

# NEW SKIN, OLD WINE: (EN)GAGING NATIONALISM, TRADITIONALISM, AND GENDER RELATIONS

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This Article ascertains a range of variables and influences that make for the selective rendering of history and the manipulative reification of culture for nationalistic purposes. While the bulk of the perspective articulated in this Article is informed by an African experience, it draws on other contexts as well. With particular reference to the Igbos of South-Eastern Nigeria, this Article chronicles the gender-biased renegotiation of some incidents of marriage dissolution to demonstrate that taken-for-granted cultural traditions are, oftentimes, organic historical artifacts inherent in certain social conditions. Locating specific cultural formations in the colonial moment, this Article argues that their affirmation and appropriation is inconsistent with the spirit and politics of “nationalism.”

This argument proceeds in four segments. Part One is a theoretical framework that establishes and evaluates the origins, purposes, and limitations of nationalism. Part Two discusses the double bind implicit in trumping and short-changing feminist platforms under the guise of nationalism. Part Three illuminates the tortuous trajectory and instrumentality of the extant *mélange* known as “customary law.” This Part also challenges the celebration of customary law as the quintessence of an ancestral past. Part Four brings the objective realities of women at the dissolution of marriage by divorce or death to bear on the discussion of the tensions and contradictions between “nationalism” and certain categories of “cultural traditions.” This final Part demonstrates that, regardless of the convoluted history and dynamics of gender relations in Africa, most African nationalist regimes foist the subordinate status of women as a customary given. On this premise, this Article argues that the failure to problematize the representation of indigenous mechanisms that regulate gender relations and the structural and ideological factors that reconstitute and constrain women’s options over time places these regimes on a continuum with the colonial predecessors they once deprecated.

## I. ENGENDERING COLLECTIVE CONSCIOUSNESS, IMAGINING CONTINUITIES

Generally speaking, nationalist ideology suffers from pervasive false consciousness. Its myths invert reality . . . . It preaches and defends continuity, but owes everything to a decisive and unutterably profound break in human history.

Ernest Gellner<sup>1</sup>

[W]e can bring to bear on narratives of nationalism the critical and theoretical insights of analyses of literary narratives . . . . We would do well from this perspective to pay attention to the “narrative voice(s)” who speak these stories, their constructions of time and space, and their postulations of narrative telos.

Mary Layoun<sup>2</sup>

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1. ERNEST GELLNER, *NATIONS AND NATIONALISM* 124-25 (1983).

2. Mary Layoun, *Telling Spaces: Palestinian Women and the Engendering of National Narratives*,

Researchers have demonstrated that nationalism is the outcome of processes in history produced and elaborated where particular conjectures of relations, contingencies, and events in everyday practice render it meaningful.<sup>3</sup> Situated at the point where politics, technology, and social transformation intersect, nationalism emerges as a traditionalistic antidote to the deracination of familiar origins. As such, it purports to provide an alternative for systemic and relational integrity, security, and equilibrium.<sup>4</sup> More precisely, an important aim of nationalist ideology is to orchestrate a potential for wholeness that transcends the estrangement and rupture between individual and society precipitated by antecedent material conditions.<sup>5</sup> Since the imputation of continuity with the past is germane to this end, the nationalist discourse strategically reinterprets and reifies intrinsically organic cultural and historical narratives as though they are autonomous constants rooted in the remotest antiquity.<sup>6</sup> The politicized past that encapsulates a demagogic "vision of reality through a prism of illusion" becomes a rallying point for political legitimation and mobilization.<sup>7</sup>

Ordinarily, if nationalism prospers, it enacts a mode of cultural engineering that, instead of replicating local low culture, attenuates a mosaic of cultural heterogeneity and replaces alien high culture with a local high (literate, specialist-transmitted) culture.<sup>8</sup> Sub-Saharan Africa—where the use of an alien, Eurocentric high culture survived nationalist claims and struggles—exemplifies an exception to this proposition.<sup>9</sup> In this region, in spite of animated rhetoric and iconoclasm against European colonialism, the philosophy underlying the quest for national culture and identity promoted synthesizing the vitality of mingled continuity and innovation to pick out what is best from European culture and dilute it with an indigenous essence.<sup>10</sup>

It is paradoxical that the relevant nationalist elites ultimately aligned with and ratified the self-same alien dispensation whose radical opposition was the impetus and the articulated *raison d'être* for their struggles. This paradox speaks of an aspect of the

in NATIONALISMS & SEXUALITIES 407, 413 (Andrew Parker et al. eds., 1992) [hereinafter NATIONALISMS & SEXUALITIES].

3. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983); ERIC J. HOBSBAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH AND REALITY* 10 (1990); GELLNER, *supra* note 1, at 125; Richard G. Fox, *Introduction*, in *NATIONALIST IDEOLOGIES AND THE PRODUCTION OF NATIONAL CULTURES* 6 (Richard G. Fox ed., 1990) [hereinafter NATIONALIST IDEOLOGIES]; Liisa Malkki, *Context and Consciousness: Local Conditions for the Production of Historical and National Thought among Hutu Refugees in Tanzania*, in *NATIONALIST IDEOLOGIES*, *supra*, at 32, 54.

4. See HOBSBAWM, *supra* note 3, at 10; GELLNER, *supra* note 1.

5. See HOBSBAWM, *supra* note 3, at 10; GELLNER, *supra* note 1.

6. See THOMAS HYLLAND ERIKSEN, *ETHNICITY AND NATIONALISM: ANTHROPOLOGICAL PERSPECTIVES* 73 (1993); RICHARD HANDLER, *NATIONALISM AND THE POLITICS OF CULTURE IN QUEBEC* 27 (1988).

7. GELLNER, *supra* note 1, at 58.

8. See GELLNER, *supra* note 1, at 57; HOBSBAWM, *supra* note 3, at 92. See also Simon Roberts, *Introduction: Some Notes on "African Customary Law,"* 28 J. AFR. L. 1, 3 (1984).

9. See GELLNER, *supra* note 1, at 81.

10. JOHN ILIFFE, *A MODERN HISTORY OF TANGANYIKA* 327 (1979).

contradictions of nationalism, both as a phenomenon and as an ideology. These contradictions cumulatively signify a Janus-facedness that betrays the inner realities of nationalism.<sup>11</sup> The element of the contradiction that is most apposite for our immediate purposes lies in this fact: In principle, nationalism purports to counter imperialist depredations by fostering a wholesale return to ostensibly ancestral traditions and values; in reality, it routinely deploys bounded cultural objects and imperialist stereotypes that are demonstrably discrepant and dissonant with the specificities of historical experiences.<sup>12</sup> The centrality of this element derives from its bearing on gender relations as a paradigm of the contradictions of nationalism.

## II. BREACHED MANIFESTOES, CRISES OF CONFIDENCE: IMPLICATIONS FOR WOMEN

Seek the political kingdom and all will be added to you.

Kwame Nkrumah<sup>13</sup>

It is difficult to start a revolution, more difficult to sustain it. But it's later, when we've won, that the real difficulties will begin.

The Battle of Algiers<sup>14</sup>

[I]n various parts of the "Third [W]orld," the struggle for women's emancipation was expediently connected to an anti-colonial, nationalist struggle. After Independence was won, militant women found themselves, typically, back in "normal" subordinate roles and came to recognize the dangers of conflating national liberation with women's liberation.

Ketu H. Katrak<sup>15</sup>

The study of gender relations affords a framework within which to examine the dilemma and dissonance between the propaganda and the practices of nationalism. According to nationalist ideology, the preeminent criteria for exclusion and inclusion from the structures and institutions of society is determined by the boundaries of the nation.<sup>16</sup> Given the historical conditions of its origin, the dictates of efficient nationalist resistance enjoin the consolidation of disparate currents in the body politic. Consequently, it is not unusual for perceived fractures and counter-politics to be censored and victimized as treacherous of the compelling irredentist agenda. This strategy of containment often translates into an atmosphere of coerced or studied cooperation for some persons with a different plan of action.

11. See BASIL DAVIDSON, *THE BLACK MAN'S BURDEN* (1992). Compare R. Radhakrishnan, *Nationalism, Gender, and the Narrative of Identity*, in *NATIONALISMS & SEXUALITIES*, *supra* note 2, at 77, 84 and *NATION AND NARRATION* (Homi K. Bhabha ed., 1990).

12. See Rhonda Cobham, *Misgendering the Nation: African Nationalist Fictions and Nuruddin Farah's Maps*, in *NATIONALISMS & SEXUALITIES*, *supra* note 2, at 42, 44.

13. Quoted in DAVIDSON, *supra* note 11.

14. *THE BATTLE OF ALGIERS* (Antonio Musu, Igor Films of Rome, Stella Productions 1988).

15. Ketu H. Katrak, *Indian Nationalism, Gandhian "Satyagraha," and Representations of Female Sexuality*, in *NATIONALISM & SEXUALITIES*, *supra* note 2, at 395, 395.

