Colonial Systems of Control

Saleh-Hanna, Viviane

Published by University of Ottawa Press

Saleh-Hanna, Viviane.
Colonial Systems of Control: Criminal Justice in Nigeria.

For additional information about this book
https://muse.jhu.edu/book/4441

For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=103114
CHAPTER 17

WOMEN, LAW, AND RESISTANCE IN NORTHERN NIGERIA: UNDERSTANDING THE INADEQUACIES OF WESTERN SCHOLARSHIP

Viviane Saleh-Hanna

INTRODUCTION

Colonialism in West Africa imposed foreign legal systems upon ethnically and structurally diverse regions that functioned in complex, precolonial, non-Western contexts. Colonial legal systems played a key role in the process of colonization because they defined and (il)legalized business transactions and codes of conduct among colonizers and colonized, and eventually came to (il)legalize interactions among colonized populations (Bentsi-Enchill 1969); this recent colonial era has left West Africa functioning in complex sociolegal settings. This chapter focuses on women in the contemporary northern Nigerian context: their interactions with pluralities of law in northern Nigeria, and the modes of resistance they employ in facing colonial and patriarchal oppressions.

Legal centralism and legal pluralism have emerged as the two main paradigms through which legal theories are constructed (Manji 2000). Each paradigm indoctrinates a foundation of assumptions about law and society, forming frameworks of ideological assumptions and guidelines for methodological activities that establish a "code of conduct" in which theorists who assess law and society construct sociolegal theories.

The legal centralist paradigm encompasses those theories that implement an "authoritative conception of law," insisting
that the label of "law" must be confined exclusively to the
laws of the state:3 "that there is no distinction between law and
positive morality, and that there is no ultimate unifying source of
norms in a legal system" (Manji 2000, 631). In assuming that the
"norms" of the powerful are also the "norms" of the oppressed,
legal centralists impose a form of thinking that is elitist and
inaccurate. They are predominantly a group of scholars trained
in legal positivism, and tend to assume that "the state and
the system of lawyers, courts, and prisons is the only form of
ordering," and thus study "law" by studying legal institutions
(Merry 1988, 874).

The legal pluralist paradigm encompasses those legal
theories recognizing that "two or more legal systems coexist
in the same social field" (Merry 1988, 870), and add that there
exists a "large range of normative orders which, although they
enjoy no connection to the state, are nonetheless described
as law" (Manji 2000, 632). This school of thought is open to
recognizing that "norms" are differentially created and rejects
the oversimplifications imposed by legal centralists. Based
on the categorizations of these two "paradigms," Manji (2000,
631) concludes that legal pluralism is most relevant to studying
and appropriately representing women, specifically women
in Africa. In general, postcolonial settings imply an inherently
legal pluralistic context (Bentsi-Enchill 1969) due to the colonial
experiences that transported foreign European legal systems
into Africa. In assessing the specific circumstances through
which women interact with law in northern Nigeria, that
generalization appears to be applicable. The monolithic and
simplified assumptions of the legal centralist paradigm not only
are inapplicable to women in northern Nigeria, but also seem to
be inappropriate for addressing the complexities within which
societies in that region interact with law and society.

Legal Pluralism in Nigeria: Historical Context

On October 1, 1960, Nigeria gained independence from the
occupation of the United Kingdom's colonial government. After
decades of military dictatorships, and a plethora of military coups, a new Constitution was adopted in 1999, marking the appearance of structural transition to civilian government. Nigeria is the most populous nation in Africa. With a population exceeding 140 million, the controversial 2006 census reported that 71.7 million males and 68.3 million females live in the country. The Nigerian government’s official statement on ethnic populations affirms that Nigeria is home to more than 250 ethnic groups: “Three of them, the Hausa [predominantly living in the north], Igbo [predominantly living in the east], and Yoruba [predominantly living in the south], are the major groups, and constitute over 40 per cent of the population.”

In relation to religious affiliations, fifty percent of the nation identify as Muslim, forty percent identify as Christian, and ten percent identify with traditional African religions (World Fact Book 2007). The legal system in Nigeria is “officially” implemented within a pluralistic framework based on English common law, Islamic sharia law (in some northern states), and traditional law modelled after precolonial African systems of justice.

The plurality of state legal institutions in Nigeria is a function not only of the colonial imposition of “new legal systems” but also of how colonial systems institutionalized traditional law. As the British began to colonize northern Nigeria in the early twentieth century, Hausa states underwent sharp changes through which the “Protectorate of Northern Nigeria” was adopted in 1903. This protectorate implemented an “indirect rule” policy that indoctrinated the philosophy that, “whenever possible, the metropolitan power should seek to recognize rule through traditional authorities in accordance with the indigenous social and political institutions and mores” (Callaway and Creevey 1994, 14). As a result Christian missionaries were denied access to northern Nigeria, and as a political function Islam became more entrenched in Hausa society. Islam became the avenue through which traditional autonomy could be maintained. “Thus,” as Callaway and Creevey note, “the colonial state provided the stable conditions necessary for African Islamic cultures to grow and deepen. Under Hausa/Fulani rule and British protection,
the Islamic (sharia) courts were at the heart of that culture” (14). As customary/local law in West Africa (including Islamic law) became institutionalized into Western structures and conceptions of what “law” should look like and do, a residual rule was formed. This policy stated that, in legal situations in which no expressed rule is applicable, the colonial court would have the jurisprudence to govern the situation according to the principles of “justice, equity, and good conscience” (Bentsi-Enchill 1969, 30). Since Nigeria was “created” as a colonial nation-state, this residual rule disappeared in western/eastern Nigeria, but was kept in the north with the specific purpose of regulating sharia laws. Through this context emerged contemporary sharia courts and the state-endorsed formality of legal pluralism in northern Nigeria.

Nigerian Population Demographics
The Nigerian population is young, with only 2.9 percent of the population reaching the age of sixty-five and 43.4 percent of the population being below the age of fourteen. In 2004 the average age for males in the country was 18.2 years, while the average age for females was 17.9 years. Males in Nigeria comprise a slight majority of the population; they also experience a slightly higher infant mortality rate and a slightly lower life expectancy rate (44.7 years) compared with females (45.8 years). The fertility rate is high in Nigeria, with the average woman in 2004 giving birth to about five children. In 2003 the majority of the Nigerian population was recorded as being literate (68 percent), with 60.6 percent of women and 75.7 percent of men in the nation knowing how to read and write. In 2003 the Nigerian government announced the privatization of all oil refineries, resulting in economic structural growth in 2004, headed by increased oil and natural gas exports. Despite such growth, 60 percent of the population continues to live below the poverty line. With a labour force exceeding fifty million people, 70 percent of whom rely on agriculture, 10 percent on industry, and 20 percent on services, the push to expand oil and natural gas exports while continuing to neglect agricultural resources is problematic.
Aside from such problems, and more specifically in relation to gender dynamics in northern Nigeria, women have a unique and strained relationship with law; nonetheless, they have managed to work against these obstacles by establishing networks and regulations through which they can achieve some autonomy. I will use legal pluralism, an academic framework that recognizes different levels of control and law in society, to illustrate these networks and to contextualize the laws used by/against women in northern Nigeria. Upon reviewing the literature on women in northern Nigeria and the three main frameworks of legal pluralism, I will offer an assessment of legal pluralism to identify which framework is best equipped to understand and properly represent women and their relationships to law in northern Nigeria.

WOMEN OF NORTHERN NIGERIA AND THE STATE: TRENDS IN ETHNOGRAPHIC RESEARCH

Since colonialism Western researchers have gained more access to conduct research in northern Nigerian societies. This intimate link between research and colonialism had a significant impact on the type of research produced by Western researchers. Whereas early works researched the relationships between colonizer and colonized, in the 1970s research began to focus more specifically on women in the north and their relationship to the state. Three topics of research have become prominent: sharia courts (what Westerners would call family and employment law), purdah (the practice of excluding women from public life), and prostitution. Western researchers tend to draw attention to the negative, gendered impacts of purdah and sharia, and have recently begun to work toward achieving an understanding of women’s efforts to resist both; in so doing, they have come to emphasize female agency, and have begun to identify “law” as existing among women and not “law” as emerging only through state institutions.

Ayua (1998), Wall (1998), and Werthmann (2002) have conducted ethnographic research assessing women’s experiences
and struggles with sharia law. Relying on family planning and land ownership issues, they bring forth concerns about sociolegal status, emphasizing that the struggles of women are related to patriarchal legal structures and cultural attitudes. The foundations of such structures are closely related to the implantation and institutionalization of colonialism. While scholars have written about purdah for decades, recent work conducted by Callaway and Creevey (1994, 2003), Coles (1988), and Pittin (2002) emphasizes informal networks created by women to expand their access to opportunities in the socioeconomic realm. Emerging is a body of work on women’s labour, focusing on both “formal” legal prohibitions and “informal” yet engrained networks, created by women to regulate prostitution and other forms of work. As these researchers conduct interviews and surveys, they present a literature emphasizing legal and cultural contexts that have been shown to influence interactions (or lack thereof) between women and the state.

According to Garland (2001), formal social control includes state-run institutions and state-set definitions of deviance. In addition, formal social control includes state-prescribed reactions to deviance (punishments, sanctions, regulations, and so on). In contrast, informal social control includes “the learned, unreflective, habitual practices of mutual supervision, scolding, sanctioning, and shaming carried out, as a matter of course, by community members” (159).

