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## STRONGER THAN THE MAXIM GUN LAW, HUMAN RIGHTS AND BRITISH COLONIAL HEGEMONY IN NIGERIA

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Until relatively recently the dominant paradigm for explaining the paradox of the colonial project in Africa was deemed simple and self evident: European imperialists masked the real motives for acquiring colonies—exploitation of economic resources, national pride and the quest for power—in claims to civilise indigenous peoples and liberate them from their primitive past. The rhetoric of the mission to civilise and liberate was only a tool employed in furtherance of more fundamental economic and political imperial agendas. In the case of the British in Africa, the discourses on law and the development ethos were considered central to the process of consolidating the military gains of empire. Law was an effective instrument both for fostering colonial hegemony and for guaranteeing the maintenance of social order on a scale conducive to colonial interests. The essence of law—whether English or customary—was never simply to serve the ends of justice or protect native rights and liberties. Discussion about rights within this context of colonial law was merely part of the many discourses employed to legitimise the colonial state.

While this instrumentalist approach has produced many incisive studies of the ways imperialism profited the West, and how the rhetoric of law, development and the civilising mission was employed in rationalising this process, such studies rarely stopped to ask an equally pertinent question. Why were this rationalisation and legitimisation of empire necessary in the first place? (Conklin, 1998: 421.) What conditions within the colony and beyond it made the legitimising rhetoric of law and rights so powerfully appealing to colonial regimes and so central to the imperial project? In line with the call for scholars of imperial histories to explore the tensions and ambiguities of empire and not merely its triumphs, it is becoming increasingly necessary to go beyond the instrumentalist assumption that law and discussions about rights within it were merely tools of colonial control.<sup>1</sup> There is a need to

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<sup>1</sup> Cooper and Stoler (1997: 1–2) argue that the colonial situation or the colonial state cannot be understood through the simple paradigm of coloniser initiative versus colonial response. They argue that the categories of coloniser and colonised obscure tensions and ambiguities within each category. The most basic tension of empire was that the otherness of the colonised person was neither as inherent nor as stable as previous historiography had suggested.

scrutinise what circumstances produced the many discourses—of the civilising mission, development and rights—that were employed to rationalise empire.

In this article I examine broadly the tensions and contradictions in the use of law as an instrument of coercion to consolidate British control in Nigeria and the legitimising rhetoric of human rights and social justice employed within the context of the operation of those laws. The article explores the effects of these laws, introduced mainly as a means of fostering British colonial hegemony, against the background of the aspiration to guarantee social justice and forge a ‘modern’ regime of rights and liberties for native subjects in the colony. It probes the circumstances that made the rhetoric of rights and liberty imperative for both the colonial regime that employed it to legitimise empire and the African elites who appropriated it to strengthen the demands for representation and self-rule. The task is not so much to underscore how the colonial state fell short of its own liberal agenda—a task that others have adequately addressed (e.g. Adewoye, 1977; Elias, 1962, 1963; Tamuno, 1972; Mann, 1991)—but to examine the appeal of that agenda and the conditions that made it so central to the colonial project.

#### HUMAN RIGHTS AND THE COLONIAL LEGAL SYSTEM

Scholars are divided on the appropriateness of employing the concept of ‘human rights’ within the context of the history of colonial societies. Some writers have argued for a precise and historically specific definition of the concept of human rights. They contend that the concept is problematic when used within a historical context in which the notion had no formal meaning. Before the Universal Declaration of Human Rights in 1948 there was no recognisable notion of ‘human rights’ such as became enshrined in the post-UN world. Bassam Tibi has argued, for instance, that many scholars tend to confuse human rights with human dignity. He states that if one is talking about the latter there is no doubt that fully developed notions of human dignity exist in many traditional non-Western cultures. However, the modern concept of human rights stems from the contemporary articulation of legal entitlements that individuals hold in relation to the state. Its foundations lie specifically in the inauguration of the UN Universal Declaration of Human Rights in 1948, which for the first time articulated a regime of universal and inalienable rights that attached to individuals simply by virtue of their humanity.<sup>2</sup>

<sup>2</sup> Bassam Tibi goes further to point out that the absence of the concept of human rights in certain cultures and contexts is not peculiar to non-Western societies. Medieval Europe, like traditional African or Asian societies, also had no inkling of human rights in the modern sense. Thus the idea of human rights, as rooted in modern society, is an entirely new concept, distinct from previous notions of human dignity (1990: 104–32). An-Naim and Deng (1990) present a summary of Bassam Tibi’s arguments in their introductory chapter.

Rhoda Howard and Jack Donnelly have made similar arguments. While Howard draws a distinction between broad notions of human dignity and the more precise concept of human rights, Donnelly distinguishes between the concepts of distributive justice and human rights.<sup>3</sup> Donnelly argues that distributive justice involves giving a person that which he or she is entitled to (his or her rights). Unless the rights are those to which the individual is entitled simply as a human being, the rights in question will not be human rights. In many pre-colonial African societies, for instance, rights were assigned on the basis of communal membership, family status or achievement. Similarly, in colonial societies, rights were ascribed on the basis of race and social status, often with a clear distinction between the colonised peoples as citizens or subjects. These were therefore, strictly speaking, not human rights (Donnelly, 1982: 303).

On the other hand, other scholars have argued for a more fluid and flexible definition of human rights that focuses not so much on the restricted context of post-war usage as on the continuing ideas and notions that have historically underlined the concept of rights and social entitlement in various societies. Alice Conklin (1998: 420–1; see also Ibhawoh, 2000), for instance, employs the notion of human rights with reference to the republican and liberal ideal that underlined colonial legal codification in French West Africa. She points out that, at a time of liberal ascendancy in France, republican elites maintained that Africans should be freed from the material and moral want that had once oppressed the French nation. Africans were still to evolve within their own—different—cultures, but they were to do so in a way that respected the universal rights of all individuals. French policy in West Africa, in realms as different as education and forced labour, sufficiently expressed these beliefs to convince committed democrats that colonialism was actually advancing the cause of human rights and liberation when it was in fact depriving Africans of their basic freedoms. Thus the notion of human rights, circumscribed as it was by the exigencies of colonial rule, underlined official thinking on the direction of French colonial policies in West Africa

The problem, it seems, is largely one of ontology—of labels that we choose to designate ideas rather than the ideas that underlie the labels. Although it may be useful to distinguish between the abstract ideals of human dignity or distributive justice and the more precise legal principles of human rights, we must not overlook the close connection between these sets of concepts and the ways they reinforce each other. In fact it would appear that the whole debate over the conceptual

<sup>3</sup> In response to arguments for an African concept of human rights, Howard states quite categorically that the African concept of human rights is actually a concept of human dignity; of what defines the inner moral nature and worth of the human person and his or her proper relations with society. Human dignity and human rights are therefore not coterminous, as dignity can be protected in a society that is not based on rights. See, for example, Howard (1986, 1990: 19).

distinction between human rights on one hand and human dignity or distributive justice on the other arises from a failure to appreciate and put into adequate historical perspective the evolution of the idea of human rights. This has arisen mainly from the tendency of some scholars to conceptualise human rights within the narrow sense of modern legal language, the emphasis being on the strict contemporary legal definition of the term rather than the idea that underlies it.

The problem with this approach is that, while it emphasises historical change, it tends to ignore underlying continuities. A more historical approach to the rights discourse in Africa, for instance, will place emphasis on drawing the crucial link between pre-colonial notions of human dignity, later colonial notions of social justice and civil liberties and the modern idea of human rights, which are all contextual reinterpretations of the age-long notions of defining human worth and value. The object is to appreciate the distinct historical contexts in which this idea has manifested itself.

In the case of colonial Nigeria there are several bases for employing the concept of human rights within the context of the colonial legal regime. For one, the aspiration towards the protection of 'native rights and freedoms' was central to the colonial legal system. Although there were no explicit legal instruments specifically binding the British authorities to the protection of individual rights and liberties in the colony of Nigeria, it was generally assumed both in London and in the colony that imperial rule was to be guided by consideration for the basic worth and human dignity of the colonial subject. Indeed, from as early as 1886, the social obligation of the British government had been made clear in several official documents emanating from both the Colonial Office in London and the various colonial administrative regimes in Nigeria. These documents included letters patents and royal instructions issued in 1886 which remained in force until 1899, when Sir William MacGregor inherited them on becoming the Governor of Lagos. Governor Walter Egerton and others after him also undertook the same social obligations under the Royal Instructions to the Governor of Southern Nigeria, issued in February 1906.<sup>4</sup> These instructions were subsequently replaced by the Colony of Nigeria letters patent and the Nigerian Protectorate order-in-council of 1913.<sup>5</sup>

These instructions spelt out the ostensible function of the British government towards the people in the territory. This was among other things to:

<sup>4</sup> Sir Walter Egerton was appointed High Commissioner of the Southern Nigeria Protectorate, as well as Governor of the Colony and Protectorate of Lagos, in February 1906. He was charged with the specific assignment of clearing the way for the amalgamation of the two administrative units into the British colony of Nigeria.

