

**JUDICIAL INTERVENTION IN SELECTED COLONIAL BOUNDARY
DISPUTES IN SOUTH WEST NIGERIA: SURVEYING THE PROVENANCE
AND EFFECTS OF PROCEDURAL ERRORS**

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Abstract

Boundary disputes form an integral part of regular disputes commonly found across the world. There is no doubt that such disputes have occurred in both pre-colonial and colonial Nigerian societies, and more generally in both agrarian and nomadic economies around the African continent where land has been central to culture, political and family survival. Arguably, when these conflicts took place in pre-colonial polities of South-West Nigeria, they were settled. However, when the British colonial administration attempted to adjudicate in this kind of disagreement, they committed a number of procedural errors. This essay examines selected cases adjudicated by the colonial administrators who doubled as judicial officers during the colonial period with specific focus on these procedural issues. In some cases protocols were respected; but there were also cases where the procedures were relaxed in the interest of British colonial economy. It is argued here that where the procedures were followed, there was a fair resolution; whereas when procedures were relaxed, issues still remain unresolved very many years after.

Key words: *land disputes, South-West Nigeria, British colonial rule, legal procedural rules*

Introduction

A boundary dispute exists when two or more countries or communities hold clearly opposing opinions concerning the status of a boundary or ownership of an area. Such boundary disputes arise when a party claims land in an adjacent territory because of some important quality that the land possesses, including agricultural fertility, an important historic or cultural shrine, sacred space, strategic positioning, or a natural resource of economic value. Such disputes form an integral component of conflicts commonly found across the world. This essay focuses upon selected historic cases that were adjudicated by colonial administrators who doubled as judicial officers during the period of foreign interference in Nigeria. The analysis will consider the lasting effect of procedural errors committed in such formally litigated conflicts when colonials intervened in due process.

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Today the International Court of Justice (ICJ) acts as the judicial arm of the United Nations Organisation and provides advice to countries involved in official disputes. This agency recognises a dispute as “a disagreement on a fact, or a conflict of legal claims or interest between two parties.”²

In the resolution of any dispute, procedure is very crucial, hence the need for us to examine briefly its meaning. One of the numerous meanings of the term ‘procedure’ is “. . . the correct or normal way of doing something.”³ It could also mean “. . . the accepted methods or order of doing things especially in an official meeting, such as a law case.”⁴ This study refers to the particular combination of qualities that made the judicial intervention in such cases eventful. The procedures referred to here concern the legal methods or protocols deployed by the intervening judiciary.

At every stage of the evolution of the Nigerian judiciary, the procedure for resolution has occurred in accordance with the earliest types of English styled courts’ interpretation of the nature of the dispute to be resolved.⁵ Despite the lack of operational rule, as noted by Adewoye, the two principles of ‘fairness’ and ‘honesty’ as understood in British legal tradition were, ostensibly, firmly upheld. In land and boundary matters, the nature of the disputes and the nature of the boundary were also given adequate consideration according to British jurisprudence.

During the pre-colonial, colonial and post- colonial days, disputes relating to boundaries on land or waters between two contiguous indigenous groups erupted basically in two ways. Sometimes they were initiated by one of two individuals or land-owning families occupying or farming in the locations adjudged to be the boundary of the communities. The second type of case concerned outright conflicts initiated by the communities themselves against each other through their respective rulers. Although the first type began as inter-personal or inter-family boundary disputes, they subsequently extended to their communities to become an inter-community dispute – perhaps because of the location of such land either at the boundary between the conflicting communities, or at a location where the boundary

² This short definition was an excerpt from the International Court of Justice, Palace Camegieplein 2, 2517KJ, The Hague, Netherlands, judgment No.2007/23 of 8th October 2007 in Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*). In this judgment, the court found that Honduras has sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay and draws a single maritime boundary between Nicaragua and Honduras.

³ Definition in *Longman Dictionary of Contemporary English*, third edition, (Pearson Education Ltd., 1995) p. 946.

⁴ Oral Interview with Hon. Justice S.A. Afonja (rtd.) 12th March 2011 in His Office at Akure, Ondo State.

⁵ Oral Interview with Anthony Ijaola Asiwaju, Professor Emeritus, University of Lagos, 9th October, 2009.

was not well defined, or for some other extraneous but over-riding reason spurring the communities into conflict.

There seem to be very few of the second type of case, i.e. of inter-community boundary conflict, that emerged at the onset of colonial administration. But there were indications that many inter-personal or individual cases arose and escalated at that time.⁶ However, as the interest of the British colonial administration deepened in the South-Western Nigeria, a gradual escalation of both types of boundary disputes erupted between communities, for a range of reasons.⁷ The colonial government therefore found it necessary to develop mechanisms to resolve these disputes.⁸ Indeed, under the colonial administration all land and boundary cases were reserved for the Native Courts under the supervision of colonial administrators throughout the Protectorate. As such, the boundary disputes that affected two or more communities were singled out for sufficiently senior colonial officers like the Residents and Governor to adjudicate; while the purely inter-personal boundary or land dispute cases were left in the hands of the lower ranking officers like District Officers and Assistant District Officers.

In attempting to adjudicate in inter-community boundary cases, certain procedural errors characterized this early effort of the colonial judicial administration. A few of these procedural errors have been identified and are illuminated here for discussion. These include: the class of people entrusted with judicial power or position to decide in boundary cases, the use of judicial discretion, restricted jurisdiction, problems of communication, exclusion of legal representation in critical inter-community boundary cases, malicious denial of requests for case transfer, and adoption of foreign nomenclature in the adjudication of matters which were essentially local. All these procedural errors are examined in what follows with the aid of a few examples.

The class of people entrusted

A trend that ran through judicial intervention in colonial South-West Nigeria was the reliance upon colonial administrators doubling as judicial officials to decide upon boundary dispute cases. Although these officers had some training before they were given their initial assignment as administrators, the quality of training provided was in all probability inadequate to put such crucial decisions as inter-community

⁶ Ibid.

⁷ NAI Oyo Province [hereafter Prov.] File No.2/3 LC 10 Land cases - method of dealing with boundary disputes, pp. 5-6.

⁸ Omoniyi Adewoye (1977), p. 69.

boundary resolution into their hands.⁹ Indeed, the cases they handled were so crucial as to attract permanent socio-cultural dislocations where the issues involved were mishandled or totally missed.

Examining the Osogbo/Ede inter-community boundary dispute will explain this further.¹⁰ The thrust of the dispute was the location of an aerodrome in Ido-Oshun which was named by the colonial government as ‘Osogbo Aerodrome’.¹¹ Ede elite who contested this on grounds which included boundary violation, argued that Ido-Oshun was founded on Ede land and therefore the aerodrome should have been named ‘Ede Aerodrome’.¹² Although the colonial administrator who handled the case may be presumed to have been acting, by his own lights, in his administrative capacity, he did not see any cause for dispute in the issue; neither did he see any way in which the Ede were negatively affected in either the name or the siting. Hence, rather than resolve the boundary questions raised by the Ede elite, he interpreted and explained the issue exclusively as an administrative matter that had nothing to do with the townspeople themselves.¹³ The socio-cultural dislocation resulting from this decision included an extension of the territory of the *Ataoja of Osogbo* well beyond his domain. By implication this caused an abominably capricious and arbitrary reduction of the territory of the *Timi of Ede*, who was never given any chance to make a contesting case.

Because the colonial administrators depended heavily upon the opinions of the traditional rulers and local adjudicators, whenever there were sustaining collaborations between the Native Authorities and one of the disputing communities, there would be no way for the colonial officer to identify such collusions. For instance in the *Iroko v. Fiditi* case, judgment was first entered for *Iroko*; the resulting demarcated boundary was acceptable to the two communities.¹⁴ Afterward, however, *Fiditi* appealed against the judgment and the new administrator referred the case to *Alafin Ladugbolu* in Oyo. After the hearing was completed in 1926, the *Alafin* took evidence from his messenger *Janta*, who followed the disputants to the contested area in 1923. The *Alafin* then based his judgment predominantly upon *Janta*’s

⁹ NAI Oyo Prov. 2/14 File 72/1937 The location of Osogbo Aerodrome, Memo from the Assistant District Officer to the Resident, Oyo Province, October, 16 1937.

¹⁰ NAI Oyo Prov. 1/1 175/2 A Petition Written by Ede Descendant Union, Abeokuta Branch (Undated).

¹¹ [An aerodrome is a small airport or airfield. – Ed.]

¹² NAI Oyo Prov.1/2814 Vol. I, decision extract from the minutes of Ede Leaders with the District Officer, Osogbo, 1939.

¹³ NAI Oyo Divisional File 2/14 72/1921 Judgment of Alafin Ladugbolu in *Iroko v. Fiditi* Boundary Case, *Janta*, the Messenger of Alafin in evidence.

¹⁴ *Ibid.*

evidence.¹⁵ This was clear from the fact that he reversed the earlier boundary decision, and divided the land in dispute between Ibadan and Oyo Native Authorities, rather than adjudicating in the *Fiditi v. Iroko* boundary case before him.¹⁶ The administrator did not know the intricacies of *Ladugbolu*'s judgment, but a perceptive observer from both sides would know that *Fiditi* was pro-Oyo, while *Iroko* was pro-Ibadan. This judgment, therefore, did not resolve the inter-community boundary disputes which continued to re-occur till 1958 under different applications.¹⁷

The use of judicial discretion and denials of transfer

'The use of judicial discretion' here refers to situations where the arbiter (the colonial administrator) used his personal assessment of the situation, under the authority or power vested in him to either adjudicate in land and boundary related matters, or to report in his administrative capacity thereby deciding a case *de facto*, or to prepare the ground for an anticipated decision in a way that might prejudice that decision. According to Muhammad JCA in *Folorunsho v. Folorunsho*, the term judicial discretion was interpreted as:

... a term applied to the discretionary action of a judge or court and means discretion bounded by rules and principles of law and not arbitrary capricious, or under strained. It is not the indulgence of judicial whim, but the exercise of judicial judgment, based on facts and guided by law or the equitable decision of what is just and proper under the circumstances. It is a legal discretion to be exercised in discerning the course prescribed by the law and is not to give effect to the will of the judge but to that of the law. It is an act that had no hard and fast rule governing the conduct of the judge as to which course to adopt. Discretionary act is an antithesis of defined rule as the latter will eliminate the former.¹⁸

So many cases would provide illustration in this regard. One such is the history of litigation in the *Iba v. Okuku* series of boundary cases, which dated back to the period before 1910. Mr. Gladstone, a colonial administrator of this period adjudicated and fixed a boundary for the two communities.¹⁹ When Mr. Grier succeeded Gladstone as the administrator in 1913, the boundary was reversed another was fixed in 1914.²⁰

¹⁵ NAI Native Court Record, Oyo Prov. File 1/1 2467 Text of the Judgment of the Alafin in *Iroko v. Fiditi* boundary case.

¹⁶ NAI Oyo Prov. File 1/2674 Bale Iroko in Evidence in *Iroko v. Fiditi* boundary case, July 1957.

¹⁷ *Folorunsho v. Folorunsho* (1996) p. 5, *Nigerian Weekly Law Report* [hereafter NWLR] (pt 450) 614.

¹⁸ NAI Oyo Prov. File1/524. Petition of the Eburu of Iba to the Resident Officer, 1921, p.2.

¹⁹ NAI Oyo Prov. File1/524. Mr. Griers' note to the Resident Oyo, 1913.

²⁰ NAI Oyo Prov. File 1/524. The Senior Resident Oyo on tour at Ibadan, 14th June 1923.

The *Eburu of Iba* and his people were strongly opposed to this development and they appealed to the Senior Resident.²¹ In 1923, instead of resolving the boundary dispute before him, the Senior Resident used his discretion to offer the *Eburu* and his people sixty-four pounds sterling in lieu of the land that was in dispute, after a meeting with the leaders of the disputing communities.²²

The *Eburu* rejected this offer on the grounds that it would amount to selling his birth-right, which was contrary to accepted tradition.²³ Another judicial discretion used in this same case came in the form of coercing the *Eburu* to accept a judicial verdict not favourable to him on the grounds that his town was considered smaller in size compared to Okuku.²⁴ The *Eburu* was warned in strong terms never to open the case again, while the colonial judicial officers also wrote reports presenting the *Eburu* as obstinate for making such moves on behalf of his people's land in the first place.²⁵ To the *Eburu*, his request for the traditionally accepted expanse meant securing his traditional territorial boundary with *Olokuku* through legal means, but to the colonial administrators, it meant obstinacy since he did not seem to need the land at that time for any purpose. The case was awarded to the *Olokuku* under the guise of using judicial discretion.²⁶

In *Okumade Senjiren v. Suberu Alade*, one of the series of cases in *Ibadan v. Ijebu* boundary disputes further illustrates this mistaken strategy.²⁷ The case had to do with certain Ibadan farmers whose farmland fell across the boundary between Ibadan and Ijebu after the establishment of the colonial inter-provincial boundary demarcation of 1926.²⁸ The farmers enjoyed their freedom, until an Ijebu man, Shoyemi, instituted and won an action against Ola, an Ibadan man.²⁹ Thereafter, other Ijebu farmers began to depend upon the precedent of the Shoyemi judgment to molest other Ibadan farmers. The representative of the Ibadan farmers, who stood as the defendant in the *Okumade Senjiren v. Suberu Alade*, observed that the final decision in the appeal

²¹ NAI Oyo Prov. File 1/524. Report of the Senior Resident to the Secretary, Southern Provinces, Enugu.

²² NAI Oyo Prov. File 1/524. Mr. Lapage, the District Officers Report to the Senior Resident.

²³ Ibid.

²⁴ NAI Oyo Prov. File 1/524 Mr. Lapage, op. cit.

²⁵ Ibid.

²⁶ NAI Ijebu Prov/J397/Vol. IV/475, Ibadan-Ijebu boundary dispute.

²⁷ NAI Colonial Secretary's Office [hereafter CSO] 26/31615, report of Mr. Nesbitt on the proposed inter-provincial boundary, 15th June 1926, p. xii.

²⁸ NAI Ijebu Prov. J/1772, Ibadan-Ijebu boundary dispute: *Shoyemi versus Ola* in Suit No. 82/33.

²⁹ NAI Ijebu Prov. J/1772, Ibadan-Ijebu boundary dispute: protest letter of Mr. Lambrou a counsel in respect of his client, Suberu Alade, to the Resident.

case might not favour them and applied for transfer of the case to the Supreme Court of the Ibadan Judicial Division through the lawyer Mr. Lambrou.³⁰

The application was made initially and granted by the District Officer, based upon Section 25 (1) (c) of the Native Court Ordinance. Depending upon the convention of using judicial discretion, the District Officer had a rethink and then decided to deny Mr. Lambrou and his client the earlier granted transfer without communicating this reversal with him.³¹ Mr. Lambrou then petitioned the Resident Officer who upheld the District Officer's denial of the transfer.³² However, after sustained pressure Mr. Lambrou got his way; and in 1948 Mr. Dickenson agreed to forward the case to the Supreme Court sitting in Ibadan on transfer.

As a consequence of the use of judicial discretion in most of the cases just mentioned, there followed several miscarriages of justice. This did not promote the colonial judicial officers' intention to adopt the methods established in British tradition for adjudicating boundary actions. Of course should not overlook that this convention of relying upon judicial discretion also had its positive sides, bearing in mind that it is the nature of boundary disputes that they have the tendency of continual recurrence, particularly since there was always the option of re-opening litigation for the disputing communities. The aggrieved party would always seek a way of revisiting an injustice rendered by re-opening a previously decided case.

The *Gbayo v. Shenaike* case demonstrates this. This law suit went to virtually all the courts yet the decision could not be reversed. This action was also part of a series of cases that trailed the colonial inter-provincial boundary demarcation between Ibadan and Ijebu. As in the earlier cited case of *Okumade Senjiren v. Suberu Alade*, George Gbayo was an Ibadan man who represented the interest of other Ibadan farmers working on Ijebu land. Perhaps the case can be read as a wrong application of judicial discretion both by the Ijebu Native Court and two Resident Officers.³³ However, after the 1934 judgment, it was discovered by Mr. E.G. Hawkesworth, the Acting Resident of Ijebu Province, that the decision in the 1928 judgment was wrong for many reasons, including eviction without compensation which ran contrary to the British colonial policy in such circumstances.³⁴ He noted further that it had been endorsed

³⁰ NAI Ijebu Prov. J/1772, Ibadan-Ijebu boundary dispute: reply of the Resident to Mr. Lambrou in respect of *Senjiren v. Suberu Alade's* case transfer to the Supreme Court.

³¹ Ibid.

³² National Archives, Ibadan, Nigeria [hereafter NAI], Ijebu Prov. File No J1726 Ijebu-Ibadan boundary case in *Shenaike v. Gbayo*, endorsement of the Resident.

³³ NAI Oyo Prov. File 2/3 /397/Vol.4 Mr. E.G. Hawkesworth report to the Secretary, Southern Provinces, Enugu.

³⁴ Ibid.

as an error by Dr. Talbot, the Resident Officer in 1928,³⁵ Mr. Brice Smith, the District Officer in 1931,³⁶ and Mr. Wann in 1934.³⁷ In the opinion of Mr. Hawkesworth, the Secretary, Southern Provinces might approve that, as the Resident Officer, sitting in his appellate jurisdiction he could waive the original judgment.³⁸ Although this judgment could not be waived because of several other circumstances, the Gbayo led farmers from Ibadan were paid compensation after the 1938 intervention of Mr. E. G. Hawkesworth yielded better justice in 1946.³⁹

In line with the meaning of judicial discretion in *Folorunsho v. Folorunsho* earlier cited that it is a term applied to the discretionary action of a judge or court and it only means “discretion bounded by rules and principles of law and not arbitrary capricious... It is not the indulgence of judicial whim . . .”⁴⁰ An assessment of the use of judicial discretion during this period would not be adequately covered by this definition. Moreover, Lord Halsbury defined judicial discretion as acting according to rule of reason and justice not according to private opinion and according to law and not according to humour.⁴¹

The explanation given about the colonial use of judicial discretion in the various cases earlier examined would show that the exercise of judicial discretions, were not based on facts and not guided by law or the equitable decision of what is just and proper under the circumstances. One could, therefore, argue that many instances of the adoption of judicial discretion were not exercised in discerning the course prescribed by the law and so gave effect to the will of the judge, but not the law. The position of the court in the judgment earlier cited that ‘discretionary act is an antithesis of defined rule as the latter will eliminate the former’⁴⁰ would, therefore, explain why some of the judgments went the way they did. In virtually all the cases decided by the colonial judicial officers, the judges perhaps over-used discretion hence their decision.

³⁵ NAI Oyo Prov. File 2/3 /.397/Vol.4, Mr. Brice Smith, the District Officer’s report the Resident, 1931.

³⁶ NAI Oyo Prov. File 2/3 /.397/Vol.4, Mr. Wann’s report to the Acting Resident, 1934.

³⁷ Ibid.

³⁸ NAI Ijebu Prov. File No J1726 Ijebu -Ibadan boundary case in *Shenaike vs. Gbayo*: 1946 decision in the Governor’s Court in respect of Gbayo and other Ibadan farmers cultivating beyond the boundaries.

³⁹ *Folorunsho v. Folorunsho* (1996) 5, NWLR (pt 450) 614.

⁴⁰ For Lord Halsbury’s definition of judicial discretion, see *Sharp v. Wakefield* (1891) A. C. 173 at 179 cited by Vivian Ify Onyia. 2004. *Words and phrases judicially interpreted*, Lagos: Law Digest Publishing Co. p.114.

⁴¹ *Folorunsho v. Folorunsho* (1996) 5 NWLR (pt 450) 614.

Problems of communication

Another serious issue arising with judicial intervention in inter-community boundary disputes during this period was the problem of communication, especially when a case began to move from the lower rung of the judicial ladder to higher ones. Official communication involved the use of written and spoken English. Yet most boundary cases began with local people who could neither speak English nor write it. As such, at the point of initiating their cause of action, plaintiffs depended first upon public letter writers and later on; and as the case advanced without satisfactory resolution, they needed interpreters. Many cases that began in the Native Courts went as far as the courts of both the Resident Officer and the Governor's Court because that was the appropriate appellate judge; and as these cases moved up, services of interpreters or letter writers were sought as well. Although these services were purportedly regulated by the relevant Ordinances, the operators exploited the ignorance of their clients to perpetrate illegal acts which affected some judicial decisions.

For instance, in the case of *Ogunshile, the Apena on Behalf of Ojowo Quarters, Ijebu-Igbo v. Shenaike*, the townspeople engaged the services of one public letter writer, Mr. Nonowo, to prepare an agreement between themselves and one of their sons whose activities in an earlier case was suspicious. Mr. Nonowo was alleged to have written an agreement of which he later denied having any knowledge.⁴² And when the Ojowo people presented the agreement purportedly written by Mr. Nonowo, he and Shenaike denied ever writing and signing, respectively, any such agreement.⁴³ The denial constituted another issue which was not before the District Officer's Court, but would require attention if the case was to be redressed. The Ojowo community lost their first attempt in the case and had to represent their claim in an appeal.⁴⁴

The case of *Oni vs. Akintola, Akanbi and Babarinde* would also illustrate this. The issue for decision in this suit was that Oni, a man from Ikereku, laid claim to a parcel of land located at Iware around the boundary area. The case began as inter-personal land dispute, and ended up gaining the attention of the Oniware and the Baale of Ikereku. Ikereku felt marginalised when this case was first awarded to Akintola.⁴⁵ Later it was heard *de novo*⁴⁶ at the instance of the Resident Officer.⁴⁷ The case was

⁴² NAI Ijebu Prov. J/453, court record in *Ogunshile, the Apena on behalf of Ojowo Quarters, Ijebu-Igbo v. Shenaike*.

⁴³ NAI Ijebu Prov. File No J1270, Vol. II, Mr. Nonowo.

⁴⁴ Ibid.

⁴⁵ NAI Oyo Divisional File No. 2/14/72/192 *Ikereku v. Iware* boundary dispute.

⁴⁶ [beginning anew – Ed.]

⁴⁷ NAI Oyo Divisional File No. 2/14/72/192, *Oni v. Akintola Akanbi and Babarinde*.

awarded to *Oni* in the Appeal Court of the Resident Officer under the Senior Resident, Mr. H. F.M. White, for reasons best known to the colonial administrators.⁴⁸ Again, against this decision an appeal was made before the Governor, who upheld the decision of the lower Court. Possibly the reason why *Oni* won his appeal was because he was able to enlist a better writer's services in filing his appeal than he had in the original suit.⁴⁹

For a village population to be cut from their natal area, or further still, for a whole city's population to lose a part of its area of influence, meant severance of intergenerational links as well as exclusion from the joint heritages of these traditional areas, with repercussions for the loss of integrity in matters of central importance for social, familial, economic, religious and personal walks of life in communitarian and agrarian polities. Reliance upon judicial decision thus became a permanent source of tension as villages that lost part of their territory continued to pursue it, irrespective of the number of years involved.⁵⁰ The crises created by the seemingly innocuous procedural errors of the colonial administration remain grievous to this day, a veritable source of deep seated hatreds which can explain much of the difficulties encountered in regional cohesion, cooperation, conflicts associated with ethnic identities, confidence in the structures of the central state and the attainment of traditional standards of good governance.

Conclusion

Judicial intervention in inter-community boundary disputes during the colonial period in Nigerian history would reveal a lot of things to perceptive observers. Here just a few procedural errors committed by adjudicators of important cases have been identified and discussed briefly. The cases discussed were limited to the protectorate of Southern Nigeria and the hinterland, because throughout the period the colony of Lagos enjoyed better judicial interventions to a certain extent. Still, mention could be made of the famous Tijani land case that went as far as the Privy Council, and was decided in favour of Chief Amodu Tijani, a white capped Chief in Lagos. Through the course of this research, a few cases were found where the appropriate procedures were respected but many more where the explicit rules were relaxed in the interest of British colonial economy. Where the procedures were followed, there was fair resolution; while where the procedures were relaxed, issues arose that remain unresolved many years after, some to this day.

⁴⁸ *Ibid.*, decision of the Senior Resident, Mr. H.F.M. White.

⁴⁹ Toyin Falola, (2010).

⁵⁰ B.N. Cardozo (1960), pp. 168-169.

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