16. ERIKSEN, *supra* note 6, at 102.

Besides the conflation of causes, the exigency and frenzy of the fight against "the enemy from the outside" tends to preclude meaningful consideration of the credentials or potentialities of nationalism.<sup>17</sup> The tried and proven lessons of international history reveal, however, that, in the final analysis, the pragmatic exaltation of the nationalist agenda over competing subaltern politics becomes taken at face value, perpetuating arbitrary exclusions in nascent nation-states. Contestable assumptions and mythical claims are uncritically integrated into the newly established material and ideological order, often settling the equation in favor of the elite. The resultant inequality, appallingly reminiscent of the condition it emerged to palliate, lends credence to the designation of nationalism as a perversity that demands freedom with one hand and denies it with the other.<sup>18</sup>

On a number of occasions, women have been known to repress protests against what could validly qualify as gender-based internal colonialism to avoid "giving fuel to the enemies" of the noble cause of political self-determination.<sup>19</sup> As the following discussion will show, the relative silence and invisibility of women is also attributable to the gravitation of the colonial administration to men.<sup>20</sup> Some nationalists strategically exploit this colonial discontent to coopt gender-specific struggles and discourses. Despite assurances that self-governance would be prophylactic of gender-related inequities, however, nationalism typically fulfills itself as a bastion of patriarchal aspirations, authority, and privilege.<sup>21</sup> A rude awakening comes for women when feminist interests and discontents, which were muted and deferred for the benefit of the nationalist agenda, persist unentertained and unremedied, irrespective of independence.<sup>22</sup>

With the travails of sociopolitical dis-ease, everyday events, processes, and relationships are spontaneously interpreted by evoking a putative past of pristine purity as a kind of moral blueprint.<sup>23</sup> In the bid to reclaim this perceived past, nationalist elites seldom pause to acknowledge or address discernible conflicts, tensions, and lacunae. They conceive and pursue programs that are rarely adapted to the complexities of the

17. See DAVIDSON, *supra* note 11, at 163; NATION AND NARRATION, *supra* note 11, at 3.

18. See DAVIDSON, *supra* note 11, at 18.

19. See Marie-Aimée Hélie-Lucas, *Bound and Gagged by the Family Code*, in 2 *THIRD WORLD—SECOND SEX* 14 (Miranda Davies ed., 1987). A recent illustration of this hierarchization of priorities is offered by the African National Congresswomen's statement, "It would be suicidal for us to adopt feminist ideas. Our enemy is the system and we cannot exhaust our energies on women's issues." Anne McClintock, *No Longer a Future Heaven: Women and Nationalism in South Africa*, 51 *TRANSITION* 104, 118 (1991) (quoting STATEMENT OF DELEGATION TO THE NAIROBI CONFERENCE ON WOMEN (1985)).

20. See L. Amede Obiora, *Reconsidering African Customary Law*, 17 *LEGAL STUD. F.* 217 (1993).

21. See McClintock, *supra* note 19, at 122.

22. The overwhelming male cast, gendered power-base, and sexist implications of nationalist regimes has been discussed and referenced in other forums. See Hélie-Lucas, *supra* note 19, at 14 ("I will certainly admit that Western right wing forces may and will use our protests, especially if they remain isolated. But it is as true to say that our rightist forces exploited our silence."). See also Gayatri Chakravorty Spivak, *Woman in Difference: Mahasweta Devi's "Douloti the Bountiful,"* in *NATIONALISMS & SEXUALITIES*, *supra* note 2, at 96, 97; McClintock, *supra* note 19, at 122.

23. Cf. Malkki, *supra* note 3, at 37.

social categories and roles of gender.<sup>24</sup> In this scheme, masculinity is idealized as the foundation of the nation and society, and the home is reified as a sacrosanct sanctuary from the profanities of the material world.<sup>25</sup> By the logic of this scheme, women, of course, take center stage in the cult of domesticity.<sup>26</sup> Defined as the guardians of morality and traditional order, women are scape-goated, and simultaneously targeted as regenerative ducts, for most of the malaise inherent in societal shifts and disintegrations.<sup>27</sup> Moral turpitude is asserted and accentuated as a symptom of anomie to externalize disorder or to feign alienation from a more "natural" definition of self and to usher in animated (re)definitions of gender roles to control female sexuality.<sup>28</sup>

Several attempts have been made to locate national culture as a function of struggles and asymmetric relations and structures of power. Fox analyzes national culture as a process that evolves amidst contestations.<sup>29</sup> Williams elaborates on the issue by explaining that when culture is objectified as tradition, social emphasis shifts from neutral interpretations of human biogenetic capabilities and ecological constraints to a struggle to control the configuration of meanings and their practical implications for resource distribution.<sup>30</sup> An interesting dimension is introduced by Eriksen who sheds light on how ideologists always select and reinterpret those aspects of culture and history that legitimate a particular power constellation.<sup>31</sup>

These theories are analogous to Fanon's observation about national culture. According to Fanon, a national culture under colonial domination is an ultimately stratified and stratifying terrain shot through with centrifugal tendencies; under nationalism, national culture is a mummification of fragments which, because they are static, are in fact symbols of negation and outworn contrivance.<sup>32</sup> Concluding, Fanon insists that nationalism's ratification of spurious cultural constructs and its resuscitation of desuetude in the name of traditionalistic politics is an instrumental "throwback to the

24. See Keebet von Benda-Beckmann, *Development, Law, and Gender-Skewing*, 30/31 J. LEGAL PLURALISM 87 (1990-91); Els A. Baerends, *Woman is King, Man a Mere Child: Some Notes on the Socio-Legal Position of Women among Anufom in Northern Togo*, 30/31 J. LEGAL PLURALISM 33 (1990-91).

25. See GEORGE L. MOSSE, NATIONALISM AND SEXUALITY: RESPECTABILITY AND ABNORMAL SEXUALITY IN MODERN EUROPE 17, 18 (1985).

26. In the words of Radhakrishnan, "'woman' becomes the mute but necessary allegorical ground for the transactions of nationalist history." Radhakrishnan, *supra* note 11, at 84. See also Partha Chatterjee, *The Nationalist Resolution of the Women's Question*, in RECASTING WOMEN: ESSAYS IN INDIAN COLONIAL HISTORY 233, 239 (Kumkum Sangari & Sudesh Vaid eds., 1989); MOSSE, *supra* note 25.

27. See Valentine Moghadam, *Revolution, Islam and Women: Sexual Politics in Iran and Afghanistan*, in NATIONALISMS & SEXUALITIES, *supra* note 2, at 424, 428; Carolyne Dennis, *Women and the State in Nigeria: The Case of the Federal Military Government (1984-85)* in H. AFSHARR, WOMEN, STATE AND IDEOLOGY 13 (1987).

28. In this setting, the "modern woman" becomes the deviant who symbolizes the perceived disappearance of the traditional docile and economically dependent woman. See Cobham, *supra* note 12, at 46.

29. Fox, *supra* note 3, at 6, 10.

30. Brackette F. Williams, *Nationalism, Traditionalism, and the Problem of Cultural Authenticity*, in NATIONALIST IDEOLOGIES, *supra* note 3, at 112, 127.

31. ERIKSEN, *supra* note 6, at 118.

32. See FRANTZ FANON, THE WRETCHED OF THE EARTH (1966).

laws of inertia."<sup>33</sup> In keeping with these paradigms of tension and indeterminacy, it has been vigorously argued that the process of ascertaining the presumably immutable and reproducible core of national culture privileges and represents a staking out of a position by a particular constituency predominated by male elites and supported by the State.<sup>34</sup>

The preceding insights offer a point of entry for an examination of the transitions in gender roles and relations occasioned by the formalization of so-called African customary law in the wake of colonialism and nationalism. In the next Part, I investigate the contingencies that motivated and affected formalization, both as an instrument of colonial rule and as an instrument for the furtherance of nationalism. The Part falls into two subparts. The first focuses on the making of customary law in the colonial era and its alienating implications for pertinent constituencies. The second locates formalization as a function of nationalist flirtations with the false options of "tradition" and "modernity."

### III. RATIFYING AND CONGEALING ALIENATIONS: REFLECTIONS ON FORMULAIC TRADITIONS

#### A. *The "Evolution" of Customary Law*

The nationalism which produced the nation-states of newly independent Africa . . . was not a restoration of Africa to Africa's own history, but the onset of a new period of indirect subjection to the history of Europe.

Basil Davidson<sup>35</sup>

Just because so much of what subjectively makes up the modern "nation" consists of [invented] constructs . . . , the national phenomenon cannot be adequately investigated without careful attention to the "invention of tradition."

Eric J. Hobsbawm<sup>36</sup>

Colonialism was an especially fluid era marked by transformative events.<sup>37</sup> Its political economy altered the cultural, social, and economic landscape of the encapsulated communities as well as the function, significance, and ideology of socio-legal axioms. For a variety of reasons—financial, political, and administrative—the British policy of colonial administration was one of indirect rule.<sup>38</sup> The political sensibilities of the policy meant that indigenous systems of law and authority were incorporated into the apparatus

33. *Id.* at 237.

34. See, e.g., Obiora, *supra* note 20; Elizabeth Isichei, *Myth, Gender and Society in Colonial Asaba*, 61 AFR. 513 (1991). For a dramatic illustration of the value and power of constructs such as "modernity" and "tradition," see DAVID WILLIAM COHEN & E.S. ATIENO ODHIAMBO, *BURYING S.M.: THE POLITICS OF KNOWLEDGE AND THE SOCIOLOGY OF POWER IN AFRICA* (1992).

35. DAVIDSON, *supra* note 11, at 10.

36. Eric J. Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 15 (Eric J. Hobsbawm & Terence Ranger eds., 1983) [hereinafter *INVENTION OF TRADITION*].

37. SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880-1980* (1986); Sally Falk Moore, *History and the Redefinition of Custom on Kilimanjaro*, in *HISTORY AND POWER IN THE STUDY OF LAW* 277, 278 (June Starr & Jane F. Collier eds., 1989).

