IV. THE RULE OF LAW IN AFRICA
INTRODUCTION
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The phrase "Rule of Law" has recently been the subject of a resurgence of interest, particularly as a key element in the broader and even more seductive phrase "good governance, human rights and democracy," the mantra of "the Washington consensus" and Western aid to poorer nations. "The Rule of Law" can be interpreted in a variety of ways and from a variety of perspectives. The three contributions in this section reflect aspects of this diversity. They deal in turn with an analysis of broad trends and patterns in the structure of modern African constitutions; a case study of the politics behind the Nigerian Constitution of 1963 (the first Republican Constitution), which among other things gave the executive greater power over the judiciary; and third, an account of the depiction of law in fiction by African writers in the 1970s and 1980s. Each article is quite different in reach, focus and style, yet each shows a concern with the tension between perceptions of law as a constraint on arbitrary power and of law as an instrument of power, which may itself be repressive and arbitrary.

In the first article in this section, Dr. Akin Alao gives a detailed account of the political background to the changes made by the first Republican Constitution of Nigeria in 1963. The 1963 Constitution severed remaining constitutional ties with the colonial power (creation of Republic, abolition of appeals to the Privy Council), bolstered the power of the Federal Executive, especially in relation to the judiciary, and attempted to strengthen a fragile Federation in a huge and diverse country. The 1963 regime ended with a military coup in 1966. The failure of this attempt to build a strong Federal structure, according to Akin Alao, "was a result of the zero-sum-game politics, which was compounded by a winner-takes-all strategy." Alao's article appears to converge on the point that a country characterized by regional, ethnic, or religious diversity is likely to fare better under a proportional, parliamentary, federal system than a majoritarian, presidential, unitary one. This argument might be heeded in many countries, not only in Africa, always bearing in mind that fundamental cleavages cannot be resolved by constitutional design alone.

The first article in this section is broadly concerned with constitutional design from a "top down" point of view. The second article adopts a different perspective. Drawing eclectically on ideas derived from American critical legal studies and the related, but separate, law and literature movement, Emmanuel Yewah draws attention to the

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treatment of legal themes in modern literature by African authors. The main protagonists in these novels and plays are subjects of the law: defendants, witnesses, victims and attorneys. Two themes run through these accounts: the tension between African tradition and western modernity and perceptions of law as an instrument of power or as a form of protection against it.

A striking feature of this article is that five of the seven works considered are in French. One of the enduring legacies of colonialism has been a language barrier between "French-speaking" and "English-speaking" elites, to say nothing of Dutch, Afrikaans, Portuguese and Spanish speakers. One result is that Nairobi and Lagos communicate more easily with London and Washington than will Brazzaville or Dakar, who in turn maintains strong linguistic links with their former colonizers.[1] I have to admit that when I learned that there was a contribution linking African literature with law, I immediately thought of Chinua Achebe,[2] Wole Soyinka, Francis Deng, and the great corpus of English literature that came out of South Africa during the apartheid era. I had not, until now, thought about literature in French in this connection and so I was guilty of a not uncommon form of parochialism. This article is double welcome. First, because it reminds us that the idea that we can learn a lot about law from literature applies as much to Africa as to the West and second, because "African literature" is written in many languages besides English.

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1 To talk of "Anglophone" and "Francophone" in relation to African countries is misleading, for the vast majority of people in such countries speak African languages rather than English or French. In Uganda, for example, English is the official language of law and government, but only a small minority of the population has a working knowledge of English.

2 Readers interested in English language literature may want to look at: '*Like a Mask Dancing: Law and Colonialism in Chinua Achebe's 'Arrow of God*,' Amreena Manji, J. LAW & SOC. Dec 2000 v. 27 p.626; '*Things Fall Apart, or Modern Legal Mythology in the Civil Law Tradition,*' John W. Van Doren, WIDENER J. OF PUB. LAW, Jan. 1993 n2 p. 447.--Eds.

The Republican Constitution of 1963, the Supreme Court and Federalism in Nigeria

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> "Individual judgment and feeling cannot be wholly shut out of the judicial process. But if they dominate, the judicial process becomes a dangerous sham."
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> Baron Parke in Egerton v. Brownlow, 4 H.L. C.I (1853).

This paper specifically examines the constitutional changes of 1963 as the most important factor responsible for the redefinition and re-conceptualization of the interrelationship of the Executive and the Judiciary during the era of representative government and parliamentary democracy in Nigeria. A careful review of the Nigerian political environment, especially the zero-sum game of the First Republic, will confirm that the Republican Constitution of 1963 was introduced, among other things, to allay the fears of insecurity by the Prime Minister, bolster the powers of the Executive, regulate Cabinet/Legislature relations, and enhance the leverage of the Executive over the Judiciary through subtle intimidation. The Prime Minister believed that Nigeria should review her relationship with Britain to reflect her sovereignty and independence.[1]

This belief could not, however be divorced from the decision of the Privy Council in Adegbenro v. Akintola[2] and, of course, the highly controversial build-up to the case.[3] It seemed that the Prime Minister felt insecure in office due to the provisions of the 1960 Constitution that gave the Governor-General wide discretionary powers to remove the Prime Minister, as was the case in the Western Region between the Governor and the Premier.[4] The Government Sessional Paper of 1963, which enunciated government proposals on the constitutional amendment, contained a sentence that reflected the apprehension of the Prime Minister:

> The Prime Minister himself will not be removable from office by the President unless he no longer commands the support of most of the members of the House of Representatives as a result of a vote of no confidence in the Government, secured on the floor of the House of Representatives.[5]

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1 Nig. House of Representatives, Legislative Council Debates (1963).

2 *Adegbenro v. Akintola*, 3 W.L.R. 12. (1963).

3 B. J. DUDLEY, INSTABILITY AND POLITICAL ORDERS POLITICS AND CRISIS IN NIGERIA 1-86 (Ibadan Univ. Press 1973) (detailing the political undertones in Adegbenro, *supra* note 2).

4 Nig. Western Region Const. (1960) § 33 (10)(a).

5 Nig. Govt. Sessional Paper No. 3 (1963) (containing proposals for the new constitution adopted by

The recent experience of the Prime Minister of the courts in the Doherty case[6] and his personal distaste for adversarial arguments based on precedents and procedure aroused in him a need to revise the way justice was administered.[7] He believed in and felt safe with a practice that would allow for the decisions of a wise man of honor rather than a learned man who had impeccable credentials among his professional colleagues.[8] This formed the touchstone of the abolition of the Judicial Service Commission as a body responsible for the appointment and removal of judicial officers.[9] Beyond the argument that the proposed changes were on the grounds of "bringing the Nigerian practice in line with what obtains in the United Kingdom," it could be seen that the appointment of the Chief Justice by the President on the advice of the Prime Minister was meant to be a clear warning to the Judiciary to always defer to the Executive. Adetokunbo Ademola was right when he said that the abolition of the Judicial Service Commission was enough to encourage judges to dance to the tune of any government.[10]

Pursuant to the same objective of enhancing the leverage of the Executive over the other arms of government, the abolition of all appeals to the Privy Council and the elevation of the Supreme Court to the Final Court of Appeal on all Nigerian cases[11] within a context of constitutional inferiority smacked of Executive tyranny.[12] Section 120 of the Constitution provided that "no appeal shall lie to any other body or person from any determination of the Supreme Court." "The Supreme Court was also allowed to retain its original jurisdiction in any dispute between the Federation and a region and between regions."[13]

Kasunmu seems to miss the point when he supports the abolition of the Judicial Service Commission by arguing that the attainment of judicial independence should, in the final analysis, depend on the quality, courage, and integrity of the individual judges, regardless of who

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the all party at the Constitutional Conference held in Lagos, July 1963; *see infra* note 17).

6 *Doherty v. Balewa*,1 All N.L.R. 604 (1961).

7 Trevor Clark, A RIGHT HONOURABLE GENTLEMAN: THE LIFE AND TIMES OF ALHAJI SIR ABUBAKAR TAFAWA BALEWA 595 (Hudahuda Publishing Co. 1991).

8 Id.

9 Nig. Const. (1963) § 112 (1) (relating to judges of the Supreme Court of Nigeria); See also Abiola Ojo, the panel on Nigeria since independence project Proceeding of the National Conference on Nigeria since Independence 348-349 (J. A. Atanda and A. Y. Aliyu eds. 1985).

10 DAILY TIMES (Nigeria), Jan. 17, 1972 cited in A.B Kasunmu, The Supreme Court of Nigeria 1956-1970 10 (1977).

11 Nig. Const. (1963) § 120.

12 The 1963 Constitution did not provide for judicial review of executive actions because judicial power was not expressly granted to the courts. This was corrected, albeit inadequately, by the 1979 constitution.

