Chapter 3
When British Justice (in African Colonies) Points Two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias

Mark Toufayan

3.1 Introduction

The ills and challenges wrought by colonialism on the peoples brought within its whim have generated constant demands and conflicts over the status of indigenous subjects and cultural others in relation to metropolitan laws, institutions, and practices. These developments have led to a recrudescence of attention of late both at the 'centre' and the 'periphery'.[1] The political struggles and resistance projects fashioned by non-European intellectuals have hardly been quaint and have, of necessity, been mounted on two related fronts. On the international plane, they have fiercely indicted colonial international law for legitimizing the subjugation and oppression of Third World peoples and sought to transform international law from a language of domination and oppression to one of emancipation embodying their manifold struggles and aspirations.[2] At home, they have resisted entrenched modes of

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[1] For an excellent study of the claims and strategies deployed by colonizers and indigenous peoples alike in negotiating the intersection between normative orders, see L. Benton, *Law and Local Cultures. Legal Regimes in World History 1400–1900* (2002).

[2] A. Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', (2003) 2 *Chinese Journal of International Law* 77, at 80–2.

M. Toufayan (✉)
University of Ottawa, Ottawa, Canada
e-mail: Mark.Toufayan@uottawa.ca

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representation and complexes of norms and rules and have articulated ways of engaging the universal and pragmatic claims of the colonizer and its laws.[3] This parallelism, whereby non-Western scholars have asserted claims on behalf of and, fundamentally, within their own locality to a place in law's historical construction of its own narrative, has also meant engagement in a series of obfuscated comparative moves and tropes which can be read as 'a symptom of the global (sic local) intellectual's strategy of identity formation and stabilization'.[4] Work exploring the extent to which comparativism in national, regional, or local traditions has been a tool of nation-building or modernization alongside its overt concern with intercultural understanding and the mapping of similarities and differences has barely begun.[5] Nor has there been much in the form of serious and sustained analyses of how international law may have been strategically appropriated domestically by legal intellectuals on the periphery to increase bargaining power vis-à-vis Europe and challenge the legitimacy of the 'standard of civilization'.

The intellectual portrait of Taslim Olawale Elias, a renowned Nigerian Third World scholar of the first generation, is in this respect illuminating, if not unique, given his versatility and multifacetedness as teacher, scholar, politician, diplomat, and judge.[6] It aptly demonstrates his commitment at various stages of his long and prolific career to rewriting the narrative of international law's development and the positioning of Africa within its reach.[7] His pioneering work on African customary law can, similarly, be understood in part as an attempt to decentre hegemonic relationships in the world system and foreground the legal alongside the geopolitical map of contemporary Africa drawn along lines determined by a 400-year history of the continent's relationship to its metropolis. The two projects are intimately connected. Elias continued to write tirelessly on African customary law while contemplating other pursuits prompted by the economic, social, and political upheavals

[3] A good example of this trend are the works on Algeria by Mohammed Bedjaoui. See notably his *La révolution algérienne et le droit* (1961).

[4] D. Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', (1997a) 2 *Utah Law Review* 545, at 621.

[5] David Kennedy describes internationalists' and comparativists' mutual apprehension and distrust thus: 'From the comparativist perspective, the public internationalist seems philistine, crassly preoccupied with enlisting participation in new-fangled governance structures built on the flimsiest base of cross-cultural understanding. To the internationalist, the comparativist can seem quaint, elitist, irrelevant.' Ibid., at 588.

[6] I have been able to locate three biographies of Elias: I. O. Smith and C. A. Alade, *Taslim Elias: A Jurist of Distinction* (1991); F. A. Kuti, *Elias: A Man of His Time* (1991); and A. Thompson, *Favored by the Gods* (1991). These have been out of stock with major distributors, and thus any biographical references have had to rely on individual contributions, where available.

[7] See by T. O. Elias, *Africa and the Development of International Law* (1972; 1988); *Africa before the World Court* (1981); *The United Nations Charter and the World Court* (1989a); *The International Court of Justice and Some Contemporary Problems: Essays on International Law* (1983); and 'The Role of the International Court of Justice in Africa', (1989b) 1 *African Journal of International and Comparative Law* 1.

in newly independent states.[8] It is possible to read his later work as having in a sense been foreshadowed by his voluminous scholarship on the impact of English law on the growth of African law. Many of the insights he had developed were later deployed regarding a new subject to which he inevitably came as a second-life personal and professional project.[9] Even so, there has been a marked reluctance to receiving the latter beyond African – and Africanist – intellectual circles. Elias has been fetishized and revered as having set the yardstick against which all subsequent references to African customary law had to be measured, but there have been few attempts to connect this work to broader efforts at transforming the international law traditions discovered at the 'centre'.[10] Internationalists, conversely, have for the most part remained oblivious to the significance of this vast body of work for contemporary debates on international human rights law.[11]

European expansion and trade with its colonies has brought about many changes in their social and economic as well as legal structures. As the first chief justice of the Federal Republic of Nigeria and a scholar widely commanding authority and

[8] Elias was, for example, instrumental in organizing a major workshop in August 1974 under the aegis of the Institute of African Studies of the University of Nigeria, Nsukka, followed by publication of the proceedings as an edited volume: T. O. Elias, S. N. Nwabara, and C. O. Akpamgbo (eds.), *African Indigenous Laws* (1975).

[9] The best example remains Elias's approximation of African customary law to customary international law, as both were 'law' although they did not share the criteria imposed by Western conceptions and theories of law and sovereignty. See T. O. Elias, 'African Law', in A. Larson and C. W. Jenks (eds.), *Sovereignty within the Law* (1965), at 220, 222. Just as he dedicated his life to developing African customary law, he would spend many years in such august international institutions as the United Nations, the International Law Commission and the International Court of Justice to break the Manichaeism surrounding General Assembly resolutions and declarations and customary law as sources of law-making in the international community as a means to furthering Third World nations' emancipatory projects. See also A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), pp. 7, 20 (citing Elias as one of many Third World jurists who 'attempted to demonstrate that some of the fundamental principles of international law – relating, for example, to treaties and to equity – were also to be found in African or Eastern systems of thinking and statecraft and indeed, originated not in the West, but the colonial world itself'). This argumentative strategy is all too reminiscent of Elias's work on African customary law.

[10] Nowhere is this more aptly epitomized than in the essays collected in the Festschrift dedicated to Elias himself: E. G. Bello and B. A. Ajibola (eds.), *Essays in Honour of Judge Taslim Olawale Elias*, 2 vols. (1992). Contributions were organized around two themes that permeated his work: public international law, and African law and comparative public law. The editors were at pains to emphasize that 'The framework of the essays suggest that they are designed to overlap both in the well-tested and established fields of law and those branches of law dealing with development and change in the "peripheral areas". It is not unlikely, *grosso modo*, that either side will draw from and upon the richness of the whole exercise in a mutually reinforcing manner' (xi), but a glimpse of the various contributions confirms that there is little such cross-breeding taking place. The present essay makes no pretence of faring any better on this score.

[11] In the post-colonial era the human rights movement has provided a similar supervening code of values to the general idea underlying colonial policy that the fundamental rights and freedoms of Europe were the basis of the colonial legal order. For some interesting insights drawing on anthropological work and connecting human rights to customary law, see T. W. Bennett, *Human Rights and African Customary Law* (1995); S. E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006).

repute in a field which he dominated throughout his life, Taslim Elias was at the forefront of many significant legal developments in the colonies and was thus 'central' to the development of 'British colonial law'.[12] He remained acutely aware of the need to preserve indigenous customs and traditions, which in some cases would have significantly hampered efforts to assimilate. He also happened to be a Nigerian lawyer educated in Britain, where he gained several degrees, including his Ph.D. in 1949 at the University of London, and a staunch admirer of the British, their peculiarities, their system of legal education, and legal and particularly sharp-witted judicial profession, as well as English law's reputation for liberalism, adaptability, sense of justice, and fair play.[13] Should we interpret his work and life, then, like so many of his contemporaries, as a 'peripheral' attempt to trace the influence of political and intellectual developments at the centre upon law at the periphery? What does he mean by 'Africa'? Is it a useful category to think about in terms of legal phenomena or sites of production of a legal consciousness? Does his map of the development of African customary law have a sense of direction or stability, a narrative of progress, a geography? Does his work, in the end, merely replicate the positioning – already encountered in international law, comparative law, and postcolonial scholarship – of the West as the source of theoretical models and constructs and the Third World as the gaping receptacle and substratum of evidence and raw material supplied for theoretical study and confirming images of the 'other' already projected at the margins, the only available alternatives oscillating between assimilation and a robust cultural nativism?

The present essay uses a selection of Elias's key writings as a heuristic device to retrieve the discursive maps coalescing around the positioning of Africa alongside frames of production and reception. The focus is not, however, on tracing patterns of influence or the transplantation of British legal ideas to the colonies and the corresponding elaboration of maps of ensuing similarities and differences, which are at best of descriptive value. Rather, the historical project I have in mind seeks to explore, through a contextual re- (and de)construction of Elias's leading texts, the relationship between the rise of legal thought in Africa and political projects of unity, domination, and reform in cross-cultural settings. The general relationship between the appropriation and reinvention of law from the 'centre' of the world system in the 'periphery' is usually all we have by way of a conceptual vocabulary to think about law in terms of its development in Africa; we lack 'thicker' analytical and methodological devices to identify local institutional designs and native legal creativity.

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[12] Elias defines this expression broadly, as encompassing 'the body of principles consisting partly of Imperial legislation and colonial enactments and partly of all applicable English law and local customary law throughout the British colonies'. T. O. Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies* (1962), p. 6.

[13] 'Judge Elias appreciated the British; their peculiar characteristics, and their system of education. He has an extremely high opinion of Lord Denning. He also admires the game of cricket, and often uses the language of this sport to describe everyday events'. E. Bello, 'Preface', in Bello and Ajibola, *supra* note 10, at x.

Elias befriended a generation of more sociologically informed and anti-formalist figures and approaches to legal thought to give their respective countries or regions a say in the legal tradition in a way which would acknowledge but could also bypass the European legacy. His work subverts more mainstream accounts of the stability of 'centres' and 'peripheries'. My intuition is that his scholarship typically exemplifies the production of an African legal consciousness which I call 'juridical Negritude', home to a variety of political projects, and which became associated at various moments with a more limited project, both through reception (at what is traditionally depicted as the 'centre') and through its displacement by a new avatar of that consciousness as it became habitually 'spoken' at the site of its production.[14] My use of the term 'Negritude' departs from, while dovetailing to some extent with, the intellectual movement emerging in inter-war francophone Africa bearing the same name, which celebrated Negro culture and pride as a necessary counterpoint to discursive reason as an instrument of understanding the distinctive attributes of African culture. While there are no explicit references to the ideas championed by the movement's founders in any of his works, I argue that Elias's thinking and scholarship in the years of struggle leading to Nigerian independence (1954–1960)

[14] As for others whose work has been analysing the rise of legal consciousness in geographical locales traditionally ascribed to the 'periphery', my understanding of the concept is indebted to the legal-historical work of Duncan Kennedy: 'Consciousness refers to the total contents of a mind, including images of the external world, images of the self, of emotions, goals and values and theories about the world and self … The main peculiarity of this [legal] consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process and the constellation of ideals and goals current in the profession at a given moment'. D. Kennedy, 'Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850–1940', (1980) 3 *Research in Law and Sociology* 3, at 23. The difficulties of gesturing at an 'African legal consciousness' as an essentializing frame become evident when what is sought to be embodied is not merely legal thought in one country (the United States) and a relatively fixed period (the nineteenth century) but a regional consciousness across an entire continent riven by ethnic strife and social and political turmoil, given the, one would surmise, different conceptualizations and understandings of their national legal regimes during colonial and post-colonial times. Part of the perils and predilections of engaging in historically informed work on legal thought in Africa is to verify whether a prior sense of 'Africanness' or 'pan-African solidarity' can be located as the set of shared discourses and practices across a wide range of groups and peoples concerning their explicit or implicit awareness of regional unity and identity. My understanding of juridical Negritude is much more limited, however, and confined to the retrieval from the works and thought of one leading figure on the African legal scene (Taslim Elias) of what Kwame Nkrumah (the first president of independent Ghana) called 'consciencism', as a way of incorporating in traditional African humanism principles borrowed from European and Islamic models which, Nkrumah felt, had also become part of Africa's cultural heritage. See K. Nkrumah, *Consciencism: Philosophy and Ideology for Decolonization and Development with Particular Reference to the African Revolution* (1964), pp. 68–70. This consciousness is understood as a vocabulary (or *langue*) within which its specific avatars in the form of positively enacted rules, or legal regimes (*subsystems* or structures or *paroles*) take hold along a wide spectrum of historical events. On 'langue' and 'parole', see D. Kennedy, 'A Semiotics of Critique', (2001) 22 *Cardozo Law Review* 1147, at 1175. On 'subsystems', see Kennedy, 'Toward an Historical Understanding of Legal Consciousness', *supra*. My integrative reading of the structure of legal discourse and elements in legal consciousness draws on D. Kennedy, *A Critique of Adjudication (Fin de Siècle)* (1997b), pp. 133–134.