The categorization of law and social control into formal and informal is a function of the dichotomized frameworks in which the majority of Western legal scholars conduct research. Although accepted as the “norm” in Western academic contexts, these divisions do not always reflect accurately the social and legal realities that Western researchers are attempting to assess. For women in northern Nigeria cultural behaviours (informal?) combine with sharia laws (formal?) to construct their living conditions. Women have created networks of interaction and female-established opportunity to combat obstacles and achieve some autonomy in their lives. Although defined as informal
in most Western research, the accuracy of this category is questionable. What a Western scholar might define as informal in his or her textbook or published article can be formal for a woman in northern Nigeria.

In this presentation of women in northern Nigeria I have chosen to focus on socioeconomic circumstances because it is in this realm that women’s empowerment and interactions with law are most visible; in addition, sharia cases involving women often include a dispute over socioeconomic/financial issues. With the implementation of purdah, economic activities by women, though formally limited, appear to function informally in highly organized networks. In contrasting and interrelating what Western scholars refer to as formal and informal in this specific context, a more comprehensive understanding of women, law, and resistance in northern Nigeria can be achieved. Whereas Cohen (2004) explains that the status of Nigerian women accountable to sharia courts is almost always defined through their relationships to men, Werthmann (2002) illustrates how these formal networks are challenged and transformed through informal applications by women in the region. At the root of much of this analysis is an understanding of the cultural and religious contexts within which women live.

Women in northern Nigeria are predominantly of Hausa descent, and, though not all Hausa people are Muslim, most are. As a result much of Hausa society is deeply influenced by Islam and the ways in which it is interpreted: since the introduction of Islam in Nigeria, in the early fourteenth century, “Islam has been deeply intertwined with pre-Islamic Hausa cultural and religious tradition” (Robson 2002, 183). Thus, structures and institutions that are predominantly defined by Islam have come to form major tenets in Hausa culture and practice. On a ‘formal’ level of social control, Bentsi-Enchill (1969) explains that, when the British colonized West Africa, traditional systems of law functioned alongside colonial ones. At this time a reliance on Islam was constructed in Hausa societies to keep a distance from the colonial occupiers. Islam became the preferred “traditional, customary”
law through which autonomy from the British invaders could be established. As this institutionalization of tradition and culture occurred, informal networks came to function alongside the newly formed colonial ones, and in combination these elements continue to structure women’s interactions with the law.

On a formal level, sharia laws exist and are implemented through sharia courts. On cultural, social, and, at times, religious levels purdah is used to regulate women’s living conditions. While purdah is not a stipulation under sharia to be used by all women in the region, the cultural tenets of Hausa society place many women within purdah. The interactions between purdah practices and sharia laws create an atmosphere in which women’s relationships with the law are created and guided through an interaction of formal (legal) and informal (cultural, social, religious) interactions.

An example of these formal-informal interactions exists in marriage and divorce regulations. According to sharia laws, a man is able to legally have up to four wives at the same time. In conjunction, divorce is legally made easily available to men. Wall (1998, 349) implies that in Hausa society divorce is not only differentially available to men through sharia but also culturally encouraged: “A Hausa proverb bluntly states: Zamanka kai kadai ya fi zama da mugunyar mace (‘Living by yourself is better than living with an evil woman’).... Although a man could never live alone and retain any status in Hausa society, this contempt for an ‘evil woman’ is reflected in the ease with which men... can divorce a woman.” Furthermore, sharia laws emphasize women’s status through reproduction: if a child is not produced in marriage, the man may demand a partial refund of the dowry provided to his ex-wife’s father at the time of marriage. These are examples of how the informal cultural practices and attitudes reinforce formal sharia laws in regard to divorce.

Despite the lack of formal access to divorce, women have informal methods to initiate it. Some move out of the husband’s home and back into the father’s home in an act of defiance
known as *yaji* ("hot pepper"): "The embarrassment that such an act of defiance causes the husband" may force him to resolve the dispute in the woman’s favour, or it may force him to divorce her (Wall 1998, 349). In this instance formal laws of divorce are either initiated or regulated by women through actions not defined or regulated by law; even though the law does not empower women to initiate divorce, through action and understanding of cultural dynamics they empower themselves when necessary. In such instances it becomes clear that the formal/informal dichotomies imposed by scholars to aid in their production of knowledge consist of an oversimplification that distorts social realities.

In attempts to comprehend such complex contexts, issues of power become important. Instead of focusing on a methodology that attempts to understand these issues through the implementation of predetermined formal and informal categories, I turn to a methodology that aims to understand them through an assessment of context. The context I have chosen to study is the socioeconomic one, for through an understanding of social and material wealth one can begin to understand power.

A specific area of focus has been on ownership of land and possession titles on homes. In northern Nigeria women are limited in their access to ownership. Robson (2002, 184) reports that, “while women dominate domestic spaces, they rarely own the homes they live in.... Few women become wealthy enough to invest in land and/or property and some inherit property/land, but Islamic (maliki) inheritance laws, practiced in Hausaland, generally discriminate against women.” Although Islamic laws preserve women’s formal rights to ownership of land, these rights are often ignored through informal mechanisms of social control, encouraging discrimination against women. Ayua (1998, 237-238) states that “this pattern of behavior has tended to make women as second-class citizens. Most... have resigned themselves to their fate and have accepted the humiliating status accorded them by society. The few others... who would want to assert their rights or fight for them are discouraged for fear of being branded social deviants or rebels.”
As a result of these dynamics women in Hausaland have created their own means of attaining wealth. Many of these are what Western scholars might refer to as informal mechanisms of conduct and control. Under sharia laws the socioeconomic standing of women is recorded through their fathers' or husbands' status, but women's controlled networks allow women to recognize "each other's abilities, skills, and economic successes, but this recognition does not translate into [formal] socioeconomic status" (Callaway and Creevey 1994, 95). Nonetheless, this lack of formal status does not translate into total disregard or disempowerment. In fact, a closer analysis of the issues illustrates that the lack of formal status accords more control to women, due to their distance from the state and the "under the radar" freedoms that such distance can provide.

In addition to sharia laws and cultural ideologies about gender that impact how these laws become implemented, women are further impacted through the practice of purdah. The US Bureau of Democracy, Human Rights, and Labor reported that "purdah, the practice of keeping girls and women in seclusion from men outside the family, continued in parts of the country [far north], which restricted the freedom of movement of women" (US Department of State 2005, section 1.f). Barkow (1972, 322) further explains that, in the context of contemporary Hausa societies, seclusion also "means that women are expected to be indoors during the daylight hours and to obscure their faces if they venture outside the compound. Few men refuse their wives permission to visit other compounds freely each evening, or to travel long distances to attend the ceremonies of kin."

The historical roots of purdah are well documented. The practice was introduced in the latter part of the fifteenth century "by the Sarkin Kano (the chief of Kano). At the time only wealthy rulers secluded their wives, and seclusion was not so much for Islamic religious reasons but for the social status attained by virtue of displaying their economic ability to dispense with their wives' productive labor" (Robson 2002, 184). An increase in the seclusion of women occurred at the beginning of colonial rule.
(Werthmann 2002, 120). Much as sharia was used to implement legal distance from colonialists, purdah appears to be a practice implemented in the north to maintain physical distance from colonialists and missionaries. In addition to limitations on physical activity, Robson (2002, 183) offers an analysis of the symbolic implications of purdah: “Seclusion can be thought of as a spatial boundary defining gender,” explaining that the physical setting is a manifestation of attitudes in Hausaland about the natures of men and women. Women are segregated from the public sphere during their reproductive years, and, while this practice can produce Eurocentric stereotypes and assessments of gender relations in Hausaland, my analysis of purdah focuses on its physical implications. I provide information about women in purdah and do not delve into an assessment of symbolism, not because symbolic elements are not important, but because such elements should be provided by women in purdah, not by researchers who are trained in Western academic institutions.

Out of the political and cultural stances that implement purdah emerges the physical construction of homes. The architectural designs of living compounds in the north make possible the implementation of purdah. Large walls surrounding each living complex are one element of the physical realms of seclusion. Within each living compound separate buildings (usually small huts) are arranged as rooms around a centralized open space known as the courtyard. Huts in which married women reside are designated no-entry spaces. The compound is accessed through an entrance hut with slanted pathways preventing direct vision into the courtyard or the huts that surround it (Robson 2002, 184). Yet secluded women in northern Nigeria have established “their own networks to regulate women’s tasks and to arbitrate conflicts over the decisions they make and the goods they control” (Callaway and Creevey 1994, 38). Through these networks women achieve some autonomy.

Coles (1988) conducted an ethnographic study in Kaduna (a large state in northern Nigeria), and found that between 1981 and 1985 all the women she spoke to (125 in total) participated in
economic activities providing for their families; she recorded an increase in the amounts of money women were contributing to family maintenance, coinciding with depletions in the Nigerian economy at the time. These activities were never recorded in official statistics, due to their separateness from the public sector. Werthmann (2002) conducted a qualitative study of Hausa women living in Kano in a modern housing estate referred to as the bariki ("barracks"), provided for police officers by the state. She spoke to the wives and female family members of police officers. Women who live in the bariki are segregated in their respective living compounds and emerge only to participate in all female celebrations or for specific social events that their husbands have given them permission to attend. Upon receiving this permission women are allowed to leave their living quarters, unescorted by their husbands, to visit close kin, attend naming ceremonies and weddings, visit relatives who are in dire health, attend funerals, and visit the hospital if they or their children are in need of medical attention (120). When a new woman moves into the bariki she is "successfully integrated into local networks such as the mutual borrowing of goods and money, the exchange of gifts on ceremonial occasions, and rotating credit associations" (115).