<sup>5</sup> By this order the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria were amalgamated on 1 January 1914 under the name of the Colony and Protectorate of Nigeria, with Sir Frederick Lugard as the first Governor.

Promote religion and education among the native inhabitants of the colony . . . To take care to protect them and their persons and in the free enjoyment of their possessions, and by all lawful means to prevent and restrain all violence and injustice which may in any manner be practised or attempted against them.<sup>6</sup>

Although these instructions effectively gave colonial officials wide powers to intervene in various aspects of the social life of the people, it also bound them morally, if not legally, to the protection and promotion of certain basic rights and liberties of local peoples.<sup>7</sup> These aspirations towards humanity and liberty, even if only in theory, were expected to guide colonial laws and the general social policy towards the people. In practice however, the political and economic imperatives of colonial state, whether by direct or indirect rule, were a more pragmatic consideration in the formulation of the colonial legal regime.

#### LAW AND BRITISH COLONIAL RULE IN NIGERIA

Although coercion played a crucial role in the British conquest of Nigeria, as in other parts of Africa, law clearly proved a more effective means of colonial administrative control. Force was effective in weakening the will of the conquered peoples but it did not suffice to make colonial rule endure. By the 1920s the system of military conquest and repression had largely succeeded and the British authorities found it necessary to move from military to civilian forms of rule. This process of consolidating and stabilising colonial rule was, of necessity, founded on law and specifically the English legal system. Law, in the form of ordinances and proclamations administered through British-style colonial courts, was to become the basis of promoting British hegemony in the colony. As Omoniyi Adewoye (1977: 6) aptly puts it, 'in the hands of the British colonial administration, law was a veritable tool, stronger in many ways than the maxim gun'.

The introduction of British colonial rule in various parts of Nigeria was determined by the mode of conquest of such areas. Territories came under British jurisdiction in three ways—by cession, by conquest and by treaty arrangements. While Lagos, the major centre of commercial activity in southern Nigeria, was acquired by cession, the northern territories of the Sokoto Caliphate were won by conquest. The rest of the country was acquired by so-called 'bilateral treaties of friendship and trade' where local people 'agreed' to come under British jurisdiction. There was an accepted legal distinction in the effect of

<sup>6</sup> National Archives, Ibadan, Colonial Secretary's Office (NAI CSO) 5/8/4, Instructions dated 13 January 1888, clause 31. Also see NAI CSO 5/8/4, Instructions dated 28 February 1886, clause 36.

<sup>7</sup> The Consular Instructions of 1891 and subsequent modifications made the colonial Consul General the sole lawmaker, the chief executive and the supreme judicial officer of the territory. He was empowered to legislate by proclamation.

these different modes of acquisition. Acquisition by cession or conquest rendered the conquered or ceded territories extensions of the British Isles, thereby making the laws of England operational. For instance, in the colony of Lagos an ordinance declared, as early as 1863, that 'the laws of England shall have the same force and be administered in the settlement'.<sup>8</sup> Those who came under this arrangement were considered, at least in principle, British subjects, entitled to the legal rights and liberties of Englishmen and owing their allegiance to the Crown. They were different from the occupants of territories acquired by treaty, where the affected people were not British subjects *per se*, although they were considered 'British-protected persons'. English laws were applicable in such territories only where they were specifically provided for. Thus, under international law interpretations, Nigeria as at 1900 was an amalgam of a colony and two protectorates in which the British Crown had complete sovereignty over the colony but only a limited form of sovereignty over the protectorate. However, all these were little more than mere assumptions in principle. In practice the Crown exercised unlimited jurisdiction in the protectorate in the same manner as in the conquered territories and law was considered an important tool for guaranteeing this control (Karibi-Whyte, 1987: 12).

However, law was more than just a tool of colonial administrative control. It also became, as several studies have shown, an arena in which African and Europeans engaged one another—a 'battleground' on which they contested access to resources and labour, relations of power and authority, and interpretations of morality and culture (Roberts and Mann, 1991; Chanock, 1985; Moore, 1986; Hay and Wright, 1982). In the process, local peoples encountered the realities of colonialism and both they and the Europeans shaped the laws and institutions, relationships and processes, meanings and understandings of the colonial period itself. Europeans used law to promote colonial hegemony; Africans used it as resource in struggles against Europeans, and, since Africans met one another in the legal battlefield far more often than they did Europeans, law also became central to struggles among Africans (Roberts and Mann, 1991: 3).

Underlying this multi-faceted appropriation of law to varied ends was the discourse about rights. Although colonial rule rested on a set of coercive practices that contradicted Britain's acclaimed democratic and libertarian values, the dominant official rhetoric was that the primary purpose of colonial rule and the extension of English law in the colony was to ensure peace, order, social justice and good governance. The colonial legal regime was to be guided by the need to promote free enterprise and consideration for the basic worth and human dignity of the 'native' subject. These ideals were thought to be prerequisites of the foundation of a modern civilised state. Many of the early ordinances

<sup>8</sup> Ordinance No. 3 of 1863. The Supreme Court ordinance of 1876 which established a Supreme Court for the colony also spelt out that English common law and the doctrines of general application in England as at 1874 would be in force.

and proclamations promulgated by British councils in Nigeria were therefore directed against what were considered barbaric and uncivilised 'native' practices that violated the ideals of Christian humanism and British libertarian traditions.

Even though most colonised peoples were designated subjects and not citizens—with duties and few rights—the aspiration to the rule of law, social justice and a regime of basic 'native' rights and liberties was central to the imperial agenda, underlining relations both between Europeans and Africans and among Africans themselves. For the most part, law and the appeal to individual rights and liberties within the framework of the colonial legal system provided a rationale and legitimisation of empire. The strength of law as an instrument of colonial rule lay not only on its efficacy in ensuring social order and facilitating British administrative control, but also because it provided a powerful tool for the colonial state to rationalise and legitimise empire.

The British colonial legal agenda in Nigeria as elsewhere in Africa was well articulated. From as early as 1843 the Foreign Jurisdiction Act empowered British officials in Africa to establish legal institutions and make laws for the peace, order and good government of the British and 'those in commercial relations with them'. The emphasis on 'commercial relations' indicates the primary rationale of the Act. Law and British legal institutions were conceived as means of realising imperial political control and economic ambitions above anything else. The first British consuls and other colonial officers who administered Lagos and the Niger delta carried out administration and judicial functions on the basis of this Act. The first sets of ordinances and proclamations were primarily directed at regulating trade and facilitating administrative control.

By the 1900s, however, colonial legal agenda had moved beyond trade and politics to embrace other social concerns. In 1900 further proclamations introduced a regime of English laws and set up an English-style legal system in the newly created Southern Nigerian Protectorate. These included the Supreme Court Proclamation, which established an English-style supreme court for the protectorate, the Criminal Procedure Proclamation, which encapsulated the principles of English criminal law and procedure, and the Commissioner's Proclamation, which dealt with the judicial powers conferred on colonial administrative officers. These laws formed the basis of the colonial legal regime when the British government proclaimed the protectorates of Northern and Southern Nigeria. Consequently the sovereignty of many indigenous states and societies became legally vested in the British Crown, although earlier military conquests had already made this a *fait accompli*.<sup>9</sup> The primary objective of the colonial legal system at this stage was to serve the dual purpose of forging formal relations between

<sup>9</sup> There were a few exceptions of African states that retained their independence until well after this period. The Egba United Government in south-western Nigeria, for instance, was independent of colonial political control until 1916.

the British and local peoples on one hand and extending British political and economic influence on the other.

The legal system that the British sought to impose on the colony was clearly patterned along the existing English legal system. The Supreme Court ordinance which set up a supreme court for the colony spelt out that English common law, the doctrines of equity and the 'statutes of general application', applicable in England, shall be in force in the colony. Local customs and cultural traditions were allowed to exist side by side with the imported English legal system only if they met the 'repugnancy test'. They had to be customs not 'repugnant to natural justice, equity and good conscience [or] incompatible . . . with any enactment of the colonial legislature'.<sup>10</sup> Another instrument that introduced English law into Nigeria—the Supreme Court Proclamation of 1900—had similar provisions. The idea, at least in principle, was to extend to the colony the same standards of law, rights and justice as prevailed in England. In practice, however, the introduction of English law was meant to serve imperial interests above anything else. Although the aspiration to promote individual rights, equity and social justice continued to dominate official rhetoric, the main object of the introduction of English law, as became apparent with time, was to maintain social order on a scale conducive to colonial administrative and economic interests. Laws and courts, police and prisons formed essential elements in European efforts to establish and maintain political domination (Roberts and Mann, 1991: 3).

