# Class-formation, State Construction and Customary Law in Colonial Nigeria*

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**ABSTRACT.** Au Nigéria (comme partout ailleurs), on a souvent soutenu que le droit et les tribunaux coutumiers ont été créés par les pouvoirs coloniaux aux fins de protéger et de renforcer un ordre social (et le régime politique s'appuyant sur celui-ci) enraciné dans l'économie politique indigène de ce territoire. Cette supposition n'était qu'un écran idéologique visant à masquer la réalité (ce qu'elle continue de faire d'ailleurs), à savoir que le tribunal coutumier constituait un important instrument entre les mains des autorités et des agents coloniaux pour stabiliser l'ordre social et le régime politique imposé au Nigéria par les Anglais. Le droit et le tribunal coutumiers ont joué un rôle important dans les processus historiques de formation de classes et de construction de l'Etat pendant la période coloniale aussi bien au niveau de la conception qu'à celui de la réalisation. Les chefs de l'époque devinrent un point de référence dans la définition du droit coutumier, et les tribunaux furent délibérément transformés en ce que l'on peut appeler des tribunaux de chefs. Les chefs et leurs tribunaux ont aidé le colonialisme à pénétrer entièrement et efficacement les diverses sociétés du territoire appelé maintenant Nigéria. Ainsi les institutions actuelles appelées droit coutumier et tribunal coutumier remontent au colonialisme et les intentions qui avaient animé ce régime en les créant y sont maintenues ainsi que leurs activités. On ne saurait donc s'attendre à ce que le système en place aide l'Etat nigérian à réaliser les principes de démocratie et de justice sociale prônés dans la Constitution de 1979 si ce système n'est pas remanié de fond en comble.

## Introduction

Customary courts administered laws that were supposedly customary (indigenous) in both origin and character. In this argument, the social order and the political regime these courts sought to protect and enhance were rooted in the indigenous political economy of the 'Nigerian' people.

This position is a complete reversal of the reality. To get at that reality, this paper turns that argument on its head and argues, instead, that the courts were in fact a major instrument which colonial officials and agents used to determine the character of the social order and of the political rule that were being imposed on Nigeria. The paper develops this new argument by first rescuing the concept of customary law from under the suffocating weight of colonial falsehood and making it available for theoretical and empirical analysis of the objectives of colonialism and what the courts charged with its implementation did in fact. It then proceeds to an analysis of the processes

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of class and state formation during the colonial period, carefully demonstrating the crucial role customary courts played in these twin processes.

**Customary law**

Customary law as far as lawyers in Nigeria are concerned does not pose any problem of definition because: "law, customary or otherwise, is an expression of the ideals and aspirations of a given society" (Anyebe, A.P., 1985). Of course, no serious minded professional would challenge the basis of his profession and since law, like any other profession, exists to administer to the interests of society, anything law must necessarily be an "expression of the ideals and aspirations of a given society". Pursuing this rather technicist argument further, Anyebe (1985) wrote:

> *Native law and custom is I think, a mirror of accepted usage. It is not the business of the mirror to create images or beautify an ugly face, although we do know that special mirror can, and do, distort images. The point is that the mirror is powerless to do more than reflect what it sees.*

Lest anyone is inclined to think that customary law during the colonial period in Nigeria presented a case of one of the special mirrors, Justice Anyebe quickly urged that the issue must be "read in conjunction with the Evidence Act imposed on Nigeria by colonial government" for, in this way, it would "be clear that the issue of whether or not there existed customary laws was a non-issue" (Anyebe, A.P. 1985).

But there is surely an issue, that is whether what existed and was called customary law was in fact customary law. If it was, then, it must be qualified as 'colonial customary law'. We rely on sections 73[1] and 14 of the very Evidence Act which Justice Anyebe cited. Section 73(1), for example, requires the courts to take judicial notice of all general customs, rules, principles, which have been held to have force of law in or by any of the superior courts of law equity in England or the Federal Supreme Court or by the High Court of the Region and all customs which have been duly certified and recorded in any such courts. Section 14 went further to state the point as follows:

> *(1) a custom may be adopted as part of the law governing a particular set of circumstance if it can be noticed judicially or be proved to exist by evidence. Burden of prove shall lie upon the person alleging its existence;*

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1 The British had the penchant for finding traditional rulers (chiefs) where non existed and justifying this with purely mythical and ideological explanations. But most of the time the people refused to be deceived as accounts of their reactions to the imposition of such chiefs on them clearly show in Afigbo, E.A. (1972) and Dorward, D.C. (1969).