First contact for a newcomer is usually with her immediate neighbours, who greet her over the wall or send their children to welcome her to the neighbourhood. Werthmann (2002) also reports that polygamy is common and that many girls are married at a young age. It is not expected that such marriages will last long; it is common and void of stigma to believe that "it is only the second, third or fourth marriage that may develop into a permanent bond between a man and a woman" (116). Upon divorce legal custody is most often given to the father; thus, many children are raised by female relatives of the father. Divorced women return to their fathers' homes and spend at least three months in seclusion before they can legally get married again (Barkow 1972, 320). This time span is decided and implemented through sharia law (Wall 1998, 349).
When a woman gets married she enters seclusion under purdah. It is the job of unmarried prepubescent girls to help run the household and to hawk products (foods or crafts) prepared by married women in purdah (Barkow 1972, 319). In this context custody issues enter the economic realm. For segregated women losing custody of a child brings forth great financial restraints, since only young girls and postmenopausal women are able to participate in public spaces. Robson (2002, 183-184) suggests that this enforced "invisibility" of women during their "reproductive years" brings to light an oppressive gender ideology. While she outlines the importance of an independent income, and shows that women are frustrated by the lack of access to job opportunities, other researchers focus on details of economic activities undertaken by women to combat these conditions.

Quantitative research in Zaria State in northern Nigeria records that the food-processing industries, run primarily by women, function through small-scale enterprises, with simple technology and a consumer-friendly orientation. Husbands and children provide women with necessary materials (readily available in village markets) for food grain production. While many women lack access to formal educational institutions, Simmons (1975, 156) identifies cooking as an educational skill taught to all females in this region, adding that "the amount of equipment and capital needed to take up employment in the [food-processing] industry is minimal. While weaving or trading... may demand relatively large investments... food processing can be profitably done in fairly small amounts with normal household utensils." She found that, "in hundreds of villages, hamlets, towns and cities of northern Nigeria, many tons of grains, grain legumes, and starchy roots are processed for sale as convenient ready-to-eat foods" (147). These factors illustrate that Hausa women do participate in income-generating activities. In relation to starting up, Cohen (2004, 66) explains that a woman is "given initial capital in the form of her marriage payment, to which she is entitled by the Shari'a and with which she can
start business.” Many of these businesses, as Simmons (1975) described, include household activities: “preparing and selling cooked food, doing laundry, sewing, hairdressing, taking care of children, weaving straw floor mats, pounding grain, chopping up ingredients for each other, or making charcoal or incense. Older women may develop a small-scale trade in such items as soap, kola nuts, or cloth; a few will be midwives. Wealthier women may engage in the trade of jewelry, shoes or imported wax prints. In all cases, though, the activity is essentially carried on from behind the walls of seclusion” (Callaway and Creevey 1994, 102). In addition to participating in income-generating activities, Callaway and Creevey note, custom stipulates that women regulate expenditures for all household incomes; thus, capital is accumulated through “the small amounts of money which she ‘cuts’ for herself from the household money, which her husband hands over daily” (1994, 66-67). In polygamous households co-wives establish agreements defining how much money each will receive when it is her turn to control household incomes. In accumulating these reserves of cash women establish or expand their businesses. Often considered extensions of “common household activities,” they can be classified as informal, but in relation to the accumulation of wealth the monetary gain remains unrecorded in formal statistics.

In addressing dominant methods of income generation in Hausaland, it is essential to present those areas of revenue in which women do participate in the public space. One such area is prostitution. In this realm there exist networks through which prostitution can be implemented in female-controlled settings known as karuwai (“courtesan”) in Katsina State in northern Nigeria. Karuwai networks developed historically among Hausa women in northern Nigeria, and continue to incorporate an autonomous setting in which houses owned and occupied by women are used to ensure their physical and financial safety in their work. “With the loss of women’s state-wide political power, control over women became fragmented, but was generally
allocated to husbands, fathers and other senior male kin. The karuwai, however, lived away from these authority figures, and functioned in a formal realm only in their active avoidance of confrontations with authorities (Pittin 2002, 178-179). In this instance resistance to domination by one system is found through the implementation and use of another.

Despite establishing autonomy from patriarchal figures, prostitutes cannot accumulate great wealth. Thus, while a housewife’s ability to accumulate wealth surpasses that of a prostitute, housewives cannot invest or expand wealth by entering into competition with men in public places. Prostitutes, with access to public spaces, can compete with men and invest earnings, but are not given opportunities to accumulate great wealth (Cohen 2004, 67). Despite these difficulties, women have established networks of function to produce significant socioeconomic power.

In light of these conditions legal pluralism arises as a relevant framework in which women’s relationship (or lack thereof) to the state can be studied because it incorporates recognition of different levels of sociolegal functions. Focusing only on formal “law” and “status” is misrepresentative, because women do not live within those realms: “I did not vote during the last elections because I saw no need for it. My success in life depends on what I do with my hands and not what anybody promises me, so I prefer to be left alone. Politics is not for women. It is for men—men who can lie and those who have the time” (quoted in Callaway and Creevey 2003, 595). In this context it becomes essential to incorporate a level of analysis that recognizes law as it functions in what Western scholars have named the informal realm (purdah, informal business networks), and how that functioning interacts with laws in what Western scholars have named the formal realm (sharia).

While studies of informal networks have been conducted to assess the socioeconomic activities that women participate in throughout Hausaland, further analysis of the relationships they develop between “law” and “society” needs to be implemented.
In this social field it appears that the plurality of systems of governance and the layers of normative orders that exist for women are all relevant. The elimination of formal or informal categories in conducting research in the region would produce more accurate information, due to the inherently fluid and plural nature of life and law for women in Hausaland.

LEGAL PLURALISM: THREE FRAMEWORKS

A presentation and assessment of three legal pluralist frameworks will help us to ascertain which approach is most appropriate for achieving a comprehensive understanding of women and their relationships to law in northern Nigeria. In presenting legal pluralist frameworks it is necessary to define them according to their emerging academic contexts, methodological assumptions, and definitions of law. Within the paradigm of legal pluralism I present three main ideological frameworks. In 1988 Merry identified two: classical legal pluralists and new legal pluralists. More recently Tamanaha (2000) presented a third framework: non-essentialist legal pluralism. Each framework incorporates varied practices in presenting and assessing legal pluralism, based on respective assumptions about law and methodological approaches to studying law and/in society. I will use their different approaches to identify the pluralistic applicability of both the definitions of law in the theoretical sphere and the methods available to researchers working to identify boundaries of research, while attaining access to the circumstances that function in social fields in relation to law.

Classical Legal Pluralism

The emergence of legal pluralism as an academic field of study is intimately linked with colonialism. It was through the process of colonialism that a more visible form of legal pluralism was produced for Western legal scholars. This occurred through the implantation of colonial laws in African societies with pre-existing laws, increasing the visibility of plurality, and producing
an academic opportunity and awareness through which the plurality of legal systems in one society could be studied. In addition, it was during the process of colonialism that the study of legal pluralism became established academically. While it was accepted that Western law is law, one of the main goals of classical legal pluralism was to identify and differentially recognize (or not recognize) non-Western legal systems.

In this chapter I focus solely on British colonialism in West Africa to assess the emergence of legal pluralism; in doing so I will briefly present the "logistics" of pluralism. It is important to note first that British colonies established before the middle of the seventeenth century in Africa implemented a form of legality quite different from those established after the American Revolution; these new legal policies indicate that, within classical legal pluralism, there are several forms of legality to be assessed.

According to Bentsi-Enchill (1969, 3), British colonies established in Africa early in the seventeenth century used British-based international law to legalize "matters of general Imperial concern covering such matters as shipping, nationality, aliens, coinage, bankruptcy, and matters requiring legislation outside the powers of the local legislature." Colonies acquired by settlement at this time began through business ventures that resulted in the establishment of large expatriate populations, which implemented British laws to legalize and facilitate business transactions. After the American Revolution laws granting British subjects rights to gain "representation" in African governments and powers to pass legislation were enacted; as Bentsi-Enchill notes (3), these laws were facilitated by the fact that "African aboriginal inhabitants" of colonial settlements were not recognized under international law as having any rights. Under this legislation occupied African territories came under "absolute disposition of the Crown," but there was no presumption that private laws extended to the "aboriginal inhabitants" of these colonies. The assumption at the time was that local laws
functioned in a manner that related well to local populations, but were unsuitable in meeting the "needs" of European settlers. Consequently, Freeman v. Fairlie (1828) concluded that British or Christian settlers were to adhere to British laws, while "locals" could continue to adhere to customary laws, "with some particular exceptions that were called for by commercial policy, or the convenience of mutual intercourse" (Bentsi-Enchill 1969, 4). Further legislation stated that locals could continue to rely on precolonial laws "until 'the Sovereign' through her judges" enacted laws to replace them (5). During this process legal pluralism began to be formally established, whereby British law was enacted to differentially institutionalize and recognize (or not recognize) different systems of local law. Merry (1988) documents the literature that addresses "customary law" and highlights the fact that "custom" became "law" as a function of colonialism.

In attempts to colonize Africa, the British transformed social control mechanisms in Africa societies into words and structures that mirrored Western notions of "systems" of law; thus, as colonialists "communicated" with African populations, they created "customary laws" according to those "versions of customary law which meshed best with their own ideology of land ownership as well as other legal relations" (Merry 1968, 875). Not recognizing such contexts, Western legal scholars who studied classical legal pluralism in Africa relied on an established colonial "vision of a traditional, unchanging African past ruled by long-established customs" (876). Such visions are distorted and resulted in the inaccurate production of knowledge about legal pluralism in West Africa.