The quest to assert imperial political and economic control over a largely restive population meant a certain measure of circumscription of the traditional rights and liberties which local peoples had enjoyed, even as it introduced new regimes of codified rights. Such incidents of colonial rule as the doctrine of indirect rule, the arbitrary circumscription of the powers of traditional rulers, the creation of special courts to administer unwritten customary laws and administrative orders, the exercise of the powers of political detention and deportation, and the use of laws of sedition and censorship (framed more widely than in England) furthered British colonial hegemony but also had profound implications on the conditions of rights and liberties in the colony.

The process of legal codification redefined existing regimes of rights in two distinct ways. Some colonial laws, such as those outlawing slavery, pawnship and ordeals, tended to empower previously marginalised groups, thereby providing a new and more inclusive regime of individual rights. On the other hand, legislation introduced to promote social order and meet specific imperial objectives had the opposite effect. These laws tended to restrict existing regimes of individual and collective rights. The focus here is on this second type of legislation. Characteristic of some of the early colonial laws introduced in furtherance of British administrative control were the special ordi-

<sup>10</sup> Supreme Court Ordinance No. 4 of 1876, quoted in Odeh (1991: 27).



nances passed in 1912 by the administration of Governor Walter Egerton in Southern Nigeria. This series of coercive legislation included the Collective Punishment Ordinance, the Unsettled District Ordinance, the Peace Preservation Ordinance and the Deposed Chief Removal Ordinance. Designed primarily for British imperial administrative convenience, these ordinances had a significant impact on the rights and liberties of local peoples. Measured against the acclaimed English legal principles of 'natural justice, equity and good conscience', the derogations from basic individual and communal rights which these ordinances implied become even more obvious. The consequences for peace and social order were also quite significant.

Interestingly, in their opposition to these coercive laws African elites employed the same rhetoric of rights and liberties that the colonial authorities found so appealing. However, the language of rights as employed by African elites was not merely a form of oppositional discourse. As it was to the colonial authorities in rationalising empire, the language of rights along with those of 'self-determination' and 'development' became a powerful tool in advancing the nationalist cause and legitimising the place of the educated elite in it. The following sections of this article examine some of the coercive colonial laws, the circumstances that produced them and how the discussions about rights surrounding them were deployed by both coloniser and colonised for varied ends.

#### THE COERCIVE ORDINANCES

In the period between 1912 and 1920 the Collective Punishment Ordinance had widespread impact on individual rights in the colony. Since most ordinances and proclamations were introduced mainly to aid British administrative control, the colonial regime, especially in the earlier years of colonial rule, found it unnecessary to distinguish between individual and collective responsibility for crimes and misdemeanours. By the provisions of the Collective Punishment Ordinance, the government legalised the practice—already widespread in the colony—where such offences as murder and arson were treated as representing the collective crimes of the entire community when individual offenders could not be identified or apprehended.<sup>11</sup> Under the provisions of the ordinance, colonial officials could impose fines on towns, villages and other communities for homicide and other crimes necessitating the use of soldiers or police. On such occasions the government was required to conduct an inquiry before imposing a collective fine. Although the Governor was obliged to report all cases of collective punishment immediately to the Secretary of State for the Colonies, local officials sometimes administered collective punishment arbitrarily and such cases were rarely reported. The law also disallowed

<sup>11</sup> NAI CSO 1/19/47, Governor Egerton to Colonial Office, 24 February 1912.

legal appeals against orders made under this ordinance, thereby ousting the jurisdiction of both the colonial district courts and the native courts from entertaining any litigation arising from its provisions.<sup>12</sup>

Although the colonial authorities sought to justify the law on collective punishment on the basis that it was founded on existing local African traditions of collective rights and communal responsibilities, its implications for individual rights and social justice were lost neither on colonial officials nor on the local people. The practice of punishing whole villages for the isolated offences of individuals acting alone, and the outright denial of any form of legal redress against such punishment, was one that stood clearly in contradiction to the English common law principle of individual responsibility for criminal liability—a principle that was assumed to be applicable to colonial subjects by virtue of the extension of the English legal system to the colony.

Colonial records, particularly the annual reports of the police and prison departments, are replete with cases of collective punishment administered under the Collective Punishment Ordinance. For colonial officials the ordinance provided an effective way of checking the rising incidence of crime and social banditry as well as for dealing with conflicts between communities. Local chiefs and village heads were required to facilitate the collection of collective fines or co-ordinate the undertaking of collective labour imposed on communities as punishment under the ordinance. In one such case the entire population of Ochima, a village in Eastern Nigeria, were punished through compulsory fines and labour for the offence of murder allegedly committed by one of them.<sup>13</sup> Collective punishment fines were imposed on the villages of East Tangale in Bauchi Province and Jibben in Plateau Province in 1926. Affrays between the people of Munshi-Ogoja and Ilorin Province were also punished under the Collective Punishment Ordinance.<sup>14</sup>

The main appeal of the ordinance to the colonial government was its administrative convenience. Reporting on the application of the Collective Punishment Ordinance to the disturbed areas of Owerri and Okigwe districts in 1912, Provincial Commissioner H. Bedwell noted that the 'truculent' Oguta people, who had consistently refused to carry government luggage and clean roads with compulsory labour, had been 'a thorn in the side of the local administration'. As fines were not effective, Bedwell instructed the District Commissioner at Oguta to 'sit down in the town with escorts at the expense of the town until such time as the people come to their senses'.<sup>15</sup> Mandatory collective fines and labour were subsequently imposed on Oguta. For affected communities,

<sup>12</sup> Collective Punishment Ordinance No. 67 of 1912, dated 8 February 1912.

<sup>13</sup> Colonial Office (CO) files at the Public Record Office, London, 657/12, Administrative Report of the Police Department, 1924.

<sup>14</sup> CO 657/14.

<sup>15</sup> Colonial Secretary's Office 1/19/50, Cameron to Colonial Office, 23 July 1912, quoted in Tamuno (1972: 46).

such punishments sometimes generated social tension leading to further conflicts and police intervention. In the case of Ochima, for instance, a group of youths refused to pay their part of the collective fine because, they claimed, there had been a conspiracy between the known culprits for which the entire village was being punished and the village head, who was protecting them, had refused to bring them forward for punishment.<sup>16</sup>

The Unsettled District Ordinance of 1912 had similar implications. Under the provisions of the ordinance the colonial government reserved to itself the power to arrest and punish persons charged with being of 'undesirable character and reputation'. No specific criteria were spelt out in the ordinance for determining what precisely constituted 'undesirable character and reputation'.<sup>17</sup> That decision lay entirely at the discretion of each administrative officer. Such wide and unquestioned discretionary powers in the hands of the local colonial administrators inevitably gave rise to abuse. Given the types of cases that were subsequently dealt with under this ordinance, it became obvious that the Unsettled District Ordinance was specifically targeted at the activities of the educated African elites, especially the new class of African lawyers who were wont to engage the colonial administration in disputes and litigation over land and commerce. In the words of one colonial report, the ordinance was aimed at getting rid of 'objectionable persons trading in the unsettled districts of the interior'.<sup>18</sup> Governor Walter Egerton specifically made it clear that the ordinance was particularly intended to prohibit from all unsettled districts such 'aliens' as the 'black lawyer' and the 'Lagos agitator'.<sup>19</sup>

The Unsettled District Ordinance made it possible for parts of the eastern Central Province to be declared Unsettled Districts in 1913, and thereafter the government had the power to prohibit any persons being 'non-natives' or 'aliens' from entering or re-entering the districts. The penalties for breach included a fine, imprisonment, or both. Offenders could also be deported, having paid the expense of their deportation, to a place to be determined by the Governor with the approval of the Secretary of State in London. What the Unsettled District Ordinance so effectively did in practice was to constrain local African enterprise and political activism through restrictions on free movement and expression. This particularly affected the growing class of educated Africans in Lagos, Calabar and other urban centres in Southern Nigeria, where the colonial authorities encountered the stiffest opposition.

Like the Unsettled District Ordinance, the Peace Preservation Ordinance prescribed for the Governor the power to declare any part

<sup>16</sup> CO 657/12, Annual Administrative Report of the Police Department, 1924.

<sup>17</sup> The Unsettled District Ordinance, No. 15 of 1912, dated 4 June 1912.

<sup>18</sup> An elaboration of the official thinking that informed the enactment of these ordinances is provided in 'Acts of Southern Nigeria, 1908-20', CO 583/3.