38. Sara Berry, *Hegemony on a Shoe String* (unpublished manuscript, on file with the author) (cited in Obiora, *supra* note 20).

of the colonial system of governance.<sup>39</sup> A large portion of the day-to-day administration of justice was delegated to courts that were constituted to administer "native law and custom."<sup>40</sup> In Southern Nigeria, as in many parts of Africa, a native court consisted of appointees, including non-natives, sitting with or without assessors.<sup>41</sup>

The native court was basically foreign in substance and process. Its procedures were informed by English legal traditions, and it was commonly presided by an English District Commissioner who rendered the ultimate ruling on the validity of a custom. In discharging this responsibility, the Commissioner was mandatorily required to recognize a rule of custom only if he found that it was not contrary to public policy, incompatible with existing statute, unreasonable, or repugnant to natural justice, equity, and good conscience.<sup>42</sup> This fiat enfranchised ethnocentrism as commissioners were notoriously prone to recognize customs that resonated with their situated and culturally-specific understandings.<sup>43</sup> The foreign-ness of the court prompted the then Chief Justice of Nigeria to remark, "the main and, to my mind, insuperable objection to the Southern Nigeria native courts is [that] they are not native courts at all."<sup>44</sup>

The native courts ordinarily proceeded without critically evaluating the historical circumstances that may have interfered with any possibility for relative autonomy in the operation of customs.<sup>45</sup> In reality, however, the concomitant changes that attended Western contact exacerbated indeterminacies and created significant voids for which old ways were no longer available or viable, and legal discourses vacillated in keeping with the imperatives of disrupted conditions and patterns of life.<sup>46</sup> Notwithstanding this reality, customs regarding irrevocably altered institutions and practices were "established" and described as resting on immemorial traditions, as though they were changeless and unchanged.<sup>47</sup> Consequently, judicial procedures and transactions were set up to ignore the formative character of relevant cultural traditions and the degree to which they were constructs adapted for the management of massive social shifts and crises. The process also undermined the risk of opportunism and of embellishment emanating from the

39. LAW IN COLONIAL AFRICA (Richard Roberts & Kristin Mann eds., 1990).

40. See TASLIM OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* (1956).

41. S.N. NWABARA, *IGBOLAND: A CENTURY OF CONTACT WITH BRITAIN, 1860-1960* at 171 (1977); F. A. Ajayi, *The Future of Customary Law in Nigeria*, in AFRIKA INSTITUUT, *THE FUTURE OF CUSTOMARY LAW IN AFRICA* 42 (1956).

42. ANDREW EDWARD WILSON PARK, *SOURCES OF NIGERIAN LAW* (1963); AKINOLA AGUDA, *THE LAW OF EVIDENCE IN NIGERIA* 92, 98 (1974). Cf. Eastern Nigeria High Court Law, ch. 61, §§ 20(1), 22; Nigerian Evidence Act, § 14(3) (1958).

43. B. O. NWABUEZE, *MACHINERY OF JUSTICE IN NIGERIA* 70 (1963).

44. C. J. Speed, *Memorandum Submitted to the Governor*, in LUGARD, *AMALGAMATION REPORT, 1912-18* cmd. 468; NWABUEZE, *supra* note 43, at 70.

45. ANTONY N. ALLOTT, *THE LIMITS OF LAW* 57 (1980).

46. See LAW IN COLONIAL AFRICA, *supra* note 39.

47. Martin Chanock, *Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia*, in AFRICAN WOMEN & THE LAW: HISTORICAL PERSPECTIVES 53, 57, 59 (Margaret Jean Hay & Marcia Wright eds., 1982); Elizabeth Colson, *The Impact of the Colonial Period on the Definition of Land Rights*, in 3 L.H. GANN & PETER DINGMAN, *COLONIALISM IN AFRICA, 1870-1960* at 221 (Victor Turner ed., 1971); Fox, *supra* note 3, at 6, 11.

deficiencies of memory as a vault.<sup>48</sup> The dispositive consideration in the integration and development of "customary law" was that it was a cost-efficient constituent of the colonial structure and apparatus of governance.<sup>49</sup>

The primary mode of ascertaining "customary law" was by oral testimonies responsive to a series of hypothetical inquiries. By this mode, opinions of persons perceived as possessing "special knowledge," a term as problematic as it is ambiguous, were introduced and admitted as evidence of rules of customary law.<sup>50</sup> Additionally, in establishing "customary law," documentary sources were admissible as evidence.<sup>51</sup> Courts would also take judicial notice of a custom; and, over the years, they amassed a body of case law to sustain a system of *stare decisis*.<sup>52</sup> Granting that judicial precedents are not merely evidence of the law but a source of customary law, this system offered the courts considerable opportunity to play a law-making role.<sup>53</sup> However, where the precedential finding is flawed on account of unreliable evidence, *stare decisis* becomes problematic. The importance of discounting for the unreliability of initial evidence is compounded by the possibility that judicial recordings may reflect, not rules generated by empirical practices, but the judges' reinterpretation of these rules. The expedience of healthy skepticism that these concerns signify sustains Antony Allott's apt inquiry into whether a court's formulation and modification of the customary law within the borrowed framework of a western legal system can reflect a definition of customary law, in terms of the practices habitually followed by the peoples subject to that law.<sup>54</sup>

Like *stare decisis*, reliance on oral and documentary evidence equally engenders complications; it leads to the exaltation of distortions that bear limited relationship to the reality of lived experiences.<sup>55</sup> The problem of "feedback"<sup>56</sup> underscores the reciprocation between folk accounts of cultural traditions and versions recounted in popular

48. Obiora, *supra* note 20.

49. Berry, *supra* note 38.

50. Nigerian Evidence Act, ch. 62, § 58 (1958). This provision stipulates that, in deciding questions of native law and custom, both the opinion of native chiefs or other persons having special knowledge of native law and custom, and any book or manuscript recognized by the natives as legal authority, are relevant.

51. *Id.*

52. MARTIN CHUKWUKA OKANY, *THE ROLE OF CUSTOMARY COURTS IN NIGERIA* 239 (1984); Gordon Woodman, *The Family as a Corporation in Ghanaian and Nigerian Law*, 11 AFR. L. STUD. 1, 1 (1974). See also *Nwugege v. Adigwe*, 11 Nig. L. Rep. 134 (1934); Nigerian Evidence Act, § 14(2), 73(1) (1958) (providing that where a custom has been acted upon by a court of superior co-ordinate jurisdiction, proof of such custom is not necessary).

53. JOHN WILLIAM SALMOND, *SALMOND ON JURISPRUDENCE* 141 (1966); G. Ezejiolor, *Sources of Nigerian Law*, in *INTRODUCTION TO NIGERIAN LAW* 1, 13 (C. O. Okonkwo ed., 1980).

54. Antony N. Allott, *African Customary Law: The Problem of Concept and Definition*, 9 J. AFR. L. 82-83 (1965); ANTONY N. ALLOTT, *NEW ESSAYS IN AFRICAN LAW* 147 (1970).

55. Terence Ranger, *The Invention of Tradition in Colonial Africa*, in *INVENTION OF TRADITION*, *supra* note 36, at 211, 250-51.

56. I have more fully argued the problem of feedback in Obiora, *supra* note 20. See also ANTONY N. ALLOTT, *LAW AND LANGUAGE* (1965); David P. Henige, *The Problem of Feedback in Oral Tradition: Four Examples from the Fanti Coastlands*, 14 J. AFR. HIST. 223 (1973); David P. Henige, *Truths Yet Unborn? Oral Tradition as a Casualty of Culture Contact*, 23 J. AFR. HIST. 395 (1982).

documents.<sup>57</sup> The documents are presumably informed by folk accounts, but the circumstances and methods of their production may result in enframing biased, innovative, inappropriate, or absolutely inaccurate reconstructions. Despite their problematic derivation, the documents eventually become assimilated into the collective consciousness, adulterating supposedly original folk accounts.<sup>58</sup> Courts rely on scholarly writings, official gazettes, and other kinds of publications and bibliographic materials, not merely as evidence of what the law may be, but as works of authority.<sup>59</sup> In so far as these works characteristically transform what they purport to catalogue and in so far as they are mainly syntheses of arguably questionable testimonies—rather than the findings of representative empirical research—their susceptibility to the problem of feedback erodes their authority.

The usurpation of indigenous consuetude for colonial purposes could have been abortive but for a reasonable degree of connivance and initiative by Africans.<sup>60</sup> The greater proportion of “expert” and other witnesses were commonly persons who had reason to redefine the rules of custom. In *In the Estate of Alayo*, Justice Brook remarked that “[m]ost of the witnesses did not know what the . . . native law and custom as to succession [were] and some had invented or adopted it to support their claims to share the estate.”<sup>61</sup> The official commitment of the colonialists to re-enact and preserve what they perceived as residuary norms from a past of pristine integrity empowered litigants to functionally tailor and couch their claims in terms of immemorial customs and values.<sup>62</sup> To paraphrase John Iliffe, Europeans believed that Africans abode by ancient traditions; Africans concocted ancient traditions as a passport to transactional success.<sup>63</sup> In order to weather the impact of change and to protect their interests within the colonial framework, women and men, affected differently by the processes of change and situated differently in the power structure, manipulated cultural narratives.<sup>64</sup> Their recollections of the past,

57. This problem is forcefully illustrated in an interesting study of the utilization of particular historical accounts as tools in the contemporary creation of identities and in politics. The study found that the relevant historicity substantially corresponded to “beyond accurate recording” of events, processes, and relationships published in colonial and post-colonial historical texts that represented subversive recasting and reinterpretation of the past in fundamentally moral, categorical terms. See Malkki, *supra* note 3, at 37.

58. The problem of feedback may be particularly acute in a context of legal pluralism where hierarchical spheres of legal activity (for example, statutory versus customary) interact, with one ordering and reordering the other. See J. F. Holleman, *Disparities and Uncertainties in African Law and Judicial Authority: A Rhodesian Case Study*, 17 AFR. L. STUD. 1 (1979).

59. ALLOTT, *NEW ESSAYS IN AFRICAN LAW*, *supra* note 54, at 287.

60. Ranger, *supra* note 55, at 252.

61. 19 Nig. L. Rep. 88, 93 (1946). See also *Lewis v. Bankole*, 1 Nig. L. Rep. 81 (1908).

62. See Martin Chanock, *Law, State and Culture: Thinking about “Customary Law” after Apartheid*, in ACTA JURIDICA, AFRICAN CUSTOMARY LAW 52 (1991); Martin Chanock, *Neo-Traditionalism and the Customary Law in Malawi*, 16 AFR. L. STUD. 80, 85 (1978) [hereinafter *Malawi*].