In his assessment of colonialism from an African perspective Bentsi-Enchill (1969) states that British invasions of West Africa marked the establishment of British colonial endeavours on the continent. In Nigeria local or customary laws were mirrored after a court ordinance entitled "Application of Native Law and Custom," outlining the boundaries within which these laws could function:
1. Nothing in this Ordinance shall deprive the Courts [British courts] of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any native law or custom existing in The Gambia,\textsuperscript{14} such law or custom not being repugnant to natural justice, equity and good conscience, not incompatible whether directly or by necessary implication with any law for the time being in force.

2. Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives and also in cases and matters between natives and non-natives [Europeans] where it may appear\textsuperscript{15} to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English law. (quoted in Bentsi-Enchill 1969, 7)

Bentsi-Enchill makes three key observations in relation to this law. First, he states that it gave the British courts supremacy in deciding when customary laws would or would not be applied. Second, since the overwhelming majority of the population (the "natives") was being ruled by customary laws, British courts were able to expand the jurisdiction within which their control applied through this recognition of "customary" in their laws. And third, the British government used this recognition of customary laws to grant itself the power to decide what was, and what was not, law according to African customs and social structures.

These laws eventually came to create what was referred to as the "West African formulation," which was implanted in the rest of the continent as colonialism expanded. The manner in which legal pluralism became recognized legally occurred within the above-described politically motivated, Eurosupremacist, imperialist, colonial dimensions, and from within this context grew the academic study of legal pluralism.
Assumptions and Ideological Framework

Bohannon (1967), Gluckman (1973), Hoebel (1954), and Malinowski (1959) have been identified as key scholars in classical legal pluralism, a framework receiving its “classical” title in the 1970s. Prior to this researchers did not identify with different schools of thought in the study of legal pluralism. Legal pluralism initially was the study of colonized societies, and of the legal interactions between colonial and non-colonial legal systems. Merry (1988, 872) defines classical legal pluralism as “the analysis of the intersection of indigenous and European law,” which prior to the 1970s was applied only to colonial and postcolonial societies. Much of what has become defined as classical legal pluralism was deemed so by new legal pluralists. In their separation from classical legal pluralism they worked to critically define classical assumptions and methodologies. That process of separation included an identification of the “classical” to distinguish it from the “new” legal pluralism. A lack of understanding of this “definitional” process created a lack of understanding of “classical” legal pluralists as they are viewed in contemporary legal pluralist literature, mainly because those defined as “classical legal pluralists” never named themselves as such. In recognizing this dilemma I present the works of classical legal pluralists from the initial Western academic realizations that legality exists in plurality in society. I present classical legal pluralism as conducted prior to the emergence of new legal pluralism to address the imposition of definitions employed by new legal pluralists.

Defining Law

Classical legal pluralism is the first framework of sociolegal studies that endeavoured to study several legal systems as they exist in the same society at the same time. Classical legal pluralists were the first Western scholars who employed a framework assuming that a variety of legal systems can and do exist in the same society at the same time. Gluckman’s (1973) conception of pluralism represents the framework within which
classical legal pluralists worked. Gluckman identified the “most crucial concepts of law” as “elastic or of multiple meaning” and concluded that the essence of law “can absorb a variety of different presumptions” (393).

This variety is the legal pluralism that classical legal pluralists worked to identify. Hoebel (1940) added that law can only emerge from formal “politically organized societies.”16 Within the classical legal pluralist framework scholars worked to identify what “politically organized societies” looked like and what types of laws they produced. In addition, Bohannon (1967) and Gluckman (1965) were in constant discussion about the linguistic approach to presenting customary laws in the English language.17

Their debate over linguistics18 is indicative of the dichotomized framework within which the classical legal pluralists functioned: they relied heavily on the process of categorization in forming knowledge. Their disagreements were over how those categories should be approached and defined. Bohannon and Gluckman often disagreed over the boundaries within which definitions for customary law should fall (Nader 1969). The details of the debate were elaborate and based on lengthy ethnographic experiences throughout Africa, but those details are not the central focus of this analysis. The presentation of their debate illustrates the commonalities that tie Bohannon (1967) and Gluckman (1965) together, within the classical legal pluralist framework: the implicit assumptions that both held were related to the “essence” of law as a categorical entity; while the specifics of the categories may be disputable (as in their debate), a preconceived notion of law that is dependent on two categories (state law and customary law) was not. The classical legal pluralist framework relies on the existence of categories and in doing so employs a dichotomized approach to understanding legal pluralism: customary versus state law, native versus Western societal organization, and so on. This framework requires that more than one “legal system” fit into one of its preidentified categories of “law” for legal pluralism to exist.
Classical legal pluralists rely on categories to identify plurality in legal systems; two levels of analysis exist in this process. On one level classical legal pluralists relied on a consensus model whereby “law” in all societies could be defined according to generalizable components; on a second level law could be described as manifesting in society through two main categories, customary (relating to non-Western legal systems) or colonial (state) structures (relating to Western legal systems). A representative definition of the requirements that are necessary in defining “law” as it was viewed by classical legal pluralists was presented by Gulliver (1963, 1): “In any society, there must, by definition, exist regularized procedures... to deal with alleged breaches of norms and injuries.... There must be ways by which it can be established whether in fact a breach occurred, and what is the extent of the injuries; and there must be means of determining and enforcing decisions which provide a settlement of the dispute, and perhaps also means which tend to prevent recurrence of the matter.” This definition emphasizes procedural elements of law, while relying on the unproven assumption that social norms exist. Associations of “formality” with Western structures of organization and of “informality” with non-Western structures of organization are a resounding theme in the classical legal pluralist definitions of law.

Malinowski’s (1959, 15) work on “savage justice” presented a definition of customary law widely used in classical legal pluralist theories. Malinowski emphasized a view of non-Western laws as based on “obligation” (informal) and of Western laws as based on “authority” (formal). These formal/informal dichotomies continue to influence many aspects of contemporary legal pluralist scholarship. Implicit in these categorizations are a supremacist attitude toward formal (Western), and a primitivist attitude toward informal (African) social structures and legal organizations.

African legal scholars at the time presented a very different picture of law than the one presented by Western classical legal pluralists: “The African peoples are... at varying degrees
of political, cultural, and economic development. Since law is inevitably interlocked with all these phases of social life, it naturally manifests itself in different ways and conditions, and so we sometimes get variation in details, if not in essentials, as we pass from one society to another" (Elias 1956, 8). Elias also emphasized (293) that some African societies function through non-centralized political authority (as kinships), some function through strong centralized political authorities (with military, administrative, and judicial branches), while some function as "loosely knit confederations" (with semi-independent chiefdoms with one "supreme" king presiding over them). From this perspective it becomes difficult to classify law within Western legal pluralist assumptions about formal Western categories and informal non-Western categories. Despite these contradictions, the strongly dichotomized nature of the classical framework prevailed, and aided in keeping its theorists functioning in a categorical mindset that aimed to classify law into predefined categories and proceeded to compare/contrast these categories.

Llewellyn and Hoebel (1941, 39-40) state that the only differences between modern (Western) and primitive (non-Western) laws are the "technicalities" through which normative orders are enforced: "The only thing about technical law which is different in the sense of comparable is that it has a technical field of discourse," and, if those technical and institutional tools were to be put aside, then the essence of "law" that transcends all manifestations of "law" would "become at once familiar instead of different." This view presents the basic approach to defining law in classical legal pluralism. It is a categorical definition that relies on the existence and positive attributes of consensus (similarities), and de facto assumes that conflicts or differences are "problematic."

Bohannon (1967, 27) insisted that the "essence of law" can be found in "four legal attributes: authority, obligation, intent for universal application, and sanction." He further claimed that these attributes are present in both "Western/state" and "tribal/customary" legal systems. From these categorizations
emerged a definition of law focusing on consensus, assumed generalizability, and official states and/or political organization to produce and implement law.

Methodological Framework
The methodological framework of classical legal pluralism relies on an “unbiased observer” role for researchers. Hoebel (1954, 17) states that “in the study of a social system and its law by the specialist it is his job to abstract the postulates from the behavior he sees and from what he hears.” Hoebel (29) and Malinowski (1959, 15) both stress that the multifaceted nature of law requires an eclectic and elastic approach to researching law and society. Hoebel (36) placed great emphasis on “phonetic training” (learning the language of the society under study) and “note-taking.” He also presented the “case method” through which specific cases are gathered, followed by a search for thematic and generalizable illustrations of “facts,” leading to realistic jurisprudence. Implicit to the case method is the assumption that what cannot be generalized within the predetermined thematic categories of law does not qualify as law.

Malinowski (1959, 14), in line with Hoebel’s (1954) methodological procedures, stressed the need to conduct research with goals to “arrive at a satisfactory classification of norms and rules of a primitive community,” and, in doing so, to draw distinctions between customary laws and other customs that do not translate to law in “primitive” societies. The categorical view of law in this framework impacts the manner in which one can assess law: first, in assuming that separate categories of types of law exist and, second, in assuming that researchers can observe/record these categories.