must be understood against the context of ascendance of Negritude, but that his consciousness about law in Africa and the positioning of Africa in a global history of legal philosophy transcends it and cannot be reducible to it. Thus it is more appropriate to conceptualize the scheme of periods, modes, and narratives of production and reception in the English law/African customary law nexus elaborated in this article as 'a set of boxes for the organization of facts and factoids, a structure within which to propose low-level hypotheses, and the locale of a narrative'.[15]

Why focus on the writings of a scholar from the 'periphery' in this way? The heuristic usefulness of Taslim Elias's intellectual portrait is the situatedness of his narrative of Africa at the intersection of analyses of world history, legal consciousness, and legal pluralism. Africa appears as a disputed territory in what Ali Mazrui calls an ongoing war of 'its own changing gods'[16] – indigenous and Islamic legal traditions constantly vying for hegemony over British positivism in a 'quest for a new civilizational synthesis'.[17] The ideology of Elias's juridical Negritude needed to foster harmonious growth and development is one which would emerge from the productive encounter, *within* African consciousness, of Africa's triple heritage; it finds expression in his lifelong project of developing a common law for Nigeria modelled on, and thus in strategic alliance with, English common law. Elias embraced hybridity and eschewed assimilation. It is not so much that he seemed to be writing *about* Africa and the West as he was foregrounding through and through the conditions of a discourse working *between* them – a law in-between.

Methodologically, I believe that it is more useful to engage with his work by juxtapositions and comparative readings of his leading texts through the bearings of what Marie-Claire Belleau calls an 'intersectionalité stratégique'[18] (strategic identitarian intersectionality). Belleau's own work examines the impact of the intersectionality between political struggles of national and cultural identity and feminism in relation to the dichotomy of public law and private law in Quebec. Her approach seeks to substitute differences grounded in political and cultural contextualizations for those based on essentializations, thus creating opportunities for a deeper mutual understanding of emancipatory projects and the fostering of strategic alliances between sites of cultural practices, dominant and marginal.[19] I argue that Elias's

[15] D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D. Trubek and A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal* (2006), p. 24.

[16] A. A. Mazrui, 'Cultural Forces in African Politics: In Search of a Synthesis', in I. J. Mowoe and R. Bjornson (eds.), *Africa and the West. The Legacies of Empire* (1986), p. 33.

[17] Ibid., at 33–4.

[18] M.-C. Belleau, 'La dichotomie droit privé/droit public dans le contexte québécois et canadien et l'intersectionnalité identitaire', (1998) 39 *Cahiers de droit* 177.

[19] Belleau explains the methodological *démarche* undergirding her approach thus: 'Strategic intersectionality consists in imagining strategies that take into account experiences rendered invisible when we consider separately feminism and political struggles of national and cultural identity. Imagining spare intersectional strategies presupposes disclosing hidden differences and similarities, deconstructing myths, revealing processes of projection and dissociation, as well as promoting the emergence of new coalitions.' Ibid., at 181 (my translation). Elsewhere, Belleau has engaged in comparative reading of sociologically oriented French and Quebecois legal scholars in an attempt

obsessive yearnings for the uniform development of a 'common law of the realm' reveals a complex picture of mediating between simultaneous participation in various struggles and projects within African humanism which may at times have appeared contradictory, without subordinating any one of them to the others.[20] This impels us to appreciate the rich and multifarious significations and consequences of the interplay between identitarian struggles and the different legal manifestations unfolding in Africa at the time he was writing, which an analysis structured around the centre–periphery divide distorts, rather than imagining them as being locked into a single matrix of assimilation or rejection.

The periodization followed in this article roughly spans two decades and cuts across different facets of African colonial and post-colonial history. The various sections emulate this structure and expose different aspects of Elias's intellectual trajectory without, however, suggesting, for reasons it is hoped will become obvious, that this necessarily followed a linear progressive narrative. The first (1954–1960) situates Elias's interventions in the socio-historical context of the extension of British rule over dependent territories in west and east Africa and the introduction of English law in what was known in 1863 as the Lagos settlement and which was later to become contemporary Nigeria. I begin Sect. 3.2 by introducing briefly the African socio-political and cultural landscape, ranging from the end of the nineteenth century, when British administration of justice in the colonies was carried over from the Royal Niger Company to the British crown, to the middle of the twentieth century, which immediately preceded Elias's interventions on the legal scene. Faced with the apparent hegemony of an outside determinant that seemed all-encompassing, non-European intellectuals were hard put to make Africa understood on its own terms, freed from Western ethnocentric conceptions and values. During this period of heightened arrogance and paternalistic pronouncements, transcending the question of what is 'African' necessarily meant answering the question, 'What is law, and how do we enforce it?' I argue that Elias's strategy of engagement with English law during these formative years was as ambitious as it was Herculean: exposing Africa's relevance to the West and those seeking to understand the lived realities of its people without, in the process, reducing it to a cog in the Western knowledge wheel, and, at the same time, establishing that 'nearly all ideology in contemporary Africa reflects the fusion of humanistic ideals drawn from Western and indigenous sources'.[21] Connecting law to the social consciousness and lived realities of a people was a modernist attempt to subvert the region's marginal

to explicate the invention and loss of a critical jurisprudential tradition or consciousness which would have facilitated understanding the civil law as a social/political institution, much like the critiques of American legal realists have succeeded in doing. See M.-C. Belleau, 'The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France', (1997) 2 *Utah Law Review* 379.

[20] For the 'mediating' function of 'contradictions of experience' in consciousness (arising, for example, from 'inconsistent facts, conflicting emotions, or operative abstractions') in ways which make the contradiction less striking, see Kennedy, 'Toward an Historical Understanding of Legal Consciousness', *supra* note 14, at 24.

[21] R. Bjornson and I. J. Mowoe, 'Introduction', in Mowoe and Bjornson (1986), *supra* note 16, at 4.

position and elevate it to the same status as that enjoyed by the colonizer. I read Elias's efforts against the currents of a regional intellectual trend represented by the works of the poetics of Negritude to show their participation in an African philosophy in the making as well as the precariousness of defending both the rise of cultural nationalism and a viable sense of identity under the centripetal pressures of British law and the looming perils and predilections of independence.

The second period (1960 to the 1970s) which I analyse, in Sect. 3.3 of the article, places Elias in the context of decolonization, which witnessed at once the dislocation of the social formations inherited from the colonial period and the transformations wrought by modernization. The British colonial policy of indirect rule under Fredrick (later Lord) Lugard's administration, through the agency of a literate elite capable of performing subordinate but necessary functions in colonial administration, had secured African customary law's 'relevance' to English law through the enactment of local ordinances and legislation and jurisprudential developments.[22] Retrieving and asserting a unified consciousness of the self, under which tended to be subsumed all other concrete issues making up the objective reality of a people under subjugation and oppression, became in the circumstances far less important and, in fact, counterproductive. I illustrate in this part how confidence in customary law's 'presence' in the colonial and post-colonial eras allowed Elias to build on the insights he had already developed and downplay fears over the progressive absorption of customary law into the all-pervading English system in order to harness the positive integrative force of British law as a means of advancing the project of greater harmonization and uniformity based on 'ordered reason', 'social progress', and 'development'. The ability of Africans to synthesize fragmented elements from seemingly opposed cultures had allowed them to live through a turbulent history without contradiction or schizophrenia, yet the divisiveness of the continent post-independence along federal lines threatened unity; it required both an inward- and outward-looking continental cultural synthesis through law's agency during this early phase of nation-building in order to negotiate customary law's critical engagement with English law on equal terms. Finally, I examine Elias's specific intervention in the debate on legal reform over codification of customary law as the hybrid site of contestation and intersection between the various political projects of nation-building, African cultural liberation, and development, in which the evolution of a common law of Nigeria was to become the accessory to and frame for (re)writing the history of African humanism.

[22] For a fascinating study on how court assessors of customary law and clerks were routinely complicit in consolidating colonial rule, sometimes unbeknown to themselves, see B. N. Lawrance, E. L. Osborn, and R. L. Roberts (eds.), *Intermediaries, Interpreters, and Clerks. African Employees in the Making of Colonial Africa* (2006). See also Elias's admonishment of the 'arming of such subordinate officials of the statutory court with the new magic wand of the record book and of spoken English' in T. O. Elias, *The Nature of African Customary Law* (1956a), p. 275.

3.2 Taslim Elias Situated: The Rise and Retrieval of an African Humanist Tradition (*C.*1954–1960)

Elias's initial legal interventions on the African scene coincided with the populist inquiry as to whether there was anything like African customary law – whether it was law at all or just a hotchpotch of desultory, discordant, and ever-changing customs. Understanding the challenges he was facing and the background theories against which he was writing is crucial to the hybridity of his narrative. Accordingly, I begin this part by sketching a very brief history of the evolution of African law and institutions arising from the colonial encounter and, particularly, of the role and place of customary law administered in British dependencies and, specifically, Nigeria, since this was the context most familiar to Elias and on which he wrote most extensively. There are obvious risks in such oversimplified framing, but it will suffice for the purposes of grounding the broader argument. I then turn to explicate the vicissitudes of Elias's emancipatory 'programme' of African cultural liberation as elaborated in his seminal work *The Nature of African Customary Law*, making extensive references to his text in order to retrieve the politics of an African socio-legal consciousness in the making.

3.2.1 Out of Eden? Interrogating Africa

As the various European powers established their rule over African territories, whether by annexation, conquest, or cession, and were confronted with the problem of governing their possessions and administering justice therein, their attention was invariably drawn to indigenous laws and customs when 'either the pressure of culture contact or the necessities of trade made it no longer possible to ignore what goes on among the "natives"'.[23] In the former colony, protectorate, and mandated territory of what was to become Nigeria, the bulk of the country was first administered by the Royal Niger Company under a charter granted to it in 1886. The company established a system of courts, and its charter contained a provision ensuring that in administering justice due regard was to be had to the customs and laws of the class, tribe, or nation that came under their sway.[24] There took place between 1886 and 1900 further extension of British power inland, largely through the

[23] Elias, *supra* note 12, at 102. For an excellent survey of how cross-cultural trade has influenced the migration of behavioural norms, ideas, and institutions during imperial and colonial rule, see P. D. Curtin, *Cross-Cultural Trade in World History* (1984).

[24] For a personal recollection of the leading jurists and publicists that influenced the making of Nigerian law, see T. O. Elias, *Makers of Nigerian Law* (1956b), a series of studies commissioned in 1956 by the editor of the journal *West Africa* and reproduced in T. O. Elias, *Law in a Developing Society* (1973a), pp. 11–75. For a brief historical exposition of the impact of the Royal Niger Company on acquisition of territory and conclusion of treaties with tribal leaders, see T. O. Elias, *Nigerian Land Law* (1971), pp. 17–33.

company's administration, but native resistance to its virtual trade monopoly and the need to strengthen the western border against the French, coupled with the necessity for the suppression of the internal slave trade in the north, proved too much for a commercial venture. The British government eventually took over the administration of the territory in 1900, while in theory maintaining the company's policy regarding native laws and customs.[25] References to how private corporate power influenced law-making and the administration of justice within colonies, rather than merely the acquisition of territories through negotiated treaty arrangements or coercion and consolidation of sovereign rule,[26] are belittled in the history of international law, which constructs disciplinary narratives of origin around the distinction between 'civilized'/'uncivilized' whose relationships become further structured and regulated around the municipal/international, public/private divides. This dual exclusionary move renders invisible a range of local governance issues which are parasitic on the colonial and imperial policies of great powers and accordingly blur the distinction.[27]

There were obvious differences as regards both the manner of introducing Western legal systems and ideas and the subject matter of the law thus introduced. For example, the way in which English law was operative in its overseas dependencies differed according to whether they fell into the category of colonies, protectorates, or mandated territories. As far as French, Portuguese, and Spanish African territories were concerned, problems of conflict of laws were epitomized in the idea of 'citizenship' and confined to status-bearing groups (*evolués* or *assimilados*) on the one hand, who were 'deserving' of being assimilated into the imported European legal order, and to the ordinary unsophisticated Africans on the other, who, paradoxically, came under a watered-down version of that system which provided a measure of protection to their differences by way of some admixture of acceptable local usages. The British, on the other hand,

[25] For extensive treatment of how British rule impacted on the development of laws in Nigeria, one is invariably referred to T. O. Elias, *Nigeria. The Development of its Laws and Constitution* (1967).