63. ILIFFE, *supra* note 10, at 324.

64. Terence Ranger suggests, for example, that small-scale gerontocracies and establishment of control by elders of land allocation, marriage transactions, and political office were a defining feature of the twentieth century and developed to counter the competitive dynamic of the nineteenth century that created opportunities for young men to establish independent bases of economic, social, and political influence. See Ranger, *supra*

as one commentator observed, became more the expression of needs than of knowledge.<sup>65</sup> The touchstone of merit for a particular narrative depended on whether the anxieties and aims of the witnesses coincided with the moral and political predilections of colonial officials.<sup>66</sup> Those whose "tradition" lost a case returned subsequently to litigate their claims with "traditions" doctored more carefully for viability.<sup>67</sup>

Against this background, several scholars maintain that "traditional" African culture is an "invented tradition" that distorts the past but became itself the reality through which a good deal of the colonial encounter was expressed.<sup>68</sup> This ideational corrective accentuates the contextuality of cultural narratives and their susceptibility to cooptation, the tenuousness of the relationship between contemporary and past cultural forms, as well as the agency of cultural participants. However, in extremity, the insight reduces culture to a set of manipulative responses, obscuring the survival of cultural elements, the capacity of cultural participants for resistance, and the normative effects of rules on behavior. For these reasons, some scholars, while conceding the merits of the revisionist insistence that customary law is "a tendentious montage with slender links to the past,"<sup>69</sup> make a cogent case for a shift in emphasis from the elements of novelty to a focus on the "exploitation of an existing repertoire, or the artificial sustaining of ancient forms, with detrimental, constraining effects upon the ruled."<sup>70</sup>

A close reading suggests that this perspective is implicit in several versions of the revisionist account that highlight the eclecticism of "invented tradition." To effectively conjure and assert a link with the past, "invented tradition" must exhibit some smatterings of "authenticity." Its appeal precludes its manifestation as an obvious aberration, and its validation depends on the extent to which it resonates and builds on popular sentiments and folkways.<sup>71</sup> Accordingly, it tends to obtain as a renegotiation of cultural content, rather than as an uncompromisingly top-down imposition of unintegrated form and meaning. The revisionist account emerged partly as a reaction to ahistorical

note 55, at 211.

65. See *Malawi*, *supra* note 62, at 85 (citing MARK BLOCH, *FEUDAL SOCIETY* 113-14 (1965)).

66. WYATT MACGAFFEY, *CUSTOM AND GOVERNMENT IN THE LOWER CONGO* 207-08 (1970); Chanock, *supra* note 47, at 53; F. Snyder, *Colonialism and Legal Forms: The Creation of Customary Law in Senegal*, 19 *J. LEGAL PLURALISM* 19, 49 (1981).

67. See MACGAFFEY, *supra* note 66.

68. See, e.g., MARTIN CHANOCK, *LAW, CUSTOM & SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI & ZAMBIA* (1985); *LAW IN COLONIAL AFRICA*, *supra* note 46; Colson, *supra* note 47; Ranger, *supra* note 55, at 211, 212, 261-62.

69. Roberts, *supra* note 8, at 3. Roberts forcefully contends that the idea of the invented tradition implies an impoverished understanding of the operation of ideology that conjures a vision of the manufacture, transmission, and assimilation, intact of some new world view, and the corresponding destruction of existing cognitive and normative foundations of the lifeworld. His analysis suggests that "customary law" was neither a total nor a totalizing instrument of domination; its rules offered avenues of escape, and its meanings or implications for the lifeworlds of Africans—while subject to covert penetration and co-option—also provided the means of qualified autonomy. See Roberts, *supra* note 8. See also NATIONALIST IDEOLOGIES, *supra* note 3; AJGM Sanders, *How Customary is African Customary Law?*, 20 *COMP. & INT'L L. J. S. AFR.* 405 (1987).

70. Roberts, *supra* note 8, at 4.

71. See HOBBSBAWM, *supra* note 3, at 92. See also Roberts, *supra* note 8.

romanticizations and immortalizations of an inviolate past. It dispels the myth of cultural traditions as natural, inert, and indispensable;<sup>72</sup> it emphasizes inventiveness and discontinuities as a caveat against banal apologists and reactionaries who selectively invoke "customary law" to entrench a particular agenda.<sup>73</sup>

On this note, a focus on relative impact is less misguided and sterile than a polarization of the issue in terms of "fictional" and "genuine." Whether real or manufactured, the acid test then becomes the implication of "customary law" for the ground-level realities of the affected population. There is nothing vexatious about rules of customary law that innovate in keeping with a situation of flux. There is ample ethno-historical evidence that dynamism is an abiding characteristic of the rules of custom. Between two successive regimes, the difference may largely be a question of degree. In one context the motion may be often understated and unperceived; in another context it may be more intense. In pre-colonial Africa, which is typically the reference point for the definition of "customary law," custom was certainly valued; but it was loosely defined and infinitely flexible.<sup>74</sup> The exigencies of survival necessitated some conservatism; yet, at the same time, growth and evolution from old needs to new needs compelled the spontaneous and incessant accommodation of adaptations and fresh initiatives.<sup>75</sup>

It was the process of establishing "customary law" that led to a manner of regularization, transforming fluid accounts of relationships into fixed rules, and negotiable claims into enforceable rights.<sup>76</sup> This is where the problem lies. The glorification of uncharacteristic orthodoxy, and orthodoxy that translates into inequity on several occasions, is a valid point of departure for deconstructionists and revisionists. As Terence Ranger poignantly put it, it is not merely that so-called "custom" changed to accommodate new circumstances or that it in fact concealed new balances of power and wealth, since this was precisely what custom in the past had always been able to do. The point is that these particular constructs of "tradition" became codified, rigid, and unable to readily reflect change in the future.<sup>77</sup> Paradoxically, the colonial regime of "customary law," which was conditioned by a specific set of ideas and exigencies, outlived its origins, almost intact.<sup>78</sup> In post-independence Africa, customary law remains more an imprint of colonial codification than it is a restoration of some ancestral past.<sup>79</sup>

72. A common parlance analogue of this view is the saying, "tradition was once a bright new idea."

73. See Obiora, *supra* note 20.

74. Cf. Richard Abel, *Custom, Rules, Administration, Community*, 28 J. AFR. STUD. 6 (1984).

75. See Ranger, *supra* note 55. The dichotomy of conservatism and change was the great provider of emotional tension. See DAVIDSON, *supra* note 11, at 82-83.

76. See J. F. HOLLEMAN, *SHONA CUSTOMARY LAW* (1952); Chanock, *supra* note 47, at 65.

77. Ranger, *supra* note 55.

78. See H. F. MORRIS & J. S. READ, *INDIRECT RULE AND THE SEARCH FOR JUSTICE*, ch. 6 (1972); FRANCIS C. SNYDER, *CAPITALISM AND LEGAL CHANGE* (1981); Peter Fitzpatrick, *Traditionalism and Traditional Law*, 28 J. AFR. L. 20 (1984); Ranger, *supra* note 55. Cf. Campbell MacLachlan, *The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm—A Review Article*, 37 INT'L & COMP. L. Q. 368 (1988).

79. Ranger, *supra* note 55, at 211.

*B. The Reformation of Customary Law*

The problem with nationalism is that it continues the baleful legacies of Eurocentrism and Orientalism. "Third World" nationalisms have to choose between "being themselves" and "becoming modern nations."

Partha Chatterjee<sup>80</sup>

The real tragedy . . . is when postcolonial nationalisms internalize rather than problematize the Western blueprint in the name of progress [and] modernization.

R. Radhakrishnan<sup>81</sup>

As it turned out, nationalism generally resulted in political decolonization rather than double politico-epistemological decolonization with radical implications for structural, policy, conceptual, and cognitive modalities.<sup>82</sup> The affirmative project of nation-building strengthened, instead of subverting, establishments that were vestigial of colonialism. This outcome is attributable to several reasons. One reason relates to the fact that, from the standpoint of the nationalists of the new nation-states, independence necessitated the amputation or "modernization" of whatever seemed to be suggestive of indigenous savagery. Implicit in the ideology of modernization was an obsessive concern with the West and an overwhelming preoccupation with allowing for the enjoyment of "all good things which western civilization has produced in the two millennia of its history."<sup>83</sup> In this context, "progress" was interpreted to mean the wholesale adoption and pseudo-adaptation of Western scenarios and solutions.

In the interest of clarity, it is important to indicate that the arguments articulated here do not identify a problem with the ideal of "modernization," per se. Rather, the problem is principally determined to inher in the way that "modernization" has been defined and in those who have controlled its implementation. Although at times responsive to objective conditions, modernization remains obliged to an imperialistic logic and ratifies a civilizing agenda that is squarely situated on appalling racist stereotypes.<sup>84</sup> Moreover, to the extent that the modernizing mission that evokes the West as a model allows Anglicized African elites to take the lead, its perpetuation is arguably born of self-interest.<sup>85</sup> Further, in material respects, the strategy is strikingly at variance with the traditionalistic stance of African nationalism, although, as will become apparent from the next subpart, this divergence is reconciled in certain contexts by the selective but determined attempts to define and enforce "tradition."

80. PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD (1993).

81. Radhakrishnan, *supra* note 11, at 86.

82. See CHATTERJEE, *supra* note 80.

83. SPIRO, POLITICS OF AFRICA: PROSPECTS SOUTH OF THE SAHARA 6 (1963). See also Robert Allen Sedler, *Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System*, 13 ST. LOUIS U. L.J. 195 (1968).

84. DAVIDSON, *supra* note 11, at 18-19. See also BASIL DAVIDSON, THE AFRICAN AWAKENING 95 (1955).

85. ILIFFE, *supra* note 10, at 334; Ranger, *supra* note 55, at 211. The point is well taken that it would be diserving to completely reduce the actions of the nationalist elites to opportunistic and blindly imitative impulses. See GELLNER, *supra* note 1, at 61; HOBBSAWM, *supra* note 3, at 92.

Nationalistic legal engineering entailed the juxtaposition of a false dichotomy between "tradition" and "modernity."<sup>86</sup> By virtue of this juxtaposition, state law became a projection celebrated as a magic node of access to modernity and socio-economic vibrancy, while folk law became shunned and scape-goated as a impediment to development.<sup>87</sup> This dichotomy culminated in several reformatory interventions in the realm of "customary law." The forms of intervention most pertinent for our immediate purposes relate to the endowment of "customary law" with the trappings of modernity, such as codification, and the exorcising of perceived primitive relics. These processes tended to be imbracated and interactive, rather than mutually exclusive.

To some extent, the intervention was tantamount to an uncritical acceptance of the racist claim that pre-colonial Africa had acquired no experience relevant and valid to any process of self-government.<sup>88</sup> Yet, curiously enough, it was a latent refutation of denigrations of the authenticity of African law.<sup>89</sup> By and large, however, the notion of uniformity intrinsic in codification appealed to nationalist sentiments and aspirations to "re-establish" order and to construct a sense of collective identity.<sup>90</sup> The establishment of a reasonably permanent and standardized script afforded the possibility of cultural and cognitive storage.<sup>91</sup> It offered a semblance of order and an expedient means of managing and accommodating complex diversity.

Just as their colonial predecessors, who, influenced by the metropolitan legal form, assumed that customary law was a coherent, consistent, and insular series of determinate and definable core principles that could be categorized for jural purposes and administrative facility, governmental agencies in the nascent states engaged in the systemization of the "rules" of customary law to effect certainty and predictability in "rule enforcement."<sup>92</sup> To this end, they attempted to extract systematic, neat, and fixed rules from ideal reconstructions recorded in the reports of local consultants, archivists,

86. On some level, the tension between tradition and modernity reflected the dilemma inherent in the reassessment and selection that attends culture contact. However, the dichotomy is false in so far as it represents the concepts as discrete and adverse. As was previously indicated, present understandings of tradition are relatively modern and modernistic, and this reconstitution is made possible by the negotiable character of tradition.

87. Cf. Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351 (1969); Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y REV. 29 (1969); Franz von Benda-Beckman, *Scape-Goat and Magic Charm: Law in Development Theory and Practice*, 28 J. LEGAL PLURALISM 129 (1989); . See also ALLOTT, *supra* note 54, at 177.

88. See DAVIDSON, *supra* note 11. For commendations of the colonial administration as having conferred no greater benefit than English law and justice, see B. O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES OF AFRICA 39 (1973); Kenneth Roberts-Wray, *Adaptation of Imported Law in Africa*, 4 J. AFR. L. 66 (1960). *But cf.* W. R. CROCKER, ON GOVERNING COLONIES, BEING AN OUTLINE OF THE REAL ISSUES AND A COMPARISON OF THE BRITISH, FRENCH & BELGIAN APPROACHES TO THEM 84 (1947); Abdul Paliwala et. al., *Economic Development and the Changing Legal System in Papua New Guinea*, 16 AFR. L. STUD. 3 (1978).

89. See Obiora, *supra* note 20.

90. OKANY, *supra* note 52, at 236 (marshalling the arguments for and against codification). See also I. OLUWOLE AGBEDE, LEGAL PLURALISM 272 (1991); Sedler, *supra* note 83, at 215-17.

91. See HOBBSAWM, *supra* note 3; GELLNER, *supra* note 1, at 8.

92. Cf. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

travellers, traders, missionaries, commissioned applied anthropologists and other researchers, assessors, expert witnesses, and judicial precedent.<sup>93</sup>

Eastern Nigeria is an example of a region that embarked on a project of recording and restating customary law.<sup>94</sup> Although the legislative mechanism for the reduction of customary law into writing existed as far back as 1948,<sup>95</sup> it was not until the 1970s that the government articulated a codification of what the State Attorney General declared "an authentic statement of the customary laws."<sup>96</sup> This publication was compiled by 461 men and two women.<sup>97</sup> Ironically, the government vehemently opposed strict codification, in the sense of statutory representation of customary law, arguing that it would only achieve formal symmetry by the mummification of customs and that traditions could not give ample scope to the salutary and inevitable mutations in values and institutions "that are currently taking place in our dynamic society."<sup>98</sup> Nonetheless, from all indications, the restatement that the government undertook operated as the functional equivalent of an informal process of codification.

Several problems are related to the restatement of customary law. One main implication of a "restatement" is that it is a comprehensive and authoritative (re)presentation of the law.<sup>99</sup> The previous passage on the evolution of customary law stands for the proposition that, while it may be authoritative, it is of questionable authority and representativeness.<sup>100</sup> Furthermore, the attempt to standardize and institutionalize the normative contents of customary law alienates it from its formative socio-cultural milieu, blurring the boundary between the "is" and the "ought." A restatement also transforms pre-existing culture—selecting, inventing, obliterating, and often reflecting the values of its vanguard elite.<sup>101</sup> More importantly, the process fosters the erasure of ambiguities and discretionary interstices that were adroitly manipulated to make concessions to peculiar circumstances, freezing flexible customs into hard prescriptions.<sup>102</sup> This crystallizing characteristic reinforced invented cultural constructs and cleavages while perpetuating the

93. N. N. Rubin, *The Swazi Law of Succession: A Restatement*, 9 J. AFR. L. 90, 91 (1965).

94. See Eugene Cotran, *The Changing Nature of African Marriage*, in FAMILY LAW IN ASIA AND AFRICA 15, 27 (J.N.D. Anderson ed., 1968).

95. The Native Authority Ordinance, ch. 140 § 30 (1948).

96. THE CUSTOMARY LAW MANUAL xxxvi (S.N.C. Obi ed., 1977). The Manual was produced by the Law Revision, Research, and Reporting Division of the Ministry of Justice under a directive given by the government.

97. See *id.*

98. Official Documents of the East Central State of Nigeria, No. 7, ¶ 13 (1977).

99. Antony N. Allott & Eugene Cotran, *A Background Paper on Restatement of Laws in Africa*, in UNIVERSITY OF IFE INSTITUTE OF AFRICAN STUDIES, INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA 18 (1971).

100. See *supra* subpart III.A.

101. See ALLOTT, *supra* note 45, at 184; Sedler, *supra* note 83, at 200; HARVEY, LAW AND SOCIAL CHANGE IN GHANA 346 (1966).

102. ALLOTT, *supra* note 45, at 60; WILLIAM L. TWINING, THE PLACE OF CUSTOMARY LAW IN THE NATIONAL LEGAL SYSTEMS OF EAST AFRICA 4 (1964); Paul Bohannon, *The Differing Realms of Law*, in LAW AND WARFARE 43 (Paul Bohannon ed., 1967); Ranger, *supra* note 55, at 212. See also MacLachlan, *supra* note 78.

image of immutable antiquity. At any rate, such present-day syntheses and interpretations of customary law mainly gleaned from treatises, Western considerations of morality, and the verifications of disproportionately (if not exclusively) male African elites, have gradually acquired all the trimmings of "positive" state law; and, their definitions form the core of customary law in contemporary Eastern Nigeria, as in most African contexts.<sup>103</sup>

The problems of "codification" are exacerbated by the problems of "exorcism." Customary law is applied in independent Africa by courts of a Western type presided over by Western-trained personnel who may not necessarily be far removed from the disposition of colonial officers. The appellate ruling in *Meribe v. Egwu*<sup>104</sup> underscores this point. In that case, the court of first instance upheld a custom among some patrilineal groups in Igboland that allowed a woman who had no child to secure an heir by "marrying" another woman.<sup>105</sup> The Supreme Court of the Federal Republic of Nigeria overruled the decision<sup>106</sup> and, in a formalistic stroke of the pen, reinforced on-going processes that were fortifying permeable gender boundaries and jeopardizing the cooptability of masculine status by women. Rather than probing the indigenous justification and function of the practice, the court decontextualized and situated it in an incongruous frame of reference.<sup>107</sup> The court stated:

In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a "woman to woman" marriage. Where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of section 14 (3) of the Evidence Act and ought not to be upheld by the Court.<sup>108</sup>

The implication of this decision illustrates the adverse repercussions of the continuity in colonial and nationalist policies for women.<sup>109</sup> In this respect, it is arguable that the

103. See Sanders, *supra* note 69. Cf. M. G. Smith, *The Sociological Framework of Law*, in AFRICAN LAW 24, 41 (Hilda Kuper & Leo Kuper eds., 1965) [hereinafter AFRICAN LAW].

104. 3 Sup. Ct. 23 (1976) (Nig.).

105. *Id.* at 24.

106. *Id.*

107. For insights into the indigenous perspective, see IFI AMADIUME, MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AN AFRICAN SOCIETY (1987); VICTOR C. UCHENDU, THE IGBO OF SOUTHEAST NIGERIA (1965); Cobham, *supra* note 12; Niara Surdakasa, *The Status of Women in Indigenous African Societies*, in WOMEN IN AFRICA AND THE AFRICAN DIASPORA (Rosalyne Terborg-Penn et al. eds., 1987).

108. *Meribe*, 3 Sup. Ct. at 25. For a critique of the decision, see C. O. Akpangbo, *A "Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles*, 14 AFR. L. STUD. 87 (1977). For further criticisms of the Eurocentric interpretation of the "repugnancy" doctrine, see AFRICAN INDIGENOUS LAWS (T.O. Elias et al. eds., 1975).

109. See AWA THIAM, SPEAK OUT, BLACK SISTERS: FEMINISM AND OPPRESSION IN BLACK AFRICA 115 (Dorothy S. Blair trans., 1986); Nawal el Saadawi, *Toward Women's Power, Nationality and Internationality*, in SPEAKING FAITH: CROSS-CULTURAL PERSPECTIVES ON WOMEN, RELIGION AND SOCIAL CHANGE 266, 274 (Diana L. Eck & Devaki Jain eds., 1986).

ordering and reordering of customary law was not merely a matter of pragmatic convenience, but a considered political choice to enforce patriarchal power and authority. The triumph of "codification," for example, coincided with exalted notions of virility and was suffused with patriarchal predilections. Consequently, the by-products of colonial dislocations received metropolitan ethos, and nostalgic distortions that eroded female status and power were crystalized and endowed with the force of law. This gender-biased outcome was facilitated by men's domination of the reformatory transactions. As in the colonial period, the convergence of men's managerial monopoly in routine public affairs and the perception of them as the custodians of traditional knowledge meant that the entire process for (re)defining and redeeming "customary law" was primarily, if not exclusively, informed by male perspectives and experiences.<sup>110</sup> Although the official script of customary rights and obligations derived from the process was skewed, it was privileged as an article of faith.

#### IV. TOWARD REVISING THE STATUS QUO: POST-DISSOLUTION MAINTENANCE

It is precisely by binding things together that traditional visions perpetuate themselves and the prejudgments contained within them; and it is by insisting on prising things apart that we have liberated ourselves from them.

Ernest Gellner<sup>111</sup>

All too often, the doors of tradition are slammed in women's faces. Yet traditions are not the sacrosanct essences of a people; they are the social inventions of a very recent origin—both the outcome and the record of political contests and power.

Anne McClintock<sup>112</sup>

A number of scholarly contributions demonstrate the extent to which men's idealization of an African past when women were subject to unquestioned male control exploited gender categories and precipitated a shift in practices pertaining to women.<sup>113</sup> This idealization was particularly evident with regard to productive resources where men's access and control was considerably valorized, while women's complementary needs and interests were occluded. Catalyzed by salient socio-economic changes and the acquiescence of the state, men's supervisory roles over land were transformed into ownership rights, while women's usufructuary rights became increasingly threatened and

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110. For details of the variables that interacted to enable this bias and the general intensification of gender asymmetry, see Obiora, *supra* note 20. See also Edwin Ardener, *Belief and the Problem of Women*, in PERCEIVING WOMEN (Shirley Ardener ed., 1975); Isichei, *supra* note 34; Ranger, *supra* note 55, at 211.

111. GELLNER, *supra* note 1, at 22.

112. McClintock, *supra* note 19, at 122.

113. See, e.g., Marcia Wright, *Justice, Women, and the Social Order in Abercorn, Northeastern Rhodesia, 1897-1903*, in AFRICAN WOMEN & THE LAW: HISTORICAL PERSPECTIVES 33, 33 (Margaret Jean Hay & Marcia Wright eds., 1982); Marcia Wright, *Women in Peril*, AFRICAN SOCIAL RESEARCH, Dec. 1975, at 803.

vulnerable.<sup>114</sup> In most instances, normative representations did not reflect the actual usufruct of women in property and inheritance.<sup>115</sup>

As the dogma of fossilized social definitions and the hierarchical structuration of gender relations gained foothold, women affected differently by the changes actively contested and maneuvered the incipient regimen and patterns of authority.<sup>116</sup> Some confronted the system through argumentation, some took recourse to uterine and other kins to mitigate changes, others engaged in a variety of acts of resistance.<sup>117</sup> In a few exceptional cases, some women were capable of contesting injustice and subverting patriarchal efforts by resorting to court where they invoked the acid test for the approval of customary norms—the repugnancy doctrine. However, despite the utility of the repugnancy doctrine for nationalistic modernization, it was not liberally applied for the vindication of women.<sup>118</sup>

There is reason to believe that the greater majority of women preferred alternative dispute resolution forums to supplicating to courts staffed exclusively by men.<sup>119</sup> But this did not prevent the hyperbolic perception of them as increasingly litigious. This perception resulted in a backlash that intensified sexist romanticizations of the past. As women took recourse to local courts to stake out and protect their claims, the courts evolved into an arena for instituting and regulating a certain kind of morality.<sup>120</sup> In the

114. See Chanock, *supra* note 47, at 53; M. Lovett, *Gender Relations, Class Formation and the Colonial State in Africa*, in *WOMEN AND THE STATE IN AFRICA* 23, 25 (Jane L. Parpart & Kathleen A. Staudt eds., 1989); Obiora, *supra* note 20; Ranger, *supra* note 55, at 254.

115. See AMADIUME, *supra* note 107.

116. It bears reiteration that social processes and events do not affect individual members of a group uniformly. The incidence on respective women tend to vary, depending on age, education, and other socio-economic factors. By the same token, these effects are typically not unidimensional. A discrete, even if minute, percentage of women may be more empowered than some men to take advantage of the system. The emphasis on gender is born out of the disparate impact on women as a group. See sources cited in *supra* note 113.

117. See Anne Hellum, *Gender and Legal Change in Zimbabwe: Childless Women and Divorce from a Socio-Cultural and Historical Perspective*, in *LAW AND CRISIS IN THE THIRD WORLD* 243, 249 (Sammy Adelman & Abdul Paliwala eds., 1993). For captivating accounts of radical challenges by women even to proportions officially castigated as “civil disobedience,” see T. OBINKARAM ECHEWA, *I SAW THE SKY CATCH FIRE* (1992); Judith Van Allen, *Sitting on a Man: Colonialism and the Lost Political Institutions of Igbo Women*, 6 *CAN. J. AFR. STUD.* 165 (1972); Caroline Ifeka-Moller, *Female Militancy and Colonial Revolt*, in *PERCEIVING WOMEN* (Shirley Ardener ed., 1975).

118. In *Edet v. Essien*, the court relied on the repugnancy doctrine to overturn a rule that authorized an estranged husband to claim the custody of a child that his wife had with another man prior to the repayment of the bride-wealth. 11 *Nig. L. Rep.* 47 (1932). This case was an obvious victory for the woman involved, but it cannot sustain a conclusion that the courts were favorably disposed to the protestations of women against the established order. The case was actually a paternity and custody dispute between two men, one a pater and the other a genitor. At the end of the day, the child became affiliated with some patrilineage. But for this qualifier and the somewhat incidental nature of the interest of the woman, it is not obvious that the result of the case would have been the same.

119. See Colson, *supra* note 47.

120. The morality invoked by African men has been identified as being consistent with the British conception of patriarchy and affirming of the cause of missionaries. See *Malawi*, *supra* note 62, at 87.

realm of marriage, there emerged a picture of a golden age of relative marital stability, social harmony, and respect for traditional authority.<sup>121</sup> This claim was indexed by earmarking the assertive female plaintiff as the manifestation of imperialist culture and renegade sexual values whose irreverence of "tradition" must be stringently checked.

Even where the relationship between traditionalistic constructions and "objective history" is not necessarily contestable, invoked "primordial" norms and values may be just that—negotiable contents that served particular purposes at particular times and contexts that have since vanished. The reformatory transactions for women at the dissolution of marriage by divorce or by death illustrate this point. In the discussion that follows, it is submitted that the current conception of post-dissolution maintenance, for example, from a cultural and historical perspective, has been largely misconceived and predicated on false premises.

Nigerian "customary law," as restated by the contemporary citadel of justice, considers it unprecedented "for a wife having divorced her husband to turn rough and seek maintenance from the same husband. The very idea of maintaining a wife after divorce appears to be foreign to the African conception of marriage and divorce."<sup>122</sup> This view was articulated by Justice Udo Udoma in *Coker v. Coker*.<sup>123</sup> On the other hand, the position of a widow vis-à-vis maintenance is distinguished on the ground that the death of her husband is not regarded as terminating the marriage. If the decedent is not survived by a son, his male relative is presumed to succeed to his rights and duties, including the duty of maintaining his wife. By implication, therefore, a widow is not entitled as of right to succeed to the estate of her deceased husband.<sup>124</sup> This principle was applied in *Nezianya v. Okagbue*<sup>125</sup> where the court held that customary law does not vest a widow with the absolute right of possession to her deceased husband's property.<sup>126</sup> Instead, a

121. Some of the isolated and individual challenges of women resulted in jaundiced pontifications that have been preserved and recycled into precedents.

122. Suit # Wd/19/1961, Lagos High Court (July 1, 1963).

123. *Id.*

124. See EMMANUEL NWOGUGU, FAMILY LAW IN NIGERIA (1970); SAMUEL NWANKWO CHINWUBA OBI, MODERN FAMILY LAW IN SOUTHERN NIGERIA (1966).

125. 1 All Nig. L. Rep. 352 (1963).

126. *Id.* at 353. The devolution of the property interests of a person who dies intestate is ordinarily regulated by his or her personal law. One way of circumventing the application of customary rules of inheritance upon intestacy is by contracting a monogamous marriage under canonical or statutory law. *Nezianya* involved the intestate death of a man who died intestate but was monogamously married to a woman with whom he had a daughter. The plaintiffs were the deceased's granddaughters; the defendants were his cousins. The widow of the deceased developed his property after his death and rented it out. She attempted to sell some of the property but was obstructed by the defendants. She left the property for her granddaughters when she died, but the propriety of the transfer was contested by the defendants. In the defendants' view, they were the patrilineal next-of-kin and legal heirs of the deceased who was not survived by a son. The Supreme Court of Nigeria entered judgment in favor of the defendants. Notwithstanding the deceased's monogamous marriage, the court noted that his widow exceeded the limits of her rights when she dealt with the property as if she had absolute proprietary, as opposed to permissive, interest. *Id.* Cf. *Cole v. Cole*, 1 Nig. L. Rep. 15 (1898); *Administrator-General v. Onuo Egbuna*, 18 Nig. L. Rep. 1 (1945); *In the Estate of Emodi*, 18 Nig. L. Rep. 1 (1945).

widow's rights are limited to use and occupancy, and she may only alienate her deceased husband's property with the consent of her affines.<sup>127</sup> In the estimation of the court, even a widow's usufruct is contingent on her "good behaviour."<sup>128</sup>

Under erstwhile conditions, strong kinship ties provided an effective framework for the organization and management of subsistence and exchange.<sup>129</sup> "Kinship relations were hardly distinguishable from property relations," and kinship ideology subsumed every form of social and economic relations and rights.<sup>130</sup> Typically, in the prevalent dispensation of communal ownership, the law of property was intricately intertwined with the law of status; the household was the center of production, distribution, and consumption.<sup>131</sup> Individual members of the kin group who held communal property were at best trustees; and, to the extent that the market for the alienation or commodification of property existed, the transaction was concluded in the name of and on behalf of the entire family.<sup>132</sup> In this arrangement, post-dissolution maintenance was a welfare issue that the relative availability of kin support rendered moot.<sup>133</sup> As an eminent African scholar observed, if the question of who is to provide for the economic needs of individuals in African society had been raised one hundred years ago, such a question would have been considered purely academic.<sup>134</sup> The social and economic organization and priorities underlying most African families was such that individual economic needs were seen as part of the needs of the wider community.

127. *Nezianya*, 1 All Nig. L. Rep. at 353; NWOGUGU, *supra* note 124, at 408.

128. 1 All Nig. L. Rep. at 353. Members of a family, irrespective of sex, are entitled to occupancy and user rights on family land subject to good behavior. *See Adagun v. Fagbola*, 2 Nig. L. Rep. 110, 111 (1932). An attempted alienation of land that has been certified to be family land may be considered "bad behavior." *See Nezianya*, 1 All Nig. L. Rep. at 353.

129. *See B. A. Rwezaura, The Changing Role of the Extended Family in Providing Economic Support for an Individual in Africa*, 11 BAYREUTH AFR. STUD. SERIES: AFR. AND W. LEGAL SYS. IN CONTACT 57, 57 (1989).

130. *Id.* A woman's economic role was given social meaning by reference to her duties as a daughter, sister, wife, or mother, while the meaning of a man's economic role featured his status as a son, brother, husband, or father. *Id.* at 60. Both men and women had the ability to manipulate their social structural position. *See also* MAX GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* 74 (1965).

131. There are ethno-historical records to suggest that this system of production and exchange was pragmatically characterized by cooperation, complementarity, and reciprocity. Respect and equitable consideration were goals and values elemental to the smooth functioning of the system.

132. Several authorities have noted that land was inalienable in the customary milieu. *See, e.g., Babhun v. Oshodi*, W. Afr. Ct. App. Rep. 1, 2 (1936). However, it appears that if a family were the absolute owner of a parcel of land, no cultural decree would prohibit it from transferring its interest *in toto*, if all the members consented to the transfer. Land alienation was uncommon in the pre-colonial era because land was perceived as belonging "to a vast family of which many are dead, few are living, and countless members are still unborn." *See Amodu Tijani v. Secretary*, 2 S. Nig. App. Ct. 339 (1921).

133. *See Abdul Paliwala, Family Transformation and Family Law: Some African Developments in Financial Support on Relationship Breakdown*, in *LAW AND CRISIS IN THE THIRD WORLD* 270 (Sammy Adelman & Abdul Paliwala eds., 1993).

134. *See Rwezaura, supra* note 129.

By the same token, the structuration of marriage produced practices which worked in the past to ensure that no person was left destitute and without some degree of maintenance.<sup>135</sup> The overriding value in the African family is reflected in the non-individual nature of marriage, sometimes called the collective or communal aspect of the marriage relationship.<sup>136</sup> Indigenous conventional wisdom regarded marriage as an alliance between two kinship groups for purposes of realizing goals beyond the immediate interests of the particular husband and wife.<sup>137</sup> The social obligations for spousal and child maintenance were seen as obligations of the family at large that defaulted to extended kins where the party immediately responsible for them reneged.<sup>138</sup> As the court in *Nezianya* recognized, the reciprocal rights and obligations that arose from marriage primarily bound groups together in a relationship that outlasted the lifetime of the individual spouses.<sup>139</sup>

In the aftermath of colonialism, fundamental changes were wrought in social relations and in the general fabric of African society. The celebrated Western perspective, restated by Lord Penzance in *Hyde v. Hyde*<sup>140</sup> and echoed in the teachings of missionaries, that the institution of marriage united two individuals rather than two kin groups, instigated the nucleation of families.<sup>141</sup> The missionaries also propagated middle-class Victorian values about the ideal roles of husbands and wives, portraying husbands as economic providers and wives as mothers and homemakers.<sup>142</sup> The opportunities offered by the innovations were not lost on persons who perceived social individualization as an avenue to maximize their prospects in the new economic era.<sup>143</sup>

Other phenomenal forces that ensued at the heels of colonialism re-characterized the impact and implications of customary institutions, processes, and practices as well as of mechanisms that were devised for the relatively smooth functioning of the indigenous system; mechanisms whereby the extended family, for example, provided a cushion for contingencies. With the transformation of indigenous politics and economies, especially aggravated by the advent of the market economy and its attendant trend of individualism, kinship ties and reciprocities, as well as marriage and property relations, have assumed

135. See SURVEY OF AFRICAN MARRIAGE AND FAMILY LIFE xvi (Arthur Phillips ed., 1953).

136. See T. R. Nhlapo, *The African Family and Women's Rights: Friends or Foes?*, in ACTA JURIDICA, AFRICAN CUSTOMARY LAW 52 (1991).

137. Inter-lineage exchanges are based on relationships traced through women as daughters, wives, and mothers. Thus, people are favorably disposed to forging alliances through the marriage of women who usually maintain strong ties with their natal homes which, in some instances, may be only a "stone's throw" away.

138. Solidarity and mutual support are recurrent themes in the worldview of the Igbo of South-Eastern Nigeria, for example. This is reflected in popular proverbs such as "unity is strength" and "ifere adigh eme onye ara," or "the reproach of the errant redounds on the kins."

139. 1 All Nig. L. Rep. at 353. See also Olayide Adigun, *The Interplay of Conflicting Rules: A Survey of the Customs of the Yoruba and the Effect of Modern Legislation*, 4 L. & ANTHROPOLOGY 281, 300 (1989).

140. 1 P & D 130 (1866) (Nig.).

141. Kristin Mann, *Dangers of Dependence: Christian Marriage among Elite Women in Lagos Colony, 1880-1915*, 24 J. AFR. HIST. 37, 42-43 (1983).

142. *Id.*

143. Darryl Forde, *Justice and Judgment among the Southern Ibo under Colonial Rule*, in AFRICAN LAW, *supra* note 103, at 79, 88, 94.

new meanings. More precisely for our purposes, these forces fostered the erosion of age-old values, bonds, and social insurance equivalents, even as they distorted and abrogated the rights, roles, and status of women.<sup>144</sup>

Accordingly, it is not unreasonable to submit that the application of historically contingent and received traditions, designed to govern an era when relative access to productive resources was compelled by the realities of existence to the present era of a more complex property regime and tenuous kin relations is dysfunctional. The assumptions underlying the decisions in *Coker* and *Nezianya*<sup>145</sup> are evidently defunct or, at least, well on their way to being inapplicable. For example, the decisions presumed the persistence of the extended kin safety net as a viable mode of or alternative for economic security; but this presumption is rebuttable in light of the foregoing discussion.<sup>146</sup> In the same vein, there is some indication that elaborate rules of dissolution and resource redistribution were barely existent in the pre-colonial customary milieu due to the nature of the property regime and the fact that terminal separation, not divorce, was more typical.<sup>147</sup> Therefore, evoking writ large a past, either real or manufactured, when men did not have to maintain their estranged wives as in *Coker* begs the question as much as it evades important issues of justice and fairness.

Furthermore, in *Nezianya*, besides failing to acknowledge the implications of the ambiguous phrase "good behaviour,"<sup>148</sup> the court appeared oblivious of the fact that the decedent's apparent individual ownership connotes a private property regime or some deviation from the seemingly standard communal form. At the very least, the court's finding is congruent with communitarian orientation and values in which the embedded individual is encumbered by the collective to the tune of a fundamental principle that has been articulated as "I am because we are, and because we are, I am."<sup>149</sup> However, the finding is of disputable relevance and accuracy in a context where communitarianism is devoid of its essential impulse. In contemporary times, male relatives utilize traditional legal and socio-economic relations to gain advantages, while at the same time shirking correlative traditional obligations.<sup>150</sup>

In this respect, although maintaining a widow is the quid pro quo for subrogating her deceased husband's estate, it is not unusual for affinal kins to assume the benefits without the burdens of the rule. In such circumstances of strained relations, it is not far fetched

144. See TRANSFORMATIONS OF AFRICAN MARRIAGE (David Parkin & David Nyamwaya eds., 1987); WIDOWS IN AFRICAN SOCIETIES: CHOICES AND CONSTRAINTS (Betty Potash ed., 1986).

145. See *supra* notes 122-128 and accompanying text.

146. See *supra* notes 138-42 and accompanying text. See also Rwezaura, *supra* note 129, at 77.

147. Max Gluckman, *Kinship and Marriage Among the Lozi of Northern Rhodesia and the Zulu of Natal*, in AFRICAN SYSTEMS OF KINSHIP AND MARRIAGE at 166, 204 (A.R. Radcliffe-Brown & Daryll Forde eds., 1950) [hereinafter AFRICAN SYSTEMS]; Hilda Kuper, *Kinship Among the Swazi*, in AFRICAN SYSTEMS, *supra*, at 86, 92; Monica Wilson, *Nyakyusa Kinship*, in AFRICAN SYSTEMS, *supra* at 111, 122.

148. Professor Taslim Elias makes the important point that the violation of social norms that justify forfeiture of an individual's rights in land is not easy to define in precise terms. See TASILIM O. ELIAS, NIGERIAN LAND LAW 144-45 (1971).