Gender Analyses
Classical legal pluralists relied heavily on the formal status of women in assessing the roles of women in relation to law in colonized regions; the majority of the work conducted within this framework studied women as wives, widows, or slaves when
slavery was legal (Hill 1972). This placed the understanding of women’s interactions with law within these rigid and unrepresentative boundaries. Gluckman (1965, 223-225) presents the role of women in “primitive” African societies as relating mainly to rituals and bewitching. In addition, he presents the role of women as “manipulated” in the political realm to solve political conflicts through the presentation of opportunities for men to rule and gain kinship. In another study Gluckman (1973, 216) presents the stereotypical view of African gender roles as he tells a story in which an African man claims, “like all Whites, I [Gluckman] spoil women.” This attitude is not problematic from within the “formal” superior and “informal” inferior categories of law, for if the African legal systems of governance are assumed to be inferior, then it would only be natural for scholars who adhere to such ideology to assume their own personal and cultural “superiorities” in relation to the “other” men and societies they are studying.

Gulliver (1963) presents a highly submissive image of African women in his account of customary courts in Tanzania. Hoebel (1954) and Malinowski (1959) made no specific mention of women in their presentations of methodological assessments in classical legal pluralism. In contrast to these negative stereotypes presented by Western scholars, Elias (1956, 101), upon presenting specific examples in diverse contexts, asserts that an African “woman’s life is passed differently from that of men and has its own sphere, but the woman’s position amongst most tribes cannot be regarded as depressed or slavish.” Despite such attempts at destabilizing the Western conceptions of Africa and Africans, Western scholars continued to present information that portrayed their biases and racisms toward the continent.

The negative views of African women presented in classical legal pluralist literature contrast with the views of Cheyenne married women presented by Llewellyn and Hoebel (1941). Women in these contexts are shown to function within the sociolegal capacities of respect and honour, though oppressed in the social realm. These categorizations of women from different
'non-white' societies fall neatly within the racial hierarchies created by European colonialists: these racist hierarchies placed "white" people at the top, "black" people at the bottom, and "red" people slightly above "black" people. In accordance with such categorizations Western scholars present images of African women as the "most oppressed" in their "black societies," "red women" as slightly better off, and "white women" as the least oppressed because their "white men" spoil them. Although contemporary scholars do not refer to racial categories in such obvious and obviously racist manners, they continue to adhere to a hierarchical ideology assuming that "white" structures and values are less oppressive than "non-white" structures and values. The stereotypes associated with gender inequality continue to be perpetuated in contemporary frameworks that assess women and the law in Africa, as shown in the presentation of Western assessments of what occurs in northern Nigeria today.

In making this point I am not stating that women are not oppressed in Nigeria; I am pointing out that, although women struggle against patriarchal conditions in both Western and non-Western societies, the prevailing assumption is that women in Africa suffer more serious types of oppression and subjugation. I assert that such normative judgments are based on Western standards of gender equality. They are also based on the Western need to categorize everything, including oppressions. Included in the need to categorize is the need to implement hierarchical understandings: one type of oppression is better or worse than another. The very nature of the methodology employed by Western scholars, specifically those who practised classical legal pluralism, relies on both predetermined categories and hierarchies. Ironically, it is assumed that reliance on such methodologies allows researchers to be "unbiased" in their approaches to scholarship.

**New Legal Pluralism**

Merry (1988), Nader (1969), and Pospisil (1967), starting in the 1960s and continuing until the present, represent some of the
most influential new legal pluralist scholarship. Much of their work is based on dissatisfaction with classical definitions of law and methodological approaches. New legal pluralists recognize that the imposition of European colonial law in Africa created "a plurality of legal orders" but [assert that classical legal pluralists] overlooked, to a large extent, the complexity of previous legal orders" (Merry 1988, 870). In addition, new legal pluralists state that the literature that addresses "customary law" in Africa is problematic because "custom" became "law" as a function of colonialism (875). New legal pluralists assert that, in attempts to colonize Africa, the British transformed social control mechanisms in African societies into words and structures that mirrored Western notions of "systems" of law; thus, as colonialists "communicated" with indigenous populations, they created "customary laws" according to those "versions of customary law which meshed best with their own ideology of land ownership as well as other legal relations" (875). New legal pluralists reject these impositions, urging scholars to recognize that these classical constructions of law create knowledge about legal pluralism that is not accurate.

The main ideological shift that spurred the emergence of new legal pluralism occurred when legal pluralism "expanded from a concept that refers to the relations between colonized and colonizer to relationships between dominant and subordinate groups" (Merry 1988, 872). Nader (1969, 2) asserts that the shift from classical to new legal pluralism was based on a shift from a focus on legal theory as pursued through an anthropology of law to a focus on "law in culture and society as it is affected by and affects the individuals who make the law both similar and different." Implementation of these shifts in academic approaches to legal pluralism also included the emergence of a postmodern conception of law: the deconstruction of law is one of the main contributions arising through the new legal pluralist framework (Santos 1987). In addition, new legal pluralism presented inequality and power relations as central elements in the study of law and legal pluralism (Greenhouse 1994).
Assumptions and Ideological Framework

Emerging in a framework that expands definitions and boundaries for research, new legal pluralists incorporated a basic assumption that the deconstruction of "law" is integral to this framework. The deconstruction of law begins with an understanding that law emerges both through the state and through "nonlegal forms of normative ordering" (Merry 1988, 870). In this recognition lies the implicit understanding that "law" is not always what the state defines as such. Santos (1987, 297), in deconstructing law from a postmodern standpoint, states that the limitations that plagued classical legal pluralism can be addressed through an assessment of legal pluralism that rejects the dichotomization of formal/informal elements of law: he asserts that "it is time to see the formal in the informal and the informal in the formal."

Greenhouse (1994, 12) places these deconstructionist notions of studying law within a politics of equality that she views as transcending all sociolegal analyses. She states that classical legal pluralists were "optimistic... of law's ability to deliver justice and community to divided nations," and contrasts them with new legal pluralists in the 1960s and 1970s who "drew fundamentally on tacit emotional understandings of equality as integral to the process of sociolegal research itself." Greenhouse also states that new legal pluralists have begun to pursue a study of equality outside the traditional realm of state-defined laws. This expansion in focus is due to a recognition that state legal systems function to disenfranchise and silence; in challenging the unitary power of states in defining law, new legal pluralists began to set new boundaries in defining law, stating that laws emerge from the state and a plurality of social-cultural foundations.

In attempts to truly grasp the essence of law new legal pluralists incorporated a framework of study that made cultures central to the study of law, thereby reinforcing the notion that the state is not the only producer of "normative thinking and power" (Weisbrod 2002, 5). The study of culture as it relates to the production and implementation of law incorporates a power-
related context. It assumes that "culture always involves power, and so is partly responsible for the differences in individuals' and groups' abilities to define and meet their needs" (Valdes 2004, 272). In studying culture and forms of law that emerge outside the realm of the state new legal pluralism began to incorporate a study of resistance as a function of understanding law. In essence this framework emphasizes the "role of law in furthering cultural transformations," and in the postcolonial context has come to study how colonialism "transformed and controlled these subjects [dominated groups] and how these subjects have mobilized the imposed legal system in resistance" (Merry 2000, 18).

In addition to extending definitions/foundations of law, new legal pluralists implemented an extension in geographical locations of legal pluralist societies. They began to recognize so-called "noncolonized societies, particularly to the advanced and industrial countries of Europe and the United States," as legally pluralist societies (Merry 1988, 872). Such recognition, while considered progressive in its shift in focus, bringing Western societies under the pluralist microscope, is problematic in its definitions of colonialism. The United States, defined as a "noncolonized" society by new legal pluralists, was established as a land mass upon which several Western European nations created "colonies." As these colonies began to war with each other, the British established an expansion in colonies. When the members of these colonies "separated" themselves from England they proceeded to impose a Eurocentric and predominantly white social structure upon North America. Their separation in government from the British did not end colonialism in North America, but merely transformed it. Such transformations continue to manifest themselves physically in the occupation of these lands, which, unlike occupation in Africa, in North America have become "homelands." Nonetheless, there are new legal pluralists who study colonialism of the Americas.

As new legal pluralism expanded, an awareness of the different types of colonialism was incorporated into analyses:
"The instance of American colonialism differs from many of the British examples by its emphasis on incorporation rather than exclusion" (Merry 2000, 258). While British colonialism included the incorporation of "dual" legal systems that "sought to construct boundaries between colonizer and colonized," American colonialism worked to incorporate and thus civilize colonized populations. This "incorporation" framework was key in laying foundations upon which Europeans can continue their control over North American land and peoples. While the British imposed legal pluralism in a manner that eventually resulted in the withdrawal of occupation, the Americans found a form of colonialism that did not require eventual withdrawal from colonized lands.

Much of the framework of analysis for new legal pluralism involves expansion. That expansion included for some a study of colonialism in the Americas. In addition to expanding the geographical location of the social field, new legal pluralists expanded the framework for understanding law to include the "informal" sector. This framework also expanded research on legal systems, recognizing that colonialism is an invasive manner in which legal systems are used to define, dominate, and control lands foreign to Europe. These expansions have aided in incorporating an understanding recognizing that the study of legal pluralism includes research into a diverse set of structures and practices.

Defining Law
The definition of law in new legal pluralist scholarship, in accordance with the expansion themes, states that "not all law takes place in courts.... The concern is to document other forms of social regulation, that draw on symbols of law, to a greater or lesser extent, but operate in its shadows, its parking lots, and even down the street in mediation offices"; it also emphasizes that "other forms of regulation outside law constitute law" (Merry 1988, 874). This definition relies heavily on culture as central to defining law. Culture in this school of thought is viewed as a
fluid, changing, interrelated phenomenon, emerging through an intermixing of tradition and everyday interactions among people living in the same social setting (Comaroff and Comaroff 1993). These interactions (defined as culture) create and implement law.