13 Nig. Const. (1963) § 120.

appoints them.[14] The fact is, however, that the abolition of the Judicial Service Commission would preclude the appointment of judges who could be of high intellectual quality, courage and integrity. These qualities according to Adetokunbo Ademola could be better discovered and appreciated in any judge by the Judicial Service Commission.[15] Nwabueze was equally right when he described the Commission as an "insurance against the injection of political and tribal considerations into judicial appointments" in a pluralized society.[16] The analogy drawn by the Executive with the English practice to justify the abolition of the Judicial Service Commission was incorrect given that the decisive voice in all English judicial appointments was that of the Lord Chancellor's Department, which according to English traditions was far removed from partisan politics.[17] This argument proceeds on the premise that the constitutional changes with respect to judicial administration within the context of enhanced executive powers of a more confident Prime Minister affected the institutional safeguards of judicial independence during the 1963-1966 period.

The abolition of the Judicial Service Commission according to Adetokunbo Ademola was ill advised and in the words of W.O Briggs, "the twin brother of preventive detention Act."[18] Adetokunbo Ademola believed that although the machinery of justice worked with many wheels, the judge was the central figure in the scheme of things and it was around him that the whole machinery of justice revolved.[19] The judge occupied a unique position as the arbiter of rights and duties not only between, citizen and citizen but also between the state and, the citizen and in a federal constitution, between the constituent regions.[20] The Chief Justice further contended that however good and however democratic the constitution might appear to be, it had, in the last resort, to depend and be greatly influenced by the quality of its judges, who would interpret the Constitution.[21] "The more detached or impersonal the judge, the more likely will the intention of the framers of the constitution

14 Kasunmu, *supra* note 10.

15 In person interview with Hon. Justice Adenekan Ademola (Feb. 14, 1995).

16 B.O. Nwabueze, CONSTITUTIONAL LAW OF THE NIGERIAN REPUBLIC 290 (Butterworths, 1964).

17 A.E.W. Park, *The Constitutional Changes of 1st October 1963*, Nig. L. J. 97 (1964).

18 W.O Briggs was an Action Group Politician representing Degema at the House of Representatives. *See* Nig. House of Representatives Parliamentary Debates Vol. 13 2953 (1963); *See also* Clark, *supra* note 7 at 601.

19 Adetokunbo Ademola, *Personnel problems in the Administration of Justice in Nigeria*, 5 L. and Contemp. Probs. 27, 576-577 (1962).

20 *Id.*

21 *Id.* at 577.

be realized."[22] It was therefore submitted by the Chief Justice that the recruitment of judges should be left in the hands of a nonpartisan and professional body that would be able to assess and appreciate the basic qualities of a good judge.[23]

Adetokunbo Ademola gave the following as the basic qualities of a good judge:

a) Sound knowledge of the law. The judge must possess a sound logical mind, which would help the assimilation and application of knowledge of the law;
b) A good judge should be objective in assessing facts. A judge should never allow his own personal feelings or his own preconceived notions to displace facts which had been proved before him;
c) Sound common sense. A judge must also be good on facts and his assessment of facts that is, evaluation of the evidence before him and deductions from facts. Common sense is considered an indispensable factor in the attributes of a good judge;
d) A judge should be humane. This attribute played an important role in the relation between the Judiciary and the public. The humane element in the administration of justice had always strengthened the position of the Judiciary; and
e) Freedom from fear, prejudice or corruption.[24]

The Chief Justice submitted that modern constitutions provided for the appointment, renewal of appointment, dismissal, general welfare, and promotion of judges.[25] In order to ascertain all these attributes, the Judicial Service Commission was the best suited. The abolition of the Commission was therefore seen as an attempt to expose the independence of the Judiciary to gross abuse by the political class. As noted by Clark, the Chief Justice could not be convinced of the reasons why the politicians abolished the Judicial Service Commission and he continued to plead with the Prime Minister and Premiers to reconsider the decision and reconstitute the Judicial Service Commission.[26] He believed that the Nigerian politicians generally never sympathized with any system that excluded their right to determine important state appointments. "We cannot, therefore, but feel that in the years ahead the appointment of judges by politicians may lead to what we call a packed

22 *Id.*

23 *Id.*

24 Id. at 578.

25 *Id.*

26 Clark, *supra* note 7, at 600.

bench."[27] Timing and the political turbulence of the period 1963-1966 did not, however, allow for the fulfillment of this prophecy.

By September 1964, it was obvious that the executive was not prepared to reconsider its stand on the abolition of the Judicial Service Commission in spite of the general and overwhelming conclusion that it was both deplorable and premature, considering the character and features of the Nigerian Federal System. The Supreme Court and its Chief Justice had to readjust to the new reality and this regulated or moderated its relationship with the Executive. It is, however, feared that considering the depth of the interpersonal relationship between the Prime Minister and the Chief Justice,[28] the public condemnation of the abolition of the Judicial Service Commission by Adetokunbo Ademola was only a professional duty. It would seem that the Prime Minister would never contemplate any judicial appointment without an input of his friend, the Chief Justice. In view of his recent experience with the courts, the Prime Minister would seemingly prefer to deal with the Chief Justice in his private capacity with regard to judicial appointments. The Judicial Service Commission seemed too formal, independent, and difficult to manipulate in carrying out the dictates and preferences of the Prime Minister.

One recurrent, and perhaps serious, defect of both the 1960 and 1963 constitutions was the attempt to practice a Westminster cabinet system in a supposedly federal framework plagued by ethnic, religious, educational, and economic disparities.[29] Intra-class conflicts assumed dangerous dimensions when such conflicts were presented and fought deceitfully as inter regional hostilities and rivalries. The actual manifestations of these rivalries undermined the objective base of the artificial federal system because the apparatus of the Nigerian state became structurally suspect. The political class, as composed in the major parties and in shifting combinations and alliances, could not resolve and arbitrate the differences among them; and this led to an escalation of political disturbances in many parts of the country.[30] These were clear indications of the existence of a deep resentment against government.[31]

A major cause of concern for some politicians of the first republic, especially the opposition, was the existence of an arrangement that gave a particular section of the country the opportunity to dominate

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27 *Id.* at 643.

28 Clark, *supra* note 7 (detailing the relationship between the Prime Minister and the Chief Justice).

29 Akin Alao, *The Military and National Integration in Nigeria 1966-1979*, Chapt 2. (1987) (unpublished M.A. Thesis, Obafemi Awolowo University, on file with author).

30 B.J. Dudley, INSTABILITY AND POLITICAL ORDERS: POLITICS AND CRISIS IN NIGERIA 78 (Ibadan Univ. Press 1973).

31 *Id.*

Nigerian politics and central government.[32] The Northern Region was much bigger in total land area and in population strength than all other regions, including the federal territory of Lagos, put together. In the allocation of seats in the House of Representatives, the Northern Region was allocated 174 seats out of the 312 seats. The Eastern Region had 73, while the Western Region and Lagos had 62 and 3 respectively.[33] This inequality of a federal system that was created through the peculiar process of devolution negated one of the conditions necessary for the practice of a truly federal government.[34] In the words of John Stuart Mill:

> "There should not be any one state so much powerful than the rest as to be capable of vying in strength with many of them combined. If there be such a one, and only one, it will insist on being master of the ... deliberations; if there be two, they will be irresistible when they agree and whenever they differ, every thing will be decided by a struggle for ascendancy between the rivals."[35]

The fact that the ruling elite in the North was consciously using the North's political weight to decide major issues and to promote private political as well as economic interests at the expense of their disparate Southern counterparts led to mistrust and suspicion.[36] The Prime Minister was more determined in using the Central might at his disposal to redefine and rearrange the basis of the federal system; an attempt that was seen as a clever design to entrench the domination of the Northern oligarchy over the federation. It would appear that it was the extent to which the judiciary, headed by Adetokunbo Ademola, became involved in this design that provoked Ezejiofor's conclusion that the crisis which ultimately led to the collapse of the First Republic was the failure of the courts to "interpret the Constitution fearlessly, impartially and liberally."[37] The Supreme Court and its leadership became involved in the national question; an involvement which affected public perception of its role as the final arbiter in constitutional matters. As the Chief Justice of Nigeria, a statesman and confidant of the Prime

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32 *Id.*

33 Oyeleye Oyediran, NIGERIAN GOVERNMENT AND POLITICS UNDER MILITARY RULE 1966-1979 (Macmillan 1979).

34 For an articulate theoretical positions on the evolution, nature and character of the federal system in Nigeria. *See* L. Adele Jinadu, *Federalism, the Consociational State and Ethnic Conflict in Nigeria*, 15 Publius J. of Federalism 2 (1985); *see also* FEDERALISM IN A CHANGING WORLD (R.A. Olaniyan ed., Lagos: Office of the Minister of Special Duties 1988).

35 John Stuart Mill, REPRESENTATIVE GOVERNMENT 367-368 (Everyman Doubleday, 1948).

36 For an analytical examination, *see* Oyeleye Oyediran, NIGERIAN GOVERNMENT AND POLITICS UNDER MILITARY RULE 1966-1979 (1979).