[26] M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1969), pp. 91–108.

[27] The typical discursive moves within the disciplinary narratives of its own construction as regards chartered corporations were essentially twofold: either they were not 'subjects' of international law and thus were removed from the reach of international law in their relationships with native peoples; or they were considered to be subjects and, hence, sovereign in relation to the natives, who, however, looked at them from a position of subordination and delight as to their majesty and ability to administer order and justice in their territories. The former can be traced, for example, in Henry Wheaton's *Elements of International Law* (1866), p. 30, §17. For the latter see T. J. Lawrence, *The Principles of International Law* (1900), p. 79, §54 ('It is easy to see how the natives must regard a body of men armed with such authority as that granted to the British South Africa Company, and possessed of skill, energy, scientific machinery, and weapons of precision. To them the company must be all-powerful. They know little or nothing of the Imperial Government … He is thousands of miles from the scene of action … Practically the company rules its territories in so far as they are ruled at all. It legislates, it administers, it punishes, it negotiates, it makes war, and it concludes peace … They are sovereign in relation to the barbarous or semi-barbarous inhabitants of the districts in which they bear sway'.

lacked the resources needed to impose their laws on large and potentially hostile populations and were interested instead in preserving African institutions in order to use them as intermediaries and thus minimize the cost of administering the territories that would have resulted from direct utilization of British labour; they were thus forced to compromise and recognize the operation and applicability of indigenous laws, provided, however, that they were suitably 'civilized', or, as it was then understood, not 'repugnant to natural justice, equity or good conscience, or incompatible' with English law. I explore in the third part of this essay the way in which this 'repugnancy doctrine', which was born out of the colonial encounter to structure a legal system that would account for the relationship between subaltern and metropolitan laws and institutions, in fact served the interests of both colonizer and colonized by ensuring the reinforcing mutuality of law's function as a tool both of development, national-building, and social legitimacy, and of resistance. In practice, however, despite the differences in philosophy and method of governance in the colonies, the colonial 'masters' and their judicial acolytes all over Africa exhibited a blatant contempt for the values of traditional African society.[28] A central corollary 'at home', as it were, to Tony Anghie's provocative thesis on the colonial origins of international law thus became implacably obvious: because the decentralized polities of Africa did not comply with European ideas of statehood, they could not be considered sovereign, and, consequently, could have no 'law'.[29] Colonialism firmly imprinted its values on custom, which was derided and consigned to the study of anthropologists whose interests lay in whatever was alien or secondary. But what counted as 'indigenous' or 'foreign' was often a matter of the level of cohesion of an imagined body or institution and the feeling or fear of, or desire for, or seduction of, its importation, penetration and influence.[30]

[28] A classical example of the prevailing state of mind are these words of a famous colonial judge: '"How do you justify the application of English principles of justice to so many different peoples whose outlook and mentality vary so much from our own, especially when English ideas pass their understanding?" We believe that these ideas are the best that can regulate our administration of justice, and an Englishman, because he is an Englishman and not someone quite different, cannot adopt other persons' conception of justice. Whether there is really much difference and whether our ideas are not understandable to others, I will not stay to discuss, because if they are not understandable it is a pity, but it must not be allowed to stand in the way of doing what we believe to be right since in the last resort we govern other peoples by our conscience and not by their understanding.' Sir S. Abrahams, 'The Colonial Legal Service and the Administration of Justice in Colonial Dependencies', (1948) 30 *Journal of Comparative Legislation and International Law* (3rd Series) 1, at 10.

[29] A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) 40 *Harvard International Law Journal* 1, at 29–30.

[30] My idea of a customary law as a weaker and underdeveloped geographical space inviting foreign, namely Western, interest, penetration, insemination, in short colonization, borrows from Edward Said's reference to how 'Oriental sexuality' was depicted in Orientalist literature, the supine feminine Orient suggesting not only fecundity but sexual promise (and threat) as well, and thus portrayed as both dangerous and threatening, in need of control and regulation. E. W. Said, *Orientalism* (1979), p. 190, 218.

3.2.2 Negritude in Ascendancy

Implicit in this view was, of course, a particular conception of the 'primitive' mind: spontaneous, traditional, personal, commonly known, corporate, relatively unchanging, and so on. These, alongside other more derogatory epithets, have strongly influenced the production of classical works on customary law, which were as much responsible for data-gathering as for producing theory.[31] The quest for an original integrity of 'being' gradually came to dominate African thinking as it fulfilled a therapeutic need to resist the dislocation of social structures and cultural life that colonial domination had engendered and that were reflected in the tensions assaulting the consciousness of the self. To be sure, writing against the colonial policy of the administration of justice in British dependencies instilled with this covert racial stigma carried bewildering difficulties that 'beset the path of the writer on African laws and customs'.[32] Elias was no doubt aware of his leadership role in these dire times and of the need to confront these attitudes with the 'African awakening' and '*prise de conscience*'[33] about its leading position in world history and human life:

> The increasing economic and social importance of the Continent for our time, the emergence of political consciousness among the indigenous peoples in various parts of the Continent, and their aspirations towards recognition in the various fields of human endeavour, make it all the more urgent that an attempt should be made to give expression to the immanent ideas of the African peoples in the rapidly changing circumstances of their modern life.[34]

The *Nature of African Customary Law* was a child of necessity. In an earlier work, published in 1954, Elias had expressed no intention of being embroiled in the theoretical controversy as to whether or not rules of customary observance were by positivist (or other) standards law, but simply assumed this to be the case and proceeded to demonstrate 'what it is in the Nigerian customary law that entitles it to the name of enforceable legal rules'.[35] His *Native Land Law and Custom*, which was a slightly revised version of his doctoral dissertation first published in 1951, was groundbreaking, not least because of a change in nomenclature in the expression 'native law and custom' – where 'native' was typically associated with something

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[31] It is generally accepted that Hegel's *Philosophy of World History* (1837), in its general reference to non-Western peoples and its particular bearing on Africa, provides the most important intellectual foundation for the colonial ideology. It was on this foundation that classical anthropology sought to rationalize European domination of other races by presenting them as inherently inferior to the white race. This ideological thrust of classical anthropology found its culmination in Lucien Lévy-Bruhl's *La Mentalité primitive* (1922) and marked the development of proto-Negritude thought in the Caribbean, particularly Haiti, in the nineteenth century.

[32] Elias, *supra* note 22, at 1.

[33] I borrow the expression from J.-P. Sartre, 'Orphée noire', in L.-Sédar Senghor, *Anthologie de la nouvelle poésie nègre et malgache de langue française* (1948), pp. XI–XV, who sees it in the passage from an unreflected to a reflected mode of experience.

[34] Elias, *supra* note 22, at 4.

[35] T. O. Elias, *The Nigerian Legal System* (1963), p. 12 (first published in 1954 under the title: Groundwork of Nigerian Law).

uncivilized or barbaric – to 'customary law'. Ethnographers fashionably used the terms 'law' and 'culture' on the one hand, and 'law', 'custom', and 'tradition' on the other, interchangeably; whereas laws were deemed coextensive with cultures which were conceived as bounded and static, custom implied a normative order legitimated by tradition which was understood as being apolitical and socially, but not legally (as understood through a Western lens), sanctioned.[36] Considering that such misconceptions continue today to plague the disciplines of social and legal anthropology, Elias's reshuffling of these concepts in what appeared to the casual onlooker to be a mere cosmetic change had profound implications not only for understanding custom and its position in modern legal systems, but also for Africa in a global history of (legal) philosophy.

In *The Nigerian Legal System* (originally published in 1954 as *Groundwork of Nigerian Law*), a book he wrote while Simon Fraser Research Fellow at the University of Manchester, Elias was quintessentially pragmatic, if not comically ironic, about the effects of the colonial encounter on law in Africa. Custom was not 'peripheral' to the Nigerian legal system as it was in England, but, in the context of the history of Nigeria's development, was one of its main sources of law.[37] Precisely because it already existed when the country came under British rule, courts had recognized it, and colonial administrators had done as much, and it was regularly being enforced.[38] His task thus became to study it painstakingly, and to ascertain it or create an environment conducive to its ascertainment.[39] As the British accorded it recognition, while fatally ignoring its content and how they could apply it in their

[36] See the insightful discussion on the reification in mainstream property relations scholarship of the dichotomy between formal law and custom in connection to gender and property relations in Kenya by C. I. Nyamu, 'Achieving Gender Equality in a Plural Legal Context: Custom and Women's Access to and Control of Land in Kenya', (1998–99) *Third World Legal Studies* 21.

[37] Elias, *supra* note 35, at 12, 14.

[38] Ibid., at 13.

[39] Ibid., at 14 ('The problem here is largely one of finding out what the true indigenous rule is and whether and how far, when one has been discovered, it can be said to have originated or to have been adopted'). In many of his works (almost all with the exception of *The Nature of African Customary Law*), there is in Elias's narrative a sense of a self-appointed, almost messianic, role, catering to the needs of lawyers, judges, administrators, and all concerned by his endeavour and exhibiting a heroic urge to revamp the academic discipline of African customary law and rescue it from indifference, ineptitude, placidity, and bewilderment. For example, in the preface to the fourth edition of *Nigerian Land Law and Custom*, *supra* note 24, he candidly states: 'The received English law on these subjects has been carefully blended with Nigerian law wherever necessary, the aim throughout being to present the living law of land tenure as it is practised and applied in Nigeria today … This edition should, accordingly, meet the new demands of the revised syllabuses of all the Faculties of Law in Nigeria, while the long-felt needs of the members of the Nigerian Bar should now be better served. The requirements of the administrator and the investor should also be largely met. In short, all those interested in comparative law, especially in the study of the interaction between English law and indigenous African customary law in a dynamic society, should find this book a reliable and stimulating guide.' While this is testimony to his staggering erudition and learning, it also exemplifies the attitude of certain pioneers of a legal discipline to make their task a 'personal quest' on a long journey towards a better tomorrow. On the 'personal quest' device in international legal scholarship, although in a different context, see D.Z. Cass, 'Navigating the

own courts, they had to learn about or find out what African customary law in Nigeria was! While Elias did not explain why customary law was 'law' from the vantage point of legal theory, he did lay out the 'groundwork', as it were, of his vision of law:

> But the wise policy of not ignoring the customary law of dependent peoples has been based upon a realization of the sound legal fact that law as an expression of the social consciousness of every people subject to its authority cannot always be judged by purely exotic standards. What is by one people regarded as possessing the attributes of law may not impress another people as such, if the rules of social behaviour and the juridical sentiment of the latter are different from those of the former. This is not to say that 'reception' of the law of the former by the latter is impossible; it is only to emphasise that law is a relative phenomenon and any attempt to judge its validity by absolute canons is doomed to failure. The important thing is its acceptance and recognition by the particular people whose conduct it is deemed to regulate.[40]

Whatever explains this self-imposed restraint, the question could no longer be avoided. Yet there was a significant shift in tone and posture in *The Nature of African Customary Law*, where the entire enterprise took on the rather austere allure of dealing with 'the whole problem of the African in contact with white man's law'.[41] This behavioural shift was hardly innocent. There needed to be a 'change of heart and of attitude on the part of Western jurists towards indigenous laws and customs in Africa',[42] for isolating African ideas about law and government from general problems of political and legal theory would 'fall … into the kind of error … that "political theory and political practice (including colonial administration) have often suffered by reason of this type of system being set up, consciously or unconsciously, as a norm"'.[43] Whereas Africa had been read from the perspective of 'law' (Europe), 'law', in turn, had failed to be interrogated by Africa. 'An intellectual adventure into African legal conceptions', in his view, 'should enlarge our horizon, if it does not enrich our knowledge, of the function and purpose of law in the modern world.'[44] It would then become clear that 'African law, when once its essential characteristics are fully appreciated, forms part and parcel of law in general. It is thus no longer to be set in opposition to what is frequently but loosely termed "European law", and this notwithstanding a number of admitted differences of content and of method'.[45]

What is remarkable in these two juxtaposed sentences lies in what they adroitly conceal: the ingredients of an African legal consciousness defined both against and in conjunction with Europe as an aspect of African humanism. 'African law' was

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Newstream: Recent Critical Scholarship in International Law', (1997) 65 *Nordic Journal of International Law* 341, at 365–9.