New legal pluralists rely on a definition of law that has a predetermined essence, emerging in formal and informal elements. Pospisil (1967, 24) defines legal systems as capable of existing mainly through interactions among subgroups who live at all levels in society and who, combined, make up society: "Every such subgroup owes its existence in a large degree to a legal system that is its own and that regulates the behavior of its members." He challenges centralist notions of law that place law solely within the context of the state, because they present a definition of law without incorporating the role of social interactions in defining and implementing law.

In composing new and broader definitions of "law," new legal pluralists present a broader and more flexible conception of customary law as compared with classical legal pluralists. Engel (1980, 429) defines customary law as emerging "wherever patterns of repeated interaction among people necessarily lead to mutual expectations and interdependencies that serve to regulate conduct," and emphasizes that this occurs in both non-Western and Western settings.

This definition is heavily reliant on the role of culture in defining law, and, while the definition of culture is disputed, there appears to be a definition of legal cultures that is widely accepted: the legal culture of a society is produced through a "synthesis of formal and customary elements," continually changing and evolving "in response to changing circumstances," concluding that "the totality of norms and behavior of the local citizenry" comprises the legal culture of that community (Engel 1980, 431). Still existing in this definition of law are categorical constructions of law. New legal pluralists, while challenging the construction of these categories and deeming them "too narrow," proceeded to expand the number of categories in which law can be defined.
They did not challenge the categorical nature through which classical legal pluralists produced knowledge about "law"; they challenged only the relevance of the categories used.

Working specifically within the African context, Hellum (2002) presents an understanding of law that emphasizes new legal pluralist works to deconstruct law. She observes the construction of a tension between the implementation of "international standards of human rights" and the "inequalities" imposed through African customary laws, and she adds that, while it is often assumed that legal pluralism in contemporary Africa is an attempt to revive or preserve traditional African legal structures, it is seldom recognized that "in many countries a number of the discriminatory customary rules that were created by the colonial courts have been upheld" (637; emphasis added). Merry (1988) and Nader and Grande (2002) provide a foundation for this deconstruction, expanding the boundaries through which law can emerge and be defined. While new legal pluralists deconstruct the assumed "nature" of law that tends to place the centrality of law in the state,\(^2\) they also examine what has been referred to as "customary" law, and study the colonial roots that named and shaped it. The categories used in new legal pluralist work place the centrality of law in society, not the state.

**Methodological Framework**

Based on the increased number of categories in which law can exist, a new methodological framework was implemented by new legal pluralists. The goal of this new methodology was to access informal mechanisms of social control and creations of law. Pospisil (1967, 8) proposed that, if the point of reference of law and society shifted from "society as a whole" to "the individual subgroups that exist within society," researchers would discover "radically different bodies of 'law' prevailing among these small units." Collier's work (1968) operationalized this proposition with an ethnography conducted in Chiapas, Mexico. In studying the rituals of marriage Collier documented the courtship, dowry, and ceremonial elements of the process (six categories in total leading up to the wedding ceremony), and thus illustrated...
that the cultural meanings and practices associated with each ritual contribute to and facilitate the final contractual union of marriage.

In bringing forth the subgroups of associated actors and actions Collie (1968) was able to better explain the process through which marriage laws are practised in Zinacantan, Chiapas, Mexico. Her work emphasized the informality of law as it emerged in diverse contexts and exemplified the interrelational, subgroup emphasis in this framework that centralized culture to assess law. In the methodological framework of new legal pluralism the researcher must enter a social field in search of both the formal and the informal elements of law, looking to discover and record a wide array of elements that merge to create law.

Gender Analyses
It is important to note that the rise of new legal pluralism coincided with the increased participation of female scholars in the field: as women came to study law and society from a legal pluralist perspective gender analyses in social fields became more prominent, as the roles of women and their relationships with law came under consideration. In Merry’s (2000) ethnographic work women encompass a much different role than what was offered in the classical legal pluralist paradigm. Merry places gender as one element of understanding colonial processes. She assesses gender relations to illuminate the types of transitions occurring in law and culture through colonialism (111). Merry illustrates how in precolonial Hawaii women had leadership/decision-making roles, and explains how the transitions that made male power dominant in Hawaii’s sociolegal structures were linked to the emergence of capitalism (property ownership as wealth) and the secularization of the state: “This meant a shift from the sovereignty of the chiefs [many of them women] to the sovereignty of men of property,” with the result that “only men were viewed as entitled to govern themselves” (110-111).

In this contextual framework gender relations are not viewed as markers for civilization in societies, as was done in
classical legal pluralism. In new legal pluralist frameworks gender is used as a variable through which the processes that guide cultural and legal relations can be better understood and identified. In addition, the recognition of normative orders and informal methods of social control as law in this paradigm allows new legal pluralists to access a more relevant understanding of the role of women as members of patriarchal societies run by patriarchal, colonialist laws.

This gendered approach to legal pluralism is linked to the new legal pluralist assessment of "inequality" as central to an understanding of law (Greenhouse 1994). In expanding on definitions of law, and in implementing a methodological framework that used "subgroups" for access to social fields, new legal pluralists expanded on the understanding that "law" is experienced differently by different subgroups. In this methodological framework there is room to present and understand the experiences of women with law, culture, and society.

*Contemporary Applications of the Classical Legal Pluralist Framework*

In contemporary legal pluralist scholarship new legal pluralism is dominant, yet several strands of classical legal pluralism continue to function. Despite the racist and sexist foundations of classical legal pluralism, and despite the problematic associations between classical legal pluralism and colonialism in Africa, this form of scholarship continues to influence contemporary scholars. Normative legal pluralism presents one such field of study. Assessing the significance of the ideological advancements of new legal pluralism within an "operational context," La Torre (1999, 193) states that "normative legal pluralism can be operative only within certain limits. Otherwise it will be transformed into descriptive pluralism, interesting perhaps for the sociologist but useless for the lawyer and the citizen who are called to orient their conduct in a specific situation."
Normative legal pluralism, according to La Torre (1999), functions within a form of legal monism that studies and utilizes pluralities as they exist within “the rule of law.” This approach prefers to place pluralism within the realm of the state and to keep the definitions of law within a hierarchical realm. The methodological framework in this type of pluralism incorporates Moore’s (1973) semi-autonomous social fields. Moore states that “law is a short term for a very complex aggregation of principles, norms, ideas, rules, practices, and the activities of agencies of legislation, administration, adjudication and enforcement, backed by political power and legitimacy” (719). In the complexity of the state and its interactions with society this form of legal scholarship defines legal plurality.

Whereas La Torre (1999) presents a contemporary assessment of how classical legal pluralism is applied in contemporary conceptions of the state, Moore (1973) advocates a return to Malinowski’s focus not only on “rules” but also on how rules are made valid and implemented in society, reaffirming the customary elements of law. In relation to methodological frameworks, Moore disagrees with the new legal pluralist definitions of law in her assertion that the “semi-autonomous field” in which law can be studied encompasses a relationship between the state and society, and does not place the emergence of law in that relationship. The social field functions in a semi-autonomous context: “It can generate rules and customs and symbols internally, but... it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded” (720).

Moore (1973) recognizes the threat of force and fear associated with the punitive structures of state law, and emphasizes the legitimacy and power of other forms of law (not imposed or defined by legal institutions) as having impact on the people functioning within a semi-autonomous field. In this sense she rejects Pospisil’s concept of law as emerging from the relationships and interactions among subgroups, and, in line with much of the criticism of new legal pluralists, asserts
that they "see law everywhere" and, in their deconstructions of law, confuse definitions of what law is with functions of social control.

In addition to presenting a critique of new legal pluralism this form of contemporary classical legal pluralism illustrates, in a more familiar setting, the ideological assumptions of classical legal pluralism. It is a framework that functions in a highly dichotomized and categorical manner (mirroring how colonialists defined and addressed African social structures), presenting information about "colonial state law" as separate from "customary tribal laws," "formal" (state) laws as separate from "informal" (community-oriented) laws, and, as La Torre (1999) points out, "sociological" and "legal" scholars as encompassing separate, not interrelated, functions.

Despite such attempts to emphasize the dichotomies used by academia to produce knowledge, the emphasis within normative legal pluralism on state law as "plural" creates a scholarly link between legal centralists and legal pluralists, illustrating the existence within academia of the interrelations between paradigmatic affiliations and highlighting that, when these categories pre-exist, one (state laws in La Torre's case) will inherently be perceived as more relevant or more powerful than the other (community laws in La Torre's case). The function of dichotomy is to implement a predetermined and academically constructed hierarchy. In attempts to deconstruct "law" new legal pluralists redefined dichotomies and expanded the realm within which such categories can exist, but they, like past and contemporary classical legal pluralists, did not challenge the methodological structures that reinforce and continue to assume the existence of generalizable dichotomies in the emergence of law in society.

In acknowledging and understanding the dichotomized and categorical structure within which classical and new legal pluralists function, one can achieve a greater understanding of the theoretical approaches and conclusions reached in relation to legal pluralist scholarship. One can also begin to achieve an understanding of the academic institution's tools, which
"professionalize" the definitions of law and keep them within a framework that mirrors the state's dichotomizing processes of social control.