*(2) a court of superior or coordinate jurisdiction in assuring that the persons or the class of persons concerned in that ares look upon the same as binding in relation to circumstances similar to these under consideration; and*

*(3) where a custom cannot be established as one judicially noticed, it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or class of persons concerned in the particular area regard the alleged custom as binding upon them:* ***Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and social conscience.*** *(Emphasis added).*

Anyebe's study in terms of analytical perspective, falls into one of three dominant analytical trends or tendencies in the study of customary law in Africa. Essentially these tendencies revolve around the thesis that commonly held official stereotypes provides the basis for customary law. Colson (1971) observed of customary law from this perspective as:

*resting on tradition and presumably derived its legitimacy from immemorial custom. The degree to which it was a reflection of the contemporary situation and joint creation of colonial officials and African leaders, more especially of those holding political office, was unlikely to be recognized.*

Analyses from this perspective cannot provide a correct understanding of the nature and mission of customary law in Nigeria because such analyses, like that of Anyebe's fails to theoretically and explicitly consider the connection between the subordination of Nigeria's social formation to capitalist relations and the promulation of this new law. This failure is, of course, consequent upon the manner in which the perspective directs analysis of legal changes to be conducted against a background of assumed indigenous law.

*The second tendency, which seems an improvement over the first, sees customary law as "folk law in the process of reception... not so much a kind of law as a kind of legal situation... in dominant legal system recognize and support the local law of politically subordinate communities". (Llyod Fallers, 1969).*

Customary law is presented in this framework as denoting the distinctive, discrete and normative structures of particular ethnic groups which then became the basic unit of analysis. Recognized by colonial authority, these structures and their social referents were encapsulated and incorporated within a large cultural and social whole. The thesis here is that the normative

structures of the various ethnic groups were carefully studied and elements of them acceptable to the colonial authority were recognized and incorporated into the colonial state legico-political structures.

The difficulty with this thesis is that it is premised on a theoretical model which sees society as necessarily a harmonious whole. Yet, that model can only lead to an ahistorical analysis of customary law in Nigeria since it does not allow for an examination of the social forces that selected and shaped it. If the general conception of customary law in Nigeria during colonialism did not always necessarily entail the creation of new norms and concepts, it certainly did always entail justifying of newly elaborated or extant, though changing, legal ideas by reference to an ideally consensual community in a past often presumed to be static. The preoccupation of colonialism in producing this referent was postulating an ahistorical, functionalist conception of social relations in pre-colonial 'Nigeria'. In fact, some writers have gone further and reified this referent in the concept of tradition. This has allowed for an explicit integration of this pre-colonial referent into the ideologies of scholarship and of politics, becoming, as it were, an essential component of the conventional contrast between 'tradition' and 'modern' a dichotomy containing both an evolutionary and political presuppositions. It supplied justification for the otherwise empty ideological position that the future of African communities and countries, including Nigeria, lay inevitably in modernization which in turn depended necessarily and fundamentally upon foreign capital and the intervention of the state. This conceptual dichotomy of which 'customary law' was only a part rationalized this and other positions which then formed the basis of state policies, including the provisional recognition of, and eventual opposition to legal forms other than those sanctioned by the state.

It should be clear, therefore, that the concept of customary law in Nigeria, as elsewhere in Africa, was an ideology of colonial domination produced in the particular circumstances of the colonization process including colonial state formation. The process entailed creation of 'new classes' and the ideology reflected the emergence of these 'new classes' and their relations to the colonial state. It also supplied the framework for their insertion into the peripheral capitalist formations. Even more important, it helped in the relegation of local social forces to a subordinate position vis-à-vis foreign capital and the metropolitan legal ideologies associated with the state. This is precisely the position we shall argue in this paper.