[40] Elias, *supra* note 35, at 5–6.

[41] Elias, *supra* note 22, at 5.

[42] Ibid.

[43] Ibid., at 17.

[44] Ibid., at 6.

[45] Ibid., at v. The expression 'European law' may appear to be a misnomer, for it was hardly disputed that 'law' was 'European'. Nonetheless, it could be argued that this was deliberate, for the entire debate on whether African law was law turned on what differentiated 'Africa' from 'Europe'.

'not law' because of what made it distinctly 'African', its Africanness. Yet answering the question 'What is 'African?' had been collapsed into the question 'What is law?' and measured against criteria prevalent in Western societies. There was no independent source for assessing either; they defined themselves against each other, as each other's opposites. It thus became necessary to probe the inner selves of Africans, to retrieve their 'essential characteristics', for only then would it become possible to position Africa in relation to law in general. By expressing the distinctive attributes of African culture (e.g. the nature of African societies in terms of political organization and their theories of government), Elias was necessarily differentiating it from Europe and asserting its position in world history. But this was only an accessory to his overall project, for despite differences, both shared similar legal ideas, which was testimony to 'the unity of all human knowledge and experience', and were accordingly brought together under law's soothing yoke; for 'law, apart from differences in social environment, is no respecter of race or tribe, and the problems it has to solve are everywhere the same, namely the resolution of conflicts in human society and the maintenance of peace and order'.[46] Once 'law' was stripped of its Western garb and made 'relevant' and palatable to the needs of African and European peoples alike, there could be no doubt that African customary law, no less than English law, drew from the same abundant well.

Elias's reference to African law's 'essential characteristics' was a rhetorical move, part of his goal of African empowerment. It paralleled, and therefore must be set against the background of, the rise of Negritude as a full-fledged cultural ideology in the early post-Second World War era and the wider shift in black intellectual and literary circles during the inter-war years, although the movement's tenets seemingly percolated only modestly outside francophone Africa. There were, however, marked differences in the strategies deployed by Elias on the one hand, and the leaders of Negritude on the other. The former, while perhaps not as polemical in tone and posture, were no less a counter-thesis to the scheme of ideas, systems of meaning, and representations by which the colonial system was sustained.[47]

The term 'Negritude', first used by the Martinican poet Aimé Césaire in his 1939 poem 'Cahier d'un retour au pays natal' (Notebook of a return to my native land),[48] refers in its Césairian acceptation to a collective identity of the African diaspora born of a common historico-cultural experience of subjugation. Both the term and the subsequent literary and cultural movement that developed emphasized the possible negation of that subjugation via concerted actions of racial cultural affirmation. In succeeding decades the term became a focus for ideological

[46] Ibid., at 6.

[47] See C. Mwalimu, *The Nigerian Legal System, Volume 1: Public Law* (2005), p. 121 ('Elias was also one of the distinguished freedom fighters who used law, just as Sarbah had done in 1898 to advance the cause of freedom and independence for the new and emerging African state ….').

[48] For a useful introduction to Césaire's poem and the context of its conception, composition, and publication, see M. Rosello, 'Introduction', in *Aimé Césaire: 'Notebook of a Return to My Native Land/Cahier d'un retour au pays natal'*, trans. and ed. M. Rosello, with A. Pritchard (1995), pp. 9–68.

disputes among the black intelligentsia of a francophone world in the process of decolonization. Negritude as a concept encompassed and distilled a wide range of previous historical moments, in turn generating a diverse field of debate that has, in its use of the term, extended, and at times even contradicted, Césaire's original intervention. It is not necessary to enter the debate here; suffice it to say that there were essentially two opposing lines of interpretation around which all critiques could be organized. The first, associated with Césaire, sustained the notion as a cultural, historically developing process with a political dimension of resistance to the politics of assimilation.[49] In his usage, an alienated black identity is forced to confront itself as a reified object. This conception postulated Negritude as self-estrangement, a fact or quality that confronts the black subject as an object. Such a gesture initiates an aesthetic movement in Césaire's poem, through an intense symbolism of aggression and complexity of imagery involving a drama of consciousness, towards a self-consciousness that breaks the bonds of subjugation through a grappling with negativity in the form of self-alienation. Césaire applied to the realm of black subjectivity Hegel's insight that 'alienation' is in fact a transformational process in which the individual's so-called 'natural' existence, in this case the ideological subjugation of blacks, is concretely negated for an artificial, self-created one. He thus produced the material, textual objectification of black self-consciousness, a programme for self-understanding and liberation.[50] In contrast, Léopold Sédar Senghor's notion of Negritude and the general reception and critique of the concept in west Africa following Senghor (a poet and later the first president of independent Senegal) focused on the putatively 'African' characteristics of emotion, intuition, artistic creativity, and 'anthropopsychism', by which he referred to the unmediated relation of the 'black soul' to the phenomenological world, its 'eternal' characteristic,[51] as opposed to a Western, or 'Hellenic', rationality. The quintessential African civilization emphasized the group over the individual, race and culture over class, the irrational and mythical over the conscious and rational, images over concepts, and art and religion over science and technology. The very process of delineation between Africa and Europe was itself 'part of the organicist, antimodern tradition of European thought that sought to retrieve what had allegedly been lost with the triumph of modernity'.[52] In short, Senghor's Negritude was, to use his own vocable, a revisionist 'ontology', or study of 'black being' in the world, a fundamentally ahistorical, transcultural determination and celebration of the constituents and commonalities of 'blackness' in African diasporic societies.

At almost the same time as these views confronted each other in a clash at the First International Congress of Negro Writers and Artists, held at the Sorbonne, Paris, in September 1956, Elias's *The Nature of African Customary Law* gave a modernist turn to the debate on whether African law was really 'law', by making use of European anti-modernist thought against Europe through a set of typically

[49] Ibid., at 125.

[50] J. G. Vaillant, *Black, French and African: A Life of Leopold Sedar Senghor* (1990), p. 244.

[51] L. Sédar Senghor, *Liberté I: Négritude et humanisme* (1964), pp. 71–4.

[52] R. H. King, *Race, Culture, and the Intellectuals 1940–1970* (2004), p. 241.

modernist moves (not in the sense of the system of ideas and thought of the Enlightenment, but the cultural and aesthetic experiment and innovation of the early twentieth-century avant-garde). Whereas Senghor assumed the objective existence of the 'African personality' as it had been accepted in years of ethnological and sociological investigation, Elias's juridical Negritude instead defined 'African' in African law by precisely what it was not, by what Ernesto Laclau calls its 'lack' or 'absent totality' as marking the 'emptiness' of signifiers, the non-'purely differential space of an objective identity'[53]: irrational, primitive, communal,[54] mystical, conservative, static,[55] yet 'boastful, arrogant and self-assertive'[56]; in other words, everything for which previous generations of writers on customary law had argued and which tainted their analysis with racial prejudice.[57] The move was significant, since it departed from other influential scholarly accounts. For example, Elias's contemporary, Kéba M'Baye from Senegal, has argued in a typically Senghorian vein that African law has its own special characteristics, which are the result of 'the African idea of law itself, and its finality, and also of the dimensions of Negro African civilization'.[58] Elias faulted missionaries, who 'are accustomed to regard African law and custom as merely detestable aspects of paganism which it is their duty to wipe out in the name of Christian civilization'.[59] The district officer, whose policy was 'the sublimation of native custom so that it may approximate more nearly' to what he believed to be a 'higher standard',[60] was no more enlightened on this score. While the anthropologists, because of their training, had a better understanding of African material, their views were flawed; those of the older generation saw little or no law in African societies and were emphatic that 'custom is king',[61] whereas the younger ones were prepared to concede that African law was indeed law but, due to the social environment and economic milieu in which it had to operate, was nonetheless somehow 'different' from other forms of law.[62] As for the judiciary, they recognized the fact that African law was law, but felt that it had nothing in common with European conceptions of law and justice, which could not therefore be used 'to explain the basis of primitive legal theory'.[63]

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[53] E. Laclau, *Emancipation(s)* (1996), p. 42. For Laclau, the empty signifier stands for the universal, the *impossible* fullness of the community. It is a particular 'which has divested itself of its particularity' or 'which overflows its particularity' to stand for the universal. Ibid., at 22.

[54] Elias, *supra* note 22, at 98.

[55] Ibid., at 80.

[56] Ibid., at 93.

[57] Elias's main antagonist was Sir Henry Maine and the views on evolutionism he had expressed in his *Ancient Law* (1906).

[58] K. M'Baye, 'The African Conception of Law', in *International Encyclopedia of Comparative Law* (1973), I, 148 ff.

[59] Elias, *supra* note 22, at 25.

[60] Ibid., at 26.

[61] Ibid., at 92–3, also 160.

[62] Ibid., at 29.

[63] Ibid., at 36.

Elias dismantled the civilized/barbarous distinction on which each of these theories rested, not by showing and glorifying Africa's cultural distinctiveness or 'essence' but by revealing the region's similitude with all human societies, its participation in humanity, in one and the same civilization. The uniqueness of African law lay not so much in the rules or legal ideas applicable in the region (which were no different from those in England,[64] where differences were 'of degree and not of kind',[65] where 'while institutions may differ, processes tend to be everywhere the same'[66]) but in the historical, economic, and, especially, social conditions that these rules and norms were to embody and mark out.[67] He then internalized differences as marking different levels of legal development and social cohesion, rather than as constitutive of the organic character of 'human law'[68] and thus reconfigured the distinction along development lines *internal* to the legal system.[69] But Elias's genius unquestionably lay in the fact that by rejecting the stigma of the 'primitive mind' or what he called the 'inferiority complex',[70] he did not confront himself or Africa, for that matter, as a reified object as Césaire had contemplated. As Arnulf Becker notes in relation to the Chilean jurist Alejandro Álvarez, 'Overcoming the civilized/barbarian boundary did not mean the exaltation of a reified local identity (as *criollismo* or *indigenismo* [or *nègre*]) but the juxtaposition of the elements of the dichotomy',[71] the marking out of a space between Africa and Europe where there would subsist something which was neither one nor the other.[72]

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[64] Elias's main examples of areas where African law and British law were in unison were the distinction between civil and criminal law (ibid., at 110–29), principles of liability for legal wrongs (criminal, contract, and tort) (ibid., at 130–61), concepts of ownership and possession (ibid., at 162–75), resort to legal fictions (ibid., at 176–86), modern and customary legislation (where British influence was palatable) (ibid., at 187–211), and the judicial process (ibid., at 212–72). For each item, he masterfully refuted all detractors of African customary law, demonstrating how their objections were all predicated on misconceptions, ignorance, and racial bias against African societies and the all-too-ready desire to assume that African law in general must, by the very fact of being African, be irreconcilably different from English and, broadly, European law.

[65] Ibid., at 36.

[66] Ibid., at 31.

[67] Ibid., at 121–2 ('we are not by any means suggesting that there is, therefore, no difference between the African and a more developed legal system like the English … It would be not only foolish but also absurd to ignore the obvious fact that the legal, no less than the other, arrangements of a society, are affected by their sociological context … such notions will vary as much, or as little, with the *mores* and the *ethos* of particular communities as with their historical and geographical conditions').

[68] Ibid., at 34. See also Elias, *supra* note 35, at 8.

[69] References are numerous in his work on the different levels of development of African societies. See, for example, Elias, *supra* note 35, at 9 ('Of course, the areas are not all at the same level of development and there are hierarchies of courts corresponding to the particular stage of advancement attained by the community concerned').

[70] Ibid., at 376.

[71] A. Becker Lorca, 'Alejandro Álvarez Situated: Subaltern Modernities and Modernisms that Subvert', (2006) 19 LJIL 879, at 915.

[72] For an illustration of this hybridity, see Elias, *supra* note 22, at 213 ('We need not emphasize that this synthesis of the two English and African legal ideas is a curious amalgam partaking of the nature of neither pure common law arbitration nor customary law arbitrament').

Clearing up the question of civilization by collapsing the civilized/primitive distinction and disentangling it from the question of what is 'law' allowed Elias to rest Africa and Europe side by side and include them in the same grouping of human societies, thus expressing a will to power and influence and securing a pre-eminent place for the region. But a further inclusionary move was necessary to substantiate the claim that African customary law was law. If 'The question whether African customary law is law or not, can best be answered only when we know what law is'[73] and not what we mean by 'Africa', then the elements of Africanness were no more relevant to making this determination than were Western criteria of society and government. Only a unified theory of law that was not discriminatory could legitimately account for both, while variations would be accommodated within a single frame of reference. Recall that in his earlier work Elias had already demonstrated strong modernist affinities with an anti-formalist legal consciousness and the turn to the 'social' whose influence could be felt on the continent, at least insofar as French anti-formalist social ideas in the French African colonies were concerned. Of all the extant theories considered, he appears to have been most seduced by Pound's suggestive metaphor of law's 'social engineering' function, Ehrlich's 'living law' idea, and Savigny's concept chiding at the 'inner consciousness' of the people (*Weltanschauung*) as the true foundation of law (although he was also known as a formalist, hence the more appropriate denomination of the 'social associated with tradition' to characterize his work). But Savigny's nationalist bent crucially failed to explain 'why its reception by these alien peoples can ever make the French Code an expression of *their* popular consciousness'[74] or, as Duncan Kennedy puts it, 'why, at the moment of discovering national particularity, *each nation discovered the same thing*'.[75] Ultimately Elias found all of them wanting, and no more convincing on this score[76] than they were in explaining (along with social contract models of a Western pedigree) why law was habitually obeyed[77]: the law of a given community was 'the body of rules which are recognized as obligatory by its members',[78] a tailor-made definition that ensured that the determinant of 'the *ethos* of the community is its social imperative', which 'does not assume a particular type of political organization or a special brand of social philosophy'[79] and which is applied equally to Africa and Europe. For 'order, regularity and a sense of social obligation

[73] Ibid., at 37.

[74] Ibid., at 44.

[75] D. Kennedy, 'Two Globalizations of Law and Legal Thought: 1850–1968', (2003) 36 *Suffolk University Law Review* 631, at 661 (emphasis in original). Kennedy's hypothesis that 'The ideology of The Social was (perhaps) not a reflection of national particularity, but an instrument in the "imagining" of presently non-existent national communities', is not implausible for colonies, given the fact that they are stripped of their capacity to make a claim based on nationalistic consciousness, hence the paradox of defining (or imagining) the 'social' through 'lack'.

[76] Elias, *supra* note 22, at 53.

[77] Ibid., at 73.

[78] Ibid., at 55.

[79] Ibid.

are essential attributes of law, in Western no less than in non-Western societies'.[80] His was an attempt to distinguish African customary law from Western conceptions and theories of law (differentiation) while defining it from the perspective of both (sameness),[81] and not from a romanticized and reified 'African' perspective which was less of a localized trope with a placid signifier than a rhetorical device.[82] In positioning African law on a par with English law, Elias was able to locate Africa at the centre of legal developments in the colonies and succeeded remarkably in retrieving African humanism as the genus of the hybridity of its Western and indigenous influences, both of which were required for the development of African states on the brink of imminent independence.[83]

3.3 Strategizing Fringes in Search of Synthesis: Constructing the African (Nation-) State in the Shadow Of Dualism (1960–1970s)

The previous section has argued that the first wave of legal consciousness in Africa during British colonial rule as retrieved from the work of Elias coincided with the rise of African humanist thought marked by a self-assertion of an African consciousness about its place and role in world history and the inscription of the double heritage of Africa as the site of Western and indigenous cultures, laws, and politics. With the independence in 1960 of many African states, energies came to be directed away from ontological and philosophical questions towards pragmatism – that is, managing conflicts and the harmonization of African indigenous laws and received Western legal ideas. In this period of resurgence of nationalist sentiments and militant ethnocentrism within a fledgling Africa coping with modernity, it became necessary to give more assertiveness and clarification to African customary law in a movement towards fashioning a cultural continental convergence (pan-African culture) so as to prevent it from being swallowed up by the 'exotic other', and, at the

[80] Ibid. See also ibid., at 131, 268.

[81] Such a reading seems to be doing more justice to Elias's feat than the following comments, which do little more than confuse the reader because of a certain circularity in reasoning: 'Rather, he combined the views or attributes of a future definition of African law to the fundamental elements that go in defining law in general in western societies. However, he specifically omitted certain factors, primarily because none of them would adequately describe the nature of African customary law.' Mwalimu, *supra* note 47, at 125.

[82] For a contrary view, see ibid., at 128–9 ('Indeed Elias did not per se define customary law, but rather defined law in general from an African perspective to which we have subscribed and attributed the ingredients for a definition of African customary law.').

[83] Kéba M'Baye, a prominent African scholar as well as the first president of the Supreme Court of Senegal and a former judge of the International Court of Justice, has rather spoken of a 'stratification' of African law, African society having been transformed by contact with the monotheist religions and the influence of colonization, with the successive contributions being superimposed on one another without really becoming unified. See M'Baye, *supra* note 58, at 151.

same time, to weld the two into a unified legal system which was thought to be the only road to modernization's salvation. Rather than tracing patterns of norm diffusion and reception widely emerging in the works of Elias during this period, particularly in his *British Colonial Law* (which was partly written during the previous era and published in 1962), and the anxieties of influence, I examine in this section the politics of his narratives of 'uniformity' and 'progress' in his quest for an ever-greater amalgamation of the legal legacies bestowed by the multiple influences in the region.[84] Two distinctive elements whose combination would mediate between seemingly conflicting projects of cultural nationalism, ethnic particularism, and development-oriented 'ordered reason and progress' were to emerge: the heroic figure of the enlightened judge as the guarantor of the social equilibrium against a rigidified dualism, and the instrumentality of the 'repugnancy' doctrine as catalyst for law's growth negotiated *between* assimilation and resistance, tradition and modernity.

The question of how much of African customary law was still 'relevant' and what were its prospects for survival, given its contact with English law, had already been considered, albeit under different socioeconomic conditions, under British colonial rule. In 1954 Elias had noted the inevitability of this dualism: 'the tempo of life is already quickening fast in many rural communities and the infiltration of new ideas into these goes on apace; the people are learning rapidly and are imbibing many alien notions of law which the new civilization is making familiar day by day'.[85] '[N]ew legal situations naturally follow in the wake of modern transactions between the two, and as these are often foreign to traditional legal ideas English law has to be adopted by the local people.'[86] But whether such trends in the progressive absorption of customary law into the all-pervading English system would result in the 'total or partial extinction' of the former was too early to gauge, although this would be unlikely, especially in those personal aspects of indigenous law relating to marriage and the family, land tenure, and succession and inheritance where English law's application was virtually excluded by legislation. In *The Nature of African Customary Law*, however, a rather mixed picture was given. On the one hand, English law's 'creative role of supplying the deficiencies of the traditional law and usage brought about by the new commercial and economic values',[87] such as the loosening up of kinship ties and obligations, the widening of the ambit of customary rights, and the narrowing of the extent of the traditional duties of individuals, as well as the self-sufficiency of a reconfigured *Homo economicus*, was seen to be 'a

[84] One cannot help notice the enduring paradox in Elias's efforts to employ the formalist medium of the treatise or textbook to write about and advance his project of developing African customary law. If we readily concede that customary law is 'living law', which is the law in fact being observed by its subjects, it must also be the case that law is not directly available to outsiders. Surely the mere fact of writing about what the customary law in Africa is constitutes in some ways the creation of a new and somewhat artificial distillation of that body of law to make it 'ascertainable' and 'known'. For the virtues of the legal textbook, see Elias, *supra* note 12, at 283.

[85] Elias, *supra* note 35, at 7.

[86] Ibid., at 5. See also ibid., at 7.

[87] Elias, *supra* note 22, at 273.

logical development of the traditional African conception that a person should be free to do what he likes with his own so long as social solidarity is not thereby endangered'.[88] At other times, it was hastened by his daily contact with European habits and ideas, 'which seem to be bringing out of him the less sociable traits in his indigenous culture but which he is powerless to resist in modern world conditions'.[89] On the other hand, the process of such assimilation was often subtle and imperceptible, such that it was not always possible to tell whether a particular rule was adopted through 'conscious' incorporation.[90] On the civil and criminal sides of African law, 'For better or for worse, British Colonial Africa is bound to tread a path of legal and administrative development which may be very similar to, if not always identical with, that already trodden by Great Britain.'[91] The overall effect of the contact, however, would not be complete uniformity, but '[a] kind of legal *tertium quid*'.[92]

Elias's 1956 prognosis may have had far-reaching implications which have transcended its importance for anglophone Africa. The book was translated into Russian and French and published in 1961, under the editorship of Alioune Diop, in *Présence Africaine*, which became the chief forum in which issues of Negritude were aired. At the First International Congress of Negro Writers and Artists in Paris in September 1956, a crucial event in the cultural politics of the Third World which was seen by many as the cultural counterpart to the Bandung conference held the previous year in Indonesia, and which was organized under the aegis of Diop's journal, one of the tasks was to explore the possibilities of African cultural independence from, but coexistence with, the West. The contributions of Césaire and Senghor, who were at odds on their understanding of Negritude, are instructive, as both seem to have envisioned ultimately the conditions for a cultural synthesis within African humanism. Senghor came to see the ultimate goal as one of 'reconciliation' between Negritude and Western culture and the realization of a universal humanism, a new world cultural order which he dubbed 'la civilisation de l'universel',[93] in which each culture would be respected and allowed to contribute its characteristic virtues to the rest, although the terms of assimilation had to be set by people of African descent, not by Europeans.[94] Césaire also imagined a condition in which a 'new civilization' was possible that would 'owe something both to Europe and to the native civilization'.[95] He thus recognized that whatever cultural synthesis might emerge in the future, it would look different from the pure, ideal type of either culture: not quite the one nor the other. But Césaire also insisted on

[88] Ibid., at 281.

[89] Ibid., at 282.

[90] Ibid., at 278–9. See also ibid., at 280.

[91] Ibid., at 292.

[92] Ibid., at 274.

[93] L. Sédar Senghor, *Liberté III: Civilisation de l'universel* (1977).

[94] L. Sédar Senghor, 'The Spirit of Civilization, or the Laws of African Negro Culture', (June–November 1956) 8–10 *Présence Africaine* 51, at 52, and his comments during the Discussion Session on 20 September 1956, ibid., at 219.

[95] A. Césaire, 'Culture and Colonization', (June–November 1956) 8–10 *Présence Africaine* 193, at 202.

a complex kind of coherence in which the disparate materials making up the new culture had to be experienced as a cultural unity or, as he put it, 'lived internally as homogeneity'.[96] A leading figure in the Negritude movement, Cheikh Anta Diop of Senegal, also aired his idea of 'pan-Africanism', the goal of which was the development of a complex political and cultural unity.[97] One could speculate as to the extent to which Elias, on the one hand, and Césaire, Senghor, and Diop, on the other, were influenced by each other's ideas,[98] but the parallelism is nonetheless striking. Yet Elias's work seems to have had a more 'visible' connection to the broader political events taking place at the time when, 2 years before *The Nature of African Customary Law* was published in French, his remark that 'there are surprising similarities, at least in important essentials, in bodies of African customary laws as divergent as those of the Yorubas, the Bantus, the Sudanese, the Ashantis and the Congolese'[99] was cited with approval in favour of the African 'unity of law' thesis – a central pillar of African humanist thought post-independence – in a report which was presented at the Second Congress of Negro Writers and Artists held in Rome in March and April 1959.[100] Incidentally, the congress would also turn out to be the occasion when Frantz Fanon would definitely abandon cultural pan-Africanism and Negritude and enlist the ideology of national liberation as the basis for a national culture.[101] The point here is not to debate the congruity of these various prescriptive views or intimate that Elias was endorsing any one or more of these positions, nor that his work was directly connected to the Negritude movement; rather, it is to highlight that pan-Africanism (however understood), cultural nationalism, and split ethnic identity politics were as many political projects and elements (subsystems or *paroles*) of an African legal consciousness (*langue*) as

[96] Ibid., at 204.

[97] C. Anta Diop, 'The Cultural Contributions and Prospects of Africa', (June–November 1956) 8–10 *Présence Africaine* 347, at 350–3. It is not clear, however, whether Diop was a historical particularist, who saw the future of Africa as separate from the rest of humanity, or a universalist who hoped for a historical and cultural convergence between Africa and Europe. On the ambivalence of his narrative, see M. Diouf and M. Mbodj, 'The Shadow of Cheikh Anta Diop', in V. Y. Mudimbe (ed.), *The Surreptitious Speech:* Présence Africaine *and the Politics of Otherness 1947–1987* (1992), pp. 118–35.

[98] It is not entirely clear, for example, whether Elias attended the two congresses of Negro Writers and Artists, given that his work and ideas about the unity of African law were to be presented in Rome in 1959, or what to make of his contribution to a collection of essays (T. O. Elias, 'Judicial process and legal development in Africa', in Bjornson and Mowoe (1986), *Legacies of Empire*, pp. 189–210, supra note 16) presented in late May 1982 at the conference 'Africa and the West: The Challenge of African Humanism' in Columbus, Ohio, where the tenets of the Negritude movement were discussed. It was attended by Senghor, but it is unclear whether Elias participated at all or was merely solicited to contribute an additional essay 'in areas of specialization that had not been fully represented in the conference sessions.' See Bjornson and Mowoe, 'Introduction', ibid., at 6.

[99] Elias, *supra* note 22, at 3.

[100] The report, which was published in the *Présence Africaine* congress proceedings, is reproduced in A. Allott, *Essays in African Law* (1960), pp. 55–71.

[101] F. Fanon, 'The Reciprocal Basis of National Cultures and the Struggles for Liberation', (February–May 1959) *Présence Africaine* 89.

would intersect, rather than subordinate one another, in the complex and hybrid site of negotiation of the trajectories of English law and African customary law in an emerging post-independence Africa.

3.3.1 Repugnancy: The Politics and Fashions of Inclusion–Exclusion

In spite of having rediscovered a sense of pride and self-confidence depicted in Elias's *The Nature of African Customary Law*, newly independent states resisted an Africanism resolutely turned towards the past. The singular concern of the previous generation with the problem of identity had given way to a complete rethinking and redefinition of what one might call the 'African problematic'. One can also trace this shift in the thought of Elias, who was appointed the first Attorney General of the Federal Republic of Nigeria in October 1960. It resonates, too, in the works of the so-called 'new philosophers' such as Marcien Towa, whose call for the renunciation of the self constituted by the African past that the protagonists of Negritude had championed, in his *Essai sur la problématique philosophique dans l'Afrique actuelle* (1971), represented a restorative move for African philosophy towards new perspectives of thought and action in the modern world through, invariably, Western rationalism and philosophy as an agent of development and accession to modernity.[102] Because custom stood for ethnic pluralism and rural conservatism, it was all too often seen as an obstacle to the realization of the two great imperatives of the time of national unity and modernization. Some states, especially those which had inherited a civil law regime, responded either by excluding customary law from the national legal system or restricting its scope of operation. T. W. Bennett refers to René David, the great twentieth-century comparatist and universal taxonomist, as an illustration of the former.[103] David, who drafted the Ethiopian civil code, thought that custom was too fluid and unstable and lacked a true juridical character, and that Ethiopian society based on custom was not satisfactorily developed; thus Ethiopians could not wait for centuries until their legal system had evolved to the appropriate level of maturity: a 'revolution' was necessary.[104]

David, of course, was hardly known as a staunch sympathizer of African societies and traditions.[105] I refer to his work here only in sharp contradistinction to the policy which prevailed in former British colonies, where English law would be

[102] A. Irele, 'Contemporary Thought in French Speaking Africa', in Mowoe and Bjornson (1986), *supra* note 16, at 144–6, 154–5.

[103] T. W. Bennett, 'Comparative Law and African Customary Law', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2006), p. 662.

[104] R. David, 'La Refonte du Code Civil dans les états africains', (1962) 1 *Annales Africaines* 160, at 162.

[105] David subsumed custom under civil, common, and socialist law, systems which he regarded as the world's main legal families. Only as an afterthought did he add an assorted group of exotic

introduced and, where necessary, moulded to fit the contours of traditional customary law. British colonial administrators knew all too well that the sudden imposition of an entire body of 'alien' rules on indigenous peoples, particularly on the illiterate in rural areas, would cause social upheaval. With the spectre of the 'return to the primitive' looming large in the minds of African elites all too eager to enlist their system of law in the service of a 'law of decolonization', cultural unity, and, later, a 'law of development', the social and economic conditions of their new lived reality made them increasingly aware of the need to break with the 'backward' aspects of the past and carry out legislative reforms through the dictates of modern law. The way to achieve this compromise was through the fashioning of the 'repugnancy' doctrine, which implied that those customary practices that were found by judges to be 'repugnant to national justice, equity and good conscience' should be disallowed. I consider in the next section Elias's misgivings about the direct implications of 'repugnancy rule' and legal dualism, and the discursive strategies or tropes he strategically deployed to contain its deleterious effects and further his overall project for Africa.

Elias first considered the ramifications of the doctrine in his 1958 Lugard Lectures commissioned by the federal government of Nigeria and entitled 'The Impact of English Law upon Nigerian Customary law', noting that its actual application had proved difficult. Yet his messianic faith in the judiciary as vital in the maintenance of the social equilibrium at a crucial stage of transition through which the country was passing, sometimes by offering a sober dose of legal conservatism, made him rather apologetic: how could they, after all, be blamed for sometimes applying 'exotic' standards (or those based on judges' professional training, social background, or personal predilections) to situations for which there were no exact precedents as to what the 'social' (the common ethos of the people of Nigeria) commanded in the circumstances?[106] Writing contemporaneously in his first work after Nigerian independence, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies,* in which he masterfully undertook a systematization of the various ways in which customary laws differed from each other on the one hand, and from the imported English law on the other, Elias resurrected the civilized/barbarous distinction, in relation to particular rules of customary law, which he had so cleverly dissolved to rehabilitate African law as a whole at a par with English law. He used the terms 'barbarous', 'obnoxious', 'obsolete', and 'contrary to natural justice and good conscience' interchangeably: 'the many approaches to the unvarying ideal of justice, which the components varying local laws represent, should conform to the modern standards of civilized values'[107] or 'the canons of decency and humanity considered appropriate to the situation at hand.'[108] These were not necessarily English but 'the average

'other' laws – Jewish, Hindu, Asian, and African. See R. David, *Les grands systèmes de droit contemporains* (1973), pp. 571–602.

[106] T. O. Elias, 'The Impact of English Law upon Nigerian Customary Law', reproduced in Elias, *Law in a Developing Society*, *supra* note 24, at 3, 83–4.

[107] Elias, *supra* note 12, at 17.

[108] Ibid., at 104.

good sense and good taste of all decent men and women of every clime'.[109] Judges were faced with the difficult task of 'striking a balance between what is reasonably tolerable and what is essentially below the minimum standard of civilized values in the contemporary world'[110]; this was compounded by the fact that these criteria of validity were themselves subject to modifications and amplifications. Yet Elias was at pains to downplay the considerable influence exerted by British notions of morality and justice: although difficult to define, these standards were 'an essential attribute of British justice' and were 'for that reason if no other, the yardstick of the fundamental aim and purpose of all colonial legal systems'.[111] He did not deny that there were, on occasion, wrongful applications of English legal ideas in the determination of 'alien' issues which had resulted in injustice, but, on the whole, 'the judicial attitude to colonial customary law has always been more liberal [one could say 'liberating'] than such isolated instances of prejudice'.[112]

Despite the radical reforms wrought by the application of the doctrine and aimed ostensibly at 'reforming' Africans to resist a return to those aspects of the 'dark' past that would inhibit the task of facing the challenges of modernization, it was widely perceived that its emergence, itself a product of colonialism which now, paradoxically, provided a tool of resistance against its effects in the post-colonial era, perpetuated the contempt or ignorance (or both) of former colonial masters towards 'native law and custom', who would thus be enabled to reject a rule which they believed was contrary to British ideas of civilized behaviour.[113] These critics considered the role the doctrine had to play in creating the boundaries, distinctions, and practices that produced, organized, and sustained conditions of subjugation and domination. Since the application of Nigerian or, more broadly, African conceptions would have made British justice look both ways, the British system, backed by all the force of a judiciary trained in the finest crafts of British justice and the legal profession, would be in a position in which it would gradually swallow up the indigenous system. Given the weight of the views of the detractors of the doctrine and the anxieties about a return to the stigma of civilization which Elias had so relentlessly struggled to break, what, then, explains his extolling of the doctrine's virtues and marginalization of its vices?

Custom, like tradition, is a tool which can be resorted to in struggles for power. As Bennett explains,

> Colonial, and then post-colonial, governments reconstituted existing institutions to achieve new policies, but then returned these same institutions to the people as if they were unchanged. In this process, 'history was denied and tradition created instead'. The people subjected to these changes also invoked tradition, however, partly to resist the imposition of new laws and partly to make sense of new situations.[114]

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[109] Ibid., at 17.

[110] Ibid., at 104.

[111] Ibid., at 17.

[112] Ibid., at 106.

[113] See P. Nnaemeka-Agu, 'The Contribution of Judge Elias to African Customary Law', in Bello and Ajibola, *supra* note 10, at 518, 526; E. K. M. Yakpo, 'The Public Policy Doctrine in African Interlocal Conflict of Laws', in ibid., at 864–7.

[114] Bennett, *supra* note 103, at 665.

Elias understood that human agency participated in the creation of culture and tradition,[115] just as it did in negotiating its ever-shifting boundaries with the received legal system following culture contact, and that this had a profound effect on Africans' understanding of the ideological function of customary law. Clearly, barbarous customs such as witchcraft, the killing of twins, and trials by ordeal had to be (and were) ruled out (though, even here, it was not always easy to define what actually constituted these often imprecise and amorphous notions of customary practice),[116] as this would influence the future development of the law along progressive lines towards forging a cultural continental unity.[117] It would thus become necessary to decide which particular local customs should be diffused and adopted throughout the continent in a movement towards pan-Africanism.[118] Whereas in 1956 Elias had eschewed fashionable attempts to distinguish in *négro-africanité*, behind the diversity of traditional practices, a family likeness (a particular vocabulary, methods, feeling, and intuition) which was the manifestation of the values of black civilization and allowed to maintain that there was a distinctive African conception of law, his embrace and externalization of the unity thesis on similar grounds was here resolutely strategic[119]: a repugnancy doctrine, sparingly applied, could be valuable in a federal state such as Nigeria to protect and unify the basic principles of the various customary systems as a tool of nation-building against the threatening imposition of an 'alien' system. Elias reconfigured the mission of the legal elites of the newly formed states as the development of African law in a world of formally equal nation-states, rather than in the outer darkness of 'barbarism'. Any greater powers of modification possessed by judges over customary laws than over English law would therefore be 'a matter of degree and not of kind'.[120] Receiving the doctrine through legislation permitted a gesture of striking liberal cosmopolitanism in furtherance of a nationalist project based on the notion of national particularity as a

[115] See also J. Ngugi, 'Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration', (2004) 25 *Michigan Journal of International Law* 467 (arguing that certain sectors in Kenyan society, who refused to accept the full range of implications of land registration such as near-absolute powers of the individual registered owner, organized, invented, and mobilized customary norms to frustrate the complete operationalization of the new 'formal' regime of tenurial arrangements).

[116] Elias, 'Impact of English Law', *supra* note 106, at 81.

[117] Ibid., at 109.

[118] Elias observed that this was already taking place in large areas of Africa where there had emerged broadly similar political and economic conditions and, therefore, similar rules of customary law, 'which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law.' Elias, *supra* note 9, at 220.

[119] M'Baye, although inclined to recognize the unity of African law as being bound up with the assertion of the Negro-African disposition towards the world, nonetheless recognized that this had often been raised to the level of a matter of doctrine and that 'This attitude, although flattering to African pride, is not realistic; those who adopt it immediately realize this and do not hesitate to abandon it, turning firmly towards modernity'. M'Baye, *supra* note 58, at 155.

[120] Elias, *supra* note 12, at 119.

secular force, against both the old colonial power and the fragmenting elements in the local situation, thus not sacrificing, but rather reinforcing, local autonomy.

There was, for Elias, another important function for the doctrine which arose in the context of discussing situations of incompatibility or conflicts between indigenous customs and English laws. There were 'borderline' cases that neither offended against the judges' enlightened sense of morality and fairness nor affronted the indigenous code of ethics. What should be made of those instances? Not any incompatibility would disqualify the local rule, just as not all rules that were 'not repugnant to principles of natural law, equity and good conscience' would be retained; in such cases, or whenever there was no precise rule either of English law or of native law and custom applicable to a case, judges had discretion to decide them according to principles of natural law, equity, and good conscience or through an appeal to 'natural justice and "sweet reasonableness" – a mixture of *jus gentium* and *jus naturale*'.[121] These were largely pragmatic indicators of 'progress' and grounded in 'naturalizing', 'dichotomizing', and 'dissimulating'[122] effects of categories and ideas of 'native welfare'[123] versus backwardness, or 'orderly development and social welfare'[124] versus underdevelopment, or of bringing the body of law 'up to date' in the light of modern-day economic conditions of commerce and industrialization versus regression.[125] Here, the question of community versus individual system of land tenure and the former's suitability for modern economic development projects becomes paradigmatic as the site where particular techniques and progress vocabularies help to shape the conditions in the colonies that are sympathetic to receiving

[121] Ibid., at 213, 222.

[122] I usefully derive these notions from their borrowing from ideology critique scholarship and application to the work of Stelios Seferiades by Thomas Skouteris in developing the analytical sketch of 'vocabularies of progress' in international law, namely 'discursive strategies with which arguments buttress their power over others and seek to distinguish themselves from their ideological opponents'. T. Skouteris, 'The Vocabulary of Progress in Interwar International Law: An Intellectual Portrait of Stelios Seferiades', (2005) 19 EJIL 823, at 824, 837–40. I argue that Elias's work can be seen as another scholarly endeavour shaping the face of 'progress' as a narrative straddling different ideological struggles and personal/professional projects, making the relationship between progress and African customary law central to the renewal of the discipline.

[123] Kennedy, *supra* note 75, at 659.

[124] Elias, *supra* note 12, at 241. Francescakis suggests the concept of 'ordre public du développement' as a way to assuage fears over the arbitrary application of the repugnancy doctrine, based on the idea that local rules that are detrimental to social development should be discounted. See P. Francescakis, 'Problèmes de droit international privé de l'Afrique noire indépendante', (1964-II) 112 RCADI 269, at 305. It is not entirely clear in what sense 'social development', a political policy goal, would be a more useful device and applied with a greater degree of certitude, or be purged of an ethnocentric bias. Both the social development and repugnancy doctrines, however, seem to share the same function of contributing towards the unification of the local legal systems and a unified society run, to paraphrase Senghor, on the principles of universal civilization (*civilisation de type universel*).

[125] Elias, *supra* note 12, at 142. See also Elias, 'Impact of English Law', *supra* note 106, at 107 ('Under any progressive legal system most of the alterations would have had to be carried out if orderly development in social and economic life were to be at all ensured').

such a renewalist political ethos.[126] Whenever it was in their 'interests' (as they would understand or be made to understand it), the operation of English law through the applications of such notions would be ratified by local elites, sometimes with necessary transformations; but when it reflected peculiarities of English law that it would be unjust to impose on the local peoples, or when it confronted racial and ethnic idiosyncrasies, they would compromise with the local forces that identified with tradition and resist it. Still, on some occasions custom was upheld but reinterpreted such as to make it appear as conforming to principles of development, equality, and progress.[127] Duncan Kennedy explains thus the effect of post-colonial appropriation of formalism through experiences of strategic selection in reconciling various, and at times conflicting, political projects:

> [I]t offered peripheral elites the categorization of their family law as popular, political, religious, cultural and particular, and therefore as eminently *national*. In exchange, they accepted (usually with alacrity) that the law of the market would be, not positively and in every detail, but generally and 'essentially', the property and contract-based law of a national 'free' market.[128]

This is identitarian intersectionality thinking through and through, alternating between essentializing a particular trait (tradition or 'Africanness') that sets its possessors apart in furtherance and legitimation of legal claims (custom), and trying to reconcile these claims when they conflict with each other (cultural synthesis) and with claims from other identity-based narratives (development). Repugnancy doctrine and its corollaries were well received because both former colonial administrators and local elites could live with it. The doctrine framed what we could perceive as resistance and domination and provided an effective mode of assimilation and resistance. It helped both to preserve the neo-feudal institutions and to sustain ethnic nationalism and thus served as the hybrid site of negotiations of a law between tradition and modernity.

3.3.2 Against Dualism! Mimicry in Defence of Hybridity

The previous sections of this article have suggested how African legal systems, following the introduction of English law in colonial dependencies, became the product of Westernization, by transplantation on the one hand and as containing pockets of pre-modern customs or informal practices on the other. Throughout his life Elias waged an uncompromising crusade against the sometimes uncomfortable and uncanny dualism between received English law and indigenous customary law. Occasional frictions and conflicts occurred from the competitive coexistence of the two bodies of law with different systems of courts not always hierarchically

[126] Elias, *supra* note 12, at 223–44.

[127] Bennett, *supra* note 103, at 662–3.

[128] Kennedy, *supra* note 75, at 646.

integrated.[129] In *The Nature of African Customary Law*, he noted that there was 'no intrinsic opposition between the two and that the extrinsic divergencies of form and content of some basic principles have been occasioned as much by historical and geographical factors as by commercial and technological considerations', but also grudgingly acknowledged that 'given its specific context, each system is valid for the type of society and the species of task for which it is designed, at least so long as the process of acculturation has not resulted in a disruption of the African society by the European impact'.[130] While there has been recognition of the diversity of forces – British and indigenous – active in the creation of African customary law, it could not always be ascertained and distinguished clearly between the substratum and the borrowed, whether the telling blend between tradition and modernity had been a Westernization of African law, or whether British law had, in fact, been 'Africanized', thus unsettling fringes. How could one address the duality of operating in alternative and at times incommensurate discourses?

There is certainly a progressive movement in Elias's narrative, from the assertion of an African consciousness in the development of law's identity to the realization of a pan-African cultural unity of law as a tool for nation-building, both set up against the imperial domination of the West, to the need for 'the existence of conditions which would ensure the stimulation of common purposes and loyalties in the legal, no less than in the national, fields of our endeavour',[131] for developing the law along a 'common path' guided by and modelled on 'the unifying force of English law'. The latter's own development as the 'common custom of the realm' had been 'evolutionary' rather than 'revolutionary'[132] in adapting itself to changing social and economic circumstances; it had proved 'capable of absorbing the shock due to alien contacts and new ideas and of meeting the ever-present challenge of rapidly changing social needs'.[133] It thus offered to Nigerian law 'an example of flexible and pragmatic legal development in a relatively dynamic society'.[134] But this could not sustain deriving from an 'is' the 'ought' claim that African customary law *should* evolve along the lines of British common law in substantive and procedural terms. Here, Elias was emphatic: 'English law had supplied the framework' within which indigenous laws could 'flourish in an atmosphere of ordered freedom and rational progress'.[135] Since a closer degree of assimilation with English law could be forecast, an ultimate 'amalgam' of elements from both was desirable and would be 'the best bulwark against tribal cant and ethnocentric prejudices' in the search for unity and uniformity in the 'conscious striving after the worthwhile ideals of social justice and national solidarity'.[136] The

[129] T. O. Elias, 'The Commonwealth in Africa', (1968) 31 *Modern Law Review* 284, at 301; Elias, 'Impact of English Law', *supra* note 106, at 106.

[130] Elias, *supra* note 22, at 299.

[131] Elias, 'Impact of English Law', *supra* note 106, at 110–11.

[132] Elias, *supra* note 22, at 301, also 274.

[133] Elias, *supra* note 22, at 301, also 274.

[134] Elias, 'Impact of English Law', *supra* note 106, at 108.

[135] Ibid., at 111.

[136] Ibid.

judiciary would emerge as the hero figure that would, through rational thought and scientific study, supply 'the necessary *esprit de corps* for the achievement of the symbiosis, if not an initial synthesis',[137] and would therefore not be so preoccupied with the charge of doing 'politics by other means'.[138] It was unclear, however, what this mishmash of rules and legal ideas would ultimately look like. Such, then, was Elias's broad vision for constructing the post-colonial African state already legally and constitutionally fissured by regionalization and federalism – his background story about Africa which the discursive tropes of 'the unifying force of English common law' and 'rational order and progress' aligned on the unity (reform)/tribal ethnocentricity (regression) dichotomy were going to assist in sustaining.[139]

Discussion on how best to achieve the harmonious synthesis of British law and indigenous law – the classical tropes of monism and dualism – itself becomes a discourse that plays a role in critiquing or sustaining various political projects. These can be informed, for example, by newly fashioned theories of race (answering the question 'Who is a native?' takes centre stage when one seriously considers monism a judicial policy option[140]) and models of post-colonial or neo-colonial governance. Through their deployment, various elites and subalterns would be produced and reproduced, always negotiating, marking, and disciplining the shifting boundary between centre and periphery, and playing defining although varying roles (to civilize, restrain, develop, manage, protect, or dominate) in the decolonization movement. Elias (writing prior to independence but meaning to apply his words in the post-colonial context) considered that the inquiry raised the further problem of

> the proper aim of English law in a colony's legal development. Should it merely help the indigenous law to develop itself into a vital instrument of social control in the evolving colonial society, without claiming a share in whatever the finished product might be? Or is it eventually to replace the indigenous law after an evolutionary adaptation of it to English law and ideas has fully prepared the way?[141]

The truth, once again, lay somewhere in between: neither one nor the other, 'at once various and unitary', 'unity in diversity'.[142] 'The mixing of English and indigenous ideas of law must be so proportioned as to make each supplement the other by supplying deficiencies and removing excrescences, with the avowed aim of producing a truly *native* body of law in each colony.'[143]

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[137] T. O. Elias, 'Towards a Common Law in Nigeria', in T. O. Elias (ed.), *Law and Social Change in Nigeria* (1972), p. 271.

[138] T. O. Elias, 'Judicial Process and Legal Development in Africa', in Mowoe and Bjornson (1986), *supra* note 16, at 208 ('On the whole, it can be said that the application of the judicial technique of the English common law to our customary laws has often resulted in the remoulding of the traditional rules and concepts along lines of rational development to suit our economic and social characteristics').

[139] Elias, *supra* note 12, at 288.

[140] Ibid., at 102–3, 130–1.

[141] Ibid., at 287.

[142] Ibid., at 9.

[143] Ibid., at 289 (emphasis in original).

There is, however, one sense in which 'mimicry' becomes significant for retrieving the *langue* of Elias's juridical Negritude. I argue that Elias's narrative of 'uniform amalgam' or *tertium quid* impels us to re-imagine normative developments in the English law/African customary law nexus as the institutional matrix constructed out of the 'mimicry' of cultural practices and local conflicts. My understanding of this concept is informed by the distinct usage of the term by post-colonial critical scholar Homi Bhabha in his critique of metropolitan literature: as an elusive and effective strategy of colonial power and knowledge which, however, in its 'double vision' of the Other inscribed in its enunciatory act – 'almost the same but not quite' – menaces the colonial mode of representation and mocks the power that supposedly makes it imitable by disclosing the ambivalence within colonial discourse,[144] thus disrupting its cultural authority without, however, destroying it entirely.[145] Bhabha offers such a reading of Fanon's *Black Skin, White Masks/Peau noire, masques blancs* (1952), where the latter undertook a phenomenology of black existence. In psychoanalytical terms, Fanon investigates the way in which the introjection of social values is disturbed in the case of the black subject placed within a socio-psychological field dominated by the white paradigm. The conflict between the external 'fact of his blackness' and his internalization of a highly valorized symbolism of whiteness creates a distortion of his self-image and installs within him a profound 'neurosis', with repercussions upon his total mode of being. Bhabha explains,

> The ambivalence of mimicry – almost but not quite – suggests that the fetishized colonial culture is potentially and strategically an insurgent counter-appeal. What I have called its 'identity-effects' are always crucially *split*. Under cover of camouflage, mimicry, like the fetish, is a part-object that radically revalues the normative knowledges of the priority of race, writing, history. For the fetish mimes the forms of authority at the point at which it deauthorizes them. Similarly, mimicry rearticulates presence in terms of its 'otherness', that which it disavows.[146]

[144] Bhabha explains the colonial presence in its enunciative act as 'always ambivalent, split between its appearance as original and authoritative and its articulation as repetition and difference. It is a disjunction produced within the act of enunciation as a specifically colonial articulation of those two disproportionate sites of colonial discourse and power: the colonial scene as the invention of historicity, mastery, mimesis or as the 'other scene' of *Entstellung*, displacement, fantasy, psychic defence, and an 'open' textuality. Such a display of difference produces a mode of authority that is agonistic (rather than antagonistic)', i.e. 'within the terms of a negotiation (rather than negation) of oppositional and antagonistic elements.' H. K. Bhabha, *The Location of Culture* (2004), p. 153.

[145] Bhabha thus explains, 'the discourse of mimicry is constructed around an *ambivalence*; in order to be effective, mimicry must continually produce its slippage, its excess, its difference. The authority of that mode of colonial discourse that I have called mimicry is therefore stricken by an indeterminacy: mimicry emerges as the representation of a difference that is itself a process of disavowal. Mimicry is thus the sign of a double articulation; a complex strategy of reform, regulation and discipline, which "appropriates" the Other as it visualizes power. Mimicry is also the sign of the inappropriate, however, a difference or recalcitrance which coheres the dominant strategic function of colonial power, intensifies surveillance, and poses an immanent threat to both "normalized" knowledges and disciplinary powers.' Ibid., at 122–3.

[146] Ibid., at 129–30 (emphasis in original).

The signifier of colonial mimicry is produced as an 'affect of hybridity – at once a mode of appropriation and of resistance, from the disciplined to the desiring'.[147] This is 'the more ambivalent, third choice … black skins/white masks'.[148] 'Black skin splits under the racist gaze, displaced into signs of bestiality, genitalia, grotesquerie, which reveal the phobic myth of the undifferentiated whole white body.'[149] Thus

> hybridity is not a *problem* of genealogy or identity between two *different* cultures which can then be resolved as an issue of cultural relativism. Hybridity is a problematic of colonial representation and individuation that reverses the effects of the colonialist disavowal, so that other 'denied' knowledges enter upon the dominant discourse and estrange the basis of its authority – its rules of recognition.[150]

The paranoid threat from the hybrid is finally uncontainable because it breaks down the symmetry and duality of self/other, inside/outside, familiar/foreign.

I suggest that the introduction of English law in former British African dependencies can be seen as the production of hybridization within Africa as well as Elias's narrative that subverts imageries of indigenous culture as sites of reception in a dialectic of influence or assimilation and resistance, or a more amorphously aesthetic process of structural transformation. The turn to hybridity characterizing Elias's work means that comparativists and local intellectuals at the core and the periphery do not necessarily come to produce and understand similar maps of what are assimilable and inassimilable legal cultures. In his narrative African law is portrayed as both sufficiently unique, distinct, and insulated to support nationalist projects of decolonization and pan-Africanism, and sufficiently resilient, already assimilated, and permeable to outside influences (Western and Islamic) to support assimilation. In this story of the rise of African legal consciousness, it is, however, not a matter of choosing between alternatives (which dualism implies),[151] but of an intersectionality between political struggles of national cultural identity and ethnocentric particularisms in relation to broader ideological projects of legal unity and pluralism structured around the development paradigm of modernization in an era of decolonization. Asserting a strong cultural nativism through the diffusion of particular customary rules can be inscribed in alliance with Western law as an attempt to break away from those elements of the past that hamper progress and develop-

[147] Ibid., at 172.

[148] Ibid.

[149] Ibid., at 131.

[150] Ibid., at 162 (emphasis in original).

[151] David Kennedy reads M'Baye, *supra* note 58, at 155–6 ('The African continent is a world of contradictions: subjected to a variety of frequently contradictory forces, it is ever hesitating between them'), as assisting local intellectuals and elites in making such a 'choice' between assimilation and exceptionalism, noting that 'a postcolonial African law will involve each country choosing the legal models and rules, whether Western or African, best suited to achieve the national priorities of development and modernization in its particular circumstances.' Kennedy, *supra* note 4, at 619–20, n. 104. My reading of Elias's scholarship as signalling a turn to hybridity of an African law always already reflecting the double heritage of African humanism indicates otherwise.

ment, just as it can easily be mounted as a 'racial front' (unity of law through diffusionism of certain 'traditional' rules) to resist receiving Western ideas and institutions about development. Coalitions are thus formed between European and indigenous laws strategically within patterns of production and reception of imageries of Africa that are not settled but constantly shifting and being negotiated.[152] This means that images of what are 'Africa' and the 'West' are only partial and tendentious and 'the presence of the first world in the third and the third world in the first'[153] challenges those narratives that make only some development strategies seem available and foregrounds that they, too, just like those seeking to disrupt the frames within which such strategies are articulated, are engaged in the pursuit of ideological and political projects.

3.3.3 Repetition as Renewal: Anti-formalism as Reform

The previous sections of Sect. 3.3 have highlighted that the most important task in the field of African law after independence was to carry out codification and structural reforms.[154] Changes through the decolonization of the legal system led to the adoption of a development-oriented model. There were imitations, adaptations, inventions, and, occasionally, resistance. The unification of law (internal, regional, and 'continental') became a subject of particular importance. The question was how to achieve synthesis into 'a common law for the country'. In francophone Africa newly independent states began to codify their customary laws mainly in order to stave off neo-colonization by France. Elias desired not only the modernization of African law, but the harmonization and, ultimately, unification of the emerging modern system.[155] Yet unlike most of his peers he eschewed codification and the importation of legal orthodoxies to sustain a new stream of legal reform, and refashioned those 'at home' to tackle the pressing social issues. What were the forces behind his extreme faith in anti-formalist legal reform and how were they to affect African societies?

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[152] Belleau, *supra* note 18.

[153] Kennedy cites the work of Lama Abu Odeh on Islamic legal culture and 'honour killings' as eschewing the alternatives of exotism and assimilation and embracing hybridity ('She does so by insisting on the presence within the subjective identity of those brought up there of both traditional and modern elements, of assimilation and exotism, confounding efforts to categorize Islam from the centre as either one or the other'). Kennedy, *supra* note 4, at 622.

[154] Two of the 'structural' reforms proposed by Elias were the reorganization of courts to avoid the parallelism of jurisdiction as between those administering English law or some modified versions of it and those administering customary or other traditional law, and the simplification of English law so as to make easy the work of integrating it with customary law and social patterns of the local communities. See Elias, *supra* note 12, at 288.

[155] Elias, *Law in a Developing Society*, *supra* note 24, at 139.

Elias believed that the overall effects of developing customary law along similar lines as the British common law had been 'salutary and enlightening'.[156] Where there had been difficulties, it was due to neglect of scientific and systematic study of the problems of culture contact and of adaptation to the local environment of alien ideas and institutions. Much work could be and needed to be done. There was 'the need to examine the role of law in the new society for which the traditional methods of legal education of would-be lawyers and the administration of justice were no longer adequate or even relevant'.[157] Anthropological fieldwork was no doubt necessary.[158] But there was 'a crying need for the early introduction of an enlightened system of legal education and legal research which would be designed to produce future lawyers imbued with a new sense of social purpose and moral responsibility'.[159] The judiciary, too, had to be trained and to 'emulate all the great virtues of the Bench and Bar' to 'return well-fitted to discharge properly their obligations to their communities'.[160] Elias had no doubt that 'Given the will and a conscious national direction, eventual unification … is only a question of time.'[161] But the method of achieving it was for him crucially important too. Elias had an almost fetishist admiration for the judiciary, which had succeeded remarkably (no doubt due to his own involvement in these formative years (1972–1975) as chief justice of Nigeria) in ensuring the coalescing of English law and African customary laws and 'to introduce order into chaos by the rational application of the judicial process'[162] without there having been resort to codification.[163] Customary law was adaptable and situational, qualities which contributed to a sense of process and transaction, and hence progress, whereas codification would render customary law artificial, a set of irrevocable acts and events, far removed from the experience and comprehension of the people, while encouraging ethnocentric prejudices.[164] For Elias, the anti-formalist 'social' was thus a positive ideological programme which had a symbolic effect in a period of transition.[165] The drive for formalist legal reforms would overlook both

[156] Elias, 'Towards a Common Law in Nigeria', *supra* note 137, at 266–7.

[157] Elias, *Law in a Developing Society*, *supra* note 24, at 5.

[158] Elias, *supra* note 12, at 276–7.

[159] Ibid., at 299. See also Elias, *Law in a Developing Society*, *supra* note 24, at 141. Elias was instrumental in establishing the Nigerian Institute of Advanced Legal Studies, with a robust research agenda through which he was to contribute further to the development of customary law in Nigeria. See Nnaemeka-Agu, *supra* note 113, at 528–9.

[160] Elias, *supra* note 12, at 290.

[161] Elias, *Law in a Developing Society*, *supra* note 24, at 140.

[162] Elias, *supra* note 138, at 208–9. See also Elias, *supra* note 35, at 375–6.

[163] Elias's first-hand account of the judicial delineation of analysis of thought and reasoning underlying the articulation and objectivity of principles as well as practice in the 'Newer Commonwealth' (Commonwealth countries of Africa, the Caribbean, and Asia) of many strands in African law dealt with by judges trained in English law and usage is distilled in a collection of lectures and papers he gave between 1975 and 1985. See T. O. Elias, *Judicial Process in the Newer Commonwealth* (1990).

[164] Elias, *supra* note 138, at 205. See also Elias, *supra* note 12, at 299.

[165] Elias, *supra* note 12, at 280.

the legitimating and demobilizing effects of political emancipation causes won elsewhere as legal victories. I have argued in the previous section that anti-formalism was an element in a post-identity politics of hybridization in Elias's scholarship. While codification could represent resistance to universal claims of English law, it could also be the instrument of Western resistance to Africans' claims for sovereignty or redistribution. The development of a common law for Nigeria through case law as the hybrid site of contestation and negotiation, on the other hand, would harness Western law as an instrument of development and social change and resist unnecessary local divergences not rooted in the ethos of the people, just as it would support nationalist resistance to Western legal science and conceptions of development.

3.4 Conclusion

Taslim Elias's work and life display a complex map of receptions and misreadings of 'foreign' legal ideas, of strategic appropriations and alliances and rebellious cultural nativism: a map of alternative images of law in Africa and Africa in law, one that effaces the borders of legal thinking and disrupts imageries of allegiances of scholars from the 'periphery' with dominant modes, canons, and practices at the 'centre'. This article is a modest attempt to rethink the history of legal influences in Africa alongside the history of political, economic, and cultural hegemonies of various kinds through the thought and writings of such a scholar. Specifically, I have asked what role legal intellectuals such as Taslim Elias have played in resisting or entrenching hegemonic relationships in the world system. What has emerged is an unsettling picture, where it is less a different or distinctive theoretical voice hailing from Africa on legal ideas that was produced than a legal consciousness which I have called juridical Negritude and within which projects of national cultural integration or fragmentation on a local basis, cultural convergence or drift at the continental level, and a developmental ideology compatible with or resisted by African culture became nested and found expression in their unstable relationship to law and Western culture.[166] I have introduced the notion of the production of hybridization or hybridity in legal discourse and in Elias's project of a uniform common law for Nigeria as a way to explicate the workings of this relationship and how African law is inscribed in the interplay of cultural forces constantly negotiating the boundaries of their engagement with one another, and noted that it must be read on that level to be fully understood. How much of this is a never-ending search by Third World intellectuals for the right proportions of each, for finding their own place as 'global intellectuals' locally situated, and how much of it is an alert attempt strategically to use just about enough of each side to satisfy the elite role of the intellectual with his or her personal and ideological goals and objectives (nationalist, pan-nationalist, internationalist, etc.) remains uncertain. The practical effects a

[166] Kennedy, *supra* note 75, at 675.

distinction between 'conscious hybridity' and 'unconscious working through a law-in-between' oscillating between the native and the other would have on the work of a historian of (international) law are potentially considerable and worth considering further.

Africa has tried to build national systems of law and legislation heavily affected by 'legal transplants'. There are many ways of understanding this phenomenon, and the article has touched upon some of these: the way in which law is taught and understood as a discipline, the prevailing status of the legal and judicial profession, history, cultural bias, and, of course, grounds of political and social realities. Elias's scholarship illustrates well the controversies in colonial and independent Africa over identity, legal theory, political perspective, legal education, and so on, in which he occupied the privileged status of an observer-participant. Yet he did not refrain from debunking myths and forming coalitions with the dominant currents in African society. He made sense of the confused and racist approach of many anthropologists and legal scholars who concerned themselves with the legal problems in African customary law, and in the process firmly positioned Africa in world history and a global history of legal philosophy. He also engaged in modernist moves to professionalize legal studies and the legal and judicial profession, and constructed a narrative of progress as a discursive strategy through which he sought to update and reform law to tackle the social and economic problems resulting from modernization by means of a strategic alliance with English law.[167] But it is his confidence and faith in the judiciary which he had helped to train and equip and whose ultimate aim was 'to effect a dynamic compromise between law and society, between the technicalities of legal science and the requirements of social justice'[168] that, in the end, truly remains crucial to understanding the hybridity of his narrative about African humanist thought, to which his work stands out as vintage contribution.

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