The same academic frameworks that professionalized the processes of colonialism through the dichotomization of people into races continue to dichotomize the definition of "law," and thereby to aid in justifying past and present brutalities. The explanations employed by classical and normative legal scholars present an academic opportunity for Western scholars to continue to speak about Africa in manners that are racist and white supremacist. While new legal pluralists appear to have "better intentions," they too aid in the implementation of a hierarchy that places African social structures in an inferior position that is "informal," and colonial, European, American structures in a constructed superior one that incorporates both the "informal" and the "formal" elements of civilization. It is generally assumed in Western scholarship that the formal elements of African societies either have never existed or, if they did exist, were permanently destroyed by colonialism.

Non-Essentialist Legal Pluralism
Much as the emergence of new legal pluralism was rooted in dissatisfaction with classical legal pluralism, non-essentialist legal pluralism is now emerging due to dissatisfaction with new legal pluralism. Tamanaha (2000) is prominent in the presentation of a non-essentialist legal pluralist framework. Building on Teubner's (1997) critique of how the deconstruction of law was pursued in new legal pluralism, Tamanaha presents a non-essentialist approach to legal pluralism that focuses on implementing a more successful deconstruction of law. The main component is a mode of analysis that rejects the assumption that law has any predetermined "essence."

Teubner (1997b, 773) states that the methods through which law has been deconstructed have been unsuccessful and claims that the deconstruction of law manifests itself like a dance, caught in a "performative contradiction" that critiques law on
stage but fails to challenge it behind the scenes. Tamanaha (2000) associates this failure with the new legal pluralist assumption that law has an “essence” that can be predetermined in academic institutions and then sought out in the social field.

A non-essentialist framework presents a legal pluralism that places law within the minds and actions of people: law is what the people define as such. Non-essentialists, like new legal pluralists, reject the assumption that law is created, controlled, and implemented by the state alone. Furthermore, non-essentialism challenges the very assumption that “law” has an essence that can be predetermined by researchers. Non-essentialist researchers assume “nothing” before communicating with people in the social field under research.

Teubner’s (1992) assessment of legal pluralism was identified by Tamanaha (2000, 306) as “the point of departure for the non-essentialist approach to law.” Teubner (1997a, 15) identifies two problems with the new legal pluralists’ approach to law. The first is their broad approach to law, which renders them incapable of distinguishing between law and other forms of social control, and the second is their narrow approach to law, which limits its functions to social control and maintenance of order. In these criticisms non-essentialists begin to question how legal pluralists have produced knowledge and make notes of the reoccurring inadequacies. From these notes emerges the non-essentialist legal pluralist paradigm.

Assumptions and Ideological Framework
A non-essentialist version of legal pluralism defines plurality in manifestations of institutional or non-institutional, systemic or non-systemic, seen-through or not-seen-through patterns of behaviour, sometimes implemented through force, sometimes not implemented through force. Thus, non-essentialist legal plurality “involves different phenomena going by the label Law, whereas [new or classical] legal pluralism usually involves a multiplicity of one basic phenomenon, Law (as defined)” (Tamanaha 2000, 315). One of the main criticisms of new legal pluralists is that
they "find law everywhere." This critique results from the expanded essence by which new legal pluralists define law. Non-essentialism implements an ideological framework that does not prioritize assumed (expanded/depleted) essences of law, but works to build a fluid, flexible, and changing definition of law.

Nader (1969) presents a discussion that took place during a Law and Society Association meeting on whether "law and society" should be changed to "law in society." In this debate the definition of "law" was challenged as scholars disputed the point of departure for law: does law emerge apart from society, or does law emerge from within society? Nader explains that the suggestion to shift from *and* to *in* was met with defensive retorts. The resulting discussion brought out implicit assumptions that new legal pluralists hold about law: "Somehow, law is conceived of as in reality being a system independent of society and culture" (8). This may be a point of overlap from classical to new legal pluralists, with theorists working within both frameworks insisting that law has essence and thus is studied along with, and not in, society.

A non-essentialist approach to legal pluralism would incorporate a law-in-society perspective. Tamanaha (2001, 120) challenges essentialist legal pluralisms by challenging "the mirror thesis." The mirror thesis asserts that law is a reflection of society and implies that, while law "reflects" a society's morals and values, it exists separately from society through its institutions, which implement an agreed-upon social contract. The mirror thesis assumes that, first, society is governed by the social contract (emerging through law) and that, second, there exists a moral consensus that can be identified and implemented through law. Tamanaha deconstructs the mirror thesis by challenging the *existence* of a moral consensus in society, while illustrating the "law" as an institution that has yet to be proven *dominant* in governing social interactions. He does so by presenting an awareness of the contextualized diversities within and between societies, and how these differences manifest in diverse reactions to legal systems. He concludes that, "extensive as the consequent
changes to society and law might be, the result of these changes is not necessarily that law and society move entirely in sync; often mismatch, rather than mirror, remains” (120).

Classical and new legal pluralists provided a foundation for the emergence of the “mismatch” hypothesis, as was clear in the observation that the concrete “lived law” is different from the abstract “written law” expressed in legal texts (Ehrlich 1936, 501). The distinction between the “real” and the “ideal” elements of law is said to have created a foundation upon which the emergence of “a socially oriented legal pluralism” could emerge (Melissaris 2004, 59). Yet with this foundation Ehrlich (1936, 57) established an essentialist view of law within the legal pluralism framework, asserting that the essence of law is its dispute-resolving functions. Tamanaha (2001) found these foundations of legal pluralism inaccurate, adding that these foundations have been limited through an essentialism that skews pluralist approaches to studying law.

Defining Law
In non-essentialist legal pluralism “law” is viewed as a socially, politically, and culturally constructed phenomenon, and, outside the actions and beliefs of people, does not essentially exist. Thus, to study “law” one must study the behaviours and interactions of people in specific social settings: law is what behaviours/interactions prescribe as such. Legal plurality in this framework is recognized as occurring when more than one form of “law” is recognized and is seen in the social practices of a group. What makes this non-essentialist approach to studying legal pluralism different from that of new legal pluralists is rejection of the notion of law as “fundamentally functional in nature” (Tamanaha 2000, 308).

While the functions and functionality of law are central to essentialist legal pluralisms, a non-essentialist view of law does not assume that “law” is essential to the functions and survival of society. Parnell (2003, 1) provides an approach to studying law that is representative of the non-essentialist framework: “Both
crime and law are created in culture as people negotiate social change. At the same time, crime and law may arise as separate culture-making processes and become linked to each other in a wide array of associations. He also explains that there are circumstances in which an official law may not have been broken yet the perception of the occurrence of a crime may be prevalent. In addition, rule implementations may occur outside the realm of the state, and may or may not include the use of force.

A non-essentialist framework incorporates the ability to identify these complexities as a central element of understanding law in its various contexts, manifestations, and implications. Non-essentialism asserts that, “despite the shared label ‘Law,’ these are diverse phenomena, not variations of a single phenomenon, and each one of these does many different things and/or is used to do many things” (Tamanaha 2000, 313).

“Law” is not the “rules” that guide society; “law” is the interactions that take place to create, implement, and guide social interactions. In light of these complexities non-essentialist legal pluralism concludes that functionality is not central to all “law.” Failing to understand this complexity is a failure to define law, not because researchers are not searching well, but because law has no essence: the “essence” they are searching for does not exist.

Non-essentialism suggests that legal pluralists have “made up” law in academic institutions and have proceeded to try to locate it in society. Furthermore, the constructions of law in essentialist legal pluralism tend to mirror the assumptions about law that the state has presented: that it is functional, that it is necessary, that it always plays a social control function, that it can exist outside the realm of social interactions, that it is defined by institutions and codes, that it exists only in categorical, rigid entities, and that it is most powerful (power defined in formality) when backed by the state because state power trumps all other forms of organization in a society. Non-essentialists challenge all these assumptions and assert that the only way to “define” or “find” law in society is to assume that “law” has no essence.
Methodological Framework

In light of the realization that law has no essence, how does one go about "defining law"? The process is laid out in the emergence of a non-essentialist methodological framework. First, non-essentialist legal pluralists employ a methodological framework that rejects the implementation by researchers of predetermined categories of law in society. This framework incorporates Teubner's (1992) approach to "locating" law through an autopoietic approach: relying on linguistic foundations and suggesting that the use of a binary code that limits an assessment of law to verbalized "legal/illegal" entities are sufficient for defining law. Thus, law is what people define as "legal" and "illegal." Law in this context is different between groups in the same society, is different between societies, and is different over time.

Second, in addressing the nature of the relationship between law and society, this framework brings the study of law into society—not the study of society into law, as is done in essentialist legal pluralist frameworks. The use of this framework allows for the ability to locate law, not only by looking for it in society, but also by asking those 'under study' to define "law." Law is what the people say is law (Tamanaha 2000; Teubner 1997a).

Third, non-essentialists assume that the only essential feature of non-essentialism is the lack of essence. According to Tamanaha (2000), "essence" is the predetermined assumption(s) that researchers bring with them into the society they are studying. Thus, non-essentialists assume only that law has no essence. With this as a starting point Tamanaha urges researchers to start without a predetermined definition of law, proceed to look for areas in which social interactions occur and, on finding such areas, incorporate a research method that asks people to verbalize "law" in that setting. The key research questions posed to people in the social field would include what is law, and is that law? By implementing a strategy of cumulative observation and data-gathering, non-essentialism identifies law as researchers gather people's responses to such questions (Tamanaha 2000).
As conceptions of law begin to take shape within a society, it is important to recognize that these conceptions are fluid, interdependent, and not separate. Conceptions in this framework are not "dichotomized" entities, as categories are in essentialist frameworks (such as customary law or state law in the classical framework, or formal or informal social control in the new legal pluralist framework). Conceptions here overlap, are interdependent, and change through interactions among people in varying situations/settings. What is formal for a specific group may be informal for another group, and what is considered "law" by some may not be so considered by others.