To do this, we require suitable conceptual tools for building a picture of customary law in Nigeria as a phenomenon which is specific to particular historical circumstances, and as an ideology which accompanied and formed an essential part of colonial domination. The third dominant analytical trend, in spite of its shortcomings, provides these tools. The argument of this trend is well summarized by Chanock (1978) as follows:

> *... in the areas of criminal law and family law, African law represents the reaction of older men to a loss of control. This reaction grew in strength during the first thirty or forty years of the colonial period. Then, in accordance with the policy of indirect rule, a large portion of the administration of justice was turned over to precisely those people who had reason to define and, more importantly to administer the law in a restrictive and authoritarian way. These definitions form the basis of current African law.*

Implicit in the above is the thesis that customary law is a kind of neo-traditional ideology and it derives ultimately from the desires and efforts of certain social groups to translate their values (interests) into colonial legal forms in order to compensate for a loss of authority. We suggest that certain interests of these groups coincided with those of the colonialists and that their support was, therefore, needed and actively sought and received by the colonialists to enable them to succeed in the enterprise of building structures of domination, oppression and exploitation. This suggestion finds support in Bere's (1955) belief that:

> *The position of an African chief is one of great complexity, for he must be representative as well as ruler of his people, not only the authority but, also a link in the chain which joins the mass of the common people to an impersonal government machine. It is of vital importance to any African administration and to the welfare of the people, that this link should not be broken; it is the greatest safeguard against control falling into the hands of irresponsible and evil-disposed people. For the reason the pattern of affairs to which we should be able to look forward to is a blend of the old and the new.*

Apart from the lunatic bit about representativity and welfare of the people, this is an accurate representation of the place and role of 'chiefs' in the construction and maintenance of structures of domination and oppression by the colonial power in Nigeria.

**Bureaucratization and Centralization of Institutions and Power**

Bureaucratization and centralization of institutions and centralization of power were both necessary conditions for and implications of the colonialization process. While centralization allowed for greater and effective control over the running of public affairs by the colonial authority, bureaucratization tended to protect it from reactions which such control could generate by allowing a convenient role for "indigenous institutions" and by introducing impersonal element into the whole process. Burns (n.d.) adequately captured the logic:

> *The advantages of those Native Courts in Nigeria are very great. At the present time they fill a gap in the judicial system which would not*

> *otherwise be filled save at a prohibitive cost and moreover, they do the work allotted to them more effectively than it could be performed by most British Magistrates. The Courts are presided over by men of the same race as the litigants, speaking the same language and thinking along similar lines. To an African judge the circumlocution and excessive verbiage of an African witness appears natural, to a European it is little less than maddening. But there is more than this. A mistake made by a British official in a case affecting land, marriage or any other of the subjects governed by native law, would be regarded by the unsuccessful litigant and his friends as the result of ignorance, or the malicious interference of the official with the customs and the right of the people; the political effect of a number of such mistakes might be far-reaching and disastrous. On the other hand, a similar mistake by an African judge would be regarded by the losing party and the public as an unfortunate happening due to the machinations of an evil spirit... and the looser would accept the decision with the resolve that on the next occasion he would... offer to the local deity such a sacrifice as would ensure a favourable verdict.*

It was this same logic that informed the conception and introduction of indirect rule in Nigeria. The transactional drama of the colonial period can, therefore, be better appreciated within the over all context of that rule. In that context for example, the often convoluted and complex interrelationships between 'traditional' and colonial laws assume an inevitable and wonderful logic (Salamone, A.F. 1983).

Theoretically, indirect rule was to ensure only minimal interference with indigenous conduct of public affairs, but its practice placed enormous constraints on the 'minimal' and ensured great changes in the system. In the legal area, for example, the requirements that justice reach a level appropriate for a British protectorate and that no law be repugnant to natural justice, equity and good conscience meant in practice the establishment of institutional structures to ensure compliance. Keay and Richardson (1966) neatly summarize the situation Lugard had to contend with:

> *On the judicial side Lugard's aim was to establish a superimposed court organization consisting of the supreme and provincial courts to enforce the protectorate's penal laws and make available a standard of justice appropriate to a British protectorate, but at the same time to utilize existing indigenous court systems which would, under supervision and control by the government, continue to dispense justice to the masses in a form understood by them.*

The colonial authority introduced new institutions, superimposed them on the so called old systems, and in a matter of years did what took their Nor-

man conquerors centuries to do: built a centralized system which, as Elias clearly demonstrated, matched to a considerable extent the court system in England (Elias, T.O. 1962). The superimposition of the new on the old was dictated by expediency, for although the old courts and laws were regarded as inferior to those of the British, and some times by the "natural justice, equity, and good conscience test were regarded as barbaric, the experience of these courts and other judicial institutions and their political significance would help to shape the response of the indigenous population and its political leadership to the new institutions being established by the British.