<sup>19</sup> Colonial Secretary's Office 1/19/47, Governor Egerton to Colonial Office, 24 February 1912.

of the Eastern and Central Provinces of Nigeria a 'disturbed district'. Following such a declaration, people in the affected areas could be arbitrarily searched and arrested, with or without a warrant, for possessing arms and ammunitions. Within a 'disturbed or unsettled' district the District Commissioner exercised almost unlimited powers. He could detain any person without a search warrant and could impose fines of up to £1,000 on anyone involved in a civil disturbance. The law also provided that a District Commissioner or a military officer could detain anyone for a year, 'anything in the Supreme Court Ordinance to the contrary notwithstanding'.<sup>20</sup> Any district not under the jurisdiction of the Supreme Court was to be deemed an unsettled district. In the case of civil commotion, fines could be imposed and offenders imprisoned. The cost of stationing additional troops or police in such a district would be paid by the inhabitants. The ordinance also gave the District Commissioners and other commissioned officers immunity from liability for criminal or civil actions. Section 4 of the ordinance specifically affirmed that the 'District Commissioner shall be protected with regard to any suit brought against them in execution of his duty'.<sup>21</sup>

These coercive ordinances were targeted not only at educated African elites but also at some of the more influential traditional African rulers, from whom the colonial authorities could expect serious opposition. The laws that dealt with such sensitive political matters were absolute and authoritarian in their construction and were clearly contradictory to the aspiration towards native rights and liberties that dominated colonial legal discourse. The Deposed Chief Removal Ordinance of 1929, for example, authorised the Governor to order that any deposed chief should, within a specified time, 'leave the area over which he exercised jurisdiction or influence and other specified parts of Nigeria'. In fact the ordinance merely gave the stamp of legality to what had become a common practice of the colonial government in its dealings with traditional rulers who were considered unco-operative and recalcitrant. By the provisions of the Deposed Chief Removal Ordinance, failure to obey an administrative order entailed a term of imprisonment and the subsequent deposition of the chief to such part of Nigeria as the Governor might direct.<sup>22</sup> Revised versions of this ordinance enacted in 1930 and 1945 further provided for the appointment and deposition of chiefs in the colony and of head chiefs in the protectorate. Because there was no right of legal appeal, these orders became instruments with which the colonial authority fostered its policy of indirect rule and consolidated its administrative control over many parts of Nigeria.<sup>23</sup>

<sup>20</sup> See Sections 3 and 4 of the Peace Preservation Ordinance, No. 14 of 1912. This was later amended by the Peace Preservation (Amendment) Ordinance, No. 31 of 1912.

<sup>21</sup> *Ibid.*

<sup>22</sup> CO 657/14, The Deposed Chiefs Removal Ordinance, No. 4 of 1925.

<sup>23</sup> For instance, this ordinance provided the basis for the deposition of Mohammed Yaji, the *serki* of Madagali District, Adamawa Province, in 1927. On the build-up to, and the processes involved in, this deposition see Vaughan and Kirk-Greene (1995: 22-41).

These coercive laws soon became the focus of attack by African critics of the colonial regime. The Appointment and Deposition of Chiefs Ordinance and the other coercive ordinances were seen as patent infringements of the rights and liberties of Africans. Driven by their deep-seated prejudice against the indirect rule system and the Native Authorities established by the colonial administration, the educated elites focused their demands for reform of the colonial government on these ordinances. The Deposition of Chiefs Ordinance in particular became the object of attack by educated African elites because of the limitations and distortions which, in their view, it imposed on the political rights of traditional African rulers and institutions of governance. Opposition to the ordinance stemmed specifically from the all-embracing manner in which it was written, which conveyed the impression that the Governor had the powers of an absolute dictator *vis-à-vis* the chiefs (Coleman, 1958: 284). Educated Africans cited the ordinance as proof that the whole Native Authority system and, indeed, the colonial indirect rule structure was a sham in which the chiefs were not truly representatives of the people but merely obedient servants of the government and instruments of imperial rule who could be deposed arbitrarily.

The paradox of this position, however, is that while African elites were quick to point to laws like the Deposition of Chiefs Ordinance as an infringement of the political rights of traditional rulers, they were themselves often unwilling to be subjected to the authority of the traditional rulers whose political rights they sought to protect. For instance, in 1906 the colonial authorities passed the Native Court Proclamation in the East and Central Provinces, which was intended to empower native courts headed by local chiefs to enforce African customs that were 'not opposed to natural justice, equity and good conscience'.<sup>24</sup> One remarkable feature of the Native Court Proclamation was its application to 'native foreigners'—Africans other than those of the Eastern and Central Provinces who were resident in those areas. These 'native foreigners', who included returnee slaves, Liberian and Sierra Leonean *émigrés*, constituted the bulk of the new class of Africans elites who had been educated in the early mission schools. These educated elites were vigorously opposed to coming under the jurisdiction of the native courts. About 200 such 'native foreigners' petitioned the Secretary of State in London praying for exclusion from the provisions of the Native Court Proclamation.<sup>25</sup>

The petitioners criticised the proclamation on two principal grounds. First, they contended that the African laws and customs that would apply to them were uncertain and unwritten, that the members of the native courts were illiterate, and that there were serious differences in language and beliefs between them and the 'aboriginal natives'. Second,

<sup>24</sup> CO 588/I, No. 7 of 1906.

<sup>25</sup> CO 502/41, J. W. Maxwell to Colonial Office, 3 December 1906, cited in Tamuno (1972: 159).

they held that litigants generally had no right of choosing the court members who would decide cases affecting them. They further argued that the court members took no oaths and, as such, they feared the development of irregular proceedings (Tamuno, 1972: 159). In short, they feared that being subjected to the authority of the native courts would result in the violation of their rights. Similarly, although most of the educated Africans in Lagos gave unquestioning support to the system of native administration in the provinces, they strongly objected to extending the system to Lagos or the colony area on the grounds that such an extension would interfere with their rights as 'British subjects'. Yet the Lagos barristers who comprised about half the total African representation in the colonial Legislative Council in the 1940s protested their exclusion as counsel from the native court system as a restriction on their right to practise their profession (Wheare, 1950: 151-7). Thus the language of rights which this group of African elites employed in their opposition to the circumscription of the political rights of traditional rulers by colonial laws was also easily deployed to protest against other colonial laws aimed at strengthening the traditional authorities where they conflicted with the interests of the elites.

This paradox underlying the position of the African elites was not restricted to the rights discourse. In a recent study of the African intelligentsia in colonial Nigeria Philip Zachernuk points out that the educated community stood between the two worlds of European culture and African culture, seeking to define itself within an emergent Nigerian society. This was not an unstable transitional society waiting to find order by absorbing Western norms but a changeable society engaged in an ongoing—and unending—process of living through problems as it met them. In these circumstances the educated African elites were clearly not intent on reproducing Victorian society but on using its discourses to serve their own ends (Zachernuk, 2000: 32-3). They were operating in a very competitive society where variable identities could be useful. For instance, when politicking in Lagos or London, an elite Lagosian might invoke his rights as a 'subject of Her Britannic Majesty' and be very English. Yet, when settling family disputes or politicking in the village, the same person might appeal to 'customary rights' and be more Yoruba. The early intelligentsia thus attempted to adapt European discourses in and about Africa to their needs, to render from imposed categories something more suited to their medial position between imperial discourse and African realities (*ibid.*).

Colonial responses to African rights-based demands were more conciliatory than defiant. The attacks by African elites on the Deposition of Chiefs Ordinance, premised as they were on the political rights of traditional African rulers, put pressure on colonial officials to defend the need for these laws. Their defence centred on the familiar argument that measures such as the coercive ordinances were not the goal of British control over Southern Nigeria, only a means to an end. Many official explanations echoed earlier arguments advanced by Lord

Chamberlain, the Secretary of State for the Colonies, to justify the spate of British military expeditions in West Africa. 'You cannot make an omelette without breaking eggs,' he had argued. 'You cannot destroy the practices of barbarism, of slavery, of superstition which for centuries have desolated Africa without the use of force . . .'<sup>26</sup> The coercive ordinances were therefore conceived and implemented as extensions of the force necessary for colonial pacification and social reordering. However, members of the new class of educated African elites and critics of the colonial regime in the metropole queried the rationale of breaking African 'eggs' to make a British 'omelette' (Tamuno, 1972: 48). Educated Africans were relentless in their criticism of the shortcomings of this coercive legislation and the implications they spelt for the basic rights and liberties of Africans. One of the most controversial fronts on which they engaged the colonial authorities in this regard was in the legislation restricting press freedom.

#### PRESS RESTRICTIONS: THE SEDITIOUS OFFENCES ORDINANCE

From as early as 1900 a vigorous and articulate class of educated Africans had established control of the local newspaper press. These Africans, some of whom included immigrants from Sierra Leone, wielded considerable influence in the country, particularly in the growing urban and commercial centres of Lagos, Calabar and Abeokuta. By the 1930s this group of educated Africans, who were mostly lawyers and doctors, had their ranks swelled by traders, skilled artisans and other products of the missionary schools that had proliferated in Southern Nigeria. For many of these Africans who had acquired the rudiments of Western education the local newspaper press provided a means of voicing their opposition to the excesses of the colonial government and advancing the nationalist cause.<sup>27</sup> The most outstanding of these nationalist-oriented newspapers, published between 1900 and 1930, included the *Lagos Times*, the *Lagos Weekly Record*, the *Nigerian Pioneer*, the *African Challenger*, the *Lagos Observer* and the *Lagos Echo*. Of these, perhaps the most influential was the *Lagos Weekly Echo*, published by a Liberian immigrant, John Payne Jackson. Another was the *Lagos Weekly Record*. The *Lagos Weekly Record* was a determined agent in the propagation of nationalist consciousness, campaigning generally in defence of Africans against alien rule and particularly the excesses of the British colonial administration in Nigeria. The major issues that attracted the paper's comments, however, were those that directly affected the elite—issues such as discrimination against Africans in the civil service, demands for more African representation in the administration of the country and the

<sup>26</sup> Annual dinner speech, 31 March 1897, *Proceedings of the Royal College Institute* 28 (1896–97), 236–7, quoted in Tamuno (1972: 48).

<sup>27</sup> Omu (1978) studies in detail the roles of the Nigerian elites and the newspaper press during the early period of colonial rule.

campaign for the civil and political rights of Africans. In addressing these issues the paper turned out to be quite vocal and audacious in its criticism and indictment, not only of the central colonial administration but also of individual colonial officials.

Between 1910 and the outbreak of the First World War the Nigerian press, particularly in Lagos colony, displayed unprecedented hostility towards the colonial government. Although these newspapers enjoyed a limited readership, which hardly went beyond large urban centres like Lagos and Calabar, they exerted considerable influence on the policies of the colonial government and the attitudes of the growing class of literate Nigerians. Indeed, as Omu has argued (1978: 166) in his study of the Nigerian newspaper press in this period, by the 1920s the Lagos press seemed prepared to assume a new role as 'guardians of the rights and liberties of the people, as well as the interpreter of their ideals and aspirations'. Tension and hostility between the Lagos press and the colonial administration went beyond the general demands for representation in government and self-rule. More specifically, the contentious issue appeared to be the revulsion of the educated elites (who controlled the press) at their deliberate exclusion from government, following the colonial policy of dealing with traditional rulers, rather than them, as their agents in the Native Authority and indirect rule systems.

What the educated elites demanded at this stage was something like careers open to talents, the removal of arbitrary ordinances restricting their freedom and residence, and direct but enlightened government based on the old established colonial patterns.<sup>28</sup> As it turned out, the contempt for the colonial administration that the newspapers demonstrated by their attacks on the government was matched by the administration's derision and hostility towards the press in particular, and the elites in general. Although the attacks of the press never really posed a serious threat to the government, there was always the fear that it could undermine the influence of the colonial administration. The colonial government realised early enough that such open attacks had the potential to stir popular resentment and agitation that could threaten British control.

Under these circumstances, colonial officials found themselves in a dilemma—whether to suppress the press and incur the odium of attacking the British ideal of press freedom and the right to free speech, or to allow unrestrained criticism and ruthlessly deal with the resultant agitation. The dangers of working against the declared ideals of free speech and press freedom were real. The notion of free speech had, by the dawn of the colonial era, become firmly entrenched in British political traditions and the English legal system, which presumably

<sup>28</sup> In the early period of colonial rule the educated elites played an important role in local administration. This changed with the inauguration of indirect rule, when colonial officials began to see traditional African rulers as more effective partners in local administration (Osuntokun, 1979: 66).



extended to the colonies. The idea was prevalent within colonial officialdom that liberty was the source of England's greatness and that a free press was the most valuable of British privileges. These notions, which were reinforced by the asseverations of eighteenth-century British liberal intellectuals, were cited both by Africans and by liberal politicians in Britain in support of press freedom in Nigeria. Their argument was that educated Nigerians, being British 'citizens' and 'subjects' by law as much as by cultural attitude, should by extension enjoy such democratic British principles as press freedom. This distinction deserves closer examination.

Mahmood Mamdani has argued that the role of the colonial state as it relates to the ascription of rights and liberties was a 'double-sided affair'. One side—the state that governed a racially defined citizenry—was bounded by the rule of law and an associated regime of rights. The other side, the state that ruled over subjects, was a regime of extra economic coercion and administratively driven justice. Within this framework, the language of civil rights was a specific language which the colonial state employed in its dealings with urban-based 'citizens' as opposed to the language of 'custom and tradition' which it employed in its dealings with rurally based 'subjects' (Mamdani, 1996: 19). Although questions have been raised as to how well the citizen/subject dichotomy reflects the rights discourse within the colonial context, Mamdani's observations about colonial civil rights discourse underlines a guiding principle of the organisation of colonial power in Nigeria—the notion that, as British subjects, local people were entitled to a regime of basic civil rights, particularly the more 'enlightened' subjects.<sup>29</sup>

A related consideration that guided colonial officials on the spot in their cautious handling of the press was the ever-present need to protect and promote the 'good name of His Majesty's government in the colony'. In several memoranda Governor Donald Cameron, like his predecessors, reminded local administrative officers that, in their dealings with the press, they should be sure not to do anything to 'damage and bring into disrepute the good name of British administration in Africa'.<sup>30</sup> Apart from the idea of a free press in a civilised society as an institution for the scrutiny of government policies, there was the more pragmatic viewpoint, even within official colonial circles, that the activities of the press were not solely a threat to the

<sup>29</sup> While this distinction between citizen and subject may be useful in understanding how various broad groups encountered the colonial state, some critics have argued that it tends to reduce discussion about rights and the enjoyment of those rights to rigid, polarised categories. It has been argued that Mamdani's thesis on 'citizens' and 'subjects' tends to obscure the more nuanced and multidimensional ways in which diverse parties—contending voices within colonial officialdom, workers and peasants, old and young, men and women—engaged in discussions about rights in ways that crisscrossed the assumed divide between urban 'citizens' and rural 'subjects'. See O'Laughlin (2000), Murray (2000) and the response of Mamdani (2000).

<sup>30</sup> See, for instance, CO 583/183/3, Memorandum from Governor Donald Cameron to District Administrative Officers.

government but, as one official put it, 'a permissible outlet for the inevitable fumes of discontent'.<sup>31</sup> Press freedom, it was argued, would 'afford vent for the escape of the effervescence of the feelings [of educated Africans], which if kept continually smothered, might develop into violent outbursts'.<sup>32</sup>

This caution that the colonial administration exercised in its dealings with the local press was indeed aimed at protecting its good relations with the early African press in Lagos. In spite of their constant criticisms of some specific colonial policies, the early newspapers were almost unanimous in the opinion that, on the whole, the British administration fared significantly better in protecting 'native' rights and liberties than other colonial regimes in Africa. Contrasting British colonial administration in Nigeria with the 'tyranny' of the French in Porto Novo and the Germans in East Africa, one Lagos newspaper editorialised:

The English are acknowledged to be the best colonizers and the secret of their success lies in the great consideration invariably shown by them to the people, whom they undertake to govern, affording them at the onset the full liberties and privileges of British subjects. It is by this means that they readily win the confidence of African natives who become easily and willingly reconciled to their government and institutions . . . To become successful colonisers in Africa, the French and the Germans must take a leaf from the book of the English by endeavouring to render their governments more palatable to the natives.<sup>33</sup>

Although the colonial administration was cautious in its handling of the press and keen to protect its 'good name', it was increasingly confronted with the challenge of maintaining a balance between upholding the ideal of free speech and accommodating the relentless attacks of the Nigerian press. One of its responses to this challenge was the enactment in 1909 of two main laws, which outlined the government's strategies for curtailing the activities of the press. These were the Newspaper Ordinance of 1903 and the Seditious Offences Ordinance of 1909. Although both laws were conceived as early as 1843, their promulgation was delayed because of the initial reluctance of the Colonial Office to approve them. While these ordinances did not seek outright censorship of the press, they were intended to impose restrictions and strict regulations that would ultimately curtail its activities.

In seeking official approval from the Colonial Office of restrictions on press freedom in the colony, Frederick Lugard as High Commissioner argued that the 'unrestrained licence' which the press enjoyed undermined the government's authority and had increasingly negative effects on public order.<sup>34</sup> The local newspaper press, he argued, had become

<sup>31</sup> Quoted in the *Lagos Weekly Record*, 25 April 1903.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Lagos Weekly Record*, 12 September 1891.

<sup>34</sup> CO 586/17/301/39, Lugard to Harcourt, 12 August 1914.

too militant to be tolerated; that 'every week, scurrilous articles full of abuse for the King's local representative were published'.<sup>35</sup> The Seditious Offences Ordinance was expected to check this trend. While the colonial administration sought to justify the enactment of the ordinance as an attempt to check libellous publications, local opponents of the censorship law argued that it was unnecessary because actual cases of libel in the colony were rare. They argued that the real object of the ordinance was to restrict press freedom and limit the right to free speech. The *Lagos Weekly Record* described the ordinance as 'a measure calculated to militate in no small degree against the people's interest and rights'.<sup>36</sup>

However, in spite of stiff opposition from the Nigerian representatives in the colonial Legislative Council and the proprietors of the Lagos newspapers, Governor MacGregor passed the Newspaper Ordinance as law in October 1903. Under the ordinance a number of restrictions and administrative regulations were placed on the publication of newspapers. They included a £250 'libel bond' which was prescribed as a condition of being allowed to publish a newspaper in the colony. Since many of the early newspapers were small, privately run affairs, the law made the newspaper business that had thrived in Lagos more expensive and effectively checked the tendency for newspapers to proliferate. The Acting Chief Justice of the colony, E. A. Speed, subsequently justified the new ordinance during Legislative Council debates on the grounds that 'it is rare to find an absolutely free press anywhere in the world'.<sup>37</sup>

Like the Newspaper Ordinance, the Seditious Offences Ordinance was aimed at protecting government officers generally from public criticism. Its promulgation was informed mainly by the growing concern for public order and social stability on the part of the colonial administration. Two immediate reasons were immediately responsible for the introduction of the Seditious Offences Ordinance by Governor Egerton. The first was concerted press attacks on and public opposition to the government's land acquisition policy. Under this policy the government had compulsorily acquired a vast portion of land in Northern Nigeria known as the 'Hausa lines'. The other cause of press attacks was public opposition to the proposed water rate in Lagos. These public issues, which became the focus of extensive press comment, were considered sensitive matters that could disrupt public order, particularly in Southern Nigeria.

In making his case to the Colonial Office on the need for a new law relating to 'seditious publications, unlawful assemblies and resistance to civil power', Governor Egerton argued the need to punish publications designed to

<sup>35</sup> *Ibid.*

<sup>36</sup> *Lagos Weekly Record*, 14 February 1903.

<sup>37</sup> CSO 7/1/14, Legislative Council Debates, 8 June 1903.

inflame an excitable and ignorant populace, the bulk of whom are under the control of Headmen and Chiefs who themselves have only recently emerged from barbarism and the old traditions of their race.<sup>38</sup>

The Seditious Offences Ordinance which was subsequently promulgated was based on the Indian penal code and, like the Newspaper Ordinance, was vigorously opposed by African elites who questioned the appropriateness of applying in Southern Nigeria a law that had originally been drafted in Britain for the government of India. Opposition to the law was not limited to Nigeria. Criticism also erupted in Westminster, where some members of Parliament described the law as unsuitable and inappropriate.<sup>39</sup> Concerted opposition to the Seditious Offences Ordinance reached a climax in 1909 when there were a series of public demonstrations against the law in Lagos.

In practical terms the Seditious Offences Ordinance did not achieve much. Exposed to the fire of public criticism and protestations both in the colony and in London, Governor Egerton (like MacGregor, in the case of the Newspaper Ordinance) was cautious in enforcing it. In fact the period from the introduction of the ordinance in 1909 to 1945 passed without any serious allegation of or punishment for sedition. However, armed with press censorship and sedition laws, colonial officials successfully arrogated to themselves extensive legal powers to deal with perceived threats to law and order. The more profound effect of these restrictive laws was that they served to curtail growing press and nationalist activism, particularly in Southern Nigeria.

#### INDIVIDUAL RIGHTS AND THE COLONIAL JUDICIAL SYSTEM

The aspiration to promote the rule of law and protect individual rights dominated official rhetoric concerning the administration of justice in Nigeria. Colonial courts were expected to serve such a function no less than the courts in England. Two primary tenets of the common law were expected to guide the operation of the courts in the colony—*Nemo iudex in causa sua* (equal treatment of all persons before the law) and *audi alteram partem* (the guarantee that all parties will be heard fairly). Status differences were not to affect the outcome of legal decisions, and the purpose of the colonial courts was to deal with cases of conflict in which clear-cut rights and duties would be established by investigation of those events only that were deemed relevant to the pending case. Strict rules of evidence were to restrict the content of the testimony the courts could hear. Cases were to be treated as involving a right and a wrong. In them, judges, some time after consultation with local 'experts', made final, enforceable decisions. These were all elements of the modern judicial system that was introduced into the colony.

<sup>38</sup> CO 520/50, Egerton to Elgin, 2 December 1907.

<sup>39</sup> The issue of press censorship in the colony of Lagos often arose in questions raised on the floor of the House of Commons between 1903 and 1919. See CO 583/183/18.

It has been rightly argued that the notion of a judicial system where isolated cases of clear-cut rights and duties were violated and judgements of right and wrong strictly enforced is to simplify the complexity of local relations.<sup>40</sup> However, colonial officials in Nigeria saw this approach to the administration of justice as the best guarantee of the modern social and political order they envisaged in the colony. Indeed, from as early as the 1850s European merchants in the Niger delta had established courts of equity based on these principles, to hear cases involving commercial transactions between Europeans and Africans. These courts sat infrequently, following no formal procedures and administered by no fixed body of law. Cases were decided by a majority vote, depending on what the merchant judges believed the 'justice' of a particular situation required. Sometimes they took local trading customs into account, but overall there was a shift towards Western understandings of property, contract, crime and punishment (Adewoye, 1977: 34).

With the imposition of colonial rule in the 1900s a more formal judicial system was put in place. It comprised a Supreme Court, divisional courts and district courts, all fashioned after the British model. There were also 'native' courts and councils that were patterned along the African model. Links were provided through procedures for appeal that went from the native courts to the Supreme Court and sometimes to the Judicial Committee of the Privy Council in London. These courts and other colonial apparatus for the administration of justice, despite the overwhelming British influence, were intended to blend both European and indigenous African standards of right and justice. Indirect rule in Nigeria, and elsewhere in British colonial Africa, took the fundamental principle that customary rules and practices should be upheld among locals unless they failed the repugnancy test or contravened local statutes. In an attempt to keep the apparatus of government close to local people and relevant to their traditions, native courts and Native Authorities were expected to enforce innocuous customary rules and practices. Historians and anthropologists have recently come to understand, however, that what these colonial courts treated and enforced as immutable customary law was itself the product of historical struggles unfolding during the colonial period.<sup>41</sup>

For the most part, the operation of the colonial judicial system reflected inequalities in power both between colonial officials and Africans and among Africans. Inequalities in power affected the

<sup>40</sup> Kidder (1978) makes similar observations in the case of colonial India.

<sup>41</sup> Chanock (1985: 145–216) has shown in his study of law and the colonial experience in Malawi and Zambia that customary law was shaped by the complex interplay of European beliefs about local and African representations of themselves. The creation of statute law throughout the colonial period and the codification of customary law during the 1930s and 1940s created opportunities to represent and debate tradition. In each of these arenas African representations were themselves moulded by indigenous ideology and local struggle over power and resources.

outcome of local conflicts over rules and procedures in the courts. For instance, the fact that traditional rulers served as judges in native courts gave them extraordinary opportunities and, in some cases, statutory authority to define and enforce rights, obligations and relationships. Even in situations where the privileges of local rulers were not institutionalised, colonial officials allowed them great influence. When questions arose about custom, officials turned for answers to chiefs and others they regarded as repositories of local knowledge and holders of local authority. Such persons were always men and usually elders. The reliance of officials on particular individuals or groups to define tradition gave the individuals or groups new advantages in the competition for resources and labour, and augmented their power (Roberts and Mann, 1991: 22).

This situation was true of both Northern and Southern Nigeria, even though separate judicial systems were put in place in these areas. In the protectorate of Southern Nigeria the Native Court Proclamation of 1900<sup>42</sup> established the native courts, while in Northern Nigeria provision was made for two kinds of native courts—Islamic courts (Alkali courts) and judicial councils. An Alkali court consisted of an Islamic scholar (*alkali*), as president, and other persons who sat as co-judges, while a judicial council consisted of an emir, a chief or a district headman as president with whom other persons sat as co-judges. In either case the colonial Resident appointed court members after consultation with the emir or local traditional ruler (Obilade, 1979: 27).

The native court system was inaugurated to allow some level of African autonomy in judicial matters. However, what became most evident with the operation of the system soon after its inauguration was the new powers it gave traditional rulers. In the view of some traditional rulers who became heads of native courts, their new position represented the state-sanctioned extension of their traditional powers as absolute monarchs. Under indirect rule, many of these rulers suddenly found themselves presiding over native courts that covered areas beyond their traditional jurisdiction and areas of influence. Many came to see their new positions more as an opportunity to strengthen political advantage than to arbitrate impartially in the administration of justice. This became the basis of wide-scale abuse of the court system, particularly at the local level.

Colonial records are replete with cases of abuse by the native courts and expressions of concern by officials that such incidents could bring the 'good name of British administration in the colony' into disrepute. In one widely reported case in 1932 a native court in Adamawa Province sentenced one Mr Edwards, a newspaper publisher, to a year's imprisonment for the 'crime' of placing a copy of his newspaper (in which he had criticised the local Native Authority) on the notice board of the office of the Native Administration. Evidently there was no great

<sup>42</sup> Native Authority Proclamation, No. 10 of 1900 and No. 25 of 1901.

harm in this and the proper course would have been to bring a civil action for trespass. Instead Edwards was summoned before the Wakili (the local 'native' official),<sup>43</sup> who turned him over to the native court, which fined him and sentenced him to a year's imprisonment. In a subsequent review of the case the District Commissioner overturned the sentence, acknowledging that the sentence was 'preposterous'.<sup>44</sup>

In another case that illustrates the excesses that became characteristic of the local judicial system, one young man was convicted by a native court in Ijebu Ode for having in his possession tools capable of being used in making counterfeit coins and was sentenced to twenty years' imprisonment, even though it was a first offence. The case became public knowledge when it was discovered by the District Officer in the course of his routine inspection of Lagos prison in 1931. Alarmed by the severity of the punishment the native court had imposed for such a minor offence, the District Commissioner brought the case to the notice of the Governor, stating in his memorandum that he considered it 'simply a question of a wicked sentence'.<sup>45</sup> In April 1932 the Governor responded. His reply read in part:

You will recollect the case of the young man convicted by the Ijebu Ode Native Court lying in the Lagos prison under the sentence of 20 years imprisonment . . . Although I have been pressing for the record of this case since February, the case file came before me today only. Now hear me. At the time the sentence was passed, the maximum sentence that the court could inflict was two years. He is being released at once and I am of course pursuing the case . . . This is one case discovered in one prison in one day. Can anyone doubt that there are other cases of a similar nature?<sup>46</sup>

Indeed, cases like this were not uncommon and although the colonial authorities at the central level frowned on such blatant violations of individual liberties by the native courts, the limited control which they exercised over these courts, coupled with the fact that many local chiefs and emirs had no training in the workings of the new judicial system, combined to result in the widespread occurrence of such violation of rights and miscarriage of justice.

The excesses were not limited to the operation of the native courts. Although the provincial court system that had existed in Southern Nigeria since 1913 was less prone to abuses and miscarriages of justice, its record on the promotion of human rights and individual liberties also had significant limitations. Many of the members who sat in the provincial courts were British administrative officers who had no legal training and little understanding of the principles of English law they

<sup>43</sup> Wakili was the generic title of the local 'native' official who headed the Native Administration in some of the Provinces of northern Nigeria.

<sup>44</sup> CO 583/183/14, Native Court Matters, Vol. 1 (1932).

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

<sup>46</sup> CO 258/183/14, Native Court Matters, Vol. 2 (1932).

were expected to administer. As the Chief Justice conceded in his evaluation of the provincial court system in 1923, 'mistakes were sometimes made and some convictions had to be set aside or altered'.<sup>47</sup> However, in comparison with the operation of the native courts, the provincial courts fared significantly better in upholding individual rights and liberties. One reason for this, particularly in the Southern provinces, was that the supervision of the criminal work of the provincial courts was placed in the hands of trained judicial officers rather than solely in the hands of colonial administrators, as was the case in Northern Nigeria.<sup>48</sup> Another reason for the relative success of the provincial court system in Southern Nigeria was the legal provision that guaranteed the right of persons charged with a criminal offence to appeal to the Chief Justice to have their case transferred to the Supreme Court. There they could have the opportunity of being defended by counsel. Until 1933 these rights were considered a privilege and did not apply to proceedings in the native courts.

Given these and other limitations of the legal system, Governor Cameron made proposals to the Colonial Office in 1932 for a reduction of the powers and jurisdiction of the native courts. A new Bill was introduced, 'An Ordinance to make Better Provision for the Administration of Justice in the Protectorate'.<sup>49</sup> The Bill, which was eventually passed in 1933, was intended to effect a fundamental reform of the entire legal system and of the native court system in particular. It provided, among other things, for the dismissal and suspension of any member of a native court 'who shall appear to have abused his powers or be unworthy or incapable of exercising the same justly'.<sup>50</sup> More important, it provided for a right of appeal against the decisions of the native court. These judicial reforms were subsequently extended to higher courts like the provincial courts.

The 1933 judicial reforms also made provision for the creation of new High Courts throughout the protectorate, to replace the provincial courts. The old Native Court Ordinance of 1918 was replaced, providing for the creation of new native courts. In addition, the West African Court of Appeal Ordinance of 1933 was promulgated. The ordinance conferred the right to appeal in both criminal and civil cases heard by the Supreme Court and the High Court, on the newly established West African Court of Appeal (WACA). Similarly, under the new Protectorate Court Ordinance of 1934 the High Courts and the

<sup>47</sup> CO 657/9, Report by R. M. Combe, Chief Justice of Nigeria, in the Annual Administrative Report, 1923.

<sup>48</sup> In the northern provinces the criminal work of the provincial courts came under the direct supervision of the head of the colonial administration in the region—the Lieutenant Governor.

<sup>49</sup> CO 583/183/14. This proposal was modelled after a similar Bill enacted by Governor Donald Cameron in Tanganyika, where he had earlier served as governor.

<sup>50</sup> Section 25 (1) of the proposed Bill provided that any person aggrieved by an order or decision of a Native Court of first instance might within thirty days of the date of such an order or decision appeal to the Native Court of Appeal or to the court of a magistrate.



magistrates' courts were open to legal practitioners who had previously been barred from appearing in the provincial courts. These reforms also significantly curtailed the powers hitherto enjoyed by colonial administrative officers.

Attempts at judicial reform did not end with these reforms. In 1926 and 1932 official visits to Nigeria were sponsored by the Colonial Office mainly to examine the working of the judicial system in the territory (Adewoye, 1977: 221). The 1933 reforms were, however, the most far-reaching. The main architect of the 1933 reforms was Governor Donald Cameron, who was convinced that the native courts must be modernised to suit the requirements of a more enlightened community if they were to be saved. He insisted that native courts 'must swing towards the system of justice administered in the European courts'. To the question, often raised by African elites, whether such a development might not destroy 'tribal institutions', his answer was that it were better these institutions were destroyed if they ceased to be acceptable to an enlightened community.<sup>51</sup> The bases of the 1933 judicial reforms were ideological, representing a shift of focus away from a paternalist, almost static view of government to one embodying a development concept.<sup>52</sup> The introduction of the right of appeal was considered particularly significant in the move towards modernising the local judicial system. As the Attorney General put it, 'nothing could be more effective in checking irregularities on the part of the native court than the knowledge that the persons who came before it are aware that they have a right of appeal to a competent and honest court of appeal'.<sup>53</sup>

Although constitutionally guaranteed human rights were not introduced until independence in 1960, the 1933 judicial reforms, particularly the extension of the principle of legal appeal within the judicial system, marked a significant turning point in the development of institutional safeguards for the protection of individual rights and liberties in Nigeria. Given the criticism that had trailed the operations of the entire legal system, the 1933 reforms were well received by the public, particularly among the educated African elites, who had relentlessly criticised the old legal and judicial systems as being instruments for the legitimisation of colonial abuses. Commenting on the significance of the reforms, the *Daily Times* in an editorial compared them to the Montagu reforms in India<sup>54</sup> and remarked that the

<sup>51</sup> NAI, CSO 1/32, 112, Cameron to Colonial Office, 17 March 1932, on the Native Court Ordinance.

<sup>52</sup> This shift towards the notion of development in British colonial policy was marked by the introduction of the Colonial Development and Welfare Act in 1929.

<sup>53</sup> Comments by A. C. V. Prior, Attorney General, Legislative Council Debates, eleventh session, 46.

<sup>54</sup> The Montagu reforms refer to the reforms recommended in the Montagu-Chelmsford report in India in 1917. The Secretary of State for India (Edwin Montagu) and the Viceroy (Lord Chelmsford) drew up the report, which suggested the rapid introduction of Western methods of representative government into India and the development of institutions with that end in view.

changes in the judicial system in Nigeria might be regarded as 'the great charter of liberty for the native peoples of this country'.<sup>55</sup> However, the African elites refused to see the reforms simply as a magnanimous gesture by either the colonial administration or Governor Cameron. The Lagos newspapers implied that the reform was inevitable at the time it was undertaken and that it was a consequence of the breakdown of the judicial system.<sup>56</sup>

Whatever may have been its real cause, what is clear is that the 1933 reforms represented a landmark in Nigeria's legal history. Prompted as they were both by the attacks on the colonial administration and its own aspiration to good governance, the reforms reflect the paradox of the colonial legal system in Nigeria. It is a paradox characterised by an underlying concern on the part of the colonial authorities to maintain a semblance of social justice and a regime of rights comparable to that prevailing in England while at the same time extensively and arbitrarily employing law as an instrument of coercion to meet overriding imperial objectives.