37 Kasunmu, *supra* note 10, at 67 (*citing* Dr. G. Ezejiofor, A JUDICIAL INTERPRETATION OF CONSTITUTION: THE NIGERIAN EXPERIENCE DURING THE FIRST REPUBLIC 67 (A.B. Kasunmu ed. 1977).

Minister, Adetokunbo Ademola could not but participate in the effort to arrest the drift of the state, as it were, to anarchy.[38]

The 1962 census controversy erupted[39] in the course of the felony treason trial of Obafemi Awolowo and others that most people in the Western Region felt was a political vendetta in an attempt to liquidate the Action Group. The initial and unconfirmed figures had shown that the South was more populous than the North; a claim the N.P.C rejected immediately. The Prime Minister cancelled the 1962 exercise because virtually everyone became a "willing liar of the first magnitude." A new board, headed by Sir Kofo Abayomi was set up to produce a more credible figure. The 1963 head count preserved the numerical supremacy of the North over the southern regions. The Southern politicians, however, had a "free for all" contesting the figures and after serious negotiations, the Economic Council adopted the figures in May 1964.[40]

The appeal of Obafemi Awolowo and 17 others came before the Supreme Court with Adetokunbo Adernola presiding and empanelled with Lionel Brett, J.I.C. Taylor, Vahe Bairamian and Louis Mbanefo.[41] The accused persons were charged with three counts of the following offences: felony treason contrary to section 41(b) of the Criminal Code, conspiracy to commit a felony contrary to section 516 of the Criminal Code and conspiracy to effect an unlawful purpose contrary to section 518(6) of the Criminal Code.[42] There is evidence to believe that Adetokunbo Ademola had a prior knowledge of the case against Obafemi Awolowo and his associates since he had the benefit of a privileged discussion concerning the same with the Prime Minister.[43] According to Trevor Clark, the Prime Minister had shown some of the impounded firearms to Adetokunbo Ademola to convince him that the leadership of the Action Group had indeed master minded a plan to overthrow the central government through non-constitutional means.[44]

When the appeal in the case eventually came up before the Supreme Court, it was wholly dismissed with respect to Michael Omisade, Gabby Sasore, Samuel Akanbi Onitiri, Sebastian James Umoren, Sunday Ebietoma, Lateef Jakande, Uzodinna Iroegbu

38 In person interview with the Hon. Justice E.O. Fakayode Ibadan (Mar. 11, 1996).

39 L.K. Jakande, The Trial of Obafemi Awolowo (Seeker Warburg 1966); Politics in Africa - 7 Cases (R.L. Carter ed., Brace and World Inc. 1966).

40 The figures were North: 29,177,986, East: 12, 388, 646, West: 10278,50, Mid West: 2533,337, and Lagos: 675,352.

41 *The Queen v. Omisade & 17 Others*, N.M.L.R. 67 (1964).

42 Id.

43 Clark, *supra* note 7, at 555.

44 *Id.*

Nwaobiala, Samuel Adesanya Otubanjo and Chief Obafemi Awolowo.[45] The performance of Adetokunbo Ademola in the felony treason trial on appeal at the Supreme Court was not a surprise to Obafemi Awolowo, who believed that the Chief Justice was decidedly against him and his party, the Action Group.[46] Awolowo believed that the Chief Justice as far back as October 31 1962 had confided in Adewale Thompson that Awolowo would be arrested on November 2, 1962 and charged with treasonable felony, convicted and sentenced.[47] This confirms Trevor Clark's claim that the Chief Justice had discussed the matter with the Prime Minister and that the latter had a strong case against the leadership of the Action Group.[48] It further confirms our submission that Adetokunbo Adernola seemed to have been convinced by the evidence of the Prime Minister, and that he was prepared to allow the Supreme Court to protect the person and office of the Prime Minister.

Michael Ornisade believed that the felony treason charges, trial and the dismissal of the appeal wholly by the Supreme Court, were a part of a grand design to eliminate any opposition to government in the Federal Parliament.[49] The Action Group provided a robust opposition to the government side in the legislature. Obafemi Awolowo also referred to an instance when Adetokunbo Adernola compared him to a man in a village who thought it was his duty to oppose everything done in the village.[50] Awolowo seemed to believe that the Chief Justice and the Prime Minister were too simple minded to know that in a dynamic society and in politics, there was always something for thinking people to oppose. He accordingly said:

> However, the business of the opposition in a democracy was something totally beyond the ken and comprehension of our Chief Justice. Otherwise, he would not have spoken the way he did. It were better if in future he kept his wits within the confines of the Bench so as to avoid behaving like a fish out of water.[51]

From the above, it could be inferred that the Executive and the Judiciary believed that the opposition was detrimental to the unity and stability of the Nigerian State and to orderly conduct of government business. The Prime Minister was a firm believer of peaceful negotiation. According to his friend Adetokunbo

45 *Omisade & 17 Others*, N.M.L.R. (1964) at 99.

46 Obafemi Awolowo. ADVENTURE IN POWER: MY MARCH THROUGH PRISON 203-236 (Macmillian Nig. Pub. Ltd., 1985).

47 *Id* at 204.

48 Clark, *supra* note 7, at 555.

49 In person interview with Chief M.A. Omisade Lagos (Aug. 4. 1994).

50 Awolowo, *supra* note 46, at 211.

51 *Id.*

Ademola: "Sir Abubakar was a peace loving man and he accepted the Prime Ministership of Nigeria with a view of establishing peace, unity and love among the several tribes and peoples of Nigeria."[52]

The Federal Election of 1964, which was characterized by the alliance of strange bedfellows, mutual distrust and boycotts, created "a lot of tension and upheaval." The President, Dr. Nnarndi Azikwe, was obviously disturbed about the state of the nation in 1964 when he confided to an interviewer on his 60th birthday that, "what is happening in Nigeria today does not inspire me to be optimistic that we shall survive as a nation."[53] The Northern Peoples' Congress and the Nigerian National Democratic Party formed the Nigerian National Alliance. The National Council of Nigerian Citizens and the Action Group became the United Peoples Grand Alliance. UPGA lost faith in the ability of the electoral body to organize a free and fair election devoid of persecution and intimidation of political opponents, especially in the Northern Region.[54] It therefore decided to boycott the elections. The NNA was sure of electoral victory and therefore went ahead and held the elections as scheduled. The boycott was effective and absolute in the Eastern Region and some parts of the Western Region. The Mid Western Region belatedly participated when the Premier Sir Dennis Osadebay realized that the boycott would improve the chances of the NNA candidates at the polls.[55] The haphazard conduct and participation in the elections raised the question of credibility, especially when the Chairman of the Electoral Body had cause to resign his appointment.[56]

On December 30, 1964, elections were held in the Northern Region, in many parts of the West and in some parts of the Mid West. They were completely boycotted in the East.[57] The results that were eventually released showed that the N.N.A. had won 190 seats and the U.P.G.A only 40 seats.[58] Many people called for the cancellation of the elections and urged President Nnamdi Azikiwe to assume executive powers, nominate a caretaker government under a Prime Minister of his choice and later hold a new and more credible election.[59] Tafawa Balewa

52 Clark, *supra* note 7, at VIII.

53 *Id.*

54 For details, *see* Olav Stokke, INTEGRATION AND DISINTEGRATION: THE CASE OF THE NIGERIAN FEDERATION UP TO JUNE 1967 24 (Scandinavian Inst. of Afr. Studies 1970).

55 J.D. Ojo, CONSTITUTIONAL BREAKDOWN IN NIGERIAN, LECTURE DELIVERED AT THE UNIVERSITY OF SOUTH AFRICAN (Sept. 1995).

56 Sir Kofo Abayomi resigned as both the Chief Electoral Commission and Chairman of the Federal Electoral Commission on April 1964.

57 Stokke, *supra* note 54.

58 *Id.*

59 Clark, *supra* note 7, at 698.

on the other hand, strongly believed that the results of the elections were truly reflective of the political preference of the majority of Nigerians. On January 1, 1965, the President informed the Prime Minister that the elections were "unsatisfactory in view of the violations of freedom of recent weeks."[60] The President believed that the results of the elections could not be relied upon in calling up a new Parliament and that he had no intention of appointing Tafawa Balewa or any person to form a government.[61] Azikiwe further said he would prefer to resign as President of the Federal Republic of Nigeria rather than to accept the results of the elections.[62] The Prime Minister responded that he was still the Prime Minister until a new one was appointed within the provisions of the Constitution.[63] He believed that the clear majority votes of the NNA votes gave the President no alternative other than to reappoint him. He concluded that, if the President was not prepared to carry out the duty of his office, he should resign.[64]

It was in the thick of this national crisis that Adetokunbo Ademola became involved in finding a workable solution to the impasse. The Prime Minister confided in Adetokunbo Ademola his intention to appoint Sir Kofo Abayomi to succeed Azikjwe as President.[65] Adetolcunbo Ademola, however, disabused his mind and assured him that Nnamdi Azikiwe would not resign.[66] The President had wanted to call in the Armed Forces and the Police to strengthen his bargaining position *vis a vis* the Prime Minister's.[67]

At a joint meeting with Major-General Welby-Everard, Commodore J.R.A. Wey and Mr. Orok Edet, the Inspector General of Police, the President sought to secure the allegiance and loyalty of the Forces.[68] It was, however, at this stage that he called for legal advice as to which office the Forces should pledge their loyalty. It would seem that the constitutional interpretation that was provided by Mr. Justice Lionel Brett of the Supreme Court was with the fore knowledge and concurrence of Adetokunbo Ademola.[69] It was submitted that the Constitution gave the Federal Parliament sole powers to legislate for the Forces. The Army and Navy Acts laid down general control to be

60 *Id.*

61 Id.

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 699.