The stated policy which was followed somewhat religiously throughout the colonial period was that the bulk of civil and criminal cases should be handled by the native courts. Every codification of laws, starting with the Native Courts Proclamation of 1900, embraced this principle. However, a close watch was maintained over these courts. Lugard introduced reforms which established a provincial court in each of the provinces and these courts were superior courts of record. Also, each court of whatever rank had a resident or other political officer of the province in supervision. These officers enjoyed unlimited power in criminal cases. They also enjoyed unlimited jurisdiction in landlords and tenant suits, *habeas corps* application and personal contract suits among others. All civil cases could, furthermore, be appealed to the supreme court. The most important point to be noted here is that both the administrative control and judicial supervision of the Native Courts was vested in the hands of political officers. This invariably meant control and supervision of the activities of the 'chiefs' who in most cases constituted the members of these courts (Murray, D.J. 1969).

The Native Courts Proclamation of 1906, possibly because of the relative acquiesce to British suzerainty and the pacification of the North, added significant elements to the 1900 codification. With it, for example, the Residents power to establish and control courts became clearly established. Residents could also extend jurisdiction over African non-natives and native government servants. The Proclamation also established Native Courts of Appeals and empowered courts to make rules. One of the logical effects of the proclamation was the formal fusion of the legislative, executive and judicial functions of the colonial authorities.

Between 1910 and 1911, the colonial authority introduced financial reform into the court system and this helped to further strengthen the centralization process.

Although the stated goals of this reform were to end corruption and to raise the prestige of native courts through establishment of fixed salaries, in practice, it made the judges (mostly chiefs) independent of their constituencies and dependent on the colonial authority (they became salariats) but did not end corruption. This was a logical result of the policy which informed that

reform, and that logic was not missed by the colonial officials as testified to by Lugard when he said:

> *The policy which I am endeavoring to carry out as regards the natives of the Protectorate may, perhaps be usefully summarized here. The Government utilizes and works through the native chiefs, and avails itself of the intelligence and powers of governance of the Fulani caste in particular, but insists upon their observance of the fundamental laws of humanity and justice. Residents are appointed whose primary duty is to promote this policy by the establishment of native courts, in which bribery and extortion and inhuman punishments shall be gradually abolished. Provincial courts are instituted... to enforce these laws of the Protectorate, more especially which deal with... the import of liquor and fire arms and extortions from villagers by terrorism and personification... (Quoted in: Keay, E.A. & Richardson, S.S. 1966).*

"Inhuman punishments" were abolished and 'human' ones established as symbolized by prison yards. Of course, we know that prisons did centralize state power in order to control paupers, debtors and dissenters being produced by economic and political crises generated by colonialism. We also know that by centralizing state power, prison was helping to create one of the necessary conditions for the emergence and survival of a new ruling class in Nigeria.

Sir Donald Canceron effected further changes in 1933 in the attempt to bring Northern Nigeria's laws into closer conformity with those of the South. But that, of course, meant greater governmental control of the system. These changes were contained in the Protectorate Courts Ordinance, the west African Court of Appeal Ordinance, the Native Courts Ordinance and Supreme Court (Amendment) Ordinance. A close look at the Native courts Ordinance would show that the appeal system and powers of the political officers over the system were extended. The significance of the Ordinance, therefore lies in the fact that it carried further the twin principles of centralization and political control.

After the Brooke Commission of 1948, further reforms were made. Among the effects of these were the establishment of Moslem court of Appeal and new Native Courts laws. The Native Courts Laws were aimed at stopping people from jumping from one system to another. For example, anyone who had instituted a case in a native court was made to remain subject to the jurisdiction of that court by the laws. The reforms also specifically provided for land jurisdiction. The net result of the reforms was, of course, greater centralization and uniformity of law, and thus of power.

**Customary Law, Class-relations and the State**

As various parts of what became Nigeria were pacified by the British colonial might, Native Courts Ordinances were put in place and became law at

the same time. Native Authorities were established. These Native Courts were, therefore, as much part of the machinery of colonial administration as were the Native Authorities. Together they expressed the external form of those normative structures called customary law. The importance of the customary court system for this paper, therefore, lies in the fact that it constituted one of the concrete implementation arenas where the normative structures were demonstrated in practical terms as structures of domination and oppression. The courts were in fact, a major instrument through which colonial officers could (and did) determine the character of rule at the grassroots; the brunt of the work of settling disputes and of enforcing law and order fell on them. Their activities as law enforcement agents were closely supervised by colonial officers and so they could not but ensure law and order that was decidedly colonial in nature.