149. See JOHN S. MBITI, AFRICAN RELIGIONS AND PHILOSOPHY (1969).

150. See NWOGUGU, *supra* note 124, at 408; WIDOWS IN AFRICAN SOCIETIES, *supra* note 144; Rwezaura, *supra* note 129.

for the kins to trump up spurious charges of lack of “good behaviour” to inculcate and summarily dismiss a widow who, in all likelihood, made some form of contribution to the acquisition of the property in question.<sup>151</sup> In fact, a key issue that routinely escapes the consideration of the courts in post-Independence Nigeria is the difference introduced by the emergence of a private property regime and by the fact that women make significant contributions, financial or otherwise, to the acquisition of property that may be registered in their husband’s name.<sup>152</sup> On several occasions, courts have divested women of the fruits of their labor by refusing, primarily on the basis of the fact that their names are not recited along with the names of their husbands in the title to the property, to settle property in their favor.

In *Nwanya v. Nwanya*,<sup>153</sup> the appellant filed a petition in a lower court to dissolve his marriage to the respondent. The respondent prevailed on the court to order the appellant to pay her a secured maintenance in an amount the court considered representative of the value of her tangible and intangible contribution to the erection of their matrimonial home.<sup>154</sup> The parties were married in 1962; and, the respondent—who was described as a woman of substance—testified that she contributed no less than six thousand naira to the building. However, she failed to offer any concrete evidence in the form of receipts, cancelled cheques or the like, in support of her claim. In setting aside the judgment of the lower court, the court of appellate jurisdiction stated that “the court has consistently resolved issues based on evidence or inferences that can be drawn from evidence. But it has never been part of the duty of the court to resort to mere conjecture so as to make an award to a Plaintiff or Defendant that has failed to prove the claim or counter claim . . . . We have constantly been reminded that our court is not Father Christmas, hence who comes to court must come prepared to prove his claim in accordance with the law.”<sup>155</sup>

Although it did not revolve around the incidents of the dissolution of marriage, the case of *Onwuchekwa v. Onwuchekwa*<sup>156</sup> is instructive on the question of elevating form over substance. *Onwuchekwa* involved the unilateral disposition of property by a spouse. The couple had nine children who lived with the wife in the property that was the subject matter of the litigation. Although the wife averred that she and her husband mutually cooperated and pooled their money to purchase and develop the property, the husband retired to the village home and conveyed the property to a third party. When the wife

151. It is on record that the widow in *Nezianya* improved the property that her affines claimed. 1 All Nig. L. Rep. at 353.

152. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

153. 3 Nig. Wkly. L. Rep. 697 (1987).

154. *Id.* at 703.

155. *Id.* at 703, 704. In so ruling, the court declined to affirm the holding in *Kafi v. Kafi*, 3 Nig. Wkly. L. Rep. 175 (1986), in which a woman was awarded a life estate in one of her estranged husband’s pieces of property because she performed domestic duties and, additionally, managed the family business, doubling as its secretary, entertaining its clients, and participating in the negotiation for and purchase of the land in dispute. The woman bought building materials, supervised the construction, catered to the workers’ refreshment, and offered other moral and financial support. In explaining its decision, the *Kaffi* court observed that non-monetary or non-material contributions such as service were not generative of proprietary interest, but that they became salient for considerations of justice and equity. *Id.* at 177.

156. 5 Nig. Wkly. L. Rep. 739 (1991).

sued, claiming a cancellation of the sale or a declaration that she was a joint owner entitled to half of the proceeds of the sale, her husband counter-claimed that he solely and singularly acquired the property with his savings and a loan. He had receipts issued in his name to support his claim. He contended in the alternative that, even if the appellant had contributed towards the acquisition of the property, she was not entitled to restitution because he, as her husband, owned her as well as her material resources under the governing customary law.<sup>157</sup>

His wife attempted to rebut the contention by arguing that, even if such a gender-biased rule existed, it admitted exceptions and mediating circumstances, particularly for a woman who had children who would eventually inherit her property. Additionally, she argued that the alleged custom was repugnant to natural justice, equity, and good conscience, or inconsistent with a statute in force.<sup>158</sup> The trial judge conceded that the wife's contributions may well have made the existence of the property possible.<sup>159</sup> However, he insisted that nothing was unusual in her conduct and acknowledged her husband's claim.<sup>160</sup> On appeal, one of the presiding judges, Niki Tobi, observed that "It is a matter of experience that most witnesses on either traditional evidence or on customary law only come to court to give evidence in favor of the party calling them. And this they do even if they believe that the evidence they give is not correct."<sup>161</sup> Nevertheless, the court upheld the decision of the lower tribunal and found that customary law cannot be said to be repugnant to natural justice, equity, and good conscience merely because it is inconsistent with or contrary to English law.<sup>162</sup>

157. The alleged customary norm that authorizes a husband to appropriate the nuptial property of his wife derives from the perception that a wife is the husband's "property." It is expressed in the folk proverb: "The owner of a goat owns its kid." Incidentally, local courts support the "customary" norm by analogy with the Roman law of accession. I have argued elsewhere that the alleged customary norm was probably coined in the colonial era to counteract the incipience or perceived rampancy of divorce. See L. Amede Obiora, *All Fingers Are Not Equal: A Discourse on Law and Gender Relations in Nigeria* (1995) (unpublished manuscript on file with author).

158. As indicated earlier, the statute vests courts with absolute discretion to strike customary rules and practices that are inequitable, inconsistent with existing statute, or contrary to public policy. In several instances, some of which have been unfortunate, the courts have relied on this doctrine to dismiss claims predicated on customary law.

159. *Onwuchekwa*, 5 Nig. Wkly. L. Rep. at 750.

160. *Id.* A host of factors, including the circumstances of the parties' relationship (the existence of nine children, for example), the fiction of the unity of personality, and perhaps illiteracy and naiveté on the part of the appellant, may have led the appellant to undermine the relevance of technicalities, such as having the agreement with her husband reduced to writing.

161. *Id.* at 751.

162. *Id.* at 753. See also *Rufai v. Igbirra Native Authority*, 2 N. Reg. Nig. L. Rep. 178 (1957). Note, however, the opinion in *Nzekwu v. Nzekwu*, 2 Nig. Wkly. L. Rep. 373 (1989), where the court stated that the conduct of a defendant who alienated his uncle's property "whilst his widow is still alive is a most callous and despicable act. He should have at least waited until the death of the plaintiff, before claiming the property . . . Any [custom which empowered the defendant to engage in such conduct is] a barbarous and uncivilized custom which in my view should be regarded as repugnant to equity and good conscience." *Id.* at 377.

While it was insightful of the court to reject ethnocentric views that utilize English law as the yardstick for measuring the moral validity of customary law, it is important to point out that the court may have either confused issues or terminated its inquiry prematurely. It is incontrovertible that the relevant community gives primacy to and actively enforces a meritocratic ideology of achievement and reward as an over-arching hallmark.<sup>163</sup> This ideology mandates resourcefulness and cooperation and promotes reward for labor participation.<sup>164</sup> It is arguably counter-intuitive and contradictory that this same cultural base would enjoin the confiscation of the property of the mother of nine children, in her lifetime and in the lifetime of her children. The court's reluctance to override an alleged local custom on account of the repugnancy doctrine and its reminiscence of colonial domination precluded its evaluation of the custom in light of post-colonial legislation. For all intents and purposes, the custom is clearly at odds with the Nigerian Constitution. Article 39 of the 1979 Constitution, which specifically prohibits discrimination on grounds of sex, articulates socio-legal equality as a fundamental objective and prohibits the ghettoization of the interests of women in the name of some spurious custom and tradition.<sup>165</sup>

### CONCLUSION

I have sought to demonstrate in this Article that, from the dawn of Independence to date, nationalism has yet to make gender relations more equitable. Regardless of the promise or declared manifesto of nationalism, women labor under discriminatory conditions that are akin to a colonialism of sorts. At inception, nationalists vowed to redeem ancestral traditions and to establish a more inclusive regime. However, the triumph of nationalism appears in material respects to have mainly enabled its almost exclusively male elites to consolidate hold-overs and infusions from the colonial period or to inscribe rules that essentially entrench their portfolios. It is particularly intriguing that, once these elites assumed office, they did not simply renege on the pledge to redeem tradition; but, they shifted the force of their allegiance to what they perceived as the Western model of development and recognized only the "tradition" that was concocted and immortalized in the crucible of colonialism or the "tradition" that they had invested with new meanings. The reality is that, while nationalists have paid lip service to, and

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163. Victor Uchendu notes that the Igbos subscribe to a world-view of achieved, rather than ascribed, status. This captured in Igbo saying "*nwata kwo aka, ya esoro oki rie ihe*," or "a child that washes his or her hands may dine with the elders." See UCHENDU, *supra* note 107, at 19. Uchendu is corroborated by S.N.C. Obi who maintains that a fundamental principle of Igbo customary law is that a person is entitled to the fruits of her labor where this takes the form of a consensual improvement. Professor Obi, however, reasons that in the context of divorce, this principle conflicts with the principle that non-resident strangers, such as divorced wives, are devoid of permanent rights or interests in real property. OBI, *supra* note 124, at 271-72.

164. Marriages in the community are potentially polygamous. The very survival of the institution of polygamy dictates, and depends on, the self-reliance of spouses. Hence, a wife is often the bread-winner for her unit in a polygamous household; and, even women who contract monogamous marriages have already been socialized to be enterprising and independent.

165. NIG. CONST. art. XXXIX (amended 1979). Although considerable sections of the 1979 Constitution have been suspended and/or abrogated by successive military regimes, the relevant section remains in effect.

made some sporadic attempts to implement, gender equity, this objective has not been readily facilitated by their version of "Western development" or by their interpretation of culture and tradition.