68 *Id.* at 700.

69 *Id.*

wielded by the Army Council and the Navy Board. They were both responsible to the Minister of Defense. The operational control of the Forces was said to be by the commanders who were under the policy direction of the cabinet. With respect to the maintenance of public safety and order, the direction was to come from the Prime Minister.[70]

This legal position emphasized the figurehead position of the President who had no operational control or command over the Forces. The position of the law on the matter was conveyed to the President on Sunday 3 January 1965 by Adetokunbo Ademola and Louis Mbanefo and with a six-point proposal on how best to resolve the crisis. The six points as proposed were:

(i) reaffirmation of the federal unity of Nigeria, with equal opportunities and no oppression;
(ii) strict observance of the constitution till it is properly amended;
(iii) a broad based national government formed on the declared election results to avoid chaos;
(iv) detailed legality of the election to be determined by the courts and the constituency results upheld, except where the small turn-out had made an obvious mockery and common sense required a re-run;
(v) a one-year eleven man commission to be set up within six months, to review the constitution and electoral machinery with a view to a constituent assembly (the President to nominate a member and the Prime Minister and Premiers two each); and
(vi) the Western government to be dissolved to allow a free expression of regional electoral will.[71]

In spite of the uncompromising position of the activists who surrounded him, President Nnarndi Azikiwe, on Monday 4 January, called on Tafawa Balewa to form a government on the basis of the 1964 electoral results.[72] In his acceptance speech, the Prime Minister said *inter alia*: "The President and I have once again showed [sic] that the things that bind us together are much stronger than those that sometimes divide us... it is my intention to try and form a broadly based (SIC) government that will cater for all our peoples."[73]

Between 1963 and 1966, the fragility of the Nigerian federation was quite apparent.[74] The Chief Justice became involved in the resolution

70 *Id.*

71 *Id.* at 701.

72 *Id.* at 703.

73 *Id.*

74 Oyeleye Oyediran believed that all that happened between 1962 and 1966 were signposts to

of the national crisis. His performance as head of the Judiciary could therefore be understood in view of his avowal to use the agency of the courts, especially the Supreme Court to ensure the survival of the Federation. The political situation and circumstances of the period called for enlightened self-restraint and not judicial activism. As noted by Cardozo, the Chief Justice could not help but be influenced by prevailing values[75] and in the words of Wright, "value choice is the most important function of the Supreme Court, because of constitutional causes."[76] This would be better determined when judges prefer a process of selecting values to one of constructing and articulating principles.[77] Adetolcunbo Ademola believed that the problem of the country was how to meld together the diverse ethnic groups and bring about a balance between national unity and regional autonomy.[78] The Constitution, which Ademola described as a piece of African art in its detailed simplicity,[79] would in his opinion only succeed if the politicians approached it with care and tolerance and the judges with prudence and restraint. The Bench in Nigeria must always be aware of the "peculiar Nigerian circumstance and situations while considering constitutional issues and allowance must be made for spatial and historical differences," which according to Adetokunbo Ademola while commenting on the Nigerian situation during the First Republic noted that:

> Much had been said about the liberal method of interpretation, but one must remember that conditions are different from country to country and whilst therefore judicial interpretations in Nigeria may not necessarily follow those of other countries, it was to be hoped that courts would evolve their own distinct jurisprudence.[80]

The case Attorney-General Western Nigeria v. African Press Ltd. and Ayo Ojewunmi, provided an opportunity for the Supreme Court, presided over by Chief Justice Adetokunbo Ademola, to make more definitive pronouncements on sedition. The facts of the case were as follows: the Director of Public Prosecutions Western Region initiated criminal proceedings against African Press Ltd. and Ayo Ojewunmi in the name of the Attorney General for the Western Region. The following

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disaster.

75 Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS (Yale Univ. Press 1925) 1921.

76 Robert H. Borke, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 5 (1971).

77 *Id.*

78 Constitutional Problems of Federation in Nigeria, Record of Proceedings of a Seminar Held at Kings College, Lagos 8-15 August 1960 134 (Lionel Brett ed.).

79 *Id.* at V.

80 *Id.*

charges were preferred against them:[81]

(i) Publishing seditious publication contrary to section 47(1)(c) of the Criminal Code, Cap 28, Laws of the Western Region of Nigeria, 1959.

(ii) Publication of false news with intent to cause fear and alarm or to disturb public peace contrary to section 54(1) of the Criminal Code, Cap 28, Laws of the Western Region of Nigeria, 1959.

(iii) Publication of defamatory matters contrary to section 316 of the Criminal Code, Cap 28, Laws of Western Region of Nigeria, 1959.[82]

Relying on the Republican Constitution of 1963, which placed the Director of Public Prosecutions under the Attorney General, the respondents at the lower court submitted that the Crown could not prove that the Attorney-General's written consent, a prerequisite, had been obtained before the prosecution was initiated.[83] The lower court acquitted the respondents, despite reference to Western Nigeria Legal Notice 293 of 1963 giving a general consent of the Attorney-General to the Director of Public Prosecutions, the Deputy Director of Public Prosecutions, and all grades of State Counsel in the Department of Public Prosecutions.

When the case came before the Supreme Court, Chief Justice Adetokunbo Ademola was concerned with the policy implications of the case, and perhaps more importantly by the political climate of the Western Region in particular and the country in general. Relying on the 1962 Second Amendment to the Constitution as contained in section 47 (1), (2), (3), and (6) of the Constitution of Western Nigeria,[84] the Chief Justice held that the Respondents' argument that the power to institute proceedings differed from the duty of giving consent and that the latter could only be personal and could not be delegated was a misunderstanding of the constitution.[85] Accordingly the Chief Justice said: "The Attorney-General may exercise the power to institute criminal proceedings which the constitution of the Region gives him in any case in which he considers it desirable to do so, and in exercising it he is not subject to the control of any other person or authority."[86]

With reference to the clause disallowing the intervention of any court of law in the proper exercise of the powers of the Attorney General to delegate his or her powers, Adetokunbo Ademola acquiesced that:

81 *Attorney General Western Nigeria v. African Press Limited and Ayo Ojewunmi* 4 N.M.L.R. 158 (April 1965)

82 Id.

83 *Id.*

84 Nig. Const. Western Region, §47 (1), (2), (3) and (6).

85 *Id.*

86 *Id.*

> "The question whether in instituting these proceedings, the Director of Public Prosecutions was acting in accordance with any instructions he may have received from the Attorney General has no bearing on the question of whether the proceedings were validly instituted and is not one into which the court can inquire."[87]

It was therefore declared that:

> Generally, there is no need for a Judge to know what instructions the Attorney General has given to the Director of Public Prosecutions in regard to the conduct of a case and the courts must normally take it for granted that if the Director of Public Prosecutions begins a prosecution under section 47 of the Criminal Code, he has done so in accordance with instructions given him by the Attorney General....[88]

Commenting on the case under review, Ijalaye contends that the Supreme Court sat on the fence when it had the opportunity to review the rules of evidence relating to the exclusion of evidence on grounds of state privilege.[89] It would seem, however, that the Chief Justice was, above all, concerned about the stability of the country at the material time. Sedition was an obstacle to healing the wounds of the country. Indeed, the African Press Ltd. case was the only criminal case that called for a decision of the Court on privilege claims of the state under section 219 of the Evidence Act.[90]

The restrictive interpretation of the Constitution by the Supreme Court and the fear that it had compromised its separateness and independence as an arm of government affected the confidence of the people in the court as protector of individual liberty, rights, and privileges.[91] As noted by S. S. Ogan, the number of constitutional cases that came up for determination by the Supreme Court reduced in number progressively from 1963 to 1965. He believes that the reduction in number was a clear indication that the public had lost confidence in the ability of the courts to settle constitutional disputes impartially.[92]

It could however be argued that the reduction in the number of constitutional cases was the result of a combination of factors. In the first instance, by 1963 the federal government had succeeded in assuming a

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87 *Id.*

88 *Id.*

89 D.A. Ijalaye, THE IMPACT OF THE SUPREME COURT DECISIONS IN THE ADMINISTRATION OF CRIMINAL JUSTICE 183 (A.B. Kasunmu ed. 1977).

90 *Id.*

91 S.S. Ogan, *History of the Supreme Court of Nigeria* 268 (1989) (unpublished Ph.D. dissertation on file with the University of Ibadan).

92 *Id.*

position of leverage over the regions and had penetrated the Western Region, the hot bed of opposition to its rule.[93] The leader of the opposition and his lieutenants in the regional and Federal Houses of Assembly had been silenced.

The Supreme Court under Ademola became characterized as over-protective of the interest of the Federal government. His extra judicial activities during this period confirmed that he was very close to the Prime Minister and would not mind using his position as Chief Justice of Nigeria to protect the interest of the government led by his friend and soul mate. The personnel of the Court became involved in hotly partisan matters such as giving political advice to political actors.[94] The political climate was not conducive to constitutional litigations, as the business of government was conducted on the basis of political bargaining, compromise, mutual and ethnic mistrust and suspicion.[95] The preferred position of the Prime Minister was to give as little recourse to the courts as possible, and this appeared to have been appreciated by Adetokunbo Ademola.[96]

The Western Regional election of October 11, 1965 was a landmark in the history of federalism and political party activities in Nigeria.[97] The various political parties were all interested in the outcome of the elections as the political stakes were high. The political calculations were that, if the NNDP won, the AG would probably collapse and the NCNC would then be isolated in a federation completely dominated by the Northern Region and its leadership. If the AG defeated the NNDP, all three Southern Regions (East, Midwest, and West) would then be under parties opposed to the NPC. By acting together, they might be able to cause sufficient political upheavals to force the federal government[98] to conduct a new round of general elections which they might possibly win.

Adetokunbo Adernola's support for the NNDP through the Egbe Ornn Olofin was well known.[99] The election was characterized by electoral fraud of frightening proportions in order to secure victory for the NNDP.[100] Some electoral officers disappeared or refused to accept nomination papers of opposition candidates, thereby declaring NNDP candidates unopposed. Ballot papers were widely found on unauthorized

93 Douglas A. Anglin, *Brinkmanship in Nigeria: The Federal Election of 1964-1965*, XX Int'l. J. 173 (1965).

94 Clark, supra note 7, at 700-702.

95 *Id.* at 674-712.

96 Sam Ekpelle, NIGERIA SPEAKS 54-55 (Lagos: Federal Government Printer 1966).

97 Anglin, *supra* note 93.

98 Clark, *supra* note 7, at 674-712.

99 Awolowo, *supra* note 46, at 219.

100 NIGERIAN GOVERNMENT AND POLITICS (Jolin P. Mackintosh ed., Allen & Unwin 1966).

persons on election day, and some returning officers refused to declare the result of the polls after their count so false returns could be made from the regional capital.[101] The Chairman of the Electoral Commission resigned in protest and declared that he had no confidence in the conduct of the elections.[102]

The Federal Government for inordinate political reasons became most insensitive to the situation in the Western Region. In spite of public outcry, the NNDP went on the air, through the federal government owned radio network, to declare its victory in 73 out of the 94 seats.[103] These returns were transmitted to the Governor of the West, Sir Odeleye Fadahunsi, who immediately called on S.L. Alcintola to form a new government in the Western Region.[104] The rump of the Action Group, led by Alhaji Dauda Adegbenro, were arrested and charged for illegal assumption of office.[105] The supporters of the AG felt that the injustice was so unbearable, that it led to a complete break down of law and order in the region.[106] Moreover, farmers saw the cut in guaranteed price of Cocoa from £120 to £65 as an attempt by the Premier S.L. Akintola and the Northern dominated Federal Government to repress them politically and economically.[107]

The Federal Government watched the mounting tension but remained generally indecisive. Some observers however believe that the Federal Government was waiting for the crisis to escalate to a point that would justify the use of the armed forces as an army of occupation in the Western Region.[108] The coup of January 15, 1966, led by Major K.C. Nzeogwu pre-empted the Federal Government' plan to use the army in the West.[109]

In fact, it is believed that January 15, 1966, became the D. Day because Major K.C. Nzeogwu and his collaborators were aware of the intention of the central government to use the army to settle a sectional and political cause in the Western Region.[110]

From an analytical class perspective, the January 15, 1966 coup

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101 *Id.*

102 Clark, *supra* note 7, at 656.

103 Toyin Falola et al., THE MILITARY FACTOR IN NIGERIA 1966-1985 67 (The Edwin Mellen Press 1994).

104 *Id.*

105 *Id.*

106 Adewale Ademoyega, WHY WE STRUCK 67 (Evans Brothers Nig. Publishers Ltd. 1981).

107 Olutayo Adesina, *An Historical Evaluation of Western Nigerian Government Agricultural Policy 1951-1966* (1989) (Unpublished M.A. Thesis on file with Obaferni Awolowo University).

108 Ademoya, *supra* note 106.

109 *Id.*

110 *Id.*

that ended the life of the First Republic was a result of zero-sum-game politics, compounded by a winner-take-all strategy.[111] The Nigerian political class competed amongst themselves for access to the corridors of power and by extension the acquisition of substantial wealth.[112] The federal state structure was not founded on any enduring principle; the institutions of state including the judiciary were not prepared or equipped to resolve deeply rooted structural conflicts and contradictions.[113]

Adetokunbo Ademola thought that the judiciary's role was independent to the extent that it could not be said that the Supreme Court was under the control of the executive. It is obvious, however, that the Chief Justice failed or pretended not to see the thinly disguised maneuvers of the Prime Minister to build up the powers of the central government at the expense of the regions, and to ensure the protection of the political interest of the NPC by all the institutions of state including the Judiciary.

111 Falola, *supra* note 103.

112 Toyin Falola and Julius Ihonvbere, THE RISE AND FALL OF NIGERIA'S SECOND REPUBLIC 1979-1984 254 (Zed Books Ltd. 1987).

113 *Id.*

The Depiction of Law in African Literary Texts

Emmanuel Yewah

A quick survey of oral literature and African literatures written in received languages reveals an overwhelming amount of works dealing with legal subject matters and an almost obsessive appeal to legal stories by African writers. In spite of that recurrent depiction of court scenes or situations, interdisciplinary scholarship that brings together African literatures and the various traditions in the law, from which a good number of the writers draw part of their inspiration, remains rare. As I have stated elsewhere, such lack of interest could be attributed to a number of reasons: the unease by literary scholars to venture into a relatively unsafe and somewhat intimidating space, a long desire on the part of legal scholars and practitioners of the law to maintain and defend the autonomy of the discipline,[1] even though, as Christopher Norris points out, "recent trends show that disciplinary boundaries are beginning to break down and legal discourses no longer possess anything like the sovereign autonomy it has always claimed."[2]

This study attempts to fill that important gap in African intellectual history by breaking disciplinary boundaries to show, through textual analyses, how legal stories have been inscribed in literary texts. These inscriptions, given that they are framed within a somewhat legal context, help to establish the legality of the stories themselves. However, those stories, besides illuminating some aspects of the law, might, indeed, subvert both the indigenous and the received traditions in the law or might be used to critically inquire into the various institutions impacted by those traditions.

A major purpose of this work is to use selected African literary texts to explore the various strategies by which those texts attempt to undo, indeed, deconstruct legal structures and traditions by superimposing what is clearly the inner workings and mechanism of indigenous courts on Western court setting. For instance, court participants are allowed to tell their stories unrestrictedly, that is, "without evidentiary constraints."[3] It will also be shown that undoing or subversion of the judging process takes one of two forms: introducing into the process one or more witnesses, each telling his/her own personal story unrestrictedly and with no relevance to the case in point; or

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1 Emmanuel Yewah, *Court Stories in Selected African Short Narratives*, 26(4) RESEARCH IN AFRICAN LITERATURES 172 (1995).

2 Christopher Norris, Law, Deconstruction and the Resistance to Theory, in Deconstruction Of Theory 126, 127 (1984).

3 JOHN CONLEY, & WILLIAM O'BARR, RULES VERSUS RELATIONSHIP: THE ETHNOGRAPHY OF LEGAL DISCOURSE, 36 (1990).

presenting a defendant who has opted for silence in his own trial. In that case he does not tell any story that might be used as evidence. For as James Chandler and others have noted, facts or stories "can only become evidence in response to some particular question."[4] Moreover, this study will examine the courtroom as depicted in some of the texts not so much as a place to resolve social contradictions but a space in which the colonized, represented by the masses, generate the power to structure anti-hegemonic, anti-colonialist, and anti-dictatorial discourses and to develop alternative legal ideologies to the dominant ones of society.

It will be argued further that these transgressive narratives, especially in the case of the received traditions in the law, help break down the restrictions imposed by the rules of evidence legal system, thereby empowering court participants by allowing them the freedom to turn the courtroom into a lieu par excellence of free play, a lieu to engage in what I have called legalized subversion. In such a "de-sacralized" space (the sacredness of the awe-inspiring courtroom is broken), it is possible to bring into the judicial process those contextual elements (politics, religion, history, personal stories, and even the role of ancestral spirits) that have been excluded due to evidentiary prohibitions or in defense of disciplinary autonomy. Having thus deconstructed the structure of the received legal system and raised concerns about the indigenous, the question posed by all the texts under consideration is whether truth(s) can ever be determined? Indeed, can justice, which is the ultimate goal in each trial, ever be achieved or, is it something constantly being manipulated by some unknown forces and, therefore, in a permanent state of deferment? Given all the issues raised, the bigger question still remains, how do these texts, inspired by two or more traditions in the law, conceive of justice?

This study contextualizes its analysis by linking the ideas generated by the texts, by the stories produced in the courtroom or any other court setting to the context of their production. Additionally, it draws its critical tools from various literary theories that have become an integral part of literary theory. More importantly, this project has been inspired by the pioneering scholarship of the critical legal studies movement, whose work, interdisciplinary or, indeed, revisionary in its approach to legal studies, attempts to explore the many links between law and literature. The primary goal of this movement, whose proponents and critics cut across academic disciplines, is to challenge, what Sanford Levinson and Steven Mailloux have called in another context, "established boundaries and disciplinary demarcations."[5] It questions the notion of intentionality in a legal text, or in the words of Christopher

4 James Chandler, et al. 18 Critical Inquiry at 297 (1992).

5 SANFORD LEVINSON & STEVEN MAILOUX, INTERPRETING LAW AN LITERATURE: A HERMENEUTIC READER, xi (1989).

Norris "the authority of origins."[6] It is highly critical of legal practice for its extreme faith in textual evidence, that is, its reliance on the word on the page as all the evidence and also its "blind respect for tradition and precedent."[7] Similarities could be drawn here with literary theory and its ongoing debate on the idea of intentionality, the canon, and the Formalist notion of treating a text as a self-referential, self-sufficient, and closed world divorced from the various contexts of its production. It argues, quite passionately, as critics have done with respect to literary texts, that to read a legal text, as closely as lawyers do, with the intent of discovering or uncovering a single immanent meaning buried in the text [by its framers], or to uphold the decidability of meaning in such a text is, in itself, an intentional fallacy.

It recognizes that law is a social institution with the implication that rather than operating as a closed, self referential entity, law should be understood in Peter Goodrich's words as "a social practice" or "a process or set of processes . . . a discourse which is inevitably answerable or responsible, like any other discourse, for its place and role within the ethical, political and sexual commitments of its times."[8] In other words, Goodrich writes, "law and legal texts are to be treated as accessible and as committed, precisely because they are in themselves contingent, rather than universal—even if their historical variability is limited—and because the social or cultural value attributed to legal discourse changes—albeit slowly.[9]" Indeed for those revisionists, reading a legal text, just as reading a literary text, becomes an interpretive activity whose outcome might be an indeterminacy of meaning, or at best, the discovery of a multiplicity of meanings. For those critics, "legal reasoning," in the words of David Kairys, "does not provide concrete, real answers to particular legal or social problems..." The ultimate basis for a decision, he contends, "is a social and political judgment incorporating a variety of factors . . . The decision is not based on, or determined by, legal reasoning."[10]

Although it takes its origin in the West and has remained largely the purview of academics, I find its interdisciplinary approach to legal studies, its determination to break down what Michel Foucault calls "specialized knowledges,"[11] its emphasis on the reader as producer of

6 Norris, *supra* note 2, at 126.

7 *Id.*

8 Peter Goodrich, Law as Social Discourse II, in Legal Discourse: Studies In Linguistics, Rhetoric And Legal Analysis 158, 159 (1987).

9 *Id.*

10 DAVID KAIRYS, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 244 (1984).

11 Michel Foucault quoted in IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES 19 (Cambridge: Cambridge University Press 1995).

meanings, and its privileging of "creative interpretation" of legal texts over the "original intent" of the speaker to be very useful critical tools that could be used to open up the field of African literatures and to provide new avenues for innovative research. More importantly, these tools could be employed to express the African worldview; a worldview that traditionally does not recognize the very notion of 'disciplines' let alone compartmentalizing them. The critical legal studies' call for legal studies to transcend what they perceive as parochialism or "narrow professionalism", in order to explore the connections between law and literature/theory, has led to some of the most fascinating and innovative interdisciplinary studies ever. In that light, suffice it to mention here James Boyd White[12] whose writings and lectures were instrumental in defining the mission of the law as literature or law and literature movement. I should mention here Richard Posner[13] whose rejection of the notion of law as literature and opposition to the use of literary theory for the interpretation of law has contributed to the ongoing debate on the educative potential of integrating literature in legal studies.

While both critics have brought out important connections between law and literature in spite of their disagreement on certain issues, Brook Thomas is more concerned with the dangers of misreading the cross-breeding of literature and law by opening the law up such that it is seen merely as reflection of its social context rather than an integral part of society. Such a reflection theory remains the dominant critical approach to the reading of African literatures among some critics today. This has led some dictators who see themselves reflected in some texts to mobilize their censoring machinery. However, as Thomas is quick to caution, many members of the critical legal studies who encourage interpreting the law in its given social context "recognize the limitations of a reflection theory which explains the law as a mirror of a society's existing power structure."[14] He goes from such limitations to draw an important parallel between law and literature. He argues, quite convincingly, that "Law is not merely a reflection of social conditions, it remains a social text that responds to its historical situation by finding ways to resolve social conflicts."[15] As for literature, he agrees with critics

12 *See* James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX L. REV. 415 (1982).

13 *See* RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION, 254-263 (Cambridge: Harvard University Press 1998) (for his "hardened opposition to using literary theory for the interpretation of legal texts.")

14 BROOK THOMAS, CROSS-EXAMINATION OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOW AND MELVILLE, 4 (Cambridge: Cambridge University Press 1987).

15 *Id.* at 4

who have argued that a literary work is "an imaginative response to its historical situation, rather than a reflection of that situation."[16]

In addition to the numerous links between literature and law that the critical legal studies movement and their critics have identified, both disciplines do share another very important element, that is, storytelling. In the courtroom, litigants and their witnesses tell stories just as the writer does. Referring to what they call the new storytellers, David Farber and Suzanna Sherry say they "believe that stories have a persuasive power that transcends rational argument." [17] Stories, these critics contend, "'explode' 'stock stories' or 'received knowledge', 'disrupt' the established order, 'shatter complacency,' and 'seduce the reader.'[18] They provide a 'flash of recognition' and 'resonate' with the reader's experience. Outsiders' stories recount the experiences of those who have 'seen and felt the falsity of the liberal promise.'"[19] Lance Bennett's lucid essay explores storytelling in ways that are appropriate here. As he writes, a story "is a reconstruction of an event in the light of the teller's initial perception and immediate judgments about the audience, the interest that appears to be at stake, and, perhaps most importantly, what has gone before in the situation in which the story is presented."[20] Stories told by litigants may help to shape society's thinking or raise its consciousness about the need to revise existing rules in accordance with its socio-political, economic and historical situations.

While those stories are vital, if astutely manipulated, however, they can also be used to destabilize, or to borrow from Derrida, to 'undo' the entire legal system "while analyzing the structure of the different layers of [its] structure to know how it has been built."[21] What follows is, indeed, African writers' use of their knowledge of both traditions in the law and their poetic license to create legal discourses that illuminate or subvert various institutions of their society including the legal institutions themselves.

Alexandre Kum'a Ndumbe's LE SOLEIL DE L'AURORE depicts life under colonial rule and the transition to a dictatorship, both systems of oppression, with all that is associated with oppressive

16 *Id.* at 6

17 *Id.*

18 DANIEL FARBER & SUZANNA SHERRY, LEGAL STORYTELLING AND CONSTITUTIONAL LAW: THE MEDIUM AND THE MESSAGE, LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 42 (Peter Brooks & Paul Gerwitz eds. New Haven: Yale University Press, 1996).

19 *Id.*

20 Lance Bennett, *Storytelling in Criminal Trials: a model of Social Judgment*, 64 Q. J. of SPEECH 20 (1978).

21 IMRE SALUSINZSKY, CRITICISM IN SOCIETY: INTERVIEWS WITH JACQUES DERRIDA 164 (Imre Salusinzsky ed., New York: Methuen 1987).

regimes: arbitrary use of power; power possessed by the leader rather than relational or shared by society; psychologically unstable as in 'uneasy lies the head that dictates;' omnipotent dictator, extremely 'allergic' to intellectuals; extremist reaction to imagined and imaginary threat to the power structure. In the fear-pervading atmosphere of the text, the leader of the rebellion, one nameless character, simply known by the generic name of "le frère du président,"(the president's brother) is arrested on a trumped-up charge of subversion and brought before the dictator, who happens to be his own brother. However, when the dictator's attempt to make him compromise his intransigent position fails and he is brought to trial. Following a sham trial described by the accused as "cette parodie de justice," [this parody of justice] "un procès de pure forme" [a mock trial], a trial in which he opts for silence as a way of subverting the evidentiary process, he is found guilty to have committed 1432 murders, 93 arsons, 37 thefts, and one plot to assassinate the supreme leader. He is sentenced to die, in what textual evidence shows as a predetermined verdict.

The verdict comes against the protest of the defense lawyer who argues that there cannot be any verdict based on his client's earlier, and perhaps coerced statement. In his words, " le procès est inexistant tant que l'accusation se fonde sur les aveux de ces mêmes accusés qui n'ont pas parlé ... l'audience. Or l'aveu ne constitue plus depuis fort longtemps une preuve suffisante en droit penal"[there is no basis for the trial as long as the accusation is based on the confession of those who have not spoken . . . the audience. Admission of guilt no longer constitutes sufficient proof in criminal law].[22] The verdict underscores how, in the society in question here, law and politics have become strange bedfellows. It brings out the collusion between the legal system and the power structure, both controlled by the dictatorship engaged, as it were, in a mutual search for legitimacy. On the one hand, the power structure shapes the legal system by appointing members of the institution; on the other, those illegal and illegitimate regimes, have to rely on the legal system for some form of legitimacy, including the rubber stamping of rigged election results.

Exposing the corrupt nature of the imported legal system is also one of the themes of COUS ROMPUS.[23] Aboubacar, one of the big farmers in his society, finds himself entangled in a maze of deceit, manipulation, and empty promises; all of which finally lead to his destitution and near psychological breakdown. His pent-up emotions and resentment toward the oppressive machinery of his society explode when he attacks the director of the cooperative whose agent had not only extorted his money, but had also manipulated him into giving the cooperative monopoly over

22 ALEXANDRE KUM'A NDUMBE, LE SOLEIL DE L' AURORE (1976).

23 MOUSTAPHA DAÏTÉ, COUS ROMPUS (1978).

buying his produce. While at the police station to file a suit of extortion and abuse of power against the cooperative and its director, he is arrested, charged with trespassing [for entering the premises of the cooperative without permission], assault and battery with intent to inflict bodily harm. During the trial, rather than respond to the judge's questions or be constrained by the rules of evidence, Aboubacar digresses into telling the court his own personal story; a story that seems to highlight the collective plight of the subjugated, that is, all the farmers. A written statement represents the plaintiff, still in recovery. Although the contents of the statement are not known, one can assume that they are fabrications. Following the defense counsel's plea for leniency in the sentence citing his client's state of mind at the time he is alleged to have assaulted the director, Aboubacar is sentenced to two years imprisonment and a fine.

The verdict exemplifies a miscarriage of justice. It shows how in that society "la loi du lion" [the law of the jungle] reigns. The rich and the powerful can manipulate even the legal system such that it no longer plays its role of conflict resolution or a mechanism for seeking the truth and the administration of justice, but rather serves the interests of the existing power structure; indeed, it can become machinery for the oppression of the masses. Moreover, since litigants operate in two different traditions to tell their story, one oral and the other written, deciding on the case based on a written deposition may be a commentary on Norris' statement earlier about the Western court's reliance on the written word. In this context, it shows that the powerful have control over the legal institution and the continued domination of indigenous cultures by imported/imposed written cultures. The expeditious nature of the case suggests that we are dealing with a parody of justice in that, as in the case discussed earlier, the outcome seems to have been predetermined based on the social status of the litigants. Knowing the real societies that served as a context for these works, it will not be far fetched to conclude that the judge had been bribed prior to the trial and that the decision had already been made.

As in the preceding cases where there is interplay between politics and law, L'AFRIQUE A PARLÉ might be said to deal not only with a political trial but the trial of the indigenous legal system itself. The text develops from the story of a stolen mask, which, as textual evidence suggests, represents the African soul, indeed her past. Paulin, a European, and obviously an outsider to the society had replaced Namori the charlatan, a long time counselor to the chief in that position of authority and power. As charlatan, one of his duties is using cauris to detect thieves. Nonetheless, pushed by the desire for revenge against his usurper, he manipulates the cauris to point to Paulin as the thief. But when the mask is returned having been recovered from a vagrant, it raises the crucial question of the reliability of this method as well as

many others used in African societies to seek the truth. Indeed, who determines what is true? What is truth? The deeper question is, what to make of a society in which spider or tortoise divinations are held to be authoritative evidence against someone accused of witchcraft or when the poison oracle is relied upon to arrive at truth?

On the one hand, the indigenous legal systems that rely on animals, objects and the interpretation of the actions of those diviners, by one manipulating individual with absolute powers, come under scrutiny. Having animals and objects participate in the truth-finding process highlights the interconnectedness of various elements and the important role that each component of an African society is called upon to play. On the other hand, and more importantly, Paulin's trial might indeed be a metaphor for the trial of Europe for her rapaciousness, for her continued plundering of what is most intimate to the continent, her artefact. As one character asks in disgust, "qui a pris l'essentiel des trésors de l'Egypte? Qui a pris l'essentiel des trésors de l'Afrique occidentale et centrale? Qui nous a ravi ce que l'Afrique ancienne destinait aux générations futures? [Who has stolen the tresors of Egypt? Who has stolen west and central African tresors? Who has robbed us of what ancestors had preserved for future generations?].[24] And his answers in respective order, "c'est l'Europe!" "C'est l'Europe, toujours l'Europe insatiable!" "C'est encore l'éternelle Europe!' [It's Europe! It's Europe! Europe, always the insatiable Europe! It's again the eternal Europe!] In fact these African artistic expressions infused with some dynamic forces in the land of their creativity and the vital force that makes them serve as the link between the past and the future, have become simply lifeless objects displayed or, indeed, stacked in 'warehouses' called museums.

Paulin uses the episode, however, to question not only the arbitrary method of detection, since to him it is not based on logic, but also to challenge the African conception of justice. As he asks, "est-ce là la justice de l'Afrique? Peut-elle condamner sans avoir jugé?" [Is that African justice? Can she condemn without trial?].[25] And to add rather sarcastically, "ah l'Afrique! Est-elle donc le continent de la passion aveuglante?" [Ah Africa! Is she the continent of blind passion?].[26] His juxtaposition of passion and lack of reason to question the system that has condemned him is significant. For him, judgment must be carried out in a court of law with lawyers, witnesses, police investigation, etc. All elements of his European legal systems, rule-oriented systems in which the emotive, the intuitive, and, as will be shown later, the spiritual have been repressed.

24 MBAYE GANA KEBE, L'AFRIQUE PARLE (1972).

25 *See id.* at 42

26 *See id.* at 47

Paulin's last question above would seem to suggest that in a reversal of roles, Europe that he symbolizes, now finds herself on the defensive for destabilizing many African structures including the legal system now being used to judge her. Ironically, the king whose daughter had killed herself in protest over what she perceived as a false accusation against Paulin, calls for his people to get beyond their passions for their legal structure. He comes out in defense of Paulin against the masses including his counselors and wise men who are calling for the death of the accused. Paulin's case raises the king's awareness about the shortcomings of that particular method used in his society to determine truth. The trial has, therefore, helped to illuminate some aspects of the indigenous legal system, such as having blind faith in objects in major decisions that could very well have to do with life and death. These aspects, according to the king, urgently need revisions because they can no longer serve the needs of today's constantly changing society.

As a clairvoyant leader, the king's re-evaluation of the system that he has manipulated so far helps to bring all those who had called for the death of Paulin to rethink their position and in so doing realign themselves with their leader. This change of mindset by readily accepting this outsider as one of their own, mechanical as it appears, helps to bring about some form of reconciliation between Europe and Africa which is the ultimate in trials carried in indigenous court settings. As a reversal of the type of Manichean worldview of Europe as dominant and Africa as the dominated that these textual elements have naturalized, Paulin, who by all indication epitomizes the reverse metaphor, white skin black mask, pleads that henceforth, he be judged by the content of his character which is deeply African, rather than by the color of his skin which is white.

If cauris are used to blur the boundaries between the physical and mystic worlds, in LE PROCÈS DU PILON (The Trial of the Pestle), the pestle serves in a similar way. The play presents many cases tried in a Western style court, but the most dramatic of all is the case of Malang Dramé, the charlatan, licensed for over forty years as one who can use a magic pestle to identify thieves. Following a case in which his pestle had successfully detected the thieves who had stolen substantial sums of money from the cooperative, Dramé, is arrested and charged with defamation. His trial dramatizes the dilemma faced by modern justice based on written codes of law and traditional justice based on the occult sciences. In the case in point here, the question becomes who is really on trial, the person whose litanies empower the pestle or the pestle itself that does the actual identification? In fact, when Dramé is asked by the judge to demonstrate his technique/art to the court, he is unable to do so, because certain ideas or concepts cannot be translated from the mystical language that conveys them to one understandable to the uninitiated.

There is no way to explain the connection between the words of the litanies he pronounces and the mystic forces that take hold of the pestle and prompt it into action. And since such irrational, illogical actions based on faith in the indigenous system have been repressed due to evidentiary prohibitions or left out of the modern court system in the name of disciplinary autonomy, it becomes impossible to attempt to make sense out of them. When the crucial decision of determining the truth is carried out by an object endowed, as it were, with exceptional powers, the modern court whose raison d'être is the search for truth loses its authority. By the end of the trial, it is no longer simply the trial of an individual or one legal system but that of two societies, the traditional and the modern; two legal institutions, the indigenous represented by Malang Dramé's story and the imported that offers the structure or the framework for the trial. As the defence lawyer puts it, "aujourd'hui il ne s'agit pas de procès de mon client- il s'agit du procès de cette Afrique écartelée- entre ses croyances qui sont effectivement des religions et le modernisme importé" [today it is not the trial of my client—it is that of an Africa torn between her beliefs which are effectively religions and imported modernism].[27]

As I have suggested elsewhere "any interpretation of legal stories in African works of fiction must take into consideration . . . the role of the ancestors"[28] and "other supernatural agencies that act as third parties in the management of cases."[29] These unseen agencies are important components of the indigenous judicial process that have been left out of rule-centered systems. A good illustration of supernatural intervention in the trial process is LE FRUIT DÉFENDU.[30] The forbidden fruit, as the title suggests, deals with the issue of transgression of moral and ethical principles that forbid incestuous relationships. Mengue, a fifteen year old girl, has been sent by her parents to live with her uncle in the capital; as is customary on the continent. Upon her arrival she meets her cousin Guillaume, the son of her uncle whose attitude begins to suggest he sees his cousin as a sexual object that will help him challenge taboos and established rules of his society. Therefore, he nurtures those destructive passions for her by systematically attempting to negate their blood relationship. He questions the definitions, the origins, and his traditions that continue to uphold such taboos. He does everything to alienate himself, at least psychologically, from his traditions.

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27 OUSMANE GOUNDIAN, LE PROCESS DU PILON: PIECE EN QUATRE TABLEAUX (1980).

28 Emmanuel Yewah, *Court Trials in African Fiction*, 19 AFRICAN LITERATURE TODAY 80 (1994).

29 MICHAEL J. LOWRY, A GOOD NAME IS WORTH MORE THAN MONEY: STRATEGIES OF COURT USE IN GHANA, THE DISPUTING PROCESS LAW IN TEN SOCIETIES, 188 (Laura Nadar & Harry Todd eds., 1978).

30 AHANDA ESSOMBA, LE FRUIT DÉFENDU (1975).

As if pushed by some malefic forces, he subverts all the rules physically by frequently going into her room unannounced; philosophically, he thinks about her continuously, imagining both of them engaged in violent sexual acts. He attempts to break down all the walls between him and this forbidden fruit or what he has built into a destructive object of desire. In a final act, these uncontrollable emotions lead him to rape his cousin. Following weeks of trying to keep the secret because of the violent loss of her purity and the fear of tearing their family apart, and the threat of reprisal from her assailant, Mengue finally decides to reveal her ordeal to her parents. Her uncle still in shock, in denial, disbelief that his son could have committed such a hideous crime, acquiesces to the village chief's call for a public hearing/confession in an indigenous court setting.

However, while Mengue is testifying, her assailant who is finally named in public slips away and disappears. Unfortunately for him, while on the run, he gets into an accident in which he loses one of his legs. Although the act of public purification takes place later, his accident at that crucial moment is significant. This type of intervention in the judicial process suggests that there is another crucial dimension to be considered in court trials. And this is when competence in the culture becomes important in that it helps to interpret this extralegal dimension as perhaps orchestrated by fate, destiny or indeed by ancestral spirits who act as real judges, while those that appear as real judges in the trials are simply marionettes controlled from outside the court by those spiritual forces.

Narratives that subvert the imported legal system find their most vocal expression in T.M. Aluko's WRONG ONES IN THE DOCK The text raises serious questions about the imported legal system, which is presented as "truth-inhibiting." Jonathan Egbor and his son Paul have been arrested and falsely charged with the murder of a woman. Textual evidence shows that the woman's son had accidentally killed her during his struggle with his father. During the trial, however, many people who had witnessed the crime either refuse to testify for the accused or simply tell lies in the witness box. Telling such lies might be out of fear of reprisal from the community or the fear created by the aura of awe that surrounds a courtroom. In one occasion, the blatant lie by a witness draws this outburst from Egbor in defiance of court orders that demand respect for the rules of evidence: "what kind of legal system was this that saw a witness telling such awful lies on the so-called oath and yet wrote down such evidence in the record of the court."[31] For him, he "did not see any sense in a legal system in which a witness who tells a lie is allowed to go unchallenged immediately while the lie is still hot."[32]

31 T. MOFORUNSO ALUKO, WRONG ONE IN THE DOCK, (1982)

32 *Id.* at 164

Egbor's outburst shows both his frustration and his attempt to break out of the constraints imposed by a rule-centered system. As Virney Kirpal notes,

> "unlike the imported Western court system, in the African indigenous courts system (in operation before colonialism), it was normal for the accused to cry out that the man in the witness box was lying, or that the judge himself was wrong. 'That is your judgment,' he could say, and I tell you I don't accept it."[33] An experienced judge, he concludes, "could always determine who was telling the truth and who wasn't because the indigenous system had a truth-establishing mechanism built into it."[34]

The courtroom as depicted in some of the texts is used to subvert the legal ideology of the time and to develop alternative ideologies to the dominant ones. Ngugi's THE TRIAL OF DEDAN KIMATHI [35] represents an interesting example of that category. Although the amount of critical studies on Ngugi is overwhelming, and has, to a large measure focused on his Marxist ideology, his cultural/linguistic ethnocentrism or nationalism, his anti-colonialist, anti-capitalist, anti-dictatorial positions, few critics have examined his recourse to the indigenous and received traditions in the law to articulate his views. THE TRIAL provides another reading in that it reconstructs imaginatively the Kenyan colonial experience envisioning, in Ngugi's words, "the world of the Mau Mau and Kimathi in terms of peasants' and workers' struggle before and after constitutional independence" (preface).[36] The trial of Dedan Kimathi, one of the leaders in the struggle for Kenyan independence, is used as a vehicle to expose a capitalist legal ideology represented by the banker, the businessman, the judge, all protected by a very strong police presence, and by land laws to protect the property of the settlers. At the same time, the text uses the trial scene to shape what might be called a participatory legal ideology similar to that of the indigenous legal system in which the court audience participates unrestrictedly in the proceedings and in shaping the legal system since it is not based on precedent but individualized. In this case, the masses or the workers' active participation takes the form of a victory song and dance in reaction to Kimathi's conviction.

Such mass action in the courtroom presided over by a colonialist not only violates the awe that surrounds it but also shows that the masses conceive of law as an institution whose role is not to control people but to be constantly shaped and revised by the people. In such a society, law

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33 Virney Kirpal, *The Structure of the Modern Nigerian Novel and the National Consciousness,* 34 MODERN FICTION STUDIES 45 (Spring 1988).

34 *Id.* at 52-53

35 NGUGI WA THIONG'O, THE TRIAL OF DEDAN KIMATHI (1977).

36 *Id.* at 41

is an adjudicative mechanism used to maintain order and restore social equilibrium following a disruption as that caused by colonialism. In that sense law is no longer just part of the superstructure reflecting "capitalist control of political power" and, therefore, as serving the interests of the ruling class, as in orthodox Marxism. It is no longer just a reflection of "competing demands of society's interest groups,"[37] with a strong economic and political power to lobby, as in liberal democracies, but a social institution serving the interests of the masses.

What comes out of the discussion is that while the trials are used as a forum to subvert the structures and procedures in an imported courtroom setting, extratextual, extralegal forces themselves manipulate textual elements. The connection between these manipulations in the various texts and the contexts of their production, that is, the current socioeconomic and political realities of the African continent is evident. Perhaps a look at dictatorships that today infest the continent will show that while those monsters seem to have arrogated to themselves the power to subvert all the structures of their societies, they are in turn being manipulated by forces outside of the continent, forces on which they depend economically for their continued existence. So the dramas being played in these fictional courtrooms may be a sad commentary, or, indeed, the dramas of the African continent itself that has fallen prey to outside influences carefully channeled through their homegrown satraps.

37 Brooks, *supra* note 14, at 4.