Societies in 'Nigeria' were not free from contradictions and conflicts before the arrival of colonialism. But the arrival of British colonialism certainly did introduce new elements into such contradictions and conflicts, particularly at the level of actual struggles engendered by such contradictions. Specifically, the colonial authority introduced new structures and/or strengthened certain existing ones which placed new constraints on how the struggles could be waged, and which determined the fortunes/misfortunes of those who were involved in those struggles. The introduction of new contradictions and new elements into existing ones produced what Malinowski refers to as third cultures, *tertium quids*, (Malinowki, B. 1926). These arose, as do all socio-cultural forms, from real struggles and attempts to control the environment. The colonial milieu provided the conditions in which those new forms could, and did, develop. The basic issue at stake was that of power, of centralization as opposed to decentralization of the nature of the new state and state power being created. Autonomous centers of power had to be broken up to allow for the building of a centralized one. The new concept of customary law as developed by the colonial authority and, the new customary courts based on them were vital for both the breaking up of the autonomous centers of power and for the building of centralized ones. Lugard very much appreciated the role of the customary courts in this regard:

> *At the time when Native Courts were first established in the old Southern Nigeria Protectorate, the tribal authority had already broken down, and had been succeeded by a complete collapse of native rule under the disintegrating influence of middlemen traders, and of the Aros... The Native Courts no doubt, did much to re-establish tribal authority, and their usefulness is shown by their growing influence and the number of cases with which they dealt.* ***They have prepared the way for a further advance.*** [emphasis added] (Kirk-Greene, A.H.M., 1968).

As elsewhere (Ranger, 1978), the colonialists found out that the agrarian societies in the Eastern part of the country were already stratified in production and contained distinct class of traders, those were not the primitive utopias they liked to find. The Igbo and other societies in the East and elsewhere in the country certainly lacked centralized authority but were organized.

This discovery of apparently organized societies or communities that ordered their affairs without office-holders empowered to rule immediately presented a threat to British stereotypes of Africa which needed to be taken care of. The battle had to be started at the ideological level, thus the quotation above. In this context, the allusion in the quotation to tribal authority which was assumably centralized but which was broken down by the so-called "Middlemen traders and Aros" begins to make more sense; it provided the needed ideological services to the British in their colonization enterprise in Nigeria. Ideology here did serve the purpose which Mannheim argues it does serve, namely; create a situation in which the collective unconsciousness of certain groups obscures the real condition of society both to itself and to other and thereby stabilizes it (Mannheim, A.n.d.). This helped to secure a pattern of belief (that the colonialists were not after all doing anything entirely new) which proved crucial in maintaining the morale, sense of commitment and effectiveness of the administrators we were charged with the implementation of colonial policies relating to the construction and maintenance of a state.

This ideological frame also provided the much needed justification for the British introduction of a hierarchy of appointed Africans to carry out the day-to-day administration, particularly administration of justice at the local level. The wide powers wielded by these appointed chiefs found justification in custom (Pratt, R.C., 1965; Tosh, J., 1978) as they received representativity premised on continuity with pro-colonial chiefly roles involving mystical ties between chiefs and their subjects (Gartrell, B. 1979). It should be clear that this notion of representativity depended neither on likeness to nor the choice of those supposedly represented. Rather, it was an ideological component of the policy implementation apparatus: colonial officials' of belief in the chiefs as representatives justified dependence on them as the main sources of information on what policy measures would be feasible and the implementation of those policies. The chiefs were no more than salaried bureaucratic appointees of the colonialist who collected colonial taxes and enforced the edicts of an imposed colonial regime. They were a class of people who allied with colonial interests believing that in doing so, their own interests would invariably be protected by the colonial power.

The colonialists were so obsessed with the idea that chiefs were the only right people to be appointed as customary courts presidents such that they had problem in establishing such courts in societies referred to by colonial

anthropologists as acephalous[2]. Lugard (quoted in Report of the Native Courts (Northern provinces) Commission of Inquiry p. 9), in his 1900-1901 report, noted rightly that:

> ... *The systems of native courts has worked fairly well in the districts in which it has been possible to establish such courts, but the greater part of the Protectorate with which we are in touch is occupied by pagan tribes, without cohesion, and in a primitive state of development in which regular native courts are not possible.*

What made the setting up of regular native courts impossible in these "pagan" areas? Lugard supplied the answers in the same report; and it is the absence of "chief and councillors of which to constitute them". The absence of chiefs made setting up of courts problematic precisely because "The powers vested in the Native Courts are entrusted to the chiefs who were themselves closely supervised by the District Officers" (Lugard, in: Kirk-Greene 1968). There were two but related reasons why the colonialists thought chiefs should be in the customary courts. First, in several places the chiefs were imposed on the people. They, therefore, would need the service of that coercive apparatus, the court system, to counteract possible reactions from the people, and to make assurance doubly sure, they needed to have the customary courts under their control. The second reason had to do with the ideological fraud already discussed.

The appointment of chiefs even in places where they did not exist before and the subsequent establishment of courts in which they were members or over which they had some control had to do with the rationalization process occasioned by colonial capitalism. Under the spur of that process, all forms of pre-bureaucratic rule had to be replaced by hierarchically organized "public" organizations. These were specially designed to achieve a through and effective penetration of subject populations and to at the same time remain responsive to the dictates of central authority. With bureaucratization, it became possible to transform the cumbersome process of personal rule into what Weber refers to as impersonal and objective system of centralized command (Weber 1968). The economic imperative was the unification of

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2 This residual category, which is no doubt a relic of an ahistorical and taxonomic phase of colonial political anthropology, though cannot provide the basis for useful analysis from our point of view, did provide intellectual support to the colonial ideology earlier mentioned. Incidentally, the very reasons which make the category unsatisfactory to us made it the very powerful intellectual tool for colonial ideological warfare. These reasons include; the category inevitably leads to use of negative criteria such as absence of differentiated political office or rulers who possess sovereignty, thereby rendering itself incapable of directing analytic attention to the diverse means by which African societies conducted public affairs. It, also, does not allow for account of changes over time, it is ahistorical..

independent production and distribution units within a single economic complex (tax payable only in colonial money was introduced), the substitution of centralized state bureaucracies for the decentralized pockets of "personal" rule and the unification of previously autonomous arenas of power then stood to serve the logic of that imperative.

It is in this context that the bureaucratization and the hierarchical organization of the administration of colonial justice would begin to make sense. It is also in this context that the importance of the services rendered to the colonial capital and state by the customary courts in helping them to thoroughly and effectively penetrate the subject populations can be better appreciated. The point here is that the imperatives or capitalist growth dictated a need to bring the external world under control. This took the form of internalization; the efforts to identify, take into account, and manipulate what were previously unpredictable, disruptive and partially costly externalize through centralized and highly rationalized system of administration (Spitzer & Scull, 1977). This definitely requires at the barest minimum, social order in form of predictable and stable patterns of social intercourse. It is here, as noted by Polanyi, that the importance of eliminating outbreak of discontent and disorder assumes clarity (Polanyi, 1944). The story of incipient disaffection of so called religious fanatics at Sokoto and Bauchi shows how completely the native Emirs and their "Sarakuna (councillors and courts) identified with this objective when they "voluntarily" tried and executed the rebel leaders in Native Courts (Report of the Native Courts (Northern Provinces) Commission of Inquiry 1949-52). In the same Report, the courts were phrased because:

> *It was a remarkable fact that crimes of violence and robbery, which in the early years of the Protectorate were regrettably numerous, had almost disappeared since the native courts, with their corollary, native police (Dogarai), had been given a free hand.*

Earlier on in the Report it is stated that:

> *It was possible to look to such courts for effective assistance in such matters as the stopping of bush fires which destroy sylvan produces, and the felling of trees (so as to prevent deforestation, the enforcement of the authorized taxes, and the detection of illegal practices of collectors...*

Given this clear importance of the courts, and its so-called corollaries, the prison and police, it should be logical that the colonial authority favoured them as compared to, for example, health and education in allocating resources. (See the various colonial Annual Reports, particularly those for the years 1948, 1950, 1952, 1954, 1956 and 1957.).

The alliance between the chiefs and the colonialists placed them (the chiefs) in a position of exploiters. This was particularly the case with regard

to land relations. Now, under indigenous system land was not alienable, it was communally owned. The colonial authorities changed all that by introducing policies which made land a commodity to be owned by individuals. Land became scarce, a new condition particularly in the North. Prothero noted that a tendency developed whereby non-farmers but rich individuals cornered the best lands (Prothero, R.M. 1957). Farmers, then became rural proletariat. Possibilities for abuse are obvious and indeed became well pronounced in the post-colonial period as evidenced by the reports of Kaduna State's Land Investigation Commission.

The development of that tendency was apparently in violation of the colonial land law of Northern Nigeria as contained in the Land and Native Rights Ordinance (Cap 105, Laws of Nigeria, 1948). According to that law, all lands were native lands and were to be administered in accordance with native law and custom. But the same ordinance introduced certificates of occupancy, a principle which according to Hulley, endangered the law's intent. As he put it: "... It is clear that in the Northern emirates an exclusive right of user, which has now lost most of the aspects of communal right, is being built up beneath the ultimate right of the crown" (Quoted by Meek, O.K. 1968)

Meek's efforts to defend the colonial authority against the accusation that it introduced policies which led to markets in land completely failed. He based his argument purely on what he called the "intent" of colonial land policies (Meek, C.K. 1968).

However, Prothero has demonstrated rather clearly that whatever the colonial authority's intentions might have been, the result of its action in this case was to bring into being a principle in conflict with indigenous systems (Prothero, R.M., 1957). Indeed, Meek's own evidence stood in opposition to his argument. For example, he provided evidence to the effect that chiefs under the guise of distributing scarce land began to accept payment that represented more than what he called modest presents that acknowledged their political authority (Meek, C.K., 1968). Such gifts allowed the giver the right to 'alienate the property'. Of course, it meant best lands for the highest bidder, and probably no land at all for the poor. There is no doubt that the colonial government changed traditional land tenure system by making individual ownership of land profitable and easy. But the consequences were great, and the concept of rural proletariat summarizes it all. The colonial authority attempted to counter this development with the "Native Lands Acquisition Proclamation" of 1900, extended by the "Native Lands Acquisition Ordinance" of 1917 but failed (Chubb, L.T. 1961).

Chieftainship in this case, as in several other cases, came handy as the substance of the ideology needed to justify the colonial land policies in the country. They (colonialists) came out with a conception of African land that was fostered by land laws and expressed in African reference to the chief as

the owner of the land. This was consistent, with the dominant colonial ideology of African land tenure system. African land holding was considered in terms of European notions of sovereignty and ultimate rights to land, the colonialists now made it appear as if the African chiefs were sovereigns with ultimate rights to land. It was then, this ideology that was used to justify claims by colonial state to control African lands through the theory of *domaine eminent* and the doctrine of state succession. But the colonial authority did not overlook the importance of the chiefs in the general efforts to transform land into commodity; and to provide some role to them in the scheme of things, the colonial law permitted administrative recognition of individual customary interests in land, a register was designed to provide a cadaster of these interests. Customary courts were to hear disputes arising from such interests. The needs of commodity production also necessitated an ideological formulation in which the African Chiefs were considered as having proprietary interests in land. This then provided the ideological basis for an alliance, mediated through the state, between the chief, his kin and a new class on the one hand and colonial capital on the other. This class alliance allowed the colonial conception of land relations to be expressed as a central aspect of Nigeria's customary law.

This alliance afforded the chiefs the opportunity to exploit others, particularly the peasants. When the peasants complained about such exploitations the British authority explained them away as either the failings of individual chiefs or as what the peasants were used to anyway. After all, the chiefs were their representatives! Of course, this is in contrast to the view that the chiefs main loyalty was to their own class interests. Their implicit model of society as a harmonious whole made it difficult for the British to see such abuses by chiefs as systematic elements inherent in the process of class differentiation and increasing class conflict consequent upon British conquest and colonial state formation. The people were not deceived as evidenced by various incidences of revolts by the so-called natives. The so called "Aba Riot" stands out clearly as a case of revolt by oppressed classes in Nigeria. Even the report of the commission of inquiry constituted by the colonial government did not miss the point, for as it noted, the women were far more interested in destroying the Native Courts and mobbing the Warrant Chiefs than in looting. The Commission went ahead to identify discontent with the persecution, extortion and corruption practised by Native Court members as one of the main causes of the revolt. Earlier, and in the western part of the country, in 1916 the people had demonstrated against the newly acquired powers by the chiefs resulting in the burning of Native Courts building at Okeho and Iseyin. But Lugard insisted that opposition to the introduction of Northern style Native Courts system to the South came principally from the legal practitioners who stood to lose revenue. According to him, he was reliably informed by the Chief Justice and others that all the protests "have

been promoted solely by local legal practitioners (and their friends), who resent the loss of profits which their exclusion from the Provincial and Native Courts involves" (Lugard, in: Kirk-Greene, A.H.M., 1968). The lawyers, therefore, did not oppose the Native Courts in the South because of their being exploitative structures but rather because they were denied the opportunity to use the courts for their material benefits. They were opposed to a colonial policy which was biased in favour of the so called traditional elite in terms of access to wealth via the Native Courts system. The seeds of intra-class feuds had been sown and this added yet another dimension to the character of the emergent 'Nigerian' political economy.

It is within the context of this general policy of playing one class or a faction/fraction of it against the other that the education policy of the colonial government, particularly in the North, will begin to make sense. Although Lugard would want us to believe that education suffered retardation in the North because of the "natural suspicion and dislike with which the Christian Government was at first regarded by the Moslems..." (Lugard, in: Kirk-Greene, A.H.M, 1968) we know that the reason had to do with the general policy by the colonial authority to favour a class of people who were most receptive to their ideas. The fact that when the so called educational efforts were started in 1909 in Kano most students were drawn from "sons of chiefs and men of influence, who had been brought from various provinces under pressure by government" tell the story rather accurately. A parallel effort was also started to form an industrial class by bringing "artisans from Kano City, who plied their native trades and gave some instruction to pupils" (Kirk-Greene, A.H.M., 1968). This careful selection was necessary because it had been discovered that with some noticeable exceptions, education seems to have produced discontent, impatience of any control, and an assumption of self-importance in the individual. Education therefore, received very little attention compared to courts and penal institutions. For example, by 1913, there were only three Government owned schools in the North (Kirk-Greene, A.H.M., 1968) and in 1954 there were only sixteen such schools (Nigeria Report, 1954) compared to sixty-four prisons maintained by the Native Authorities alone. Indeed, in 1952 an average of 7870 people found their way into the prisons daily (Colonial Report, Nigeria 1952), the figure (daily) rose to 9545.09 in 1954 (Nigeria: Report 1954).

**Conclusion**

The British colonial power allowed the continued existence of radically modified indigenous laws only as a pacifier to the local chiefs who, largely speaking, then ignored or aided the process of colonization. Whatever norms there were that informed laws in the area now known as Nigeria before the advent of British rule were radically modified even by the very process of formalization and also by being forced to concur with the basic moral and jural postulates of the colonizing power - they were required not to be 'repu-

gnant to natural justice, equity and good conscience'. The clear inference, as correctly noted by Wanks, was that "traditional (indigenous) ideas and methods of justice were inferior to, if not actually repugnant to, eternal principles of justice". (Wanke, M.C. 1973). Of course, the nature of indigenous laws did not allow for the bureaucratization and the hierarchical organization of the administration of justice which was vital for the construction and maintenance of colonial state. Neither could such indigenous laws provide the basis for the imposition of the sort of discipline required for capitalist production.

Customary law both as a concept and as a legal form, therefore, originated in specific historical circumstances relating to the transformation of pre-capitalist social relations which required the construction and consolidation of the colonial state in Nigeria. As an ideology of colonial domination, the conception of customary law supplied the framework for the insertion of rural classes into the peripheral capitalist social formations. Simultaneously, it expressed the subordination of these social forces to the dominant local classes and, through them, to the metropolitan legal ideologies associated directly with the colonial state. These ideologies received practical expression via concrete structures of repression; the customary courts and other institutions like the prisons. Customary law and courts based on them were therefore only an attempt by the colonial power in Nigeria to dress colonial exploitation and oppression in a trade-mark of legitimacy. But legitimacy it never received.

A "State based on the principles of democracy and social justice" (the 1979 Constitution so declared the Nigerian State) cannot continue to allow these blatantly oppressive and exploitative ideology and structure to exist and feed fat on the rights of her people, more so when those who suffer as a result of their continued existence and operation are clearly in the majority. This is why customary law and courts based upon them must receive fundamental changes. Until then, they cannot help, indeed they will hinder the realization of the principles of democracy and social justice.

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