincial Court.[641] Appeals from grades of Native Courts in Yorubaland lay to the Head Chief's Court or a court constituted by not lesser than three of the chiefs of the Division. However, under the Native Authority (Amendment) Ordinance of 1930, appeals from Native Courts were changed from lying to the Chiefs' Court to Provincial Courts. As discussed above, like in the Provincial Courts, legal practitioners were not allowed appearances in the Native Courts, but authorized relatives were permitted to represent litigants in certain cases.[642]

[637] *Ibid.*
[638] Native Court Ordinance No. 28, 1928.
[639] Native Courts Ordinance No. 5, 1918, section 5(1).
[640] Elias, *supra* note 116 at 135.
[641] Elias, *supra* note 116 at 137.
[642] Native Courts Ordinance No. 5, 1918, section 20.

Notwithstanding the seemingly "native" character of these Native Courts, relevant Ordinances still subjected them to the whims and caprices of colonial officers. For instance, while he wasn't an active member of Native Courts, the District Officer continued to exercise keen supervisory roles over them. Like every member of Provincial Courts, the District Officer had a measure of power to transfer cases from the Native Courts to his court. He could also order a retrial, suspend a trial, or modify any sentence of the Native Courts.[643] Similarly, Commissioners of the Supreme Court, through the District Officer, also had powers to call for the records of a Native Court of a district.[644] Notably, all colonial judicial Ordinances and procedural rules enacted for the Supreme Court, Provincial and Native Courts applied to all the nerve centers of Yorubaland. These included Ibadan, Oyo, Ile-Ife, Ijebu-Ode, and Abeokuta (Egbaland). This was the situation since the special jurisdictions under which these core Yoruba towns existed under the various judicial agreements of 1904 to 1908 were abolished in 1915.[645]

Between 1914 and 1933, the above constituted the three layers of the colonial judicial mechanisms that existed in the whole of Nigeria generally and Yorubaland particularly. In addition to the above, a system of appeal was created from the Supreme Court established for Nigeria to the Judicial Committee of the Privy Council that sat in London. The procedural rules of appeals to the Council were as provided in the "Nigeria Privy Council Appeals Order in Council, 1917."[646] Up to 1963, the latter subjected the final review of all cases decided by the Nigerian Supreme Court to the external colonial judicial system in London.

(b) 1933 - 1954

1933 to 1954 was an epochal period in the judicial history of both Nigeria and Yorubaland. In his quest for reform, Sir Donald Cameron, the Governor of Nigeria from 1931 to 1935[647], made some transformative changes to the previous court system. This reform was a product of four newly enacted judicial Ordinances. These Ordinances, which came into force on 1 April 1934 were, the Native Courts Ordinance No. 44 of 1933, the Protectorate Courts

[643] Native Courts Ordinance No. 5, 1918, section 17 (1).
[644] *Ibid*, section 17 (2).
[645] Jurisdiction of Court Extension Order No. 2, 1915.
[646] This Order in Council was published in the Nigeria Gazette of 11 October, 1917.
[647] Burns, *supra*, note 553 at 226.

Ordinance No. 45 of 1933, the Supreme Court (Amendment) Ordinance No. 46 of 1933, and the West African Court of Appeal Ordinance No. 47 of 1933.

While the organization of the Native Courts was largely maintained, some adjustments were made to the scope of its jurisdiction and system of appeal. Except for matters connected to Christian marriage, matrimonial causes were added to the jurisdiction of Grade A Native Courts. Matters related to inheritance, testamentary disposition and administrations of estates, and matrimonial causes (also added to Grade A jurisdiction), were added to Grade B jurisdiction. The latter's criminal jurisdiction was reduced to one-year imprisonment, fifty pounds fine, and twelve strokes of the cane. For the new Grade C Native Courts, inheritance, testamentary disposition, and matrimonial causes like in Grade B were added to its jurisdiction. In terms of criminal penalty, the number of strokes of the cane to which a convict could be sentenced by the new Grade C Native Courts was reduced from twenty-four to twelve. Grade D also had matters related to inheritance, testamentary, and matrimonial causes added to its jurisdiction. The jurisdiction of Grade D courts was further extended to include the power to punish with six months imprisonment theft of livestock or farm produce.[648] Disobedience to any of the Native Court's summons attracted a fine of five pounds or fourteen days imprisonment against the offender.[649] The Resident was empowered to constitute a court headed by Headmen or not fewer than three chiefs in a Division as the Court of Appeal for all Native Courts in the Province. When headed by a Head Chief, such an appeal court was known as the "Final Court of Appeal". In certain cases, the District Officer presided over Native Courts as the president. That included a Native Court of Appeal. Under certain circumstances, however, the Resident was empowered to annul the orders or decisions of a District Officer.[650]

During the period under review, an appeal from a Native Court established for Yorubaland could be instituted in either of two ways. The appellant could, within thirty days, appeal to the Native Court of Appeal, or with the approval of the Governor endorsed on the court's

[648] For more on the powers, structures, and jurisdictions of the Native Courts established for Yorubaland between 1933 and 1954, see, Elias, *supra* note 569 at 140-165.
[649] Native Courts Ordinance No. 44, 1933, sections 16-19.
[650] Such power to annul was lost once the judgement exceeded six months after the end of the proceedings of Native Courts. See, Elias, *supra* note 569 at 142.

warrant, to a Final Native Court of Appeal, Magistrate Court, or a High Court.[651] The second way was for the appellant to appeal to a District Officer within thirty days, then to the Resident within another thirty days, and finally to the Governor within another thirty days. Notably, no appeal in matrimonial and family matters could be filed to any of the latter colonial political officers.[652] Except in some cases, an appeal from a Native Court heard by the High Court went thereafter from the latter to the West African Court of Appeal (WACA).[653]

The Native Courts Ordinance No. 16 of 1936 which amended the 1933 Ordinance further extended the jurisdiction of the Native Courts. Also in the Native Courts (Colony) Ordinance No. 40 of 1937, the power of the High Court over Native Courts was granted to the Commissioners of the Supreme Court within the Colony area, including Yorubaland. Hence, appeals from Native Courts went to District Officers, then to the Commissioners of the Supreme Court, and lastly to the Supreme Court. The previous Native Courts of Appeal were thus abolished.

By the Protectorate Courts Ordinance No. 45 of 1933, two new types of courts were established in place of the previous Provincial Courts. These were the High and Magistrates' Courts.[654] The High Court was composed of the Chief Justice, Judges, Assistant Judges, and a Resident who might, on occasion, be given the power of a judge within his Province. Only one judge constituted the Court. There was also a provision for the office of a Chief Registrar for the Protectorate of Nigeria. The Ordinance also provided for the office of registrars, and assistant registrars who were appointed to oversee aspects of the court's jurisdiction. With few exceptions,[655] the High Court exercised the same jurisdiction and applied the same law, practice, and procedure as the Supreme Court. Appeals in both criminal and civil matters

[651] Native Courts Ordinance No. 44, 1933, section 27.
[652] *Ibid*, section 28.
[653] *Ibid*, section 30. Cases in which such an appeal would not be allowed to the West African Court of Appeal included capital cases judgment, where fifteen days have elapsed after the judgment, in some decisions of the Final Court of Appeal, and in any other case whatsoever, in which the Governor specified that there should be no appeal to the WACA. See also, *ibid*, sections 31, 32, and 34.
[654] Protectorate Courts Ordinance No. 45, 1933, section 3.
[655]The jurisdiction exclusive to the Supreme Court and over which the newly established High had no jurisdiction included Probate, Divorce, and Matrimonial Causes, Admiralty, and matters emanating under some Ordinances that included the Legal Practitioners Ordinance of 1933, the Companies Ordinance, and the Public Trustees Ordinance of 1928. The High Court also lacked original jurisdiction in land matters, except when such came on appeal from a Native Court. See Elias, *supra* note 569 at 145.

from the Magistrates Court that involved ten pounds and above were heard by High Courts with the Magistrate's approval. Appeals from Native Courts and Native Courts' matters heard on appeal by the Magistrate's Court were also entertained by the High Court. The Chief Justice of the High Court also had the power to transfer any matter being heard by a Magistrate to another court or a High Court. Such an order of transfer stayed the proceedings in the court where the transferred matter was being heard.[656]

By the provision of section 7 of the Protectorate Courts Ordinance of 1933, throughout the Protectorate, Magistrates Courts were also established as courts of summary jurisdiction. This court was constituted by one Magistrate who was either a Justice of the Peace or a District Officer. The jurisdiction of the Magistrate Courts covered both civil and criminal matters. Its civil jurisdiction, which excluded original jurisdiction in land matters, included all personal actions and tenancy matters of up to one hundred pounds in monetary value. It exercised summary jurisdiction over criminal offences that involved up to a hundred pounds and which attracted an imprisonment term not exceeding twelve months. While appeals from Native Courts went to the Magistrate Court, the latter could also transfer cases pending before a Native Court, either to itself or to another Native Court. Magistrate Courts were also empowered to promote out-of-court reconciliation in both civil and criminal cases.[657] A novel provision in both the new Native Court and Protectorate Courts Ordinances was that legal representation was allowed in both Magistrate and High Courts, although with requirements. A requirement was that, if a case was on appeal from Native Courts, it must be a land matter that involved a monetary value of two hundred pounds and above. In the absence of the latter requirement, the land in question must situate in one of the fifteen places in Nigeria as listed in the Second Schedule to the Native Court Ordinance.[658] Thus, legal representation was allowed in the Magistrates' Courts only in cases that fell under either or both of these requirements.

In addition, the Supreme Court (Amendment) Ordinance No. 46 of 1933 was enacted to adjust the Supreme Court's position and align it to the newly established lower courts and the West African Court of Appeal. While it retained its previous jurisdiction, the new Ordinance

[656] Elias *ibid.*
[657] Elias, *supra* note 569 at 146.
[658] See, *Surakatu & Anor. v. Dende & Ors.* (1941) 7 W. A. C. A. 50.

empowered the Supreme Court to execute the processes of the new High, Magistrate, and Native Courts. The requirement for the latter was that the processes/summons/warrants issued from the lower courts must be certified by the Judge or Magistrate concerned. The new Supreme Court (Amendment) Ordinance also substituted the West African Court of Appeal (WACA) for the previous Full Court of the Supreme Court. The WACA then became the highest local judicial umpire in Nigeria during the period under review. Subsequently, provisions of the Supreme Court (Amendment) Ordinance No. 14 of 1936 and No. 43 of the same year slightly adjusted the jurisdictions of the Supreme Court. The adjustment touched on the grant of Probate and Letters of Administration, and the monetary limit of Supreme Court criminal jurisdiction. Applications that related to probate and administration of estate were only to be made to the Supreme Court through the Administrator-General.[659] The monetary value of criminal jurisdiction of the Supreme Court's Commissioners was also increased to a maximum of one hundred pounds or twelve months jail term.[660]

Since 1874 when the old West African Court of Appeal (WACA) collapsed, an attempt at resuscitating it in 1922 failed. The failure was due to certain factors that included the lack of finances required to maintain such a court.[661] The idea of re-establishing the court was again revived in 1928 when the colonial government issued the "African Court of Appeal Order in Council".[662] While the court was to be composed of judges of the Supreme Court, it was duly constituted by an even number of judges, not less than three at any sitting, but could also be duly constituted by two judges provided parties to the matter consented. To legally channel appeals from this court to the Privy Council, the "West African (Appeal to Privy Council) Order in Council" was issued in January 1930. Initially, both Orders in Council made in respect of the WACA were not effective in Nigeria generally and concerning cases emanating from Yorubaland particularly. However, at the enactment of the "West African Court of Appeal Ordinance No. 47 of 1933" and its subsequent amendment of No. 6 of 1938, both Orders in Council became effective, especially in Yorubaland.

[659] The Supreme Court (Amendment) Ordinance No. 14, 1936, section 59.
[660] See, the Supreme Court Ordinance No. 43, 1936.
[661] Elias, *supra* note 569 at 149.
[662] Issued by virtue of the power conferred on the government under the provisions of the British Settlement Act 1887 and the Foreign Jurisdiction Act, 1890 with respect to the Colony and Protectorate of Nigeria respectively.

Following the establishment of the WACA, appeals from the Supreme Court in all final judgments given on civil matters that involved a monetary sum of fifty pounds and above went to the WACA. Likewise, appeals from the Supreme Court, in criminal matters that involved a conviction based on questions of law, of facts, or mixed law and fact or on any other ground which the WACA considered as sufficient, lay to the latter. Appeals to the WACA must be brought within fifteen days of the judgment appealed against, except if an extension was granted by either the Supreme Court or by WACA itself. Sentences of death or corporal punishment cannot be executed before the expiration of the statutory fifteen days or pending the determination of an appeal against the sentence or corporal punishment. The notice of appeals must be duly given to suspend the execution of judgments. After hearing appeals brought before it, the WACA could set aside judgments of the lower courts on various grounds. These grounds included that such judgments were against the weight of evidence, or that they were wrong in law and capable of leading to a substantial miscarriage of justice. The WACA also advised the Governor (on his Prerogative of Mercy power) on petitions submitted to the latter seeking mercy against convictions other than death sentences.[663] Importantly, in exercising its judicial and advisory powers, especially during hearings, the WACA acted with flexibility and applied procedures that were not strictly provided for in statutes.

Between 1943 and 1954, there were further notable changes in the court system in Nigeria generally, thereby affecting the judicial system in Yorubaland. While amendments made to some of the extant courts' Ordinances consolidated, expanded, and merged some of the existing courts, one newly introduced Ordinance created a completely new court. Thus, after the reorganization of 1943 to 1954, six courts survived and operated in Yorubaland. These were Juvenile Courts, Native Courts, Magistrates Courts, the Supreme Court, the West African Court of Appeal, and the Privy Council.

The "Children and Young Persons Ordinance No. 41 of 1943" and later amendments established Juvenile Courts for Lagos.[664] The court was constituted of a Magistrate and an

[663] Elias, *supra* note 569 at 151.
[664] The same court was also established in Calabar. Meanwhile, before the official establishment of these courts in Lagos and Calabar, provisions of the establishing ordinance relating to "dealing in and corruption of children" had been applied in the Eastern and Western Provinces. See, Order in Council No. 22 of 1946. See also, Elias, *ibid.* at 155.

Assessor. Unless a case involved a child or young person jointly arraigned with an adult, the court sat in a room or building different from the regular Magistrate court venue. The sittings of this court were not usually open to the public. Other than members of the court, parties to the case, their counsel, those directly interested in the matter, and the media, other persons could only attend Juvenile court sittings by the leave of the court. Orders that the court could make included a fine or damages to be paid by the parents or guardian of a child tried by it. The exception to the latter order was, if found that the parents/guardians had not neglected their role of guiding the child, they could escape payment of fines. Ordinarily, the court could not commit a child under fourteen to prison but could do so in cases of persons between fourteen and seventeen only if the latter could not be otherwise dealt with. No sentence of death could be passed against a person under seventeen.[665] Neither the words "conviction" nor "sentence" were allowed to be used by the court while finding a juvenile guilty.

For the Native Courts, there was no new Ordinance enacted but an amendment was made to the principal Ordinance, Native Courts Ordinance No. 44 of 1933 as amended in 1945. By this Ordinance, the Residents continued to exercise the power, to establish, by a warrant, the four grades of court in their respective Provinces. The changes made to these courts in Yorubaland were notable in their composition, jurisdiction, and laws applied. A Native Court in Yorubaland during the period under study was constituted by head chiefs or a head chief, chiefs, or a chief, or any other person or persons, including non-natives, sitting with or without assessors. In terms of their jurisdictions, notable adjustments made by the amending Ordinance included that, for Grade A, no sentence of death was allowed to be executed except with the approval of the Governor. Grade B jurisdictions in civil matters were limited to one hundred pounds and fifty pounds or twelve months imprisonment in criminal matters. Grade C jurisdiction was pegged at fifty pounds in civil matters, and ten pounds or not more than twelve months imprisonment in criminal matters. Grade D had a jurisdiction limit of twenty-five pounds in civil matters. In criminal matters, it also had the power to impose a maximum of six months imprisonment or a fine of five pounds or the equivalent by native law and custom. In addition, within Yorubaland, these grades of Native Courts were empowered, through their constitutive warrant, to exercise jurisdiction over land matters. None of the Native Courts was allowed to execute corporal punishment judgments without the confirmation of a Head Chief or a District Officer.

[665] *Ibid*, at 166.

The laws administered by these Native Courts included, "native laws and customs" prevailing in the locality of their jurisdictions. Such native law and custom must not be repugnant to natural justice or morality and must not be inconsistent with the provisions of any Ordinance in force. The Native Courts also administered provisions of other relevant Ordinances, provisions of rules, by-laws, and Orders in force within their jurisdictions.[666] However, in *Bornu Native Authority v. Abakka Magudama* decided in 1947, it was held that when a Native Court sat on a matter which constituted an offense under both the Criminal Code and Customary Law, the court must apply the Criminal Code.[667] Up until this period under study, lawyers were not allowed appearance before any of the Native Courts established for Yorubaland, and elsewhere in Nigeria.[668]

As before, colonial officers remained in control of these courts. District Officers presided over them as Presidents in certain cases and as advisers in others. Residents also exercised powers of review and case transfer over Native Courts. The previous two lines of appeal were restored. The first line was from the Native Court to the Native Court of Appeal, then to the Final Native Court of Appeal presided over by a Head Chief, to the District Officer, to the Resident, to the Chief Commissioner, and finally to the Governor. In the second line, after the Final Native Court of Appeal, it went to the Magistrate Court, Supreme Court, West African Court of Appeal, and finally to the Privy Council in London. Up to this time, the one-grade structure of the Native Court in the Colony area of Lagos remained with few notable adjustments made to its jurisdictions.[669] This adjustment was provided by the provisions of 1943 and the subsequent 1946 amendments of the Native Court Ordinance No. 44 of 1933.

The combined effect of the amended versions of the Magistrates' Courts Ordinance No. 24 of 1943 and the Supreme Court Ordinance No. 23 of 1943, was the elimination of the formerly constituted High and Magistrates' Courts. The Ordinance then established new Magistrate's

[666] Native Courts Ordinance No. 44 of 1933 (as amended by No. 16 of 1936 and No. 18 of 1943), section 10.
[667] By the provisions of the Native Courts Ordinance No. 36 of 1948, in such a dilemmatic case constituting a crime under both the Code and Customary Law, in dealing with such a case, the Native Court was to treat the Code as part of the applicable Customary Law of the area of its jurisdiction. This short-lived Ordinance neglected or intentionally ignored the wide and unrelated differences in the sources and nature of both laws. Realities that made it unrealistic to treat the Criminal Code as a part of Customary Law.
[668] *Ibid*, section 24.
[669] On the jurisdictions of the one grade Native Courts in the Colony area of Lagos, see the Native Court Ordinance No. 40 of 1937, section 8 (as amended by No. 40 of 1941, No. 7 of 1943, and No. 36 of 1945.

Courts. The latter had both civil and criminal jurisdictions all over Nigeria, including Yorubaland. This Ordinance also scrapped the Courts of Commissioner of the Supreme Court throughout Nigeria. The Ordinance empowered the Chief Justice to divide the whole of Nigeria into Magisterial Districts. Before 1948, the country was divided into six Magisterial Districts with Lagos having three and the remaining three Provinces: Northern, Eastern, and Western Provinces (Yorubaland) having one Magisterial District each. When the Magisterial Districts were increased to twenty-two in 1948, Lagos had eight seats due to the enormity of transactions in the coastal/commercial city.[670] There were three grades of the new Magistrates' Courts; Grade I, II, and III. One Magistrate sat on each of these courts. Aside from those Magistrates who were ex-officio Justices of the Peace, the Governor was empowered to appoint fit and proper persons as Magistrates.

The jurisdiction of Grade I Magistrate's Courts covered civil and criminal matters. Its civil jurisdiction extended to contract, tort, tenancy, the appointment of guardians, and the granting of injunctions in certain cases.[671] Grades II and III could also deal with matters over which Grade I had jurisdiction with slight differences notable in the monetary limit of the former. While Grade II had a hundred pounds limit, Grade III was limited to twenty-five pounds. Thus, Grades I, II, and III had monetary jurisdiction limits of two hundred Pounds, one hundred Pounds, and twenty-five Pounds respectively. In criminal matters, Grade I had summary jurisdiction to try persons arraigned for crimes that attracted a punishment not exceeding two hundred Pounds or imprisonment of not more than two years or both. However, some senior Grade I Magistrates were appointed as Chief Magistrates in 1951, and their monetary jurisdiction limit in civil and criminal matters was increased to five hundred Pounds. The Chief Magistrates also had the power to sentence a guilty person to up to five years imprisonment.[672] Grade I Magistrates courts could also, albeit summarily, try offenses attracting higher penalties if the accused consented to be tried by the Magistrate after being informed of his right to be tried by the Supreme Court.

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[670] See, Great Britain Colonial Office, *Annual Report on Nigeria for the Year 1948* (H.M. Stationery Store: Lagos,1948), online: < https://books.google.ca/books?id=MucNAQAAMAAJ&printsec=frontcover#v=onepage&q&f=false >.

[671] Grade I Magistrate jurisdiction in civil matters did not include original jurisdiction in land matters, succession under a will, inheritance, or disposition of property of an intestate, and issues of marriage and family status. See, Elias, *supra* note 569 at 161. Notably too, tenancy matters which this grade of the Magistrate court could entertain was limited to a hundred pounds.

[672] Elias, *supra* note 569 at 162.

Like in civil matters, Grades II and III also had the same criminal jurisdiction as Grade I, the difference was in their monetary limit and term of imprisonment. The monetary and imprisonment power limit for Grade II was one hundred Pounds and twelve months respectively. It was twenty-five pounds and a three-month imprisonment power limit for Grade III. The three Grades of the Magistrates Courts could hear and determine appeals from Native Courts within their jurisdictions. Unless varied by local ordinances, these Magistrates' Courts mainly applied the Received English Law which were, common law, doctrines of equity, and statute of general application in force in England as of 1 January 1900. When common law clashed with the principles of equity in the process of their application, the latter was to prevail. The Magistrates Courts also applied rules of customary law only when such was consistent with provisions of relevant extant ordinances and not repugnant to natural justice, equity, and good conscience. Rights of direct appeal in all civil and criminal matters existed from the Magistrates' Courts to the Supreme Court.[673] Unlike in the Native Courts, legal practitioners were allowed to appear and represent clients before these Magistrates' Courts.[674]

By the provisions of the Supreme Court Ordinance No. 23 amended by No. 33 of 1943, the Supreme Court was re-established as a Superior Court of Record. Same with the High Court of Justice in England, this Supreme Court had limitless jurisdictions in civil and criminal matters throughout Nigeria. From eight judicial divisions into which Nigeria was divided in 1945 when the Supreme Court Ordinance became effective, it was increased to eleven in 1948. While the Supreme Court was composed of the Chief Justice and any number of judges that might be appointed by the Governor, the court was duly constituted by one judge of the court. Except otherwise expressly provided and as held in *Thomas v. Ademola II*[675] and subsequently in *Apena v. Thomas,*[676] the Supreme Court had original concurrent jurisdiction with Native Courts in matters over which the latter had jurisdiction. In addition, appeals from all Magistrates' and Native Courts were heard and determined by the Supreme Court. It was also a statutory duty of the Supreme Court to promote reconciliation in civil and criminal matters pending before it.

[673] Magistrates' Courts (Appeals) Ordinance No. 41 of 1945 (as amended by No. 13 of 1946).
[674] Elias, *supra* note 569 at 163.
[675] (1945) 18 N.L.R. 12.
[676] (1950) A.C. 227

The West African Court of Appeal (WACA) was the fifth court that had jurisdiction over Yorubaland during the period under study. Up to 1948, the organization, and structure of this court remained as explained above.[677] It heard appeals from the Supreme Court and below, as prescribed by its establishing ordinance. After 1948, the court was recomposed and reconstituted. It thereafter had a permanent President and a Justice of Appeal. The latter's statutory role was to sit with the Chief Justice of any of the West African Colonies when the need arose to constitute a Court of Appeal in the Colony.[678] Appeals from the WACA in matters with a monetary value of five hundred Pounds and above went to the Judicial Committee of the Privy Council (Privy Council) in London. In cases of lesser monetary value, appeals could only go up to the Privy Council at the discretion of the WACA. Except in a few exceptional instances, every appeal to the Privy Council must be filed within twenty-one days of the judgment of the WACA. Appeals before the WACA were instituted either by way of a petition or motion.[679]

The above constituted the judicial history of Yorubaland up to 1954. From 1963 onward, the judicial structure started to reflect the Nigerian national character following the advancement of the country into a republic as provided by the 1963 constitution. The current judicial structure which follows a different pattern is as provided in the relevant sections of the 1999 Constitution of the Federal Republic of Nigeria.[680]

D. Civil and Criminal Justice Procedures in Yorubaland during Colonialism

The procedures analyzed below covered the commencement of actions, hearing of cases, taking of evidence/examinations, judgment, and execution. Modes and lines of appeal have been previously discussed above. That the pre-colonial justice administration in Yorubaland was modified alongside colonial court establishments and reorganizations discussed above is without a doubt. The procedures of civil and criminal justice administrations in the various courts established during the colonial era differed from the pre-colonial courts' procedures.

[677] This was according to the provisions of the West African Court of Appeal Ordinance No. 47 of 1933, and the subsequent amendment No. 30 of 1943.
[678] See, the West African Court of Appeal Rules 1950.
[679] One of the exceptional instances is the case of a convict under death sentence who has fourteen days to give the notice of his intention to appeal to the Privy Council. See, West African (Appeal to Privy Council) Orders in Council, 1930.
[680] See generally, the 1999 Constitution, section 6.

The procedures adopted in the colonial courts were mainly predicated on the Received English Law. As found by T. Olawale Elias, the English law of evidence and procedures are contained in several statutes, rules of court, and in the general principles of the common law, and equity.[681] Hence, rules that regulated evidence and other procedures in colonial courts in Nigeria generally, and in Western Province (Yorubaland) particularly were mainly contained in the various colonial ordinances. These were, the Evidence Ordinance, Civil Procedure Code or Ordinance, and Criminal Procedure Code or Ordinance.[682] Notwithstanding the comprehensive nature of these codes and ordinances, they were not exhaustive of all the rules applied by the various colonial courts.[683] While these proliferated colonial courts were constantly reorganized structurally; their civil and criminal procedures did not encounter many changes. Consequently, the analysis of the civil and criminal procedures and practices here is streamlined to three major colonial courts of the first instance operated in Yorubaland between 1900 and 1954. These were Native Courts, Magistrate Courts, and the High Courts that were established through the 1933 reforms and survived till 1943. Notably, the procedures in the High Courts were almost the same as those of the Magistrate Courts. The main difference was that proceedings in the Magistrate Courts were summarily done without many elaborate processes as obtained in the High Courts. Thus, both courts are jointly analyzed in this subtopic.

(i) Civil Justice Procedures in Colonial Native Courts

Although reorganized severally, Native Courts formally established by the colonial government in 1900 survived through the 1933 reform even till date, albeit under different names.[684] While Native Courts were to apply "native law and custom", in practice, the courts applied an admixture of native law and custom and the Received English Law. These included the common law, doctrines of equity, and the statute of general application in force

[681]T. Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction between English Local Laws in British Dependencies* (London: Stevens & Sons Limited, 1962) at 248.
[682] *Ibid.*
[683] See, *Shorunke v. The King* [1946] A.C. 316 at 326-327 decided on whether the procedure to obtain a *subpoena ad testificandum* is exclusively limited to those contained in the Nigerian Criminal Procedure Ordinance 1914. The Privy Council held in this respect that, "*in cases of ambiguity or casus omissus, a colonial court employing one of these codes can still resort to the residuum of general principles and doctrines of the English common law applicable to the point at issue*." (Elias, *ibid*).
[684] A.O. Obilade, "Reform of Customary Court Systems in Nigeria under the Military Government" (1969) 13:1 J African L 28, online: < https://www.jstor.org/stable/745201 >; Akintunde Olusegun Obilade, *The Nigerian Legal System*, (London: Sweet & Maxwell, 1979) at 23-25. Native Courts are now known as "Customary Courts" in Southern Nigeria and as "Area Courts" in Northern Nigeria.

in England as of 1 January 1900. As attested by Elliot Alexander Keay and Sam Scruton Richardson,[685] the native law and customs allowed to be applied by Native Courts were subjected to repugnancy and incompatibility tests. The tests remained that the native law and custom must "*not be repugnant to natural justice, equity, or good conscience or incompatible either directly or by necessary implication with any written law for the time being in force*".[686]

To commence a civil action before a Native Court in the colonial Western Province of Nigeria (Yorubaland) during the period under study, parties to the matter must be persons subject to the jurisdiction of this category of Courts. Otherwise, the court lacked jurisdiction to hear such a matter.[687] As identified by T. Olawale Elias, there were two categories of persons subject to the jurisdiction of these Native Courts. The first category was those; "natives" who were government servants, and secondly, persons not ordinarily subject to the jurisdiction of Native Courts and were not permanent residents of the court's jurisdiction.[688] The latter category of persons must consent to the court's jurisdiction or have the Resident of the jurisdiction give his consent before they could be brought before the Native Courts as parties.[689] The intent for this jurisdiction limitation as contained in the Native Court Ordinances was to protect British and other Europeans who were non-natives of the communities of the court's jurisdiction.

Once the issue of parties has been sorted, an aggrieved person can then commence his/her action in line with the provisions of the Civil Procedure Ordinance or any other applicable rules of the court which include acceptable rules of customary law. By the provision of

[685] E.A. Keay & S.S. Richardson, *The Native and Customary Courts of Nigeria* (London: Sweet & Maxwell; Lagos: African Universities Press, 1966) at 227.
[686]E.A. Taiwo, "Repugnancy Clause and Its Impact on Customary Law: Comparing the South African and Nigerian Position- Some Lessons for Nigeria" (2009) 34:1 J Juridical Science 89, online: < https://caid.ca/RepClaCusLaw2009.pdf >.
[687] Justus Sokefun & Nduka Njoku, "The Court System in Nigeria: Jurisdiction and Appeals" (2016) 2:3 Intl J Business & Applied Soc Science 1, online: < https://ssrn.com/abstract=2940058 >. Cases decided on the importance of ascertaining whether or not a court lacks jurisdiction to entertain a matter include *Madukolu v. Nkemdilim* (1962) 2.S.C.N L.R. 341 and *Ajaokuta Steel Co. Ltd v. Greenbay Investment & Securities Ltd & Ors* (2019) LPELR-46929 (SC).
[688] Elias, *supra* note 569 at 137.
[689] In criminal procedures, such consent are, by law, to be given by the Lieutenant-Governor. Meanwhile, under the various Native Court Ordinances enacted since 1900, the Governor was given the power to exempt any person or class of persons from the jurisdiction of Native Courts. See, Elias, *supra* note 569 at 137.

section 11 of the Civil Procedure Ordinance No. 4 of 1924, the aggrieved party, (Plaintiff), could approach the court by filing a claim. The latter must contain the particulars of the parties involved and the issues in dispute. The court, through its registry/clerk, would issue a summons directed to the defendant, commanding the latter to appear before the court and answer the claim against him.[690] The summons was to contain brief details of the parties, the case against the defendant, reliefs sought, the venue and time of the hearing, and the power of the court to adjourn any proceeding of the matter.[691] Civil disputes that could be brought before Native Courts included breach of contract, loan, and debt issues. Others were land matters, issues related to native customs and traditions,[692] and administration of the estate of an intestate.[693] Except for matters that arose under English law but were also triable by Native Courts, the Statute of Limitation did not apply to actions over which Native Courts had jurisdiction.[694] Consequently, with few exceptions,[695] there was no time limit against a cause of action that arose under customary law during the period under study. Such an action could be instituted before the Native Court at any time.[696]

As noted earlier, Native courts in Yorubaland during the colonial era were composed of traditional leaders and presided over by colonial administrators. However, to reiterate some points made in chapter two, some of the traditional leaders appointed by colonial officers were forcibly superimposed over most of the communities they ruled, and consequently, the courts they presided over. An example was the power disorganization orchestrated by Captain Ross in the Oyo sub-province vis-à-vis other communities of the Yoruba Province like Ibadan and Ogbomoso. While the British officials constantly legalized the authorities of the validated indigenous leaders, the illegitimate nature of their judicial responsibilities undermined most of the courts' judicial process. Hence, this British officers' approach to justice under the indirect rule system and some of the Native courts' decisions were viewed by the ruled as a reaffirmation of decentralized despotism.[697]

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[690] Civil Procedure Ordinance No. 4 1924, section 12.
[691] *Ibid*, section 13.
[692] See generally, Native Courts Ordinance, 1926.
[693] Native Courts (Amendment) Ordinance, 1924.
[694] This was held in *Koney v. Union Trading Co. Ltd.* (1934), 2 W.A.C.A. 188, and *Osuro v. Anjorin* (1946), 18 N.L.R. 45.
[695] One of the exceptions related to when, for equitable reasons, the court thought it necessary to prevent stale claims. For this reason, the court could pronounce a matter that arose under customary law as statute barred.
[696] B.O. Nwabueze, *The Machinery of Justice in Nigeria* (London: Butterworths, 1963) at 264.
[697] See generally, Atanda, *supra* note 329 at 106-176, and Mahmood Mamdani, *supra* note 63 at 62-137.

Civil cases in Native Courts composed of chiefs and presided over by appointed British officials were heard in the open court. After the court was seated, the plaintiff would be prompted to state his case and present evidence to back it up. Court registrar or clerks took notes and recorded evidence presented in the course of hearings. Proof of evidence could be adduced in other ways than by oral or documentary evidence. Though frowned upon and criticized by British officials as a "barbarous" carry-over procedure of the Yoruba pre-colonial justice system, the plaintiff and the defendant could agree to swear an oath to attest to the truth of their cases. This was done with the concurrence of the court who, through its officials, oversaw the administration of the method of oath agreed to by the parties. According to Ben Nwabueze, the method of oath opted for by the parties would depend on the faith of the party swearing the oath. A Christian party swore by the Holy Bible, Moslem by the Holy Quaran, and the traditionalists by their revered god or deity.[698] If any of the parties called witnesses to strengthen the evidence in support of his case, such witnesses would be called before the court to give their testimonies as the court clerks or registrars took note. Unlike in the Northern Province where examinations were hardly allowed, in the colonial Native Courts of Yorubaland, examination-in-chief and cross-examination followed the giving of evidence. The rules of procedure applied in the Western Province allowed parties to cross-examine each other and their witnesses.[699] In certain cases, the court was directly involved in the examination and cross-examination of witnesses. This was for efficiency and clearer establishment of the truth of the matter in dispute.

After the hearing which in some cases could span several adjournments, the court would weigh facts and evidence presented by both parties against the applicable law. Judgment is thereafter given to the party whose evidence was the most believable. Depending on its grade, a Native Court could decree that the party who lost the case should pay certain damages or restore certain property or rights to the party who won the case. At times, the judgment could also decree the performance of an action or the halting of an action.

[698] Nwabueze, *supra* note 696 at 265. In some cases, the party taking the oath was believed as telling the truth and judgment was consequently entered in his favor. However, if within the time agreed to for the operation of the oath, he becomes strangely ill, dies or his close relative dies, his oath would be taken as a false. In such circumstance, his relatives would surrender the disputed object or the contended right to the other party.
[699] *Ibid*, at 264.

As discussed above, in the colonial Western Province of Yorubaland, unsatisfied parties before a Native Court could appeal to a higher court. Such an Appeal from a Native Court was taken in either of two ways. The appellant could, within thirty days, appeal to the Native Court of Appeal, or with the approval of the Governor endorsed on the court's warrant, to a Final Native Court of Appeal, Magistrate Court, or a High Court.[700] The second option, which was applicable in certain cases, was for the appellant to appeal to a District Officer within thirty days, then to the Resident within another thirty days, and finally to the Governor within another thirty days. However, as discovered[701] and also buttressed by Omoniyi Adewoye, as of 1937, the right to appeal was absent in the majority of the Native Courts that survived in Nigerian Provinces till that time. Thus, among the 1,143 Native Courts in Nigeria at the time, appeals were allowed to higher courts in only thirteen (13). All of these thirteen were in the two Southern Provinces of Eastern and Western (Yorubaland) Nigeria.[702]

In the absence of a pending appeal, a judgment of a Native Court must be complied with by the judgment debtor. In cases of defiance, the court could further be called upon to enforce the judgment. This was achieved through an application for an order of the court for the enforcement of the judgment. Such an order empowered the judgment creditor to enforce the judgment only against the movable properties of the judgment debtor, but not against his immovable assets or a debt owed to the judgment debtor by a third party. The judgment could also be enforced by imprisoning the judgment debtor till he complied with the Native Court decision.[703]

(ii) Civil Justice Procedures in Colonial High Courts and Magistrate Courts

As discussed above, by provisions of the Protectorate Courts Ordinance No. 45 of 1933, two new types of courts; High Courts and Magistrate Courts were established in place of the

[700] Native Courts Ordinance No. 44, 1933, section 27.
[701] "Native Courts in the Southern Provinces", Ibadan, NAN (CSO 26/3, 20665/S).
[702] Adewoye, *supra* note 455 at 234.
[703] Nwabueze, *supra* note 696 at 265.

previous Provincial Courts.[704] While the existence of this particular High Court was temporarily terminated in 1943 until resurfaced again in 1954,[705] Magistrate Courts survived through the various colonial judicial reorganizations. Apart from a few notable divergences, civil procedures in colonial High Courts and Magistrate courts were largely similar. Hence, both courts are jointly analyzed under this subtopic. Civil procedures in both High and Magistrate Courts were governed mainly by rules of court made by persons statutorily empowered to do so within the various colonial provinces and regions. In the Western Province/Region[706] (Yorubaland), the person empowered by establishing ordinances to make civil procedure rules for the High Courts,[707] and Magistrate Courts[708] was the; Chief Justice, acting with the approval of the Governor or Governor-General. In circumstances where no locally made rules were available to govern a procedure before the High Court, rules of the Supreme Court in England applied. Notably, as held in *Bell v. Ebenezer,*[709] all the rules of courts were subsidiary legislations and as such, were applied subject to the overriding provisions of relevant statutes.

Parties before these courts were usually persons disputing over a particular property or rights. These were not necessarily natural persons. Disputing parties could also be artificial persons like companies, businesses, and governments that had an interest in the subject matter of a civil suit. Under the various colonial civil procedure rules, the party claiming something or ascertaining some rights against another was the Plaintiff. The one against whom the claim was made was the Defendant. A civil action over which either the High Courts or Magistrate's Courts had jurisdiction must be commenced within a statutorily provided timeframe.[710] Otherwise, on the pleading of the defendant, the court could pronounce the

[704] Protectorate Courts Ordinance No. 45, 1933, section 3.
[705] Elias, *supra* note 569 at 171.
[706] Regional system of government was first introduced to Nigeria under the colonial Richard's Constitution of 1946. Under this arrangement, the various divisions of Nigeria evolved from the provincial system into regionalism when Nigeria was balkanized into the Northern Region, Eastern Region, and the Western Region (Yorubaland). For more on this, see, Louis J. Munoz, "Regionalism in Nigeria: The Transformation of Tradition" (1987) 52:2 II Politico 317, online: < https://www.jstor.org/stable/43100550 >.
[707] See generally, the High Court Rules, 1955 (Western Region); Supreme Court (Civil Procedure) Rules, Cap. 211, and the High Court of Lagos Act, Cap. 80, section 89 (3).
[708] Magistrates' Courts (Civil Procedure) Rules, 1958 (Western Region), and the Magistrates' Court (Civil Procedure) Rules, 1957 (Lagos).
[709] (1961), 1 All N.L.R. 350.
[710] The applicable local enactment on this point in the Western Region was the Limitation of Action Law, Cap. 64, Laws of Western Nigeria, 1959. In other parts of Nigeria where no such local enactment existed, some statutes of general application governed this issue. See, *Chief Dede v. African Association* (1910), 1 N.L.R. 130*; Koney v. Union Trading Co. Ltd.* (1934), 2 W.A.C.A. 188, and *Green v. Owo* (1936), 13 N.L.R. 43.

action as statute-barred and become irremediable through an action at law. The Limitation of Action Law that applied in the Western Region and the English statutes of general application prescribed a limitation of six years for actions for contract and tort. The law also prescribed a twenty-year time limit for recovery of land, specialties, rent charges, and similar other causes of action.[711]

Once established that the cause of action was yet to be statute-barred, the plaintiff could then commence his action through an application for a Writ of Summons. This application was to be made at the appropriate court registry. It should contain a *statement of particulars of the claim* which must bear sufficient information to make the defendant understand the claim made against him. If the action was before a Magistrates' Court, the statement was otherwise called "*plaint*". A summons with a hearing notice, commanding the defendant to attend the court on the stated date to respond to the suit of the plaintiff, would then be issued by the court registrar. The writ of summons and a copy of the particulars of claim were then served on the defendant, or his solicitor by an officer of the court. Such officers included the Sheriff, Deputy-Sheriff, Constable, or any other persons as may be appointed by the Native Authority, a Local Government, or the Court. Where personal service was proven to the court as impossible or inconvenient, the court could make an order for the writ to be served in other ways. Subject to the court's power of extension, the writ must be served within twelve months of its issuance, otherwise it becomes void.[712] Following the issuance of the writ, the case would be entered on the Cause List[713] for hearing. If the case was before a Magistrate's Court, instead of the Cause List used in the High Court, the plaint would be entered in the "*Civil Cause Book*" used for the same purpose in the Magistrate's Court.[714]

Unlike in England where formal written appearance[715] was a compulsion, in the colonial Western Region, all a defendant needed to appear before the court on the first day was either

[711] The Limitation Act, 1623 was applicable in other parts of Nigeria apart from the Western Region. Interestingly, when this law was applied in other regions of Nigeria, it was already repealed and replaced in England by the Limitation Act, 1939.
[712] Nwabueze, *supra* note 696 at 250-251.
[713] This list was of two types viz; the General Cause List and the Undefended List. For more on this as it applied to both the High Courts and Magistrates' Court, see, *ibid*, at 251-252.
[714] Nwabueze, supra note 696 at 249-256.
[715] *Ibid.*

to come in person, by proxy, or by his solicitor. Where a good reason was shown for why the defendant couldn't appear personally, he could be represented by his solicitor or his proxy. The latter could be a member of his family, his master, or a servant. A matter entered on the Cause List or the Civil Cause Book might eventually not go to trial. The plaintiff could, later on, decide to abandon the case or withdraw to settle out of court. However, if an attempted out-of-court settlement failed, the plaintiff could, again, make a recourse back to the court.

For cases that proceeded into hearings,[716] except the court thought otherwise, the parties were mandated to exchange written pleadings[717] with a copy of each of the pleadings filed in the court registry. If the matter was before a Magistrate's Court, the use of pleadings was not applicable. Instead, a defendant could make a written statement to admit the whole or parts of the plaintiff's claim for which judgment could be entered by the court. Pleadings were the elaborated Plaintiff's Statement of Claim and the defendant's defense of the claim. Pleadings excluded relevant evidence intended to prove each party's case. While the plaintiff's statement of claim contained facts relied upon by the plaintiff and the details of the reliefs sought, the defendant's statement of defense must contain a denial or an admission of each allegation made in the statement of claim. Pleadings aided the courts to know in advance the issues of fact and law to be decided by it and also enabled parties to make necessary preparations for the hearings. As part of preparations for the hearings, parties were to source the evidence to back their cases and make plans for their witnesses to attend the court. A witness who refused to attend a hearing might be subpoenaed. The condition for subpoenaing a witness included that his/her reasonable expenses and compensation for his trouble and loss of time must be provided by the party subpoenaing him/her.[718]

Hearings proper followed the above processes and preparations. There were usually long delays in the colonial High Courts, it was rare for cases to be tried within dates entered for them on the Cause List. In contrast, hearings were faster in the Magistrates' Courts due to reasons that included the summary trial procedure adopted by the courts. Even when a delay was experienced in the Magistrates' Courts, it was always short and occurred mainly on

[716] *Ibid.*
[717] *Ibid.*
[718] *Ibid.*

hearing days when counsel had to wait for hours to have their cases called up.[719] When the case was eventually called, parties with financial means could be represented by a lawyer. State-supported legal aid was unavailable for a party who could not personally afford it. During the period under study, certain law officers known as Proctors[720] performed some advocacy-related functions before the High Court. In the Colony area of Lagos, the Federal Attorney-General was the Queen's Proctor while at the regional level that included the Western Region, Regional Attorney-Generals served as Queen's Proctors. Proctors appeared mostly in divorce petitions or related matrimonial causes where the court deemed it necessary that a question arising from the petition required the legal argument of the Proctor.

Proceedings at the hearings commenced with the plaintiff stating his case and tendering documents as evidence to back his case up. He then called his witnesses, if he had any, and conducted his examination-in-chief. This was followed by the defendant cross-examining the plaintiff's witnesses on their testimonies. To further clarify unclear evidence given by a witness in the course of the cross-examination, the plaintiff witness could be re-examined by the plaintiff.[721] The plaintiff could then round off and sum up his case if the defendants called no witnesses. Otherwise, the defendant would open his case after the plaintiff called his witnesses and the plaintiff then cross-examined the defendant's witnesses. With the leave of court sought and obtained, the plaintiff could further provide new evidence to rebut the evidence of the defendant. The defendant could then summarize his case with a concluding argument, followed by the plaintiff who replied generally to the defense.

In the Magistrate's Court, proceedings were closely similar to the above with a minor difference occasioned by the summary nature with which the Magistrate Court heard civil cases. Before the Magistrate's Court, the plaint was read to the defendant and the latter was prompted by the Magistrate to respond to the plaint. Unless there were witnesses to be called, otherwise the Magistrate could proceed to hear the case and decide it summarily.[722]

[719] Nwabueze, *supra* note 696 at 253.
[720] Niki Tobi, "The Federal Ministry of Justice as Government's Legal Adviser to the Ministry of External Affairs in Nigeria" (1979) 5:1 DLJ 199, online: < https://digitalcommons.schulichlaw.dal.ca/dlj/vol5/iss1/7/ >.
[721] Francis L. Wellman, *The Art of Cross Examination*, 4th ed (United States: Touchstone, 1997).
[722] Ehi Esezobor, "Litigation Processes in Nigeria" (2020) 34:2 Commercial L World 26. Summary procedure used in the Magistrates' Courts was applicable in both civil and criminal matters.

As both parties closed their cases, the Judge (or Magistrate) proceeded to give his verdict. During the period under study, trial by jury was not available for civil action in the Western Province/Region. Hence, the judgment was a lone decision of the presiding judge which was based on the evidence presented by both sides, notwithstanding that assessors[723] might have assisted the judge during the proceeding. Since two parties were usually involved in a matter before the court, the decision could go either way. If the judgment favored the plaintiff, orders that the court could make against the defendant included the payment of damages to the plaintiff,[724] restitution of property, and specific performance of a contract. The court could also decree the delivery of possession of land or declaration of title to land in favor of the plaintiff. An injunction directing the defendant to perform (mandatory injunction) or abstain from performing an act (prohibitory injunction) could also be pronounced. Where there was a counterclaim[725] and the defendant succeeded in it, the court could also make an order in favor of the defendant. In addition, subject to the discretion of the Judge or Magistrate, a cost could also be awarded against the defendant. Costs in this sense were a reasonable amount of compensation paid to the successful party for the expenses he was made to incur in establishing his claim before the court.[726] As held in 1957 by the defunct Federal Supreme Court in *Inneh v. Obaroye*,[727] "*the object of awarding costs is not to punish the unsuccessful litigant but to compensate the successful party for the expenses to which he has been put by having to come to court*".[728]

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[723] Bonny Ibhawoh, "Historical Globalization and Colonial Legal Culture: African Assessors, Customary Law and Criminal Justice in British Africa" (2009) 4 J Global History 429. In the Nigerian context, assessors were Africans presumed to be knowledgeable in native customs and tradition (or in any other types of law), and consequently appointed by the British to aid the courts in the process of justice dispensation.

[724] Order for the payment of damages is the commonest form of judgement given by a High Court or Magistrates' Courts during the period under study. Damages was of two types and an order can be made either way. Damages could either be liquidated or unliquidated. If it's the former, that means the amount decreed to be paid by the court can be ascertained by referring to a scale or positive data. It's the latter when the amount is uncertain and only based on an estimate. This was usually decreed as a compensation to the plaintiff for the loss caused him by the defendant's conduct. See, Glanville Williams, "The Aims of the Law of Tort" (1951) 4:1 Current Legal Problems 137, online: < https://doi.org/10.1093/clp/4.1.137 >; and Nwabueze, *supra* note 696 at 256-258.

[725] For the meaning and procedure for counterclaims see, Patrick Woolley, "Counterclaims, Civil Actions, and the Elusive Reach of the Well-Pleaded Complaint Rule" (2023) 108:801 Iowa L Rev 801.

[726]Nwabueze, *supra* note 696 at 258-260.

[727] (1957), 2 F.S.C. 58.

[728] *Ibid.* The expenses expected to be covered by costs included court fees, counsel's fee, payments to witnesses, and stamp duties. See also, Nwabueze, *supra*, note 696 at 259.

The unsuccessful party was expected to comply with the court's order and perform whatever act was pronounced as the judgment of the court. In case of default, it could be necessary for the successful party to enforce the judgment obtained. During the period under study, judgments of a High Court or Magistrate Court in the Western Province/Region were executed by either of two procedures. These were, "*levying of execution*" or "*imprisonment*".[729] On an application made by the judgment creditor (the successful party) to the court, the court registrar could issue a "writ of attachment and sale".[730] The latter directed and empowered the court sheriff to seize and sell any goods and/or chattel belonging to the judgment debtor (the unsuccessful party) to satisfy the judgment. *Section 25* of the Sheriff and Civil Process Ordinance of 1945 clarified those items that could be seized and sold by the Sheriff to satisfy the judgment. These included any goods or chattel aside from the judgment debtor's personal effects and that of his family. Other items the Sheriff could also seize, and sell were any money,[731] bank notes, bills of exchange, and/or other securities of the judgment debtor.

In case the seized movable properties couldn't satisfy the judgment, the successful party could, with sufficient proof, apply to the court for a writ of execution against the immovable properties of the judgment debtor.[732] Notably, for an execution of a judgment obtained at the Magistrates' Courts against an immovable property of the judgment debtor, an order must be issued from a High Court following an application made to the latter by the judgment creditor.[733] In addition, a judgment debtor who defaulted in complying with the court's judgment could risk imprisonment of up to six weeks. On an application made by the judgment creditor, a judgment debtor could be brought before the court by "judgment summons". If, following an examination, the court found that the judgment debtor willfully decided to default when he had the means to pay the judgment debt, he could be committed to

[729] Nwabueze, *supra* note 696 at 260-262.
[730] The writ was called the "writ of fi fa (Fieri facias)". See, G.V. La Forest, "Some Aspects of the Writ of Fieri Facias" UNBLJ 39, online: < https://journals.lib.unb.ca/index.php/unblj/article/download/32040/1882527250/1882531866 >.
[731] This included a sum owed to the judgement debtor by a third party. Such sum could be attached through a court process called "garnishee order". See, Nwabueze, *supra,* note 683 at 261; and Ho Hock Lai, "Legal Professional Privilege and Garnishee Proceedings" (1992) Singapore J Leg Studies 144, online: < https://www.jstor.org/stable/24865929 >.
[732] Sheriff and Civil Process Ordinance, 1945, section 43.
[733] *Ibid*, section 44.

prison for up to six weeks, unless he paid before a committal order was made.[734] However, by *section 76* of the Sheriff and Civil Process Ordinance, such imprisonment does not free the judgment debtor of his liability under the judgment.

(iii) Criminal Justice Procedures in Colonial Native Courts

As noted earlier, Native Courts established for the Western Province/Region by the colonial administration had criminal jurisdiction. While criminal trial procedures in the High Court were completely different from those of the Native Courts, procedures in the latter were very similar to the summary procedure used in Magistrates' Courts with minor differences. Criminal matters were majorly prosecuted by the government and rarely did individuals take on private prosecution. Governing and procedural laws applied by Native Courts in trying criminal matters during the period under study included the Native Court Ordinance of 1901 and the series of amendments made thereon up to 1945. The Court also applied the Criminal Procedure Ordinance No. 5 of 1924, and later amendments. In addition, Native Courts were allowed to apply rules of customary law, provided such rules passed repugnancy and compatibility tests mentioned earlier and discussed in chapter five.[735] Specifically, provisions of *section 10* of the Native Court Ordinance No. 44 of 1933 amended by No. 16 of 1936 and No. 18 of 1943, itemized the categories of laws to be administered by Native Courts while trying criminal matters.

Establishing the jurisdiction to which the matter or the accused fell was the first step in the criminal trial process. This was important because Native Courts only had jurisdiction over matters that occurred and persons resident within the limit of their jurisdictions. Trial of a crime before this category of colonial courts commenced by reporting an offender to the police or judges of the Native Court.[736] The report must contain the name of the accused, the

[734] *Ibid*, section 65.
[735] These were listed by this section to include "native law and custom" prevailing in the courts' area of jurisdiction subject to repugnancy and inconsistency tests, provisions of any ordinance which it may be empowered to enforce for imposing penalties on persons subject to its jurisdiction and the provisions of all rules, by-laws or orders made under any valid Native Authority Ordinances or other Ordinances in force within its jurisdiction.
[736] Criminal Procedure Ordinance No. 5, 1924, section 9.

alleged offense, as well as the details of the informant.[737] Since the Native Courts were not strictly bound by the rules of the English ordinances, the court could, at its discretion, issue a summons to bring the accused before it. The court could also have the accused apprehended through a warrant of arrest[738] if he refused to appear before the court on the day set for the trial as indicated on the summons. Once before the court, the nature and particulars of the offense would be restated to the accused in a language he understood. Sometimes, before the trial proper, a preliminary investigation might be conducted by the Native Court officials or the police. This was to establish whether or not there existed a prima facie case against the accused. The preliminary investigation could involve examining witnesses by asking them questions. Sometimes, the questioning of the witnesses was done in the presence of the accused. Further inquiries as might be necessary to ascertain the strength of the case and potential evidence against the accused were also made during the preliminary investigation.[739]

Once a prima facie case was established against the accused, the matter then proceeded to trial proper. He would be informed of the offense and evidence would be presented against him in the open court. The accused was thereafter allowed to defend himself by calling his witnesses and also cross-examining the witnesses called against him by the prosecution.[740] Following the presentation of his evidence and cross-examinations, by law, the court was allowed to ask the accused, his witnesses, and prosecution witnesses, questions to clarify the evidence presented before the court. This was possible because the criminal procedure at the Native Courts during the period under study was more inquisitorial than accusatorial.

Once the above procedure was observed, it was left for the court, which at times worked with assessors as in civil matters, to weigh the evidence against the accused and determine his guilt or innocence. If found guilty, punishments or penalties that the Native Court could make included payment of fines not exceeding the amount over which the various grades of Native Courts had jurisdiction as discussed above. The punishments included strokes of the cane,

[737] *Ibid*, section 10.
[738] *Ibid*, section 11.
[739] *Ibid*, section 18.
[740] *Ibid*, section 19.

imprisonment, and a combination of both fines and imprisonment. Notably, Native Courts were not empowered to execute corporal punishment imposed on a condemned criminal without the approval of a Head Chief or a District officer, as the case might be. The Governor could also empower any Native Court to impose penalties provided under any ordinance on any person subject to its jurisdiction. Such power of the Governor included the conferment of duties of a judge or magistrate upon a Native Court.[741] An unsatisfied condemned offender had the right to appeal to a higher court on the hierarchy, following any of the dual systems of appeal discussed previously.

The criminal procedure in the Native Courts during the period under study was very much akin to the summary procedure in the Magistrate court but with minor variations. These variations included that, since 1914, legal practitioners were not allowed to appear before Native Courts, notwithstanding the sustained criticism against it. Those allowed to represent a party before Native Courts were the wife, husband, guardian, master, servant, or inmate of the accused household. Any of the latter must show to the satisfaction of the court that he/she was authorized to represent the party before he/she could be allowed by the court.[742] In addition, unlike in the Magistrates' Courts, criminal trial before the Native Courts was more inquisitorial than the accusatorial procedure allowed at the Magistrates' Court. Thus, the Judges in the Native Courts took an active part in the examination and cross-examination processes.

The above were the dichotomies that existed between criminal procedures before the Native Courts and Magistrates' Court in the Western Province/Region during the period under study. Importantly, as held in a line of cases that included *Abiodun Olalekan v. Commissioner of Police,*[743] and *Kasimu Salisu v. S.P.,*[744] when the issue before a Native Court is clear, the form of the procedure will not be emphasized. Otherwise, Native Courts in the Western Province/Region were required to adhere to the legally provided criminal procedures.

[741] Elias, *supra* note 569 at 159.
[742] Nwabueze, *supra* note 696 at 243.
[743] (SC/FSC. 150/162).
[744] (1960) W.R.N.L.R. 213.

(iv) Criminal Justice Procedures in Colonial High Courts and Magistrates Courts

Similar to the pattern of analysis adopted above for civil procedure, both the High Courts and Magistrates' Court criminal procedure in Western Province/Region during the period under study are jointly discussed below. Points of differences in the procedures of both courts shall be noted in the course of the analysis. In the Western Province/Region including Lagos, criminal procedures were mostly regulated by the Criminal Procedure Ordinance,[745]and the English Administration of Justice Act, of 1933. In situations where the Ordinance made no provisions to regulate a particular procedure, the procedure and practice for the time being in force in the High Court of Justice in England were also applied by the High and the Magistrate Courts.

There were usually two parties in a criminal action before the courts; the prosecution/prosecutor/complainant and the accused/defendant. "Complainant" and "defendant" were terms used during summary trials, especially in the Magistrates' Courts. While there was an Attorney-General at the federal government level, the Western Province/Region also had its Attorney-General. The latter exercised the power of prosecutions over offenses created by laws of the province/region.[746] The office of the Attorney-General only prosecuted the more serious cases. The majority of the prosecutions were done by the police under the overriding supervision of the Attorney-General's office. In performing its prosecutorial duties of detection, arrest, gathering of evidence, and actual prosecution, the police worked in collaboration with the office of the Attorney-General.[747] A case prosecuted by the police could be in the name of the native authority police officer instituting the action. It could also be in the name of the Commissioner of Police of the region if the action was instituted by an officer of the federal police, or in the name of the native authority of the area where the alleged crime was committed.[748] During the period under

[745] Criminal Procedure Ordinance, Cap. 43 Law of the Federation, 1958. The complicated and misleading provisions of this statute was expressly decried by the West African Court of Appeal in *R. v. Zik's Press Ltd.* (1947), 12 W.A.C.A 202. Hence, during the period under study, it was, in most cases, substituted by other rules of procedures in the process of criminal justice administration.

[746] Nwabueze, *supra* note 696 at 208-209. Until 1958 that the office of the Director of Public Prosecution (DPP) was established, criminal actions were instituted by the Attorney-General but in the name of the Crown. The DPP assumed the prosecutorial duty starting from 1958.

[747] The need for this cross-agency collaboration for the smooth running of administration of justice both at the federal and regional level was emphasized by the Federal Supreme Court in *Ezza Nwankwo v. R.* (1959), 4 F.S.C. 274.

[748] Criminal Procedure Ordinance, Cap. 43, section 213 (2).

study, private prosecutions were also allowed at the High Courts and Magistrates' Courts. The law allowed a private person to institute a criminal action in their name against a perpetrator of a crime, whether or not the person was directly affected by the crime. However, due to the cost implication and other risks[749] involved, private prosecutions were few and far between. In addition to the Attorneys-General, the DPP, police, private persons, government departments, public organizations, and public corporations also prosecuted some criminal matters.

Criminal actions were commenced in both the High Courts and Magistrates' Courts in different ways. However, in both courts, there must be a complainant who was usually the police.[750] In the High Courts, the Criminal Procedure Ordinance[751] provided five ways of instituting a criminal action before a High Court in the Western Province/Region. The first was by a complaint filed before the court, whether on oath or not.[752] Secondly, was information filed before the court following the summary committal of the accused for perjury by a judge or a magistrate. The third was by information filed before the court following the committal of the accused for trial by a magistrate. The committal was preceded by a preliminary investigation conducted by the magistrate. The fourth was by an information filed by the Attorney-General, without the leave of the court in respect of misdemeanors. The fifth was by information filed by the direction or with the consent of a judge.[753] As described by Ben Nwabueze, information related to a criminal trial "*is an indictment charging a named person with an offence and containing a description of the offence as in the case of a charge*."[754] Thus, information filed before a High Court to commence a criminal trial contained sufficient details about the offense and the accused. Such details were the name and address of the accused, offense(s) committed and location, date of the commission of the offense, and criminal laws violated through the commission of the offense. Other details

[749] Associated risks involved with private prosecution included the fear of the accused being acquitted at the end of the trial, and the risks of having to pay costs and compensate the accused in case the prosecution was found by the court to be false. See, sections the Criminal Procedure Ordinance, sections 255-256.
[750] Nwabueze, *supra* note 696 at 213.
[751] Criminal Procedure Ordinance, Cap. 43, sections 77, 275 and 340 (2).
[752] See also *Ibid*, section 277.
[753] This last procedure was upheld by the W.A.C.A in *R. v. Zik's Press, Ltd.* (1947), where it was that, *"…it is clear that by the enactment of s. 340(2) (of the Criminal Procedure Ordinance) which is an adaptation of s. 2(2) of the Administration of Justice Act, 1933, the legislature intended to make provision for the institution and trial of charges upon information preferred by direction or with the consent of a judge such as provided in England by similar means*."
[754] Nwabueze, *supra* note 696 at 216.

included the venue of the court where the trial would be held, the date set for the trial, and proof of evidence. As held in *R. v. Waziri*[755] only indictable (serious) offenses were tried by information.

For certain categories of offenses, the accused could apply for and be admitted to bail after arraignment. Accused admissible to court bail were mainly those charged with misdemeanors. For those charged with felonies, the admission of such offenders to bail was at the court's discretion. This discretion was to be exercised by considering factors such as the nature of the offense, the character of the evidence, and the severity of the punishment attracted by the offense.[756]

Criminal trials before Magistrates' Courts, handled mainly by the colonial police, could be commenced in either of two ways. The first was by the police making a complaint to a Magistrate and the second was by charging a person arrested without a warrant before the magistrate.[757] For the first way, after making a complaint, the Magistrate then exercised his discretion as to whether to issue a summons or a warrant of arrest. The latter was issued when a complaint was accompanied by an oath stating that the accused was likely to ignore a summons. Otherwise, a summons would first be issued by the Magistrate. The summons could be served by either a police officer or an officer of the court.[758] It contained the details of the offense and the time and venue of the court where the accused was to appear for the trial. In cases where a summons was first issued by the court but was ignored by the accused, such may be followed up by a warrant of arrest. In the second way, an accused arrested without a warrant could be brought before the Magistrate. The accused was to be taken to the court with a charge sheet containing as much information about the offence and the trial as to give the accused sufficient information about the offence for which he was charged. The charge sheet was signed by the police officer in charge of the case.[759]

[755] (1958), N.R.N.L.R. 91.
[756] Nwabueze, *supra* note 696 at 216. See also, *Dantata v. Inspector General of Police* (1958), N.R.N.L.R. 3 at 4 where it was held that, "*it would be wrong to allow bail to an accused who has clearly indicated his readiness to commit other offences in order to suppress evidence*."
[757] Nwabueze, *supra*, note 696 at 213-214.
[758] *Ibid.*
[759] See Criminal Procedure Ordinance, sections 9-18.

By the combined provisions of *sections 441 to 452* of the Criminal Procedure Ordinance and the Order in Council, No 9 of 1946, in both Courts under discussion, the conduct of criminal trials took one of the three modes highlighted by these statutes. Thus, trials in these courts could be by; a Magistrate or Judge alone, a Magistrate or judge with the aid of assessors, or by a judge and jury. However, as held in *Rabo Maroki v. Kano N.A.*[760] and *Omaku v. Igbirra N.A.*,[761] the use of assessors though not obligatory and lied at the discretion of the court, "*it ought to be standard practice to call them*."[762] In the practice of the time, assessors were only invited to criminal trials when their advice could be of assistance to the matter on trial. Similarly, as provided by *section 335* of the Criminal Procedure Ordinance, the Attorney-General of the Western Province/Region could direct that an offense or any class of offense be tried with a jury. Especially in the colony area of Lagos, all capital offenses and rape were tried with a jury.[763] Members of the jury were selected among males who could understand and speak English and were between the ages of twenty-one and sixty years of age. Female citizens and most government functionaries were excluded from playing jury roles. Other categories of persons were also excluded from acting as juries under the Western Province/Region colonial government. These included a person "*convicted of treason or felony or is a lunatic, a person of unsound mind, an imbecile, or is deaf, blind, or afflicted with any other permanent infirmity of the body or mind, or who has entered into a deed of arrangement with his creditors*.[764] In capital cases, a jury was always composed of twelve jurors.[765]

As noted earlier, criminal trials in both High Courts and Magistrates' Courts were accusatorial. While the law required the court to be a neutral umpire in the process, the burden of proof in every criminal trial rested on the prosecution. This was different from the inquisitorial system adopted in the Native Court where the judge could investigate the matter and also participate in the various examinations during trials. The burden of proof statutorily

[760](1956), N.R.L.R. 5.
[761] (1958), N.R.N.L.R. 11.
[762] *Ibid.*
[763] See, Order in Council, No. 9 of 1946.
[764] On colonial qualifications for jurors and assessors, see generally, the Jury Ordinance, Cap 90.
[765] Nwabueze, *supra* note 696 at 217-218.

placed upon the prosecution was to be discharged beyond a reasonable doubt before the accused could be convicted.[766]

1. Summary Trial Procedure

In a summary trial, the charge on a charge sheet was read and explained to the accused and asked if he was guilty or not. If he pleaded guilty, the court would ask if he had anything to say or not. The court could thereafter sentence him. However, if he pleaded not guilty, the trial moved on as the prosecution opened his case. The prosecution would then restate the allegation(s) and explain how it planned to prove them/it. Counsel or police officer for the prosecution then called his witnesses to examine (examination-in-chief) them. The examination was conducted on each of the witnesses in the absence of the other, except otherwise directed by the court in the case of expert witnesses. The defense counsel or the accused would then be allowed to cross-examine each of the prosecution witnesses.[767] The court could thereafter consider whether, by the evidence of the prosecution witnesses, a prima facie case had been established for the accused to answer.

If the court found that no prima facie case was made against the accused, he was immediately discharged. If he was found to have a case to answer, he would be required to put up his defense. The accused then proceeded to defend himself against the case. If only he gave evidence in his defense and called witnesses as to character only, he (or through his counsel) was entitled to address the court at the start or end of his case. However, if he called other witnesses, his counsel first addressed the court at the opening of his defense. Following the defense examination-in-chief and the prosecution cross-examination of the witnesses called by the defense, the defense counsel may then address the court for the second time. The defense then closed his case. Such a second-time address was subject to the prosecution's right of reply.[768]

[766] Nwabueze, *supra* note 696 at 221-226.
[767] Constitution of the Federation of Nigeria, 1954, section 21 (5)(d).
[768] Nwabueze, *supra* note 696 at 223-224.

Certain facts are notable about a summary trial in contrast to a trial on Information. While a summary trial adopted in Magistrates' Courts was conducted with a minimum formality, a trial on information applied in the High Court in more serious offenses conformed to stricter formal rules of procedure. The essence of a summary trial was to expedite hearings.[769] However, summary trials were allowed in certain cases before the High Court. These were for summary offenses and offenses for which laws provided that trial could be had in the High Courts otherwise than on information and for which no special procedure was provided.[770] Both parties, the accused, and the prosecution, were entitled to be represented by legal counsel. Meanwhile, due to their experience, police prosecutors have learned through the process that in summary trials, they hardly engage counsel for their prosecutions. Even before the High Court, the prosecution was not compelled to be represented by legal counsel except in capital cases. Legal counsel that represented the police were usually law officers, crown counselors, and occasionally, lawyers authorized by the Attorney-General/DPP.

The accused were rarely represented except in indictable offenses where expert advice was required. Legal aid that had been available to the accused in England since 1903 was non-existent in the colonial Western Province/Region of Nigeria until 1959. Long before it was established, such aid had become necessary to ensure justice. As it recurs throughout this thesis, the colonial era witnessed the introduction of the English justice procedures which altered the pre-colonial system known to an average Yoruba person. The new justice procedures included English law and its technicalities which only persons trained in the law could understand, and maneuver. If the interests of the colonial government included serving justice to litigants, and persons tried for crimes, government-funded or subsidized legal aid should have been made available instead of banning legal representation in most of the courts. Partial legal aid did not begin in the Western Province until 1959 when the law required the court, when practicable in a capital offense trial, to assign a legal aid counsel for the accused who was unrepresented.[771]

[769] R.M. Jackson, *The machinery of Justice in England* (Cambridge: Cambridge University Press, 1964).
[770] Criminal Procedure Ordinance, section 277.
[771] Criminal Procedure Ordinance, section 352.

2. Trial on Information Procedure

The above summary trial procedure was akin to the procedure observed in a trial on information but with minor differences. In a summary trial described above, the presence of an accused before the court might be dispensed with at the discretion of the court. This was allowed especially in cases punishable with not more than a fine of fifty pounds and/or imprisonment for six months.[772] In such an instance, the plea of the accused could be made in absentia and accepted by the magistrate who could summarily try the case, sentence the accused, and conclude the trial expeditiously. However in a trial on information before the High Court, all of the procedures discussed above were mandatorily observed. This was partly because a plea of guilt was rare in grave matters like capital cases where such adverse pleas were usually rejected by the court.

Furthermore, in cases tried on information, the defense was usually represented by legal counsel where the accused could call witnesses to prove his case. Where a jury was involved, the procedure was more formal and lengthier than in a summary trial. A preliminary investigation was an integral part of a trial on Information. This investigation constituted a major difference between a summary trial and a trial on Information. The investigation, which was conducted by a Magistrate, although not a summary trial,[773] was akin to it and could take the length of time that a whole summary trial could take. The preliminary investigation was for the Magistrate to find whether through the depositions of the prosecution witnesses, the statement of the accused, and available exhibits, the accused should be committed for trial. If yes, after the investigation, the accused would be sent along with the relevant documents to the High Courts for trial. However, if the preliminary investigation disclosed no case to answer, he would be discharged by the Magistrate. The accused may be admitted to bail pending trial, or if refused by the Magistrate, he could appeal the bail application refusal to the High Court judge.

[772] Criminal Procedure Ordinance, section 100.
[773] *Ibid*, section 310.

The conclusion of the trial was followed by the verdict of the court which did not always end in a direct finding of guilty or not guilty.[774] If the accused was found guilty, he would be convicted; if found not guilty, he would be acquitted. However, that an accused was acquitted was not conclusive proof of his innocence. Such an acquittal could be because the accused committed the offense while he was mentally incapable of understanding that his action contradicted the law. The third probable verdict of the court was to outrightly dismiss the charge or discharge the accused.[775] Notably, a summary trial hardly ended in an acquittal except in cases where the prosecution, with the permission of the court, withdrew the complaint. Otherwise, a summary trial, whether before the colonial Magistrate Courts or occasionally before the High Courts of Western Province/Region, would invariably end in either a conviction or discharge of the accused. In *Akinyele v. Inspector General of Police,*[776] a Magistrate entered a verdict of not guilty and consequently acquitted an accused following a summary trial. In quashing the verdict, the W.A.C.A. held that a magistrate had no power to enter such a verdict of acquittal at the close of the prosecution's case. In such a circumstance, he could only discharge the accused. However, if the accused made a defense following the prosecution's case, then the court would be entitled to either make an order of dismissal or convict the accused based on the evidence presented. The court would have to discharge the accused if it eventually found that the prosecution had made out no case for the accused to answer.[777] Hence, a criminal trial in any of the colonial courts during the period under study could end in one of three ways; a conviction, acquittal, or a discharge of the accused/dismissal of the charges. Both an acquittal and a conviction served as a permanent bar[778] against the reinstitution of a fresh action on the same facts against a convicted or an acquitted person. In contrast, a discharge of the accused/dismissal of charges did not have the same effect.[779] Subsequent criminal actions on the same facts could still be brought against a discharged person, especially when the discharge order was made after a preliminary investigation. Unlike a Magistrate,[780] a Judge of the High Court was by statute required to record his judgment in writing and state the reason for his decision. However, omitting the reason for the decision in a written judgment did not necessarily nullify a conviction.[781]

[774] Nwabueze, *supra* note 696 at 229-242.
[775] *Ibid.*
[776] (1955), 15 W.A.C.A. 31.
[777] Criminal Procedure Ordinance, section 286.
[778] *Ibid*, section 181.
[779] *Ibid*, sections 185 and 325.
[780] Criminal Procedure Ordinance, section 245.
[781] See, *Atunde v. Commissioner of Police* (1952), 14 W.A.C.A. 171.

Sentencing, the apportioning of the required punishment as prescribed by applicable laws, followed the pronouncement of court decisions. The prescribed punishments that could be given by each of the courts established under British colonial governments in the Western Province/Region of Nigeria have been discussed above. While the maximum of these punishments was usually prescribed by statutes, it was at the discretion of courts to determine the quantum of the sentence depending on the nature of the offense in question. The prescribed punishments included imprisonment, fine, canning, deportation, and in the most serious offenses of murder and treason, the death sentence.[782] Notably, imprisonment was restricted to offenders above seventeen years of age. By the provisions of the law,[783] no offender under the age of nine could be imprisoned under any circumstance. Similarly, no person between the ages of nine and fourteen could be imprisoned unless he was so depraved in character. A person between the ages of fourteen and seventeen could only be punished by imprisonment if he could not be suitably dealt with in other ways. Where fines were not expressly provided for as a punishment for an offense, the court had the discretion to order it in place of imprisonment.[784]

A major restriction to the use of canning in the Western Province/Region was that an adult of the age forty-five and above could not be punished by canning. Likewise, up to 1945, deportation was a form of sentence that could be imposed on a guilty Nigerian. This was modified from 1946 when a convicted Nigerian could only be deported to another part of the country where there were fewer possibilities for him to commit further crimes. After 1945, only a non-Nigerian could be punished by being deported outside of Nigeria.[785] The courts were also restricted in applying the death sentence as a punishment. The death sentence was used only to punish murder and treason. It wasn't a form of punishment that could be imposed on condemned pregnant criminals. In place of capital punishment, guilty pregnant women were sentenced to life imprisonment. Similarly, a juvenile found guilty of a capital

[782] Nwabueze, *supra* note 696 at 235-242.
[783] Criminal Procedure Ordinance, sections 413-434. See also, the Children and Young Persons Laws of the Western Region, and the Children and Young Persons Ordinance, Lagos.
[784] Ibid, section 382.
[785] This exception found its way into subsequent constitutions of Nigeria enacted after 1945. See, the Constitution of the Federation of Nigeria, 1960, section 26.

offense was detained at Her Majesty's pleasure. Such a Juvenile could not be sentenced to death.[786]

As discussed under the subtopic on types of colonial courts established for the Western Province/Region, an accused or a prosecution not satisfied with the judgments of either the Magistrate Courts or High Courts could appeal to higher courts. In certain cases, an appeal could be by right while in others, seeking and obtaining the leave of court could be mandatory before an appeal can be filed to a higher court. Such leave must be obtained, or the notice of appeal be given to the higher court within the time prescribed for making such application or for filing the notice. During the period under study, depending on the type of case involved, such prescribed time ranged between fifteen (in the case of an appeal to the WACA) and thirty days. Except in capital cases, leave to appeal out of time might be granted by the relevant court. Between 1933 and 1943 colonial High Courts operated in the Western Province/Region entertained appeal from both Native Courts and Magistrate Courts.[787] At the abrogation of the High Courts and re-establishment of a Supreme Court in 1943, appeals from Magistrates' Courts were redirected to the Supreme Court. It was not clear from the record where the appeal from the High Court of 1933 to 1943 lied to. However, the Supreme Court that existed at this time was mandated to execute the processes of these Provincial Courts, which included the High Court.[788] Such "execution" of processes could probably have included entertaining an appeal from the High Court. However, according to T. Olawale Elias, the West African Court of Appeal was substituted for the Supreme Court's Full Court. Before the substitution, the latter heard most of the appeals that came before the Supreme Court during the period under study.[789] Further appeals then went from the West African Court of Appeal to the Privy Council that sat in London. Between 1933 and 1963,[790] the Privy Council remained the highest court in Nigeria until the whole Nigerian judicial system was reorganized in 1963.

[786] Nwabueze, *supra*, note 696 at 241.
[787] Elias, *supra* note 569 at 146. See generally, the Protectorate Courts Ordinance No. 45, 1933.
[788] Elias, *supra* note 569 at 147.
[789] *Ibid*.
[790] See, the West African Court of Appeal Ordinance No. 47 of 1933 (amended by No. 6 of 1938).

While a court might order a stay of execution of its judgment, an appeal to any of the higher courts in the hierarchy was not an automatic stay of execution of a lower court's judgment. An appellant against whom imprisonment was ordered may apply to the trial court for bail pending trial (hearing of his appeal). If refused by the trial court, such an application could be made to the court of appeal. As held by the Privy Council in *Aladesuru v. R*,[791] an appeal in a criminal matter is not a rehearing but a limited appeal that precludes the appeal court from reviewing the evidence and making an evaluation of it. The court of appeal was to rely on the written record transmitted from the court below. It was rare for the Court of Appeal to summon and examine witnesses.[792] The decision of the court of appeal substituted that of the lower court. For the execution of the new decision, documents to that effect were to be transmitted back to the lower court.

E. Conclusion

After it alluded to the reasons for their establishment, this chapter traced the history of the evolution of the English courts in Yorubaland from 1854 to 1954. It analyzed the differences in the names, composition, constitution, and laws applied by these courts. Further, the chapter analyzed the criminal and civil procedures adopted by the colonial Native Courts, Magistrates' Courts, and the High Courts established for Yorubaland between 1900 and 1954. Based on these analyses, it is clear that the precolonial judicial system in Yorubaland was completely altered and impacted by the English judicial legacy. Chapter Five analyzes notable specific impacts of the colonial justice systems on the Yoruba pre-colonial system.

[791] [1955] 3 W.L.R. 517.
[792] Nwabueze, *supra* note 696 at 243.

CHAPTER FIVE

Impacts of Colonial Judicial System on the Pre-colonial Justice System in Yorubaland

A. Introduction

This chapter discusses some of the indelible changes that occurred in the Yoruba justice system following the introduction of the British judicial system between 1854 and 1954. The various analyses made on the organization, structure, law, and procedures of both legal systems in chapters three and four revealed the overt and inherent divergences of the two distinct judicial cultures. Initially, the newly introduced English system somewhat ran concurrently with the precolonial Yoruba justice system, especially between 1854 and 1900. However, after the amalgamation of 1914, the remnant of the Yoruba pre-colonial justice system was eclipsed by the British colonial system. Although indigenous leaders were appointed as judges of colonial courts, they were not in actual control. They "presided" over the courts and applied customary law only to the degree allowed by the British administrative officers who were in real control of the courts.[793] Generally, colonialism changed the nature and extent of the powers of the Yoruba indigenous leaders. In the pre-colonial era, Oba/Alaafins, lesser chiefs, and key socio-political leaders discussed in chapter three wielded enormous executive, legislative, and judicial powers subject only to the rules of customary law. Most of the indigenous leaders exercised the three powers of the government simultaneously and were regulated by customary checks and balances. During the colonial era, these indigenous leaders were not only stripped of their executive and legislative authorities, but they were also made marginal judicial administrators, compelled to function in line with colonial dictates. Their hitherto authorities were "legally" and forcibly hijacked and conferred on British colonial officers.

The above was in addition to the perpetual subjection of customary law to the ambiguous repugnancy and incompatibility tests.[794] Thus, the introduction of British laws and courts to superimpose the Yoruba pre-colonial justice system later had several overriding impacts as

[793] As discussed in chapter four, all the courts established and reestablished during the colonial administrations in Yorubaland were subjected under one administrative officer or another. The most intriguing was the case of the Native Courts whose judges were appointed by the Resident with the District Officer presiding as the president of the court. The power of control wielded by the Resident over Native Courts was so enormous that it included the annulment of the courts' decisions. See, Elias, *supra* note 569 at 142.

[794] Mikano E. Kiye, "The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon" (2015) 15:2 African Studies Quarterly 85, https://asq.africa.ufl.edu/kiye_march15/ >; Justice Jibril Idrisu (Rtd), "The Repugnancy Doctrine under Customary Law: Issues and Challenges" (Paper delivered at the National Judicial Institute Abuja, 15 April 2021) [unpublished].

demonstrated by the realities of the colonial era. According to Omoniyi Adewoye, it "*…would be impossible as well as historically unrealistic to attempt to define the limits of this impact*."[795] This fact was corroborated by the then Under Secretary of State for the Colonies, W.G.A. Ormsby-Gore who emphatically said in 1926 that, "*nothing tends to undermine native traditions, society and organization more than the substitution of European for native legal forms*."[796] This concluding chapter attempts a discussion of a few of these impacts.

B. Impacts of Colonial Judicial System on the Yoruba Pre-colonial Justice System

The impacts of the colonial judicial system on the Yoruba pre-colonial justice system are numerous and practically impossible to be exhaustively discussed in one thesis. Thus, six of these impacts are selected for this discussion. These are Partiality of Justice, Sacrificing Justice for Policy, Redefinition of Courts Leadership, Subjugation of Customary Law, Manifestation of Judicial Corruption, and Enhancement of Africans' Political Awareness. While some of the above-selected impacts raise questions of access to justice, notably, due to its scope as a legal history work, and its limit as a master's research, this thesis is retrained from delving into the nitty-gritty of access to justice questions.[797]

(i) Partiality of Justice

As discussed in chapter three, justice administration and dispensation in Yorubaland were targeted at maintaining social equilibrium. Thus, the justice system was structured and administered to enhance social cohesion that promoted societal harmony, and peaceful coexistence among the people. Whether in civil or criminal matters, the consciousness of dispensing justice that served the dual purposes of assuaging victims' hurts and at the same time, preventing future occurrences capable of destabilizing the society, was paramount.[798]

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[795] Adewoye, *supra* note 455 at 290.
[796] Colonial Office, "Report by the Hon. W.G.A. Ormsby-Gore on his Visit to West Africa" (1926) at 16.
[797] On questions of access to justice and relevant arguments, see, Julia H. Bass, W.A. Bogart, & Frederick H. Zemans, *Access to Justice for a New Century- The Way Forward* (Canada: Law Society of Upper Canada, 2005); Deborah L. Rhode, *Access to Justice* (United Kingdom: Oxford University Press, 2005); Asher Flynn and Jacqueline Hodgson, eds, *Access to Justice & Legal Aid*, (United Kingdom: Hart Publishing, 2016); J. Jarpa Dawumi, ed, *Intersectionality and Women's Access to Justice in Africa* (United States: Lexington Books, 2022); and Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46:4 Osgoode Hall LJ 773, online: https://doi.org/10.60082/2817-5069.1174 >.
[798] Adewoye, *supra* note 455 at 1-26.

The pre-colonial justice administrators were highly circumspect and careful of pronouncing verdicts of guilt which could breed divisive feelings capable of polarizing the societal common bond. Hence, justice dispensation within the Yoruba context was impartial, reconciliatory, and most importantly, non-discriminatory.[799] The maintenance of social equilibrium as a central focus of justice in the pre-colonial Yorubaland remained sacrosanct as long as there was no dichotomy of parties viz; Yoruba and non-Yoruba, that came before the courts. Colonialism changed this as it emerged with the migration of persons of different cultures and interests into the Yorubaland.

Following the introduction of colonial courts and justice system in 1854, the Yoruba pre-colonial notion of justice was gradually modified and eventually eroded. Spread with colonial courts' expansion and reorganization was the intrusion of color prejudice that originated from the early courts of the Lagos colony. The color prejudice that affected the course of justice in Lagos later spread through the entire Western Province/Region. As garnered from historical records, this prejudice permeated the courts' system and practically influenced it. Instead of applying laws and observing rules of procedure, color prejudice dictated the form of justice dispensed. As observed by an African in 1869, "*prejudice of color exists to such an extreme on the West Coast of Africa (covering Yorubaland) that oftentimes in our courts of law, we sue entirely in vain for the impartial administration of justice*."[800] This latter assertion manifested through the approaches of the Court of Civil and Criminal Justice[801] presided over by Benjamin Way, the then Chief Magistrate of Lagos Colony.

Two cases, *Regina v. Lobley*[802] and *Regina v. Scott*[803] illustrate the partiality demonstrated by Benjamin Ways' court in its process of justice administration. In the former case, a European sea captain was charged, and arraigned for the rape of a girl child aged seven. He was

[799] For instance, the non-discrimination notion of justice within the Yoruba context is rooted in some of the indigenous proverbs like; "*ibi o jubi, bi a ti bi eru, ni a bi omo*" (meaning, "there is no superior birth, both slaves and freeborn were born equally). See, Jacob O Arowosegbe, "Indigenous African Jurisprudential Thoughts on the Concept of Justice: A Reconstruction Through Yoruba Proverbs" (2017) 61:2 J African L 155, online: https://www.jstor.org/stable/10.2307/26857156 >.
[800] "Letter to the Editor by An Observer", *African Times* (23 August 1869), Ibadan, NAN.
[801] As discussed in chapter four of this thesis, the Court of Civil and Criminal Justice was one of the eleven prominent pioneering courts established in Lagos by the British colonial government between 1862 and 1874. For more on this court, see, Elias, *supra* note 569 at 44 and, O. Adewoye, "Prelude to the Legal Profession in Lagos 1861-1880" (1970) 14:2 J African L 98, online: < https://www.jstor.org/stable/744850 >.
[802] Glover to Kennedy (30 April 1870) Ibadan, NAN (CSO 1/8, 6B), Glover to Administrator-in-Chief, Sierra Leone (16 November 1869) Ibadan, NAN (CSO 1/8, VB).
[803] Montagu to Kennedy (17 January 1870) Ibadan, NAN (CSO 1/8, 6A).

convicted and sentenced to four months imprisonment with hard labor. Eighteen months after this case, an educated "native" was convicted of a similar offense but was sentenced to three years imprisonment with hard labor by the same court and judge. In the latter case, one George Scott, a captain of a steamer called "the Thomas Bazley" was arraigned on a charge of aggravated assault committed against an African, named Isaac Baker. Aside from the fact that the Chief Magistrate who presided over this case acted as the prosecutor and the judge, two strange peculiarities characterized the hearing of the case. First, was that the jury of twelve people who tried the case was divided into racial lines. Ten Africans on one side found Scott guilty against two dissenting Europeans on the other side. Secondly, the Magistrate discharged the jury and, against his earlier ruling to reconstitute them, failed to re-impanel them. He instead permitted the alteration of the accused plea of not guilty to guilty and consequently fined him a paltry sum of ten pounds. Persons convicted of similar offenses in the past were sentenced to long prison terms. The public outcry against these disproportionate and racially biased sentences motivated the suspension of Way and the closing down of his court by the Lieutenant-Governor of Lagos in 1869.[804]

The partiality and color prejudice perpetrated through the colonial judicial system was not limited to Way's court. The situation was so rampant that the then Lagos administrator, Captain John Glover became uneasy and anxious about it. In his observations, Glover concurred that there was "*a steady determination (of the judges) to shelter the offenses of the Whiteman against the Natives first of all in the courts, secondly in the prisons*."[805] As a response to a petition signed by a group of Africans, another British official, Josiah Gerard, a police Magistrate was sacked from office by Captain Glover.[806] Gerard was accused of an overt display of disdainful attitude towards non-European Lagos residents. He was infamous for disrespecting indigenes and handing out unjust verdicts whenever a non-white was involved in a case before him.[807] Cases of partial justice and widespread discrimination before colonial courts survived up to the third decade of the twentieth century. It was a reason for the various colonial judicial reorganizations of the twentieth century. These colonial courts' attitude was unknown to the pre-colonial Yoruba system. It practically displaced the

[804] J.J. Thornburn to Crewe, and Enclosures (16 June 1910) Ibadan, NAN (CSO 1/21, 6).
[805] *Ibid.*
[806] *Ibid.*
[807] Egerton to Crewe, and enclosed copy of telegram to solicitor, Calabar, (5 April 1910) Ibadan, NAN (CO 520/92).

preexisting notion of justice and threatened societal peaceful co-existence during the period under study.

Notably, the migration of returnee slaves and their descendants (i.e. the Saro, Amaro, and Aguda) back to Lagos created social justice issues within Yorubaland during the colonial era. First was the social stratification and segregation that emerged from the colonialism-invented class structure. The Europeans were atop the class structure, followed by the Saro, Amaro-Agudas, traditional elites, Muslims, and then indigenous Africans.[808] Due to the Western education acquired in Sierra Leone by the Saros before returning to Lagos, they were favored by the British colonial governments. While some of them were appointed to administrative positions, others were active as colonial civil servants, clergies, teachers, medical doctors, lawyers, publishers, and other professionals. Armed with Western education, culture, and colonial privileges, the Saro put up a superior attitude toward other less-favored groups including the home-based/non-Western educated Yoruba.[809] This generated inter-class skirmishes within Yorubaland, especially in Lagos, and made a huge difference in the way the colonial judicial system treated these different classes of Yorubas.[810]

(ii) Sacrificing Justice for Colonial Policies and Commercial Interests

Ordinarily, enacted laws should regulate policy and commercial issues. However, experiences during colonial administrations in Yorubaland revealed circumstances during which substantive and procedural laws were bent for policies considered central to the colonial government. Courts were used to actualizing these policies with little or no regard to legal provisions and agelong criminal trial rules of procedure. Thus, in the face of policy, and commercial considerations, in the three cases of *Regina v. Ogoo*, *Regina v. Palmer*, and *Regina v. Bickersteth* colonial courts practically defied the English rule against double jeopardy, "*non-bis in idem*." The three men involved in the latter cases were successful businessmen on the shores of the River Niger. They were arrested by the colonial government of the Acting Consul Easton of the Niger Coast Protectorate and tried for slave dealing. They

[808] A. Adeleke, "Saro Nationalism and the Roots of Elite Political Culture in Nigeria" (2008) 14 Lagos Notes and Records 35.
[809] Uwagbale Edward-Ekpu, "The Amaro-Agudas and Saros who built Lagos" (14 December 2022), online: Scitech Africa < https://scitechafrica.net/the-amaros-agudas-and-saros-who-built-lagos/ >.
[810] See generally, Kimberle Crenshaw, *On Intersectionality: Essential Writings* (New York: The New York Press, 2017).

were convicted and sentenced to fourteen, ten, and seven-year terms respectively. The terms were to be served at the Gold Coast. On their arrival at the Gold Coast, the Queen's Advocate, Thomas Woodcock, advised the Gold Coast colonial authorities to review their sentences. Consequent to the review, the trials of the three men by the Acting Consul of the Bights of Benin and Biafra were found to be illegal.[811] The men were discharged and advised to petition the colonial office for damages for illegal prosecution and to also ask for a safe passage back to either Lagos or the Niger Delta.

The discharged men were granted passage back to the Niger Delta but strangely, they were refused landing by the acting Consul and, instead, redirected to Lagos. When the three men landed in Lagos on 25 March 1880, they were rearrested, re-arraigned, and retried on the same charge of slave dealing. This was the same charge for which they were acquitted by a higher tribunal of the Gold Coast. Some anomalies characterized the procedures of their retrials. During the retrials held before Justice Hector Macleod where Woodcock, the Queen's Advocate, acted again as the prosecutor, the three men's requests for a trial by jury were refused. Instead, they were tried by panels of assessors constituted of men numbered between three to five. The above was not the only anomaly that characterized the retrials. In addition to being lodged in the same house with the judge and prosecutor,[812] the prosecution witnesses said to be invited from the Gold Coast were known previous adversaries of the accused.[813] Some of these witnesses were alleged to have been examined before the trial proper and reportedly bullied into testifying against the accused. To worsen the situation, some of the defense witnesses were turned into prosecution witnesses. Other defense witnesses were kept away from the accused until they appeared in the witness box.[814] Furthermore, lawyers for two of the accused were said to have fallen sick in the course of the retrials. Instead of allowing an application for an adjournment pending the recovery of the counsel made by the accused, the application was overruled. They were consequently compelled to personally conduct their cases against the experienced Queen's Advocate.

[811] Griffiths to Ussher and enclosure A, Ibadan, NAN (CSO 1/10, 27).
[812] Griffiths to Ussher with enclosed petition by C.A.S. Williams (8 November 1880) Ibadan, NAN (CSO 1/10, 27).
[813] Moloney to Griffiths, with an enclosed petition by J.B. Benjamin and fifty-five others (24 December 1880) Ibadan, NAN (CSO 1/10, 28).
[814] Adewoye, *supra* note 455 at 80.

Despite these procedural anomalies, the three different panels of assessors that retried the cases returned verdicts of "not guilty" for the three accused. In contravention of some provisions of procedural laws known to the court, the new verdicts were overruled by the judge.[815] While he regretted that it transcended his power to sentence them to death, Justice Macleod substituted verdicts of "not guilty" entered for the three accused by the assessors with fourteen years imprisonment with hard labor. Despite the series of educated Africans'[816] protests and petitions that greeted this strange decision, the court executed the judgment by sending the three men to Elmina Castle, Gold Coast, to serve the sentence.[817]

This situation revealed how colonial courts in Yorubaland were used in actualizing policies considered paramount to the colonial government at the expense of justice which the court ought to defend. This situation was unknown to the pre-colonial courts that prioritized justice and served it appropriately, irrespective of the political interests of the government. The policy and commercial interests that the colonial government sought to protect through the latter three cases at the expense of justice were obvious from the real facts of the cases. Firstly, the allegation of slave dealing for which the accused were tried twice fell to a period when the colonial government was bent on eradicating the four hundred years old transatlantic slave trade. To the colonial government in Lagos, punishing these men, not minding whether or not available evidence vindicated them, would deter would-be slave traders. However, as found by Omoniyi Adewoye, available evidence before the court was weighty enough to liberate the sentenced persons.[818] It was proven to the court by evidence that the accused, in fact, liberated captured slaves and temporarily engaged the grown among them as paid laborers. The younger ones among those they liberated were engaged as household help. Additional evidence before the court proved that both Bickersteth and Ogoo, two of the accused, redeemed several children from slavery and registered them in school. While under trial, Ogoo was sent some amount of money by those he earlier redeemed as their token of support for him. The combination of these series of evidence prompted the

[815] Overruling opinions of assessors in this case was contrary to some of the then extant procedural laws that included *section 126* of the Gold Coast Criminal Ordinance and the Criminal Procedure Ordinance of 1876 then applicable in Lagos courts. In practice, as at then, verdicts of assessors were rated and recognized as that of a jury. Based on the latter, the reason for the overruling was a source of concern. See also, Egerton to Crewe, and enclosure 9 by W. Fosbery, commenting on *Davis v. Rising* (5 April 1910) Ibadan, NAN (CO 520/92).
[816] Majority of the educated Africans of the time were the Saros - liberated slaves and their descendants from Sierra Leone. Some of them who were disenchanted by the colonial system of government were responsible for instigating and leading nationalist protests such as this.
[817] Adewoye, *supra* note 455 at 81.
[818] *Ibid.*

assessors to recommend that Ogoo, per se, should not only be discharged and acquitted but should also be compensated.[819] This evidence was not considered weighty enough to discharge and acquit the accused because government policies of the time insisted on making them deterring examples.

On another hand, Bickersteth, Palmer, and Ogoo's sentences also materialized as a means of protecting and preserving British commercial interests, using courts as the agent of actualization. According to Kenneth O. Dike, these three men were reputed as successful middlemen in the late nineteenth-century "legitimate trade" of the Niger-Delta region.[820] In this trade, tension was always on the rise between African and European traders. To maximize and stabilize their profits, the white traders were very much interested in eliminating "hurdles" created by middlemen. In the process, these three men who occupied enviable positions in the trade clashed with an agent of the Royal Niger Company. The agent was a known friend of Acting Consul Easton who first tried and convicted the three men. The same commercial interests in the Niger-Delta stretched down to Lagos, where the accused were eventually arrested, convicted, and sentenced for the second time.[821]

(iii) Redefinition of Courts Leadership

As noted in chapter three, the Yoruba pre-colonial court leadership derived from the people. The various levels of courts from the family level up to the central tribunal (Oba's court) were headed by experienced Yoruba socio-political leaders. These were traditional leaders grounded in the knowledge of African customary law applied by the various pre-colonial courts. Even women chiefs involved in the process of dispute settlement among women and

[819] Egerton to Crewe, and enclosure 9 by W. Fosbery *supra*, note 19.
[820] Dike, *supra* note 80 at 97-127, and 206-215.
[821] See also, *Local Authority, Aba v. L.A. Lawson*, Charge No. A/21A/1944, (14 July 1944) Ibadan, NAN (2970, Judicial Procedure, Special Rulings). This formed part of the cases which demonstrated that, colonial administrators were prepared to bend rules of justice whenever their policies or personal interests were at play. In this particular case, the appellant was convicted in 1944 by an Aba (a town in the present-day Abia state of Nigeria) Magistrate Court presided over by an administrative officer who was also the prosecutor of the case. The appellant contested this conviction at the West African Court of Appeal (WACA). His ground was that the Magistrate acted as a judge in his own case thereby contradicting the rule of natural justice that a person cannot be a judge in a cause wherein, he is interested (*Nemo debit esse Judex in propria sua Causa*). In allowing the appeal on the latter ground, the WACA reversed the sentence of the Magistrate's Court, and discharged and acquitted the appellant.

market groups were those who had acquired relevant experience over time.[822] At the dawn of colonialism, this reality changed. From the setting up of the first court in Lagos up to the total judicialization of the entire Yorubaland, colonial administrative/political officers were statutorily given the power of control over courts. Various historical accounts of colonial courts given by T. Olawale Elias supported the latter assertion. By these accounts, the majority of the heads of all of the colonial courts, from the "Native Courts" up to the Privy Council were either non-lawyers or those who lacked the knowledge of the African customary law. Some of these new courts' heads and judges served as the main presiding judges over colonial courts of the first instance. Others sat on and controlled appeals from lower courts, as seen in the dual appeal system of the Native Courts between 1933 and 1943. One line of appeal went up to the High Court while the second went to a District Officer, to the Resident, and finally to the Governor, all of whom were political/administrative officers.[823]

In addition, between 1900 and 1933, the majority of the Yorubas' Native Courts were presided over by the District Officer, where the latter sat as President *ex officio*. Although the District officer was also on the Supreme Court as a Commissioner, while he sat on his District Courts (Native Courts), he wielded more power than he did on the Supreme Court.[824] The enormity of the District Officer's power over Native Courts extended to the deniability of his actual role that allowed him to push his responsibility to the chiefs, a depowered *de jure* heads of the courts. The District officer passed the sentences of the courts but wasn't practically responsible for such sentences as they were recorded in the names of the chiefs who were nominal court members. The situation included that the chiefs only sat on a rotational basis and often lost their sense of duties because of the overbearing and controlling presence of the District Officer.[825]

Aside from the District Officer, even court clerks, lower-grade administrative officers whose primary duties were to keep court records, dominated chiefs who were court members, especially in the absence of the District Officer. While some of these lower-cadre clerks

[822] LaRay Denzer, "Yoruba Women: A Historiographical Study" (1994) 27: 1 Intl J of African Historical Studies 1, online: < https://www.jstor.org/stable/220968 >.
[823] Elias, *supra* note 569 at 142-143.
[824] *Ibid*, at 111.
[825] *Ibid.*

diligently performed their duties, some lorded themselves over chiefs appointed as members of the court. Some of the colonial courts' clerks were recorded to have "exercised undue authority in issuing the processes of courts,"[826] tried cases on their own, and on some occasions, spited and disgraced some court members by publicly walking them out of courts.[827] The latter prompted an Osborne C.J. observation quoted by T. Olawale Elias that, "*the dishonesty of the Native Court clerks was the chief evil of the system*."[828] Lord Lugard buttressed this statement by Osborne C.J. on page seventy-nine of his amalgamation report. Lugard said, "*The native courts upon which a great deal of the legal business devolved were "native" only in name, and their procedure lent itself to so many and such grievous abuses that no one can pretend to regret their (native courts) demise*."[829] The colonial leadership composition of these courts, especially the Native Courts, Supreme Courts, and later the Magistrates' and High Courts, deviated from the pre-colonial reality and what it ought to be under colonialism. Speed C.J. concurred with this when he said, "*As to the Native Courts, the main and, to my mind, insuperable objection to the Southern Nigeria Native Courts is that they are not Native Courts at all*."[830] Speed C.J. later advised, *"…but because it is better that the Courts should be subject to some purely judicial control*." However, Speed's opinions and those of others did not change the judicial status quo of the colonial era in the Western Province/Region. The various restructuring and reorganizations up to 1954 notwithstanding.

Aside from their lack of adequate knowledge of both the superimposed English law and the indigenous African customary law, these administrative/political officers played multiple roles that made it impossible for them to give full attention to judicial duties. That led to the treatment of the justice sector as an arm of the executive, not deserving separate attention even as the last hope of the common man.[831] Alan Burns' longlist of colonial officers' duties cast doubt on how well these officers could effectively and efficiently handle the various multifarious responsibilities in addition to their judicial duties. Alan Burns wrote;

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[826] *Ibid.*

[827] Nigeria, *Report by Sir F.D. Lugard on the Amalgamation of Northern and Southern Nigeria, and Administration, 1912-1919* (London: His Majesty's Stationery Office, 1920) at 21 and 79.

[828] Elias, *supra* note 569 at 111.

[829] Nigeria, *Report by Sir F.D. Lugard…, supra* note 827 at 79.

[830] Elias, *supra* note 569 at 111.

[831] Speed C.J. corroborated this when he wrote in a part of the Lugard's report that, "*The great danger to the proper working of the Provincial Courts is the possibility that the political officers who preside over them should regard them more as an arm of the executive than as the chief, and perhaps the only tribunal to which British subjects and those under the protection of British law look for the redress of their wrongs and the maintenance of their liberties*." See, Nigeria, *Report by Sir F.D. Lugard…, supra* note 827 at 80.

"The duties of these political officers- Residents, District Officers, Assistant District Officers, and Cadets-are innumerable. They sit as Magistrates to hear criminal and civil cases, and they exercise a general supervision over the proceedings of the Native Courts. They direct and control…the constabulary stationed in the various divisions, and they supervise local prisons. As deputies of the Sheriff, they are responsible for the execution of murderers condemned to death…They settle boundary disputes and the endless squabbles of neighboring tribes and villages.[832]

Alan Burn's list above was a fraction of the duties performed by political officers who were also the *de facto* heads of the various colonial courts. The near-absolute but less effective political control over these courts weakened their ability to cater to the justice needs of the people.[833] This situation made the colonial judicial system less effective, and inefficient. Consequently, the system became less attractive to Nigerians who ceaselessly yearned for further reorganizations of the entire colonial judicial structure. However, subsequent attempted reorganizations failed to produce the people's anticipated transformation.

(iv) The Subjugation of Customary Law

One of the most practical and pronounced impacts of the colonial judicial system on the pre-colonial justice system of Yorubaland was the unqualified subjection of the agelong African customary law applicable in the precolonial courts to two English tests.[834] These were the validity tests subdivided into the repugnancy test and the incompatibility test. The root of these tests in Nigeria is traceable to some colonial ordinances. These were the Ordinance No 3 of 1863 through which English law was introduced into Nigeria, the Supreme Court Ordinance of the Lagos Colony of 1876, and subsequent amendments. The Supreme Court Ordinance 1914 provided that, "*Nothing in this Proclamation 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 Protectorate,* ***such law or custom not being repugnant to natural justice, equity, and good conscience*** (highlights mine for

[832] Burns, *supra* note 553.
[833] In another statement of Speed C.J., "*It was impossible for the political staff adequately to supervise them (the courts), and the returns furnished to the judges, while making a considerable demand on their time, only afforded an opportunity of remedying an injustice or illegality patent on the face of the return*." See, Nigeria, *Report by Sir F.D. Lugard…, supra* note 827 at 79.
[834] This has since become a subject on which several articles and opinions have been published. For more on this, see, Kiye, *supra* note 794; Charles Ogwurike, "The Source and Authority of African Customary Law" (1966) 3:1 U Ghana LJ 11; Marrisa Herbst & Willemien Du Plessis, "Customary Law v Common Law Marriages: A hybrid Approach in South Africa" (2008) 3:1 J Comp L 105, etc.

emphasis)."[835] The second arm of the test, the incompatibility test, forbade the application of any customary law that contradicted the codified English ordinances/laws in force, thereby subjecting customary law to the rules of English law. Subsequent colonial and postcolonial enactments retained this provision with the major impact being the continued repression of some rules of customary law.

The seriousness and intensity with which the colonial courts condemned and clamped down on certain rules of customary law were epitomized by Lord Atkin's assertion in *Eshugbayi Eleko v. Officer Administering Government of Nigeria.*[836] In the latter case, the learned Lord firmly asserted that, customary law is either good or bad and that the court could not transform a barbarous custom into a milder one.[837] Lord Atkin continued that, if customary law still stands in its barbarous character, it must be rejected as repugnant to justice, equity, and good conscience.[838] Ironically, it was the colonial government who, in the latter case, sought the upholding of a codified "barbarous custom" under which it deposed, and banished the Oba of Lagos in 1925. To defend its actions and achieve its aims under the so-called "barbarous custom", the Lagos colonial government argued that, "*while the fundamental principle of this custom had been preserved, its barbarous features had disappeared under the influence of Christianity, British rule and the spread of enlightened and less primitive ideas*".[839]

While there is no perfect legal system as every system evolves, the unqualified approach by which the colonial courts/government sought to "reform" African customary law raised suspicion. A relevant question is, by whose standard should a rule of customary law be considered repugnant?[840] Who sets this standard and on what basis? During the period under

[835] Supreme Court Ordinance, 1914, section 19.
[836] (1931) AC 662.
[837] E. A. Taiwo, *supra* note 686 at 89.
[838] (1931) AC 662. The meaning of the phrase, "natural justice, equity, and good conscience" was/is a subject of controversy and uncertainties that makes it ambiguous. On this, Speed C.J. opines, "*I am not sure that I know what the term 'natural justice and good conscience' means. They are high sounding phrases, and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the term*". See also, *Lewis v. Bankole* (1908) 1 NLR 83 at 84.
[839] See, M.L., Tew, Judgment of the Supreme Court in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (6 August 1925) Ibadan, NAN (CSO 33115 Vol 1), and M.L., Tew, Judgement of the Supreme Court in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (9 May 1929) United Kingdom, National Archive (CO 583/166/2).
[840] Asein, *supra* note 18 at 130.

study, most of the judges who viewed certain rules of customary law as repugnant were English men. Their notion of right and wrong conflicted with those of the communities over whose courts they presided. The tone of Lord Atkin in the latter case is, apparently, very strict in interpreting *section 19* of the Supreme Court Ordinance of 1914. While the latter provision ostensibly indicated the desire of the law to prune and rid African customary law of its aspect thought to be "repugnant", the approach of the court was fiercer. Thus, the colonial government again employed the instrumentality of its newly introduced courts to throw away the customary law's baby with its birth water. Two cases, *Suwebatu Danmole and 4 Others v. Yisa Dawodu and 11 Others*[841] and *Rasaki Yinusa v. T.T. Adesubokan*[842] decided in Western Province/Region illustrated the hasty approach of colonial courts towards the abrogation, or at least, subjugation of African customary law.

In the former case, a man died intestate and the issues for determination before the court included the question of, which of two conflicting rules of customary law should govern the distribution of his property. There was the "*idi igi*" rule which based the distribution on the number of wives married by the deceased, and the "*ori ojori*", a distribution rule based on the number of deceased children (per capita). The deceased left four wives and nine children. After acknowledging that *idi igi* was the prevailing rule of inheritance of the Yoruba community of the deceased, the trial judge preferred and consequently upheld the *ori ojori* rule. His reason for nullifying the prevailing and the agelong *idi igi* rule was that:

> *"…In these days no one ever thinks of the number of wives of an intestate in order to ascertain into how many parts the properties left are to be distributed…The old rule of division according to the number of the wives of the deceased and mothers of the children therefore seems to be outmoded, and there can be no doubt that it was neither fair nor equitable to the children*."

By the last sentence of the trial judge above, it is clear that the court was only concerned about what was "fair and equitable for the children" of the deceased but neglected the positions of wives. The judge consequently downplayed and overlooked polygamy, an agelong African marital culture. An important question could follow from the view taken by

[841] (1958) 3 F.S.C. 46; [1962] 1 W.L.R. 1053.
[842] [1971] N.N.L.R. 77.

the trial judge in this case. In a society and at a time[843] where women could only inherit from their marital family, what happened to a wife who had no child for the deceased husband if the *ori ojori* rule was applied? It appears like the judge was merely keen on subordinating a custom applicable in Yorubaland, a polygamous society, to that which was applicable in Britain, a monogamous culture. Neglecting that both were two totally different societies. It took the plaintiff several years of appeal and, apparently, substantial expenses, to have the trial judge decision reversed.

The latter case, *Rasaki Yinusa v. T.T. Adesubokan* was decided on the second aspect of the validity test, the incompatibility test. The test sought to ensure that for customary law to be applicable, it must not be incompatible with any extant local legislation. Notably, existing laws in Nigeria during the period under study were either enacted colonial ordinances or received English laws/statutes. Thus, this second aspect of the validity test was similarly intended to achieve the aim of the first aspect. In the above case, a testator willed his property following the provisions of the English Wills Act of 1837. The provisions of the Wills Act obliged by the testator were inconsistent with Islamic Law, the personal law of the testator. On appeal, the Supreme Court upheld the Will, declaring the Maliki School of Islamic law as incompatible with *section 3* of the Wills Act, and therefore null and void.

The above and other decisions which could not possibly be covered here demonstrated how colonial courts that replaced the pre-colonial courts in Yorubaland embarked on judicial sanitation. These adverse sanitary efforts practically stultified rules of customary law throughout the colonial era and beyond. Due to these validity tests applied by colonial courts and followed by later courts established in Yorubaland, the application of customary law by courts diminished. Thus, the tests presented customary law as being inferior to English law. It practically ranked the English statutory enactments above the agelong African customary law.[844] Hence, the subjection of customary law to the English rules of common law, equity,

[843] The common custom, especially in Eastern Nigeria, before the 1997 decision in *Mojekwu v. Mojekwu* 7 NWLR Pt 512, 283 CA., was that a female child cannot inherit his father's property (*Oli Ekpe* custom). Thus, the hope of women to inherit properties before this decision hanged on their husband's family. Therefore, if the *ori ojori* custom was rigidly applied without due consideration to other circumstances, it would always be unfair to women, especially those having no child. A clear case of "double jeopardy".

[844] For more discussion on this point, see, Oluwabusayo Temitope Wuraola & Hameenat Bukola Ojibara, "Revisiting the Effects of Colonialism on the Development of Customary Laws in Nigeria (2018) 3:1 Kampala

and statutes of general application by colonial courts amounted to, "*emptying the legal system of all its customary law content in the guise of ensuring validity*."[845]

(v) Manifestation of Judicial Corruption

As elaborated in chapter three, the pre-colonial justice system in Yorubaland was partly based on religious belief. To establish truths of some matter presented before the court for adjudication, there was a strong reliance on the supernatural or ancestral intervention in the judicial process. For this reason, both litigants and judges were cautioned and circumspect in playing their roles in the justice administration process thereby reducing the possibility of corruption. Certain gods/deities were revered and credited with the power to visit anyone who intended to corrupt the judicial process with misfortune.[846] Thus, corruption was an outrightly feared taboo. Religion and belief in the supernatural molded the conscience of everyone,[847] including the judge who presided over pre-colonial courts. This belief was based on the certainty of attracting a punishment here on earth and in the hereafter if involved in corrupting the system. The opposite was the strong tendency to earn handsome rewards here or in the hereafter if abstained from corrupt tendencies. In addition, the pre-colonial judicial system was not as monetized as there were no court fees paid for forms and other miscellaneous payments later introduced by the colonial judicial system. These realities meant the absence of avenues for court officials to be influenced into corruption.

Following the introduction of colonial courts, documented records demonstrated a change in the above status quo previously obtained in the Yoruba pre-colonial courts. Identified judicial corruption during the period under study exceeded finance as it cut across the entire judicial landscape. Corrupt practices were encouraged partly because of the absence of definite guiding rules of courts. As found by Omoniyi Adewoye, *"...for the greater part of the nineteenth century there were no guiding rules for the courts, court officials tended to follow their own inclinations*."[848] Benjamin Way, the Lagos Colony Chief Magistrate in the early

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Intl UJ of Humanities 105, online: < https://www.ijhumas.com/ojs/index.php/kiuhums/article/download/256/238 >.

[845] Asein, *supra* note 18 at 135.

[846] Tunde Onadeko, "Yoruba Traditional Adjudicatory Systems" (200) 29:1 African Study Monograph 15 at 25.

[847] Kanu Ikechukwu Anthony & Omojola Immaculata Olu, "Justice in Yoruba Culture" (2019) 6 Tansian UJ Arts, Management & Soc Science 98, online: < https://www.nigerianjournalsonline.com/index.php/TUJAMSS/article/view/815 >.

[848] Adewoye, *supra* note 455 at 73.

years of colonial courts' was known for unregulated framing of indictments for his court. More often, Way acted as both the prosecutor and the judge in several cases.[849] Way's court clerk was also in the habit of exercising powers that placed him in comprising positions. He played the role of court's clerk, court's interpreter, and at the same time, agent, and attorney to European merchants resident in the colony of Lagos.[850] At his sole discretion, the Clerk was also responsible for impaneling the jury for the Court of Civil and Criminal Justice, a role he played without the necessary approval of the Chief Magistrate.[851]

As the Governor of the Lagos Colony later discovered, some of the jurors selected by the clerk in certain cases were alleged to be men of questionable character, perhaps, to the knowledge of the Chief Magistrate. Some of the jurors selected by the clerk were also found to be men bereaved of judicial procedures while "*some of the most respectable citizens were excluded altogether*"[852] With such enormous power at the disposal of a low-grade court clerk, there available opportunities for him to manipulate justice in favor of litigants of his choice. Another discovery about Way's court clerk was his connivance with two bailiffs of the Court of Civil and Criminal Justice to perpetrate detestable acts in their bid to pervert justice. Instances of these acts included the offering of bribes by defendants to any of the three officers to evade court summons, and unofficial collections of up to twenty percent of the total of a judgment credit from judgment creditors before executing their judgments.[853] They were also alleged to be involved in unauthorized recoveries of debts for creditors based on commission.[854] It was because of these allegations and many more arising out of several complaints, that the Administrator of the Lagos Colony dismissed the clerk and the collaborating bailiffs from office in 1869.[855]

Similarly, there were allegations of official misconduct and abuse of office against the registrar of the Court of Civil and Criminal Justice, Mr. Otonba-Payne. In 1875, Justice James Marshall, the then Chief Magistrate of Lagos complained that the registrar passed

[849] Gordon, *supra* note 558 at 116.
[850] Glover to Administrator-in-chief, Sierra Leone, with enclosure (11 February 1870) Ibadan, NAN (CSO 1/8, 6A).
[851] *Ibid.*
[852] *Ibid.*
[853] *Ibid.*
[854] Kennedy to Granville (14 March 1870) Ibadan, NAN (CO 147/17).
[855] Adewoye, *supra* note 455 at 74.

himself off as the Sheriff. Otonba-Payne was alleged to have used the fraudulently assumed office of the Sheriff to levy high charges on people before carrying out the court's orders. He was further accused of collecting commissions of five percent of all monies that passed through his hands as a Sheriff, an office he assumed without approval.[856] The Chief Magistrate further expressed his belief that Otonba-Payne "*has been enjoying no less a sum than about two-hundred pounds per annum from this source alone, viz., Sheriff's poundage, than he has had fees and salaries…*"[857]

Allegation of official corruption within the colonial court was not limited to low-ranked court officials. Certain judges were similarly found in compromising situations. For instance, in 1871, a police Magistrate, Josiah Gerard, was accused severally of handing out partial rulings in favor of one European Merchant named E. Pittaluga. The Magistrate was said to have served the latter as a legal adviser on commercial matters, an act prejudicial to the interests of other traders of the Lagos community.[858] Even the Queen's Advocate was not excused from the reported official corruption of the colonial courts. The latter used his liberty to engage in private practice to his advantage. He had close contact with the judges and used this as an influence to enhance his private practice. As of 1881, there was the prevalent notion in Lagos that a litigant who desired to win his case should engage the Queen's Advocate who was sure of using his intimacy with the judges to influence courts' decisions.[859] Thomas Woodcock, the Queen's Advocate who was the prosecution in the previously analyzed cases of Ogoo, Palmer, and Bickersteth was a known violator of the Supreme Court Ordinance, with impunity. Woodcock was alleged to have appeared in some cases that involved educated plaintiffs against illiterate defendants, contrary to a provision of the Supreme Court Ordinance 1876. This he did to the knowledge and with the consent of some judges who were also alleged of promoting the Queen's Advocate's private legal interests.[860]

Although there were fewer records in the hinter Yorubaland than in Lagos, the situation was not much different from what was obtainable in Lagos. Inexcusable factors adduced as

[856] Marshall to Lees (8 February 1875) Ibadan, NAN (CSO 1/10, 2); Marshall to Lees, with an enclosure (12 March 1875) Ibadan, NAN (CSO 1/10, 2).
[857] Marshall to Lees (15 March 1875) Ibadan, NAN (CSO 1/10, 2).
[858] Glover to Gerrard (8 September 1871) Ibadan, NAN (CSO 1/8, 11).
[859] HCA Lagos, "Civil Record Book: Chief Justice's Notebook. February 1887-August 1890"; Adewoye, *supra* note 455 at 75.
[860] Adewoye, *supra* note 455 at 75.

responsible for these untamed official corruptions included insufficient remuneration for the low-grade staff.[861] There was also the issue of limited availability and supervision from judges who were non-professional and lacked the adequate knowledge required for the proper administration of courts. In the words of Omoniyi Adewoye:

"*A situation where most of the judges were more or less illiterate in law, and were, in addition not constantly on the bench or even resident in Lagos, on account of frequent leave-taking in England, only served to encourage corruption and breed judicial and other anomalies*."[862]

(vi) Enhancement of Africans' Political Awareness

The interaction between the received English law/colonial courts and customary law during the period under study had an accidental positive impact least envisaged by the colonial government. This was the enhancement of political awareness, especially among the educated elites. Some of the initial implications of the English law were its introduction of the idea of individualism, and personal freedom, and the raising of consciousness about personal rights. Through its decisions, colonial courts were instrumental in galvanizing this consciousness, a phenomenon that motivated Nigerians to further question the basis for external domination. Perhaps, the questioning was possible because the British colonial government was not completely totalitarian. There were certain loopholes through which educated Nigerians, especially lawyers, challenged certain policies and actions of the government. While these lawyers worked for their fees, beyond pecuniary gains, their services, reinvigorated some Nigerians who were consequently able to confront the British overlords. Two *locus classicus* that involved Nigerians and the colonial government and in which the latter suffered an unexpected setback at the Privy Council elucidate how African political consciousness was enhanced by colonial courts.

[861] While it was alleged that the low-grade staff of the various colonial courts were poorly paid, so were almost all subordinate staff of the colonial government. This situation should have been rectified in better ways than hiding under it to perpetrate corruption. See, Glover to Kennedy (25 February 1871) Ibadan, NAN (CSO 1/8, 8A).
[862] *Ibid* at 76.

These cases were *Amodu Tijani v. Secretary Southern Nigeria*[863] and *Eshugbayi Eleko v. Officer Administering Government of Nigeria.*[864] In the former case, Chief Amodu Tijani, a highly-placed indigenous Lagos White Cap Chief (traditionally called "*Idejo*"), claimed against the Nigerian colonial government, compensation for the land in Apapa Lagos. During hearings, the Plaintiff/Appellant adduced evidence that the land was subject to his authority and ownership under African customary land law. Meanwhile, the said land was part of the territories that Oba Dosunmu (*Docemo*) of Lagos purportedly ceded to the Queen of Great Britain under the Lagos Treaty of Cession of 6 August 1861. In its judgment of July 1921, in addition to the compensation awarded to the Plaintiff/Appellant by the courts, the Privy Council held that "*a mere change of Sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly*".[865]

Amodu Tijani's victory opened the eyes of conscientious Nigerians who had been skeptical of colonialism, to the fact that their British overlords were questionable. Following the judgment in Tijani's case, an educated Nigerian wrote, "*Today, the dictum that 'white men and Governments make no mistake' has been exploded and proved to be erroneous and untrue*".[866] A huge enthusiastic crowd estimated to be between thirty and forty thousand was said to have trooped out to welcome the victorious Amodu Tijani on his return to Lagos from London on 25 August 1925.[867] This was followed by over two weeks of celebration and jubilation within the crown colony of Lagos.[868] This overt display of excitement by Lagos residents over Amodu Tijani's victory was proof of the huge effect that the Privy Council decision had on the then-nascent political consciousness of Nigerians.

The political consciousness enhanced by the victory of Amodu Tijani's case seemed to have been dwarfed by the unprecedented impact of the Privy Council decisions in *Eshugbayi Eleko v. Officer Administering Government of Nigeria.* This case touched on the power struggle

[863] (1921) JELR 59845; (1915-1921) 3 N.L.R. 24; [1921] 2 A.C. 399. The landmark case went through the Supreme Court, Full Court and the Judicial Committee of the Privy Council presided over by Lords Atkinson, Haldane, and Phillimore.
[864] (1931) AC 662.
[865] 3 N.L.R at 62; {1921} 2 A.C. at 407.
[866] Adewoye, *supra* note 455 at 291.
[867] *Ibid.*
[868] *Ibid.*

between the colonial government and Eshugbayi Eleko, the then paramount Oba of Lagos. The tussle between the colonial government and the Lagos king began in 1915 when the latter refused to work with the government on the introduction of a new tax. He was, later in 1920, suspended by the government on an allegation that he made certain political appointments without the government's consent. The issue became complex over the following five years so much so that, in 1925 the government deposed Eleko. Under the Deposed Chiefs Removal Ordinance, the government further ordered his deportation/banishment from Lagos.[869] Despite widespread protests hinged on the claim that his deposition contravened customary law,[870] Eshugbayi Eleko was arrested and forcefully sent into exile in Oyo town.

The series of legal battles that trailed the political imbroglio which followed Eleko's dethronement and deportation was significant to the politico-legal history of West African British colonies generally and Yorubaland particularly. It reenergized Africans, Nigerians, and the Yoruba people of the Western Province/Region particularly, towards questioning the basis for colonialism. The central issue for determination before the Lagos Supreme Court in this case was whether a detainee could successively apply for a writ of *habeas corpus* before several judges notwithstanding the number of times the application had been previously refused. The application was made for an order to allow the appellant's presence at the hearing. Three successive *habeas corpus* applications made by the appellant before the Supreme Court in Lagos were refused on technical grounds. It was consequently held that the application could not be resubmitted to a judge of the same court.[871] The court further added that the Governor's acts of deposing and banishing Eleko in 1925 were executive orders not subject to the court's investigation. It was after the third rejection of his application that the applicant's counsel, Egerton-Shyngle, and Hebert Macaulay (Eleko's leading supporter),[872] reasoned that only the Privy Council could save the situation. Following the dismissal of the

[869] W.F. Cowers, Gazette Notice Extract (6 December 1920) Ibadan, NAN (CSO 33115, Vol 1).
[870] Sworn Affidavit of Chief Obanikoro in Support of *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*, Ibadan, NAN (CSO 33115, Vol 1).
[871] F.B. Marriman & Horace Douglas, Petition of Eshugbayi Eleko for Special Leave to Appeal to the Privy Council (8 August 1925) United Kingdom, National Archive (CO 583/117/A).
[872] Herbert Macaulay (1864-1946) was a foremost Nigerian lawyer, leader, and politician. He is reputed as the father of Nigeria's nationalism. As a token of recognition of his historic contributions towards Nigeria's development and independence, his image adorned the one naira note (now coin) of the Nigerian currency. For more on Macaulay, see, Max Siollun, "The Wizard of Kirsten Hall: Who Was Herbert Macaulay?", *The Republic* (4 May 2021), online: < https://republic.com.ng/april-may-2021/who-was-herbert-macaulay/ >.

appellant's appeal to the Full Court of the Supreme Court in June 1926, the first of the appellant's two appeals was filed before the Privy Council and later heard in 1928.

Notwithstanding the vigorous arguments of the Solicitor-General for Nigeria, J.C. Howard, on behalf of the colonial government, the Privy Council reversed the decision of the Supreme Court. The Council held, contrary to the decision of the Supreme Court, that successive application for a writ of *habeas corpus* was allowed to be made to different judges of the same court. The Council affirmed that it was the duty of each judge to consider the application before him on its merit. The case was then remitted back to the Supreme Court in Lagos for a retrial.[873] A series of rehearing was then held at the Supreme Court and Full Court in Lagos between January 1929, and March 1930. In his argument before the Supreme Court, the Attorney-General of the colonial government made a strong case for the superiority difference between the colonizer and the colonized. The Attorney-General argued, "*Whereas matters affecting the liberty of the subject are in England usually relegated to the ordinary courts of law…In comparatively underdeveloped countries, it may often be necessary to give powers to Executive Officers which would be regarded as extraordinary in England*.[874] In one of the rulings of the Supreme Court during the rehearing of the case, one of the presiding Justices, Justice Tew, held that the court was incompetent to decide the two main issues raised by Eleko's applications. These issues were: whether or not Eleko was a "Chief" under the Deposed Chiefs Removal Ordinance, and whether or not he was properly deposed from office according to local customary law.

The rehearing before the Supreme Court ended in a second loss for Eleko. The challenge of his deposition and deportation and the new application for *habeas corpus* were dismissed and refused respectively. By this second judgment, it was beyond doubt that the Nigerian colonial court was seriously indisposed to questioning the legality or otherwise of the executive actions of deposing and deporting Eleko. That led to Eleko's second appeal filed before the Privy Council and heard in 1931. The colonial government's major argument before the privy council in the new appeal was that the Governor's action to depose Eleko was based on a native custom that was merely invoked to depose an "unwanted Chief". The machinery for

[873] Adewoye, *supra* note 455 at 263.
[874] A reference was made to this in the judgement of the court. See, W.B. Lloyd, Judgement of the Full Court of the Supreme Court of Nigeria, *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (3 March 1930) Ibadan, NAN (CSO 33115, Vol 1).

the enforcement of the custom was claimed to be the Governor's power under the Chief Removal Ordinance.[875]

In its judgment delivered in March 1931, the Privy Council again rejected the views held by the Supreme Court and Full Court of Nigeria. The Council opined that the colonial Governor's powers under the Deposed Chiefs Ordinance were purely executive. Consequently, the Nigerian court erred in law by holding that it was incompetent to investigate the legality of the executive order that deposed and banished an indigenous chief. The Privy Council further denounced the Supreme Court's notion that Eleko's deportation was an act of state and emphatically pronounced that, "*the Governor could only act in pursuance of the powers given by law*". Lord Atkin's declaration in the judgment was quite instructive:

"In accordance with British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject except on condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."[876]

After spelling out the form it should take, the Privy Council again remitted the matter back to the Supreme Court of Nigeria to be heard *de capo*. However, the matter did not go back to hearing as the newly appointed governor, Donald Cameron, devised a political approach to resolving the politico-legal tussle that raged for about ten years.[877] Eshugbayi Eleko was then allowed to return to Lagos and take back his throne. Eleko Sanusi who had been appointed to replace Eshugbayi was retired on an annual pension of eight hundred naira guaranteed for life.[878]

The colonial government's treatment of Eshugbayi ironically stimulated huge local support for him. The support provided by the masses for the success of the case was overwhelming.

[875] M.L., Tew, Judgement of the Supreme in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (9 May 1929) United Kingdom, National Archive (CO 583/166/2).
[876] (1931) AC 662; Adewoye, *supra* note 455 at 264.
[877] In his effort to bring political solution to the prolonged politico-legal imbroglio, Donald Cameron admitted that that Eleko's supporters strongly perceived that government had been weakened by the prolonged and cyclic litigation and that the "*game was in their hands*". He thereafter disclosed to his superiors in Whitehall that he was compelled to opt for out of court resolution of the matter in the public interest. See, Donald Cameron to Lord Passfield (16 July 1931) United Kingdom, National Archive (CO 583/177/A).
[878] Perham, *supra* note 327 at 266-268.

There was enormous moral and financial support from political, social, and cultural groups within and outside Lagos. It was written by a British official in London that, "*it is extraordinary how Macaulay, by Propaganda in his newspaper, by public meetings, public subscriptions, and litigation has for so many years kept alive an agitation over Eshugbayi*".[879] Elites contributed money in support of the litigation to such an extent that some extremely loyal supporters mortgaged their properties to raise funds for the cause. How supporters rallied around Eshugbayi to raise funds for the protracted trials and appeals puzzled colonial officials in Lagos and Britain.[880] Unprecedented jubilations rented the air following both the 1928 and 1931 victories of Eshugbayi at the Privy Council.[881] In demonstrating their feelings of triumph over an unpopular colonial policy, thousands of Nigerians flooded the streets of Lagos and neighboring towns, all singing and making merry.[882] A holiday was declared following which offices, shops, and markets were shut.[883] During the weeks of celebrations after the return of Eshugayi to Lagos, songs were composed, and pamphlets about the case were published. Plays and dances demonstrating aspects of the case were also on shows around Lagos. All of these marked the celebration of a unique victory and the beginning of a new era in the anti-colonial struggle. A struggle that was rekindled and galvanized by the political consciousness awakened by an adverse and unpopular attitude of the Nigerian colonial courts towards public interests.

The Nigerian colonial government did not expect the kind of response given to the case by the Privy Council. That response was an indictment of the Nigerian government and its judicial system.[884] This indictment reinvigorated the masses' contempt for the colonial government. In the words of Omoniyi Adewoye, "*Confidence led to contempt for the colonial regime, and such contempt, or the realization that the power of the regime was not absolute, was surely an important ingredient in the development of political consciousness among the intelligentsia, particularly in Lagos*".[885] This consciousness was the springboard for ensuing

[879] J.A. Calder, Internal Memorandum, (23 May 1930) United Kingdom, National Archive (CO 583/173/10).
[880] Bonny Ibhawoh, "Litigious Chiefs and Land Palavers" in Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford: Oxford University Press, 2013) at 121; J.E.W. Flood, Confidential Minute (17 June 1929) United Kingdom, National Archive (CO 583/166/2).
[881] Patrick Cole, *Modern and Traditional Elites in the Politics of Lagos* (Cambridge: Cambridge University Press, 1975) at 149.
[882] Adewoye, *supra* note 455 at 291.
[883] Ibhawoh *supra*, note 880 at 141.
[884] *Ibid* at 144.
[885] Adewoye, *supra* note 455 at 292.

nationalistic agitations of the subsequent three decades leading to Nigeria's independence in 1960.

C. Conclusion

As concisely presented in this chapter, the colonial enterprise especially its judicial aspect greatly impacted the Yoruba pre-colonial justice system in several indelible ways. Due to the impracticality of exhausting all of these impacts within the pages of this thesis, six of them were selected for this summarized discourse. Notably, these inexhaustive impacts of the British judicial system on Yorubaland made holistic changes to every aspect of the pre-colonial justice system that till today, procedures adopted for courts operating in Yorubaland are based on the English system. It started gradually with the British judicial officers and court staff perpetrating and allowing a great deal of partiality of justice in the judicial process. As the Yoruba people grappled with the reality that their quest for justice was being eroded on the altar of partiality, colonial policy consideration also started to override justice as the colonial regime sacrificed justice for political expediencies. The colonial courts' leadership too was redefined because the indigenous leaders' roles changed as they were allowed to constitute only the Native courts as subservient judges compelled to "dispense justice" under colonial dictates. British colonial officers presided over all the courts established for the whole of Yorubaland, the unprecedented expansion of some Obas' authorities notwithstanding. In all of these courts, English Law was superimposed over Customary Law as the latter was only applied under the stringent repugnancy and incompatibility test provisions. Corruption pervaded the whole judicial process as some officers at the temple of justice manipulated the system for self-aggrandizement and personal gains. Ironically, in the course of its biased activities, the same judicial process inadvertently enhanced Africans' political awareness. These are a few of the British judicial legacies that supplanted the pre-colonial Yoruba justice culture.

General Conclusion

This thesis investigated the inexhaustible legal history of the precolonial and colonial courts in South-Western Nigeria (Yorubaland) between 1854 and 1954, with the thrust being to deduce the impact of the latter on the former. Being the introductory chapter, Chapter One covered the general overview of the work, the literature review, the significance of the research, and the methodology used in conducting the research. The chapter continued by defining key terms that ran through the thesis and then delimited its scope. Chapter Two delved into the historical analysis of the background and evolution of colonialism in Africa, Nigeria, and South-Western Nigeria (Yorubaland). It analyzed the various factors that motivated the introduction of colonialism into Africa. The latter was then linked to diplomatic (treaty-making) and military strategies employed in the process of establishing colonial regimes over hitherto independent nations of Africa, including South-Western Nigeria. This chapter also covered the various colonial administrations set up by the British over Yorubaland from 1861 to 1954. In an expository manner, Chapter Three discussed the pre-colonial courts and justice administration in South-Western Nigeria. This chapter's analysis includes a narrative of both the hierarchical political and judicial culture of the Yoruba people before the imposition of colonialism. In Chapter Four, the thesis proceeds from the precolonial justice system of Yorubaland to demonstrate the factors that necessitated the establishment of colonial courts in Nigeria and Yorubaland between 1854 to 1954. The chapter thereafter explains the structures and *modus operandi* of colonial courts in Yorubaland during the period under study. Central to the latter is the analysis of the various civil and criminal procedures applied by colonial courts. Chapter Five explains the impact made by the introduced colonial judicial system on the pre-colonial justice administration of Yorubaland. It demonstrates some radical and indelible changes made to the agelong pre-colonial Yoruba system by the British court system and the received English law during the colonial era. As concisely demonstrated through these five chapters, long before the British introduction of colonialism and the accompanying judicial system into Yorubaland, the Yoruba people had a well-structured court and justice system. This system was eventually overridden by the colonial arrangement as deducible from the *changes* and *impacts* of the colonial courts analyzed in chapters four and five respectively.

The gradual overriding and eventual displacement of the pre-existing Yoruba system was perfected through the use of the twin instruments of colonialism- law and force. The repeated,

strategic, and combined use of "lawfare"[886] and "force"[887] by colonialists of all times underscores the paramountcy of these two strategies in every colonial enterprise. It shows that, in every colonial venture, law and force are inextricably linked thereby raising the question of whether or not a colonial state could be established and governed without the use of both law and force. The totality of the British colonial enterprise in Nigeria generally, and Yorubaland particularly provides evidence to show that law and force are the survival springboards of the colonial state. Hence, despite her possession of a myriad of weapons of war, army, and naval battalions with which she could at once conquer and impose foreign rule on Nigeria, Britain first adopted treaty-making as a strategy to seize territories. This approach was used in Lagos and the Yoruba hinterland and through it the Lagos Treaty of Cession of 6 August 1861,[888] and several others were obtained. This same legal/diplomatic blueprint was applied in Northern and other Southern parts of Nigeria where copious takeover treaties were secured.[889] If the law was sufficient for the establishment of the colonial state, the British agent who negotiated and signed the various Nigerian treaties on behalf of the British colonial office would have stopped at treaty-making. Instead, brutal force, military expeditions, and a series of coordinated bombardments complemented the treaty-making process.[890] Perhaps, the use of force also became expedient because, ostensibly, most of the treaties were not willingly appended by the indigenous leaders. Hence, Britain sought to legitimize her hold on her Nigerian colonies through law (treaty-making), and that much-needed legitimacy was secured by force. Adopting one of these strategies (law and force) to neglect the other would have made the British colonial enterprise practically impossible. A territory could be seized by force but such forcible seizure requires some form of legal template to legitimize it. The latter was realized by the British and she embarked on either securing a treaty first and suppressing the territory later or vice versa.

Although the colonial enterprise in Nigeria and Yorubaland particularly ultimately impacted and whittled down the Yoruba judicial system, the British venture generated certain incidental outcomes. One of the incidental outcomes, as discussed in Chapter Five, is the

[886] See, Pinos & Hau, *supra* note 73; Oyebode, *supra* note 178.
[887] Ikime, *supra* note 179.
[888] See, the TREATY with the King of Lagos…*supra* note 269.
[889] Oyebode, *supra* note 178.
[890] In addition to the bombardment of Lagos of 1851, Oyo town was also bombarded by Captain Ross in 1895. The Ijebu suffered a devastating defeat during the Ijebu expedition of 1892. Several other military operations were carried out to conquer Northern and other Southern parts of Nigeria. For a comprehensive account of the use of force by the British in conquering Nigeria, see, Ikime, *supra* note 179.

Enhancement of Africans' Political Awareness. Disenchanted by foreign rule and its exploitative, and divisive approach to governance, indigenous leaders and educated elites confronted the British overlords through a series of socio-legal and political strategies. Aside from the notable nationalistic efforts of legal minds like Herbert Macaulay, and Egerton Shyngle, and active others, indigenous leaders like King Jaja of Opobo, Chief Amodu Tijani, and Oba Eshugbayi Eleko, put up somewhat liberating resistances. The British government in Lagos was caught unaware by the unprecedented approach of the Privy Council to the *locus classicus* cases[891] that involved the government, and Amodu Tijani and Eshugbayi Eleko. The unusually celebrated decisions of both cases mortified the Lagos government. For instance, in an attempt to finally resolve the prolonged and unequaled politico-legal imbroglio generated by Eleko's case, Donald Cameron (Lagos colonial governor from 1931 to 1935) admitted that Eleko's supporters strongly perceived that the government had been weakened by the prolonged and cyclic litigation and that the "*game was in their hands*". Cameron thereafter informed his superiors in Whitehall that, in the interest of the public, he was compelled to opt for an out-of-court resolution of the matter.[892]

As discussed above, the success of these two cases was credited to the relentless efforts of the litigants, their legal counsel, and the masses. All of the actors involved in the two cases were indirectly spurred, by the colonial state's attitude, to question the legitimacy of the foreign rule and its imposed judicial and legal systems. This way, both the colonizer and the colonized employed the colonial legal template to achieve set goals. However, the historical facts above depict that the colonizer achieved more with his colonial structure. The incidental success achieved by the colonized Nigerians was comparatively minute, though foundational to the eventual liberation of Nigeria from colonial holds.

Despite that a series of concerted socio-legal and political efforts prompted the adjustments made by the Nigerian colonial state, not every class of citizen equally benefitted from the socio-political changes. For instance, there was a series of administrative and judicial reforms by subsequent governments of Lagos after the departure of Lugard. These reforms did not practically transform into a visible change in the life of a common Yoruba person, especially

[891] See, *Amodu Tijani v. Secretary Southern Nigeria* (1921) JELR 59845; and *Eshugbayi Eleko v. Officer Administering Government of Nigeria* (1931) AC 662.
[892] See, Donald Cameron to Lord Passfield (16 July 1931) United Kingdom, National Archive (CO 583/177/A).

the so-called "non-literate". With the migration of returnee slaves and their descendants back to Lagos since the beginning of the nineteenth century, the composition of the colonized Yoruba people expanded beyond the home-based indigenes. The Saro, Amaro, and Aguda joined the colonized population. Due to their status as Western-educated persons, the Saro and other educated indigenes who joined the "elite group" were more favored by subsequent changes made in the colonial government. Some of these elites were appointed to administrative offices while others became disproportionately-rated professionals enjoying social status that placed them above others in the scheme of things. Thus, the socio-legal and political adjustments made by the colonial government retained the societal hierarchy in which the majority of the "non-literate/uneducated" indigenes remained at the base of the social class. The category of the non-literate/uneducated who somewhat benefited from colonial structural reforms in Yorubaland were the indigenous leaders- the Obas and Baales- who shared in Cameron's power rearrangement and distribution. Under the leadership of Cameron, Ward-Price who succeeded Captain Ross as Resident of Oyo Province, eventually fragmented the power of the hitherto misruling Alaafin Ladugbolu. Consequently, the centralized and highly controversial Oyo Province was broken into five independent Native Authorities and five subordinate others.[893] Thus, the colonial politico-legal system created more spheres for additional "decentralized despotism" to thrive while the lots of an average Yoruba person who was unconnected to political power remained unchanged, if not worse. Arguably, it thus seems apt to rationalize that, at any given time, law and its reformation have always existed to cyclically renew and perpetuate social hierarchy and uneven distribution of liberation.

While the scope of this thesis does not extend to the post-colonial times which could enable it to assess the current impacts of colonial judicial legacy on the present-day Yorubaland, it raises further questions related to the post-colonial times. These questions open a window for further research. They include whether or not the impacts of colonial courts on the pre-colonial Yoruba justice system could still be found in the current post-colonial Nigeria's justice system. And, to what extent are these impacts indelible, and what are post-colonial, external, and internal factors perpetuating the indelibility?

[893] To read further on this, see, Atanda, *supra* note 87 at 249-282.

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