#### CONCLUSION

British colonial administration in Nigeria was generally guided by a consideration for the rule of law, which rested on its *laissez-faire* conception of society. The libertarian traditions of English common law and the system of justice extended to the colony professed broad concern for private rights and individual freedom of action. However, the protection of human rights and liberties goes beyond mere policy declarations, the enactment of laws or even official decisions at the central administrative level. Human rights conditions, measured within the parameters of the social impact of the actions and inaction of the state or its agents on the lives of the people, is necessarily more embracing. In the case of colonial Nigeria the introduction of the English legal system, ostensibly extending to the colony the same standard of rights, liberty and justice as prevailed in England, did not in fact guarantee human rights conditions comparable to those prevailing in England. The fact is hardly a matter of contention and is not the point of this article. The point is that the purported extension of English standards of law, legal rights and justice to the colony and the official rhetoric that kept it on the agenda was more of a discourse produced to legitimise and rationalise empire than an objective to which the British were seriously committed. For this reason, the colonial legal regime was underlined by paradoxes and even contradictions between its professed commitment to the rule of law as a guarantee of individual rights and its coercive use of law. For Africans too the language of rights was underlined by similar paradoxes. African elites appropriated and deployed discussion about rights to varied and sometimes contradictory

<sup>55</sup> *Daily Times* (Nigeria), 8 March 1933.

<sup>56</sup> *Nigerian Daily Telegraph*, 18 June 1935.

ends. African elites, considered 'native foreigners', opposed colonial laws on the grounds that they circumscribed the political rights of traditional rulers while at the same time protesting against other colonial laws that sought to extend the authority of traditional rulers over them.

For the colonial authority, however, the rhetoric of extending English standards of rights and justice to the colony was a language made necessary more by the need to 'protect the good name of British administration', legitimise colonial rule and rationalise the violence of colonialism above all else. The articulation of a humane regime of law and rights, or at least an aspiration to it, was seen as a powerfully legitimising tool that would set British colonial rule apart from the arbitrariness and excesses of imperial regimes elsewhere on the continent. Law was stronger than the Maxim gun, not only because it provided a more effective means of colonial control but also because it provided, within the context of the rights discourse, a rationale of empire for the coloniser and a framework for oppositional discourse for the colonised.

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#### REFERENCES

- Adewoye, A. Omoniyi. 1977. *The Judicial System in Southern Nigeria*. London: Longman.
- An-Naim, A. A., and Deng, Francis (eds). 1990. *Human Rights in Africa: cross-cultural perspectives*. Washington DC: Brookings Institution.
- Chanock, Martin. 1985. *Law, Custom, and Social Order: the colonial experience in Malawi and Zambia*. Cambridge: Cambridge University Press.
- Coleman, James S. 1958 (1972). *Nigeria: background to nationalism*. Berkeley CA: University of California Press.
- Conklin, L. Alice. 1998. 'Colonialism and human rights: a contradiction in terms? The case of France and West Africa, 1895–1914', *American Historical Review* 103 (2), 419–42.
- Cooper, Frederick, and Stoler, Ann. 1997. *Tensions of Empire: colonial cultures in a bourgeois world*. Berkeley CA: University of California Press.
- Donnelly, Jack. 1982. 'Human rights and human dignity: an analytic critique of non-Western human rights conceptions', *American Political Science Review* 76 (2): 303–16.
- Elias, Olawole. 1962. *Nigerian Land Law and Custom*. London: Routledge.
- 1963. *The Nigerian Legal System*. London: Routledge.
- Hay, Margaret Jean, and Wright, Marcia. 1982. *African Women and the Law: historical perspectives*. Boston MA: Boston University.
- Howard, Rhoda. 1986. *Human Rights in Commonwealth Africa*. Totowa NJ: Rowman & Littlefield.
- 1990. 'Group versus individual dignity in the African debate on human

- rights' in A. A. An-Naim and Francis Deng (eds), *Human Rights in Africa: cross cultural perspectives*. Washington DC: Brookings Institution.
- Ibhawoh, Bonny. 2000. 'Historicizing the Human Rights Discourse: history, culture and human rights', paper presented at the nineteenth International Congress of Historical Sciences, University of Oslo, 6–13 August.
- Karibi-Whyte, A. G. 1987. *The Relevance of the Judiciary in the Polity: a historical perspective*. Lagos: Nigerian Institute of Advanced Legal Studies.
- Kidder, Robert L. 1978. 'Western law in India: external law and local responses', in Harry M. Johnson (ed.), *Social System and Legal Process*, pp. 159–62. San Francisco: Jossey-Bass.
- Mamdani, Mahmood. 1996. *Citizen and Subject: contemporary Africa and the legacy of late colonialism*. Princeton NJ: Princeton University Press.
- 2000. 'Indirect rule and the struggle for democracy: a response to Bridget O'Laughlin', *African Affairs* 99 (394), 43–6.
- Mann, Kristin. 1991. 'The rise of Taiwo Olowo: law, accumulation, and mobility in early colonial Lagos', in Richard Roberts and Kristin Mann (eds), *Law in Colonial Africa*. Portsmouth NH and London: Heinemann.
- Moore, Sally Falk. 1986. *Social Facts and Fabrications: 'customary' law on Kilimanjaro, 1880–1980*. Cambridge: Cambridge University Press.
- Murray, Martin. 2000. 'Configuring the trajectory of African history', *Canadian Journal of African History* 34 (2): 376–86.
- O'Laughlin, Bridget. 2000. 'Class and the customary: the ambiguous legacy of the Indigenato in Mozambique', *African Affairs* 99 (394), 5–42.
- Obilade, A. I. 1979. *The Nigerian Legal System*. London: Sweet & Maxwell.
- Edge, Mudiaga. 1991. 'The repugnancy doctrine and the proper development of the customary law in Nigeria', in *Towards a Restatement of Nigerian Customary Laws*. Lagos: Federal Ministry of Justice.
- Omu, Fred I. 1978. *Press and Politics in Nigeria, 1880–1937*. London: Longman.
- Osuntokun, Akinjide. 1979. *Nigeria in the First World War*. Atlantic Highlands NJ: Humanities Press.
- Roberts, Richard, and Mann, Kristin (eds). 1991. *Law in Colonial Africa*. Portsmouth NH and London: Heinemann.
- Tamuno, T. N. 1972. *The Evolution of the Nigerian State: the southern phase, 1898–1914*, London: Longman.
- Tibi, Bassam. 1990. 'The European conception of human rights and the culture of Islam', in A. A. An-Naim and Francis Deng (eds), *Human Rights in Africa: cross-cultural perspectives*. Washington DC: Brookings Institution.
- Vaughan, James M., and Kirk-Greene, Anthony H. M. (eds). 1995. *The Diary of Hamman Yaji*. Bloomington IN: Indiana University Press.
- Where, Joan. 1950. *The Nigerian Legislative Council*. London: Faber & Faber.
- Zachernuk, Philip. 2000. *Colonial Subjects: an African intelligentsia and Atlantic ideas*. Charlottesville VA and London: University Press of Virginia.

#### ABSTRACT

This article examines the tensions and contradictions in the use of law as an instrument of coercion to consolidate British control in Nigeria and the legitimising rhetoric of human rights and social justice employed within the context of the operation of the law. The article explores the effects of laws introduced mainly to foster British colonial hegemony against the background of the aspiration to guarantee social justice and forge a 'modern' regime of rights and liberties for native subjects in the colony. It probes the circumstances

that made the rhetoric of rights and liberty imperative for both the colonial regime that employed it to legitimise empire and the African elites who appropriated it to strengthen their demands for representation and self-rule. The aim is not so much to show how the colonial state fell short of its own liberal agenda as to examine the appeal of that agenda and the conditions that made it so central to the colonial project.

#### RÉSUMÉ

Cet article examine les tensions et les contradictions du recours à la loi en tant qu'instrument de coercition pour consolider le pouvoir britannique au Nigeria, ainsi que le langage légitimant des droits de l'homme et de la justice sociale employé dans le contexte de la mise en vigueur de la loi. L'article explore les effets des lois introduites principalement pour entretenir l'hégémonie coloniale britannique sur fond d'aspiration à garantir la justice sociale et à forger un régime "moderne" de droits et de libertés pour les sujets autochtones de la colonie. Il étudie les circonstances qui ont rendu impératif le langage des droits et des libertés à la fois pour le régime colonial qui s'en est servi pour légitimer l'empire et pour les élites africaines qui se l'ont approprié pour renforcer leurs revendications en matière de représentation et d'autonomie. Le but n'est pas tant de montrer comment l'Etat colonial a failli dans son programme libéral que d'examiner l'intérêt de ce programme et les conditions qui l'ont rendu si essentiel au projet colonial.