Fourth, in relation to the technical application of non-essentialist research there is the issue of who identifies law and how many people need to view something as "law" before it becomes recognized as such. Tamanaha (2000, 319) sets a low threshold and never explicitly offers answers to these questions. In reference to "who," he does say "any group within the social arena," and adds that they would have to claim it as "law" for it to be defined as law, and that the definition would emerge through their actions/behaviours among other people in the (sub)group. In line with the ideological foundations of this framework, an answer to "how many" formed before entering the social field would transform the non-essentialist researcher into an essentialist one. One thing is clear: due to reliance on social interactions to identify law, a unitary source (such as a penal code) cannot create or implement law.

Fifth, Tamanaha (2000) states that sociolegal theorists should not "shrink away" from the possibility of identifying plural forms of law, explaining that fears that "too many" social practices become identified as law under this framework are unfounded, because people do not lightly or widely use the label "law."

A main obstacle recognized by non-essentialist legal pluralists includes the academic applicability of the proposed approach to identifying law. Tamanaha (2000) recognizes that, because the definition of law is contingent upon the social field, not upon academic discourse, non-essentialism may offend
"conventional" social scientific expectations: in non-essentialist frameworks there occurs a shift in power from the academic researchers' professional identity and assumed expertise in defining law to the people in society through which law emerges. Thus, obstacles to the progression of non-essentialist research include the humbling of academic sources of knowledge and are not limited to non-essentialist methodological frameworks.

**Gender Analyses**

In the non-essentialist framework the role of gender would require an assessment of law as it is defined and used by women in the social setting. Manji (1999) presented an assessment of women and law in postcolonial Africa that incorporated resistance as a central theme of study. In this incorporation Manji utilized a non-essentialist framework that defined law according to women's experiences, not according to preconceived notions of law. By doing so she was able to identify resistance as central to their relationships with law, and thus proceeded to represent gender in the study of law and society appropriately within the realm of a larger social structure that is patriarchal. A non-essentialist study of gender in law and society is able to incorporate legal pluralism as it is used by women, and does not place "law" or normative systems as defined in academia as central to theoretical goals.

Within the context of northern Nigeria non-essentialist researchers would have to ask women what they define as law: if normative orders emerge as law according to women, if communication methods emerge as law according to women, or if their socioeconomic dealings emerge as law according to women, then they are law. A non-essentialist analysis in northern Nigeria would allow women to inform the researcher of what is or is not law. Given the circumstances under which women live and the obstacles they face in achieving status/socioeconomic wealth in the international patriarchal order, non-essentialism appears most relevant in accessing knowledge and appropriately representing women's interactions with law.
ASSESSMENT OF LEGAL PLURALISM: APPLICABILITY TO NON-WESTERN CONTEXTS

In presenting the three main legal pluralist frameworks it becomes evident that their diverse approaches to law and society provide different opportunities for research; in addition, the relevance of each framework differs as different societies enter into the academic search for knowledge. The following is an analysis of the three frameworks in relation to the African context. Included is an assessment of the definition of law in each framework, and of the relevance of these definitions to women and law in northern Nigeria.

Based on the heavy reliance on formal definitions of law and social status in classical legal pluralism, it appears that this framework of analysis is not equipped to access the networks that women create and work within in northern Nigeria. This inability is evident in the deficient assessments of gender prevalent throughout classical legal pluralist work. While new legal pluralists emphasize the importance of accessing informal social control networks in the study of law and society, this framework does not implement an understanding of law that identifies the fluidity and interdependence of formal and informal networks of social control. In the northern Nigerian social setting formal social control mechanisms (sharia, colonial laws) have given rise to the informal (and at times formal from the women’s perspectives) networks created by women. It is thus important to implement a legal pluralist framework capable of identifying that connection while allowing women in the region the opportunity to explain their social settings, their networks, their actions, and their laws.

Given these circumstances, it appears that non-essentialist legal pluralism provides a framework that allows researchers to place the definition of law within the methodological realm as well as the ideological realm of scholarly work. Through non-essentialist legal pluralism the definitions of law can be brought forth in the interactions that women in northern Nigeria
experience, not through reliance on classical definitions of law or on a preconceived definition of what constitutes law, as is the case in new legal pluralist scholarship. A non-essentialist legal pluralist approach to studying law in society allows scholars to learn about law according to Hausa women in northern Nigeria and, in doing so, better represent Hausa society, and provide a more comprehensive and accurate assessment of women and law in the region.

In general this framework appears to be most relevant for understanding law in non-Western contexts, and for accessing knowledge that lies outside the boundaries of Western definitions, experiences, and academic assumptions. It implements an understanding of law that is complex and allows researchers to enter a social field that is radically different from their own with the preconceived understanding that “law” as they have known or experienced it may not be “law” as people in non-Western settings have known or experienced it. Masaji (1998, 232) suggests that a “non-Western legal pluralism may be seen in theory as one form of the dual structure of state law and minor law or coexistence of modern law with traditional law. Its reality is, however, never reduced to the simple structure or coexistence, but is built up with other systems of law.” A non-essentialist approach to law may be able to further explain this coexistence: listening to women living with purdah/sharia will illuminate their perceptions of these contexts, bringing forth their definitions of law as it emerges through their experiences/interactions. Resisting the urge to categorize and thus westernize their experiences may allow academia to present relevant and accurate understandings of their lives.

A macrolevel context of postcolonial African social structures illustrates that legal pluralism in the African context is the study of legal systems as they interact with, are created by, and overlap with society and social interactions; it is not merely an interaction that occurs between African and non-African legal systems, but also an interaction between legal systems created by states and normative orders implemented by the people. In northern
Nigeria women appear to have implemented normative orders that contradict and, at times, defy both African and British legal expectations and definitions of status. An approach to studying law in these settings that does not incorporate an understanding of these interactions, due to a reliance on law as owning an essence separate from the perceptions and actions of women, is ill equipped to address the interrelationships that form law.

An understanding of legal pluralism must allow for an understanding that law for Hausa women in the north may have an essence that is different from, or even contradicts, the assumed essence that classical and new legal pluralists assign to law. I believe that women in northern Nigeria can be best understood within this context: their interactions with the law are more a function of colonialism than they are a function of the Nigerian state and sharia laws. It comes down to a function of survival that takes place daily on a continent that has seen much upheaval but has maintained its identities and cultures. A non-essentialist approach to women's interactions with law creates an academic opportunity whereby these complexities can be brought forth: in listening to women's definitions scholars will be able to identify "law" as it exists for women, and not law as it is expected to exist for Western scholars.

While elites in contemporary Africa define "modernization" and key elements for "nation-building" through "development" as important, and equate such progress to the implementation of a unified legal system (usually based on Western legal models) (Okoth-Ogendo 1979, 165), research on the socioeconomic actions of women in northern Nigeria has shown that "development" is not always capable of being recorded officially or defined through Western academic boundaries. While the "official" legal functions continue to westernize conceptions of women's lives, it is important to academically understand that these "official" manifestations are met with resistance through a rejection of law and the creation of new laws when necessary.

The shifts in academic discourse that non-essentialism provides are not "important" for the women in northern
Nigeria; they are important for scholars who need to keep their academic disciplines relevant. If social science academics are truly embracing the quest to produce relevant knowledge, then they must place the social above the science. They must learn to “let go” of the conceptions that academia has formed and begin to really look at the society they are trying to understand. They must work to create a science that is relevant to the social before they worry about using a science that their fellow uninformed scholars will accept or reject.

Fortunately, more scholars are beginning to discover that women in Africa rely on more than formal law for their day-to-day survival: “African norms and values are incompatible with the norms and values applying in the West” (Hellum 2002, 636). This realization should not only alter the way scholars understand law in Africa, but also alter their methodological approaches to research in Africa. In realizing the fundamental differences in experience, in history, in culture, and in social setting, academics must begin to approach research in the region from a non-essentialist perspective, not to deny the existence of “essence” in law, but to deny the Western assumption that law has a predetermined “essence” that they bring forth through their own constructions of law and society.

Academic attempts to essentialize law and to impose a preconceived definition of law that guides researchers have resulted in an academia that is not relevant or appropriate for accessing knowledge about women in northern Nigeria. The incorporation of a non-essentialist perspective is key to strengthening academic tools and abilities to address the diversity that is a function of pluralism. In recognizing that many systems of law exist a non-essentialist legal pluralism also recognizes that these many systems exist differently, according to different people in different settings, and elicit different reactions. These differences can best be understood through an abandonment of reliance on “essence” as existing in law. Sharia is not just codes and implementations of rules, but also an experience of law by
women in northern Nigeria, and, although sharia codes remain constant, the experience of sharia for men and women creates a different law with different functions and implications. Non-essentialist legal pluralism, unlike other frameworks, allows for an understanding of these differences.

While non-essentialism is most relevant for research on women and law in northern Nigeria, obstacles do exist in its applicability and ideology. First, it is assumed in this framework that researchers can enter a social field without preconceived notions and biases. The “objective researcher” assumption is dangerous, because it does not take into account the impact of the presence of a researcher on a social setting, and because it posits that researchers can transcend the human element and relinquish bias while conducting research. Second, non-essentialism does not account for the transformations that take place when recording information: upon “defining law” according to people in the social field, how does a researcher avoid transforming these definitions in the process of presenting them in scholarly works? Does a researcher impose “essence” upon law when he or she translates social realities into academic materials?

These types of obