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# African Lawyers and the Strategic Uses of Legal Entanglements: the Case of the Gold Coast and Lagos (1880-1920)

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## 1. Introduction

1 The European scramble for territory and sovereignty in Africa at the end of the nineteenth century went hand in hand with a race for treaties with African polities. Treaties functioned as the quintessential legal instrument of European imperialism and have – in this particular context – earnt a foul reputation: many were coerced, even fabricated or purposefully ill-translated and ill-defined.[1] The mid- and late nineteenth-century acquisition process by Western powers was indeed far from an orderly affair. Contrary to what has long been assumed, the creation of legal instruments that furthered imperial objectives in Africa was often not centrally coordinated by the colonial metropole, but was rather steered through the actions of individuals, such as merchants, consuls, adventurers, colonial personnel, etc.[2] These actors had diverse personal interests and ambitions which did not always coincide with that of the imperial metropole. Operating far from the prying eyes of European ministries, such mid-level officials, were able to implement and adjust legal policies relatively independently. Also, their knowledge of Western domestic or international law was not the high-brow 'law of the books' learnt at European law faculties. It was rather what has been referred to as a 'legal vernacular'[3]: an amalgam of inherited notions of Western law, customary cross-cultural commercial practices and the law of nations.

2 The mayhem of the acquisition process led to uncertainty with respect to the validity of titles to territorial sovereignty and to rights over African land.[4] This became especially clear when colonial regimes in the aftermath of the Scramble sought to accommodate Western companies who wanted to exploit Africa's natural resources and raw materials by acquiring land often in the form of a concession. In its clearest, most basic form, a concession may be described as a contract for

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1 C.H. ALEXANDROWICZ, The European-African Confrontation: A Study in Treaty Making, Leiden 1973; J. FISCH, Die Europäische Expansion und das Völkerrecht: Die Auseinandersetzungen um den Status des überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart, Wiesbaden 1984; M. HEBIE, Souveraineté Territoriale par Traité: Une Etudes des Accords entre Puissances Coloniales et Entités Politiques Locales, Geneva 2015; S. PRESS, Rogue Empires: Contracts and Conmen in Europe's Scramble for Africa, Cambridge MA 2017; M. VAN DER LINDEN, The Acquisition of Africa: The Nature of Nineteenth-Century International Law, Leiden 2016; I. VAN HULLE, Britain and International Law in West Africa: The Practice of Empire, Oxford 2020; I. SURUN, Une souveraineté à l'encre sympathique? Souveraineté autochtone et appropriations territoriales dans les traités franco-africains au XIX e siècle, in: Annales. Histoire, Sciences Sociales 69 (2014), pp. 313-348.

2 For Africa: VAN HULLE, Britain and International Law in West Africa (n.2). See also the several contributions in S. BELMESSOUS (Ed.), Empire by Treaty: Negotiating European Expansion, 1600–1900, Oxford 2015; L. BENTON and L. FORD, Rage for Order: The British Empire and the Origins of International Law, Cambridge MA 2016, p. 201; L. FORD, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836, Cambridge MA 2010.

3 L. BENTON, Law and Colonial Cultures: Legal Regimes in World History, 1400-1900, Cambridge 2002; J. C. COGAN, A History of International Law in the Vernacular, in: Journal of the History of International Law 22 (2020), pp. 205-2017; W. SMILEY, From Slaves to Prisoners of War: The Ottoman Empire, Russia, and International Law, Oxford 2018, p. 5.

4 The entanglement between sovereignty and property in imperial contexts has long been recognized by scholars. A. ANGHIE, Imperialism, Sovereignty and the Making of International Law, Cambridge 2004; A. FITZMAURICE, Sovereignty, Property and Empire, 1500-2000, Cambridge 2014; M. GOLDMANN, The Entanglement of Sovereignty and Property in International Law: From German Southwest Africa to the Great Land Grab?, 2018, doi:10.2139/ssrn.3274198; VAN DER LINDEN, The Acquisition of Africa (n. 2).

economic exploitation 'granted by a national government to a private company or an individual'.[5] As was the case with many legal instruments crafted within the framework of imperialism, concessions also existed within Western economies and legal systems. However, in Africa and in other regions of the Global South, they helped bolster colonial rule and facilitated the extraction of natural resources and labour.[6] Concessions were granted by colonial governments to private parties for the purposes of effecting large-scale capital-intensive projects, such as mining, railroads, plantations, factories, etc. and served the rapid development of European colonies.

3 While the granting of concessions started when the race for treaties had ended, the two are inherently connected with each other. Colonial concessions, indeed, can be considered as nodes that connected international law, constitutional law and indigenous law in imperial contexts. Concession contracts granted at once private rights to the concessionaire, but also established a legal relationship between the concessionaire and the colonial state as the granter of the concession. At the same time, concession contracts often had as their object rights over the exploitation of land. This meant that the granter of the concession needed to be the rightful owner of the land. Concessions therefore brought to stark light whether or not the colonial state had legally acquired rights over land at the inception of the colonial regime through treaties or otherwise. In other words, concessions had a direct bearing on early treaty-making and on the international legal doctrine of title to territory. They went to the very core of the imperial endeavour: had the imperial regime rightfully acquired territorial sovereignty and, if so, had such a transfer also encompassed private rights over land? This meant that a single concession contract was vulnerable to the legal chaos that went hand in hand with the acquisition of sovereignty and territory in Africa.

4 This article explores the connectivities between international law, British domestic law and African customary law in colonial regimes by zooming in on the discussions surrounding the granting of concessions on the Gold Coast and Lagos. I argue that the haphazardly created, early and mid-nineteenth-century international legal instruments reverberated across different normative orders and well into the twentieth century in ways that have hitherto remained unexplored in contemporary scholarship.[7] One of these ways is the manner in which African lawyers who were grounded in different legal traditions, used their knowledge of Western international law, British domestic law and African customary law in strategic and emancipatory ways. In other words, they were ideally suited to navigate the entanglement of different normative orders that became a feature of colonial law.

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5 C. VEESER, A Forgotten Instrument of Global Capitalism? International Concessions, 1870–1930, in: The International History Review, 35 (2013), pp. 1136-1155, here p. 1140.

6 G. AUSTIN, Land, Labour and Capital in Ghana: From Slavery to Free Labour in Asante, 1807-1959, London 2001.

7 See for similar views with regard to the legal history of multinational corporations: D. LUSTIG, Veiled Power: International Law and the Private Corporation 1886-1981, Oxford 2020.

5 The article first discusses the early creation of judicial extraterritoriality on the Gold Coast during the 1830s and 1840s and, second, the cession of Lagos in 1861 and their effects on early twentieth-century discussions over land rights. Both the Gold Coast and Lagos became arenas where the questionable ways in which sovereignty and jurisdiction were acquired during the early decades of imperial presence, would have direct consequences for the creation of a legal framework that facilitated the presence of Western concessionaires. In the discussions surrounding the validity of land reform, I will focus particularly on the activism of two Gold Coast lawyers, Joseph Ephraim Casely Hayford (1864-1910) and John Mensah Sarbah (1864-1910), who operationalised the normative registers of international law, British domestic law and African customary law to attack colonial land reform in the Gold Coast and Lagos. The history of land reform on the Gold Coast and Lagos have been the subject of scholarly attention before.[8] Also, the writings of Casely Hayford and Mensah Sarbah have been discussed before within the context of burgeoning African nationalism.[9] However, their legal argumentation has not been discussed in detail yet, nor has it been connected to the history of title to territory.

## 2. International Law and the Inception of Colonial Regimes in the Gold Coast and Lagos

6 British jurisdiction on the Gold Coast remained poorly defined until the late nineteenth century. Initially, British presence on the Gold Coast was limited to a number of forts along the coastline that were used for commercial purposes. Like the Danish and the Dutch forts, the British settlements were administered initially through companies. Apart from a brief period of Crown rule between 1821 and 1827, the Committee of Merchants continued to administer the forts until 1843. Following allegations of corruption and the aiding and abetting of the slave trade the forts were taken over by the British government in 1843 and administratively severed from Sierra Leone in 1850. In 1807, the Act for the Abolition of the Slave Trade prohibited the import of slaves to British possessions and proscribed British subjects from participating in the slave trade.[10] This marked a downward turn in British interest in the Gold Coast.[11] Theoretically, British jurisdiction did not extend beyond the precincts of the forts, neither was there any real

8 R. GROVE and T. FALOLA, Chiefs, Boundaries, and Sacred Woodlands: Early Nationalism and the Defeat of Colonial Conservationism in the Gold Coast and Nigeria, 1870-1916, in: African Economic History 24 (1996), pp. 1-23; C. U. ILEGBUNE, Concessions Scramble and Land Alienation in British Southern Ghana, 1885-1915, in: African Studies Review 19 (1976), pp. 17-32; O. OMOSINI, The Gold Coast Land Question, 1894-1900: Some Issues Raised on West Africa's Economic Development, in: The International Journal of African Historical Studies 5 (1972), pp. 453-469.

9 H. ADI and M. SHERWOOD, Pan-African History: Political Figures from Africa and the Diaspora since 1787, London 2003, p. 82-85; B.M. ERDSMAN, Lawyers in Gold Coast Politics, C. 1900-1945: From Mensah Sarbah to J.B. Danquah, Uppsala 1979; D.E. KOFI BAKU, History and national development: the case of John Mensah Sarbah and the reconstruction of Gold Coast history, in: Institute of African Studies Research Review 6 (1990), pp. 36-48; D. KIMBLE, A Political History of Ghana: The Rise of Gold Coast Nationalism, 1850-1928, New York 1963.

10 Act for the Abolition of the Slave Trade, 47 Geo. III Sess. 1 c. 36.

11 R. SHUMWAY, Exploiting British Ambivalence toward Africa: Fante Sovereignty in the Early 19th Century, in: K. FULLAGAR and M. MCDONNELL (Eds.), Facing Empire: Indigenous Experiences in a Revolutionary Age, 1760-1840, Baltimore 2018, pp. 72-90, here p. 73.

enthusiasm to extend British responsibilities as West Africa did not feature high on the list of imperial priorities.

7 In spite of the overall governmental wish to avoid extending British responsibilities in West Africa unless absolutely necessary, British administrators saw themselves ever more closely involved outside the forts. From 1817 onwards Company- and British jurisdiction gradually grew outside of the precincts of the forts. One reason was the increased diplomatic and military involvement of Company representatives in inter-African disputes, mainly those between the Fante and the powerful inland kingdom of Asante. However, the real growth of extraterritorial jurisdiction coincided with the appointment of George Maclean as President of the Committee's Council of Merchants.[12] Maclean regularly invested resident English merchants with the powers of magistrates and commissioners in the districts in which they resided.[13] Over the coming decades the Gold Coast region would indeed witness the gradual extension of British extraterritorial jurisdiction, often on a customary basis and without the official consent of the British government. Nevertheless, a Parliamentary Select Committee in 1842 recommended extraterritorial jurisdiction as a future policy to be pursued in West Africa, albeit on a clearer legal footing.[14] These official recommendations coincided with similar initiatives throughout the British Empire and constituted an official attempt to limit arbitrary actions undertaken by colonial personnel and to limit the indigenous jurisdiction, particularly in criminal matters.[15] This was effected through the adoption of the British Settlements Act and the Foreign Jurisdiction Act in 1843.[16] In the following decades Maclean's policy continued to be pursued in the Gold Coast (and in several other regions of West Africa where the British had settlements), though with more attention to acquiring the written consent of African rulers, for example, in the Bond of 1844.[17]

8 The gradual extension of especially judicial jurisdiction provided the legal basis for what would later become the Gold Coast Protectorate that built its governance structure on the limited exercise of British sovereignty and without the burden of a comprehensive colonial

12 J. D. FAGE, The Administration of George Maclean on the Gold Coast, 1830–1844, in: Transaction of the Gold Coast and Togoland Historical Society 1 (1955), pp. 104-120, here p. 104; G. E. METCALFE, Maclean of the Gold Coast: The Life and Times of George Maclean, 1801–1847, Oxford 1969.

13 A. SWANZY, Trade on the Gold Coast. Remarks on Trade in West Africa, with and without British Protection, London 1874, p. 4.

14 Report From the Select Committee on the West Coast of Africa; Together With the Minutes of Evidence, Appendix, and Index (HC 1842, 11–12), p. iv.

15 BENTON and FORD, Rage for Order (n. 3), p. 28–30.

16 British Settlements Act, 6 & 7 Vict. c. 13; R. PENNELL, The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty, in: Historical Research 83 (2009), pp. 465–485, here p. 462.

17 J. B. DANQUAH, The Historical Significance of the Bond of 1844, in: Transactions of the Historical Society of Ghana 3 (1957), pp. 3-29, here p. 4–5; R. SHUMWAY, Palavers and Treaty Making in the British Acquisition of the Gold Coast Colony (West Africa), in: S. BELMESSOUS (Ed.), Empire by Treaty: Negotiating European Expansion, 1600-1900, Oxford 2014, pp. 161-185.

administration. The British government was reluctant to condone any extension of authority and certainly if this happened without the explicit, often coerced, written agreement of African rulers.[18] In practice, however, extensions nevertheless happened at the hands of imperial agents on the spot in an unplanned and unofficial way. Their justifications for acquiring extraterritorial jurisdiction outside of governmental approval were framed around the perceived need to protect British subjects from African criminal law and punishment or to protect African subjects from crimes committed by British subjects outside of the confines of the British settlements.[19] These justifications formed part of a Western racist and imperialist discourse that considered African legal practices as 'uncivilised'. By the 1870s and 1880s no one, including the Colonial Office really knew how far British jurisdiction really extended.[20] What was clear though is that such jurisdiction implied limited cessions of sovereign rights, namely the right to adjudicate or legislate in certain matters. What it did not imply was a cession of property over land.

9 In fact, up until the late nineteenth century, cessions of territory happened rarely in West Africa. When it did happen, the legal basis of acquisition was through treaties of cession with African rulers that transferred both sovereignty and territory to Europeans. European negotiators, however, aside from abundant cases of coercion, bribery and manipulation which rendered African consent to treaties in itself mute, often also had very little knowledge of the extent of the territory they had acquired or what the political make-up was of the African polity that was a party to the cession. This meant that it was sometimes unclear whether the African ruler or council who signed the treaty really had the political authority to do so.[21]

10 A case in point is the cession of Lagos, one of the Yoruba kingdoms in south-west Nigeria, in 1861, which was annexed by Britain in contravention of local custom. In 1807 both Houses of Parliament passed the Act for the Abolition of the Slave Trade, which prohibited the import of slaves to British territorial possessions and proscribed the participation of British subjects in the slave trade.[22] Following this, Britain embarked on a world-wide diplomatic and legal mission to convince other Western and South American slave trading nations to abolish the slave trade.[23] From the 1840s onwards, the British government shifted its focus to concluding a series of

18 Colonial Office Memorandum (25 June 1874) CO 267/113 TNA.

19 VAN HULLE, Britain and International Law in West Africa (n.2).

20 Colonial Office Confidential Memorandum (March 1874) CO 879/6 TNA; Carnarvon to Strahan (20 August 1874), in: Correspondence relating to the Affairs of the Gold Coast (HC 1875, 1139) 4.

21 See for examples of these treaties VAN HULLE, Britain and International Law in West Africa (n.1). Also ALEXANDROWICZ, The European-African Confrontation (n.2); FISCH, Die Europäische Expansion und das Völkerrecht (n.2); HEBIE, Souveraineté Territoriale par Traité (n.2); PRESS, Rogue Empires (n.2); VAN DER LINDEN, The Acquisition of Africa (n.2); SURUN, Une souveraineté à l'encre sympathique? (n.2).

22 Act for the Abolition of the Slave Trade, 47 Geo. III Sess. 1 c. 36.

23 J. ALLAIN, Slavery in International Law: Of Human Exploitation and Trafficking, Leiden 2013, p. 72–74; L. BENTON, Abolition and Imperial Law, 1790–1820, in: Journal of Imperial and Commonwealth History 39 (2011), pp. 355-374, here p. 355; D. ELTIS, Economic Growth and the Ending of the Transatlantic Slave Trade, Oxford 1987; J. QUIRK, The Anti-Slavery Project: From the Slave Trade to Human Trafficking, Philadelphia 2011.

bilateral agreements with West African rulers to tackle the supply-side of the trade.[24] The idea behind this treaty-campaign was to convince African rulers to stop the trade in enslaved people by establishing an alternative trade in so-called 'legitimate' goods.[25] The added advantage for Britain was that many of the slave trade treaties entitled commercial access and privileges for its merchants. In 1849 a number of consular and vice-consular posts were created in the region of the Bights of Benin and Biafra in the context of the abolition of the slave trade. Part of the tasks of the newly appointed consuls and vice-consuls was to keep a close eye on the adherence of African polities to the slave trade treaties and to report on slave-dealing.[26]

11 At Lagos, consul John Beecroft became involved in a succession dispute, which inadvertently led to a British military intervention and, finally, even annexation. First, he helped to orchestrate the dethronement of the Oba (or king), Kosoko (r.1845-1851), by his cousin, Akitoye (r. 1851-1853).[27] Since Kosoko had persistently refused to sign a British slave trade treaty, British officials believed that Akitoye might be more amenable.[28] While from that point on Lagos came under British control, by 1860, as part of the British anti-slave trade policy, the decision was made to transform Lagos officially into a British possession. Important imperial considerations for the annexation of Lagos were, apart from the suppression of the slave trade and the promotion of legitimate commerce, the fear of increased French presence on the Gold Coast.[29]

12 As a result, a British gunboat was sent to the new Oba and son of Kosoko, Docemo (r. 1853-1885).[30] In August 1861 Docemo was asked to sign a treaty of cession that would transfer the sovereignty and territory of Lagos to Britain.[31] The Oba, however, refused to sign the treaty of cession, after which he was informed by the British Consul that if he continued to refuse, the island would simply be taken possession of whether he agreed to it or not. Acquiescing to the British threat, Docemo was able to negotiate for himself the permission to carry the title of king

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24 M. ERPELDING, Le droit international antiesclavagiste des 'nations civilisées' (1815–1945), Varenne 2017; VAN HULLE, Britain and International Law in West Africa (n.2), pp. 112-164.

25 R. LAW, International Law and the British Suppression of the Atlantic Slave Trade, in: D. R. PETERSON (Ed.), Abolitionism and Imperialism in Britain, Africa and the Atlantic, Cambridge 2010, pp. 150-174.

26 I. K. SUNDIATA, From Slaving to Neoslavery: The Bight of Biafra and Fernando Po in the Era of Abolition, 1827–1930, Madison 1996.

27 M. LYNN, Consul and Kings: British Policy, the Man on the Spot and the Seizure of Lagos, 1851, in: Journal of Imperial and Commonwealth History 10 (1982), pp. 150-167, here p. 152; R. SMITH, The Lagos Consulate, 1851–1861: An Outline, in: Journal of African History 15 (1974), pp. 193-416, here p. 393-394.

28 Addington to the Secretary of the Admiralty (11 October 1850), in: Papers relative to the Reduction of Lagos by Her Majesty's Forces on the West Coast of Africa (HC 1852, 1455).

29 McCoskry to Russell (7 August 1861) in: Papers relative to the Reduction of Lagos (n. 27).

30 Russell to Foote (22 June 1861) FO 84/1141 TNA.

31 Foreign Office to McCosky (23 September 1861) FO 84/1141 TNA.

'in its usual African signification'[32] and was able to retain the jurisdiction to decide disputes between African subjects while decisions remained subject to appeal to British laws. Under threat of coercion, there was little that could be effected by Docemo. In a letter of protest addressed to the Queen he testified that 'it was through compulsion that he was made to sign the treaty'.[33] As with most cases of imperial aggression, his objections fell on deaf ears.

13 The coerced cession of Lagos became controversial when the question arose at the start of the twentieth century whether or not the cession had entailed a cession of land and whether or not such a cession had legitimately taken place. African tradition told that the Olofin, the original ruler, had awarded titles to Lagos island and the adjoining areas to a number of men.[34] These were entitled to wear white caps as a designation of their office and importance. They would eventually become referred to as the 'white-cap' chiefs as three main orders of chiefs who were collectively known under this term.[35] These included the Idejo, who represented the original landowners of Lagos. Kristin Mann has highlighted that the roots of the origin story are unclear, but that it gained in popularity during the first decades of the twentieth century when discussions over land rights also took centre stage in Lagos, where the colonial government had attempted to enact similar land legislation as in the Gold Coast.[36]

14 By the beginning of the twentieth century, neither the Gold Coast nor Lagos could still be described as infant British settlements. The British Gold Coast had grown to consist of three distinct administrative centres, the Gold Coast Colony (1874), Ashanti (1901), and the Northern Territories Protectorate (1902). While initially, European powers had not really been interested very much in acquiring rights over land, this changed when by the end of the nineteenth century, European companies were scrambling to obtain agricultural and mining concessions in British colonies in West Africa. During this period, colonial initiatives to reform colonial landholding resulted in struggles over what Western/colonial international law meant when applied to Africa, its relationship with African normative orders, and the distinction between sovereignty and property over land.

### 3. From Treaty to Concession

15 Under colonial regimes the rapid commodification of land in Africa took place. This was linked to the ever-increasing demand for new products and the resulting conflicts over who controlled resources and the labour supply, as well as who held economic and political power in the newly

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32 Article 2, Treaty between Britain and Docemo, King of Lagos, on the part of Himself and his Chiefs; Consul McCoskry to Lord Russell (7 August 1861) (HC 1852, 1455).

33 King Docemo to Her Majesty the Queen (8 August 1861), Ibid.

34 K. MANN, Slavery and the Birth of an African City. Lagos, 1760–1900, Bloomington 2007, p. 239.

35 SMITH, The Lagos Consulate (n. 28), p. 394.

36 MANN, Slavery and the Birth of an African City (n. 35), pp. 239.

minted colonies and protectorates.[37] As Elisabeth Colson has indicated, colonial governments introduced European concepts of legal tenure which they interpreted as universal legal principles applicable everywhere.[38] Colonial governments thus operated under the assumption that the full range of land rights covered by the concept of private and proprietary ownership existed and operated in Africa in the same way that it did in their own domestic European legal tradition.[39] If no private person could be identified who appeared to hold property rights over a given area, then colonial governments assumed that these rights were vested in the African polity whose members inhabited the region. When neither of these conditions were fulfilled, lands were considered to be vacant and as subject to confiscation by the colonial government and disposable to be sold to European merchants and companies.[40]

16 In spite of the overwhelming power imbalance with the colonial authorities, the struggle over land rights reveals that this was an important space of resistance against the colonial legal regime. This struggle, however, was not one-dimensional. African rulers and their families were able to reassert rights in land the British, while at the same time, the new urban African intelligentsia crafted a space of authority and prestige for themselves traditionally exercised by African rulers. Struggles over land reform also provided an arena for burgeoning African nationalism and Pan-Africanism.[41] On the Gold Coast, for example, by the end of the nineteenth century most Africans were excluded from influential administrative positions, which left the legal profession open as one of the only avenues for African intellectuals that provided them with financial freedom and political independence and where their expertise was needed with respect to African customs.[42] From the 1890s onwards, the British colonial settlements on the Gold Coast became the first area where African intellectuals and traditional authorities successfully subverted British attempts to extend colonial authority over indigenous lands. In doing so, they made strategic use of an African interpretation of indigenous land rights to undermine the Western doctrine of title to territory and the foundation on which British presence in West Africa was legitimated. In doing so, they were able to successfully defeat a number of colonial legal initiatives at land reform and influenced the new legislation concerning land that developed in both the regions of Lagos and the Gold Coast.

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37 R. ROBERTS and W. WORGER, Law, Colonialism and Conflicts over Property in Sub-Saharan Africa, in: African Economic History 25 (1997), pp. 1-7, here p. 1.

38 E. COLSON, The Impact of the Colonial Period on the Definition of Land Rights, in: V. TURNER (Ed.), Profiles of Change: African Society and Colonial Rule, Cambridge 1971, p. 196.

39 Ibid.

40 Ibid.

41 R. GROVE and T. FALOLA, Chiefs, Boundaries, and Sacred Woodlands (n.9).

42 KIMBLE, A Political History of Ghana (n.10).

**17** The reason for colonial intervention in indigenous landholding on the Gold Coast was a rush on concessions for goldmining.[43] Gold-mining was a centuries-old activity on the Gold Coast, done predominantly through the technique of pit-mining. The legal relationship between the pit-miners and the local stool (or chieftaincy) was one that has been described as a tributary relationship based on the *abusa*-system.[44] The abusa-system entailed that gifts amounting to a prescribed value were allocated to the local stool in return for the right to mine, along with one-third of the gold produced for the duration of the mining activities. European interest in goldmining was sparked in the aftermath of the Asante War of 1873-1874 and was especially concentrated around Tarkwa and Abosso. For many Gold Coast entrepreneurs this was a profitable affair: Gold Coast speculators would lease property from local chiefs and sell the leases at a profit to European mining companies, which then engaged in the development of the concession.[45] From the perspective of chiefly authority, the coming of European concessionaires also proved an interesting alternative to escape the more disadvantageous aspects of traditional mining customs. Chiefs ran the risk of receiving low-quality gold from miners and now had an opportunity to see tribute replaced by regular payments and wageworkers. As a result, chiefs readily sold concessions and at times 'the same ground, or parts of it, to two or three purchasers'.[46]

**18** In an effort to control the process of concession sales ànd the gold rush, the colonial government attempted to reform land ownership through a series of legislative initiatives, such as the Crown Lands Bill (1894) and the Lands Bill (1897). Overall these initiatives placed waste land, forest land and minerals under the control of the British Crown.[47] This meant that the right of traditional African chiefly authorities to sell concessions to European companies was reverted to the colonial government. Continued agitation made the colonial government's position untenable and the Crown Lands Bill was abandoned. A compromise was reached under the Concessions Ordinance of 1900. This Ordinance recognized the right of local authorities to grant concessions, but provided for oversight by the Supreme Court of the Gold Coast.

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43 K. AMANOR, The Changing Face of Customary Land Tenure, in: J. M. UBINK and K. AMANOR (Eds.), Contesting Land and Custom in Ghana: State, Chief and the Citizen, Leiden 2008, p. 58.

44 J. SILVER, The Failure of European Mining Companies in the Nineteenth-Century Gold Coast, in Journal of African History, 22 (1981), pp. 511-529, here p. 512.

45 R. E. DUMETT, El Dorado in West Africa: the Gold-Mining Frontier, African Labor, and Colonial Capitalism in the Gold Coast, 1875-1900, Athens: 1998; GROVE and FALOLA, Chiefs, Boundaries, and Sacred Woodlands (n. 9); ILEGBUNE, Concessions Scramble (n.9); OMOSINI, The Gold Coast Land Question (n.9).

46 R. F. BURTON and V. L. CAMERON, To the Gold Coast for Gold. A Personal Narrative, Vol II, London 1883, p. 62.

47 J. O. HOVE and J. KWADWO OSEI-TUTU, Regulating Oil Concessions in British West Africa: The Case of Nigeria and the Gold Coast during the Colonial Period, in: A.R.D. SANDERS, P.T. SANDVIK, and E. STORLI (Eds.), The Political Economy of Resource Regulation: An International and Comparative History, 1850-2015, Vancouver 2019, pp. 166-185.

## 4. African Lawyers and the Strategic Uses of Legal Entanglements

19 It was these legislative initiatives that were targeted by Gold Coast lawyers, Joseph Ephraim Casely Hayford (1866-1930) and John Mensah Sarbah (1864-1910). In doing so, they tied the question of who owned land on the Gold Coast and in Lagos to whether or not a cession of land had taken place during the early decades of imperial presence. In their discussion of transfers of land, they highlighted how according to what they described as African customary law, such transfers were impossible. In other words, they successfully used the chaos of early sovereign acquisitions against the colonial regime and turned Western legal argumentation on its head in order to invalidate colonial legislation.

20 A key organisation in the agitation against land reform was the Gold Coast Aborigines' Rights Protection Society.[48] The Society counted among its members primarily traditional African authorities and members of the urban elite of Cape Coast, such as barristers and merchants. Their political concerns coincided with a vast stake that many had in cocoa and mining concessions. Two Gold Coast lawyers, Joseph Ephraim Casely Hayford (1866-1930) and John Mensah Sarbah (1864-1910) played leading roles. John Casely Hayford was educated at Fourah Bay College in Sierra Leone and after becoming a journalist, decided to study law.[49] After completing his legal education in Britain, he studied economics at Cambridge University and was called to the Bar at the Inner Temple in 1896. He became an active member of the Gold Coast Aborigines Rights Protection Society. From 1916-1925 he was an elected member of the Gold Coast Legislative Council. He became the driving force and, eventually, the President and Vice-President of the National Congress of British West Africa (NCBWA), the first Pan-African organization in Africa. Through his pamphlet-style works *Gold Coast Native Institutions* (1903)[50] and *The Truth about the West African Land Question* (1913)[51], as well as newspaper articles in which he attacked British colonial policies with respect to land alienation, particularly in reference to the Gold Coast.

21 Through resistance against land reform they framed a new identity for the Gold Coast as an African nation premised on modernization and innovation of African political and legal institutions that was driven from below.[52] Mensah Sarbah and Casely Hayford both theorized on customary law and provided commentary on case law. Consequently, their writings – and that of

48 S. ROHDIE, The Gold Coast Aborigines Abroad, in: The Journal of African History 6 (1965), pp. 389-411, here p. 390.

49 A short but good summary of Joseph Ephraim Casely Hayford's life can be found in: ADI and SHERWOOD, Pan-African History, (n. 10), p. 82-85. There is also a biography of Casely Hayford's wife, Adelaide Smith Casely Hayford: A. M. CROMWELL, An African Victorian Feminist: the Life and Times of Adelaide Smith Casely Hayford (1868-1960), London 1986.

50 J. CASELY HAYFORD, Gold Native Institutions, with Thoughts upon a Healthy Imperial Policy for the Gold Coast and Ashanti, London 1903.

51 J. CASELY HAYFORD, The Truth about the West African Land Question, London 1913.

52 P. BOELE VAN HENSBROEK, Philosophy of Nationalism in Africa, in: A. AFOLAYAN and T. FALOLA, The Palgrave Handbook of African Philosophy, London 2017, pp. 405-416, here p. 407.

many other Gold Coast barristers who followed the example of commenting on customary law – became representative of what the British colonial authorities considered to be 'native Gold Coast customary law', while in truth it only represented one of many African traditions of inheritance and ownership. Mensah Sarbah, for example based his writings on Akan[53] traditions, which eventually came to dominate British courts in the Gold Coast rather than other legal traditions.[54]

**22** While describing customary law, both Mensah Sarbah and Casely Hayford attacked colonial policy. Casely Hayford's and Mensah Sarbah's main argument was that cessions of private land between African polities on the Gold Coast and the British government had never taken place. Not only had such as cession never existed, historically constituted Akan customary law did not allow for chiefs to divest of their subjects' lands independently.

**23** In a first line of attack against these legislative initiatives, Casely Hayford argued against the application of Western title to territory doctrine to transfers of private property in the Gold Coast as this contradicted what he portrayed as historically constituted African customary land rights. First, he carefully outlined matrilineal succession over land and proceeded to distinguish it from the English law of trust and from Roman law.[55] In doing so Casely Hayford warned against 'the danger of employing the terminology of English Law'.[56] He proceeded to highlight the difference between English succession over land and that of African customary law as he saw it.[57] He explained, for example, that whereas a successor under English law has sole ownership and control, under customary law he is merely a co-owner and does not have exclusive control. Nor could the successor be considered as 'a trustee in the sense of Equity Jurisprudence'. A chief was thus joint-owner of the property and would have to share every interest in this property with his people, immediately upon its realisation.

**24** In terms of the transferability of land, he argued that in the Gold Coast 'from time immemorial' the rights of the King with respect to land were inseparable from that of his people who 'have a conjoint right in the property' as well as conjoint control.[58] Of the several classes of territory over which the King exercised rights, there was not a single class of territory that could be transferred by the king independently. The lands attached to the 'stool' could only be transferred with the consent of the king's councillors. The King's own ancestral lands were only transferable with the sanction of the other members of his family. Finally, with respect to the 'general lands of the state', the King only exercised what Casely Hayford described as 'paramountcy', which he equated

53 The Akan are the largest ethnic group in Ghana.

54 A.N. ALLOTT, The Judicial Ascertainment of Customary Law in British Africa, in: Modern Law Review 20 (1957), pp. 244-263, here p. 252.

55 CASELY HAYFORD, The Truth (n. 52), p. 56.

56 Ibid., p. 53.

57 Ibid., p. 54-55.

58 Ibid., p. 53.

with ‘a sort of sovereign oversight’ which merely implied the power to confirm and ratify what his subjects granted. In other words, the real power to transfer lay with his subjects and chiefly ratifications were not constitutive of the transfer itself. The implication was that it was impossible for kings and chiefs to cede private lands in treaties of cession without having followed the correct customary procedure and that a clear distinction needed to be upheld between cessions of sovereignty (*imperium*) and cessions of land (*dominium*).[59] While cessions of jurisdiction (i.e. imperium) had taken place on the Gold Coast, such transfers of private land (i.e. dominium) had not.

**25** In 1912 the Colonial Office organised the West African Lands Commission in order to explore the further possibility of establishing uniformity of control over land by the colonial administration. Casely Hayford’s findings coincided mostly with the findings of the British Commissioner, C.H. Belfield, who was sent to investigate the manner in which lands on the Gold Coast were usually transferred under customary law. Belfield stayed a number of weeks on the Gold Coast and conducted interviews. Though reductionist in its lumping together of African tenure, the Report generally confirmed that every piece of land on the Gold Coast had an owner. Tenure could be either communal, held by a particular family or be individually held. Belfield confirmed that the colonial government ‘had no right of ownership’ except for the areas in the immediate vicinity of the forts, ‘and any endeavour to extend those rights otherwise than by legal process of acquisition would amount to a breach of faith with the people’.[60]

**26** Casely Hayford was not merely concerned with his native Gold Coast, but offered a wider spectrum of resistance against encroachments on land rights that spanned across Nigeria and Sierra Leone. He identified a trend wherein the British government argued that African rulers did not hold property rights over land by confounding the transfer of sovereignty with that of property in treaties of cession. To this he added the British ignorance of the manner in which land was traditionally transferred under what he described as African customary law. His second line of attack consisted of pointing out the uneven application of European international law in the history of territorial acquisitions in Nigeria. In 1910 the Northern Nigeria Lands Committee was organised by the government. It found that on the proclamation of the Protectorate of Northern Nigeria in 1900, the Northern emirs and chiefs had also ceded their rights over land.[61] Following the report, legislation was adopted that placed all lands in Northern Nigeria under the control of

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59 See for extensive discussion of imperium and dominium in colonial Africa: VAN DER LINDEN, The Acquisition of Africa (n. 2).

60 Citation of Belfield Report taken from W.N.M. GEARY, Land Tenure and Legislation in British West Africa, in: African Affairs 12 (1913), pp. 236-248, here p. 238.

61 Report of the Northern Nigeria Lands Committee and Despatches Relating Thereto, London 1910.

62 The Land and Native Rights Proclamation (1910). The Proclamation was adapted in 1916.

the colonial Governor who could parcel out land to European businesses.[62] There was a real fear that Southern Nigeria would undergo the same fate of land expropriation as the North.[63]

**27** Similar to what the Aborigines Rights Protection Society had attempted in the Gold Coast, the Lagos Auxiliary of the British Anti-Slavery and Aborigines Protection Society also set up a co-ordinated campaign to prevent land alienation in Southern Nigeria.[64] As a point of illustration Casely Hayford referred to the discussions waged over the cession of Lagos by Oba Docemo, which had led to exactly such controversies over land ownership in Northern Nigeria. The cession became controversial as a result of the Foreshore case of 1910 decided by the Supreme Court of Southern Nigeria.[65] The defendants in the case had purchased parcels of land of the foreshore and bed of the lagoon from local people who claimed to be the owners.[66] The colonial government had constructed a road through the defendants' alleged lands. The Attorney General asked – amongst other things – that the Court recognize that the cession of Lagosian land had been legal. The Court followed the Attorney General's reasoning and found that Lagos had indeed been the property of Docemo and that it had been legitimately ceded by him to the British Crown in 1861.[67]

**28** In contradiction to the judgment rendered by the Supreme Court, Casely Hayford pointed out that in Lagos historically the previously mentioned white-cap chiefs had the authority to grant lands, whereas the four councillors who signed the 1861 cession belonged to the council of Oba Docemo whose authority did not extend to questions of land.[68] In other words, no such cession of land had taken place.[69] Casely Hayford contested any attempt by Britain to extend the Nigeria Lands Proclamation to Southern Nigeria, Sierra Leone and the Gold Coast and branded such a potential exercise as illegal. He warned that 'empire-building in West Africa raised upon the ashes of the people's proprietary rights is raised in sand'.[70] This argument was also advanced by the Lagos Auxiliary of the British Anti-Slavery and Aborigines Protection Society Similar, which

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63 CASELY HAYFORD, The Truth (n. 52), p. 14.

64 R. OKONKWO, The Lagos Auxiliary of the Anti-Slavery and Aborigines Rights Protection Society: A Re-Examination, in: The International Journal of African Historical Studies 15 (1982), pp. 423-433, here p. 425.

65 Attorney General of Southern Nigeria v. John Holt and Co. (1910), in: Reports, Notes of Cases & Proceedings and Judgments in Appeals, Etc., and References Under Rules, Orders & Ordinances Relating to the Gold Coast Colony, and the Colony of Nigeria, from 1861 to 1914: And a Few Decisions Given by His Majesty's Judicial Committee of the Privy Council Affecting the Aforesaid Colonies, Vol. I, London 1915, p. 652.

66 Ibid.

67 Ibid.

68 CASELY HAYFORD, The Truth (n. 52), p. 20.

69 This is also discussed in O. ADEWOYE, The Judicial System in Southern Nigeria 1854-1954: Law and Justice in a Dependency, London 1977, p. 258; T.O. ELIAS, Nigerian Land Law, London 1971, p. 8.

70 Ibid. 21.

similar to the Aborigines Rights Protection Society in the Gold Coast, had attempted to set up a co-ordinated campaign to prevent land alienation in Southern Nigeria.[71]

29 While similar in its political objectives, the work of Mensah Sarbah was more academically oriented when compared to that of Casely Hayford. John Mensah Sarbah was born in 1864 in Anomabo on the Gold Coast.[72] He was sent to England at the age of fourteen where he was educated at Queen's College in Somerset. After a short period back in the Gold Coast, he returned to England and was called to the bar at Lincoln's Inn in 1887.[73] He became the Gold Coast's first barrister. Back in the Gold Coast, Sarbah set up a flowering legal practice, became a leading member of the 'Mfantsi Amanbuhu Fekuw' in 1889 in Cape Coast, which became the Aborigines Rights Protection Society and he was the proprietor and editor of the *Gold Coast People*.[74] He was himself intimately connected with the history of gold mining on the Gold Coast: his father, John Sarbah, together with a number of associates, founded the Gold Coast Native Concessions Purchasing Company which engaged in mining speculation.[75] From his father, John Mensah Sarbah, also inherited his political views and clout.

30 Like Casely Hayford, Mensah Sarbah was concerned with the fate of African land rights on the Gold Coast and proceeded to defend the land rights of Gold Coast inhabitants through a historical inquiry into the customary rules concerning private transfers of land in his *Fanti Customary Laws* (1897).[76] Like Casely Hayford, he attested to the fact that according to him before the coming of Europeans 'private property in its strict sense' did not exist on the Gold Coast.[77] More so than the sale of land, it was common for chiefs with the consent of his councillors, village elders or family members merely to grant permission to outsiders to reside on or cultivate the lands of the village community.[78] Like that of Casely Hayford, the underlying message was that the British colonial government did not own the land and was therefore not entitled to control the sale of concessions.

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71 OKONKWO, The Lagos Auxiliary (n. 65), p. 425.

72 KOFI BAKU, History and National Development, (n.10), p. 41.

73 M. SHARAFI, A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire, in: Law & Social Enquiry 32 (2007), pp. 1059-1094, here p. 1072.

74 R. GOCKING, Competing Systems of Inheritance before the British Courts of the Gold Coast Colony, in: The International Journal of African Historical Studies 23 (1990), pp. 601-618, here p. 611.

75 R. E. DUMETT, John Sarbah, the Elder, and African Mercantile Entrepreneurship in the Gold Coast in the Late Nineteenth Century, in: The Journal of African History 14 (1973), pp. 653-679, here p. 675.

76 J. MENSAH SARBAH, Fanti Customary Laws: A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Districts of the Gold Coast, with a Report of some Cases thereon decided in the Law Courts, London 1897.

77 Ibid., p. 60.

78 Ibid., p. 66.

31 Some of his and Casely Hayford's recommendations to improve colonial policy based on customary law foreshadow those of Captain Robert Sutherland Rattray[79] who was appointed the head of the new Anthropological Department on the Gold Coast in 1921, where he worked among the Asante as a government anthropologist.[80] Rattray's appointment fits into the burgeoning policy of indirect rule in West Africa as popularised by Lord Frederick Lugard.[81] The idea behind indirect rule was to create an overarching, yet minimal (and therefore cheap) British administrative system on top of already existing African political and legal institutions. In order for indirect rule to be effective, however, it needed to be adapted to the varied local circumstances of each African polity, which, in turn, required expert knowledge of African forms of government. Thus an alliance of convenience was forged between colonial governmental policy-makers and British anthropology, which being a young and still unrecognized academic field, was in dire need of financial support.[82] Such anthropological efforts as used and misused by colonial authorities led to, what Terence Ranger has referred to, as the 'invention' and petrification of customary law.[83] Mensah Sarbah, for example – and many other Gold Coast barristers who followed his example in explaining and elaborating customary law – based his writings on Akan traditions, which eventually came to dominate British courts in the Gold Coast to the detriment of other legal traditions.[84]

32 Mensah Sarbah's and Casely Hayford's successful activism against colonial legislation would have reverberations across the British Empire and on the legacy of African customary law. Their insistence on the empirical and historical reality of African communal tenure was confirmed in the Amodu Tijani case (1928) that was brought before the Judicial Committee of the Privy Council in London, the highest court of appeal for all disputes within the British Empire.[85] Similar to the Foreshore Case, the Amodu Tijani case again concerned the land rights in Lagos and therefore revisited the, by that point, politically and legally charged question of whether or not the colonial government had acquired land from Docemo in the treaty of cession of 1861.[86] Under the Public

79 R.S. RATTRAY, Ashanti Law and Constitution, New York 1929.

80 M. MCFATE, Military Anthropology: Soldiers, Scholars and Subjects at the Margins of Empire, Oxford 2018, p. 49.

81 F. LUGARD, Political Memoranda, Revision of Instructions to Political Officers on Subjects Chiefly Political and Administrative, 1913-1918, London 1970; F. LUGARD, Dual Mandate in British Tropical Africa, London 1922.

82 A. KUPER, Anthropology and Anthropologists. The British School in the Twentieth Century, New York 2015, p. 66.

83 T. RANGER, The Invention of Tradition in Colonial Africa, in: E. HOBSBAWM and T. RANGER (Eds.), The Invention of Tradition, Cambridge 2014, pp. 211-262.

84 ALLOTT, The Judicial Ascertainment (n. 55), p. 252.

85 ADEWOYE, The Judicial System (n. 68), p. 259.

86 The case has been widely discussed and in great detail: O. ADEWOYE, The Tijani Land Case 1915–1921: A Study in British Colonial Justice, in: Odu: Journal of Yoruba and Related Studies 13 (1976), pp. 21-39; A. A. PARK, The Cession of Territory and Private Land Rights: A Reconsideration of the Tijani Case, in: Nigerian Law Journal 1 (1964), pp. 38-49.

Lands Ordinance of 1913 the colonial government had expropriated certain lands belonging to the Apapa community of Lagos, following a symbolic compensation. Chief Oluwa, a white-cap chief of Lagos, claimed full compensation from the government. Confirming earlier interpretations by the Gold Coast advocates arguing against land legislation, Chief Oluwa argued that he held the land in trust on behalf of the entire Apapa community. The case landed on the desk of the Privy Council. The Privy Council now finally confirmed that native title to land remained unaffected by the cession of 1861. The case became widely celebrated in Nigeria as a victory and a vindication of African rights over land.[87] As Bonny Ibhawoh has illustrated, the case was 'the most important of the Privy Council's decisions on native title'[88] and was subsequently cited as precedent in several cases involving aboriginal land rights in Canada and elsewhere in the British Commonwealth.[89]

## 5. Conclusion

33 Understanding the nature and dynamics of twentieth-century colonial law that related to land rights, to labour and to divided jurisdictions between, for example, criminal law or family law in Africa, requires an examination of the international legal basis on which European presence in Africa was built. Gold Coast lawyers, Joseph Ephraim Casely Hayford (1864-1910) and John Mensah Sarbah (1864-1910), did exactly that. They cleverly exploited the legal loopholes and injustices committed during the early decades of British presence on the Gold Coast to attack colonial land legislation in the Gold Coast and Nigeria.

34 Many of the early- and mid-nineteenth-century legal instruments that were used to justify early European presence left a number of important doctrinal and factual elements open for debate. The spontaneity with which legal instruments were crafted meant that it was often difficult to determine the boundaries of Western jurisdiction: geographical delineations in treaties were vaguely defined; the extension of extraterritoriality more often than not had happened on a customary or even an illegal basis, or treaties of cession (not seldomly coerced) conflicted with claims that posited the occupation of so-called 'empty' territories.

35 In both the Gold Coast and Lagos, the advent of a rush on concessions, led to attempts by the colonial government to instigate legislative reform that would confirm the government's power to dispose of land. The protest by traditional African authorities and African intelligentsia exposed the legal precariousness of these claims. Above all, it illustrated how African lawyers were able to use the entanglement of Western international law, British domestic law and African customary law that had become a feature of the colonial regime to attack land reform. Such legal entanglements were best understood by a new generation of African lawyers who were able to

87 This victory was significantly dampened by the Re Southern Rhodesia case (1919), which upheld Crown title over land.

88 B. IBWAHOH, Imperial Justice: Africans in Empire's Court, Oxford 2013, p. 133.

89 B. IBWAHOH, Cultural Negotiations and Colonial Treaty-Making in Upper Canada and British West Africa 1840-1900, in: Ife Journal of History 6 (2013), pp. 1-25.

navigate different legal traditions and thus crafted a space of resistance against the colonial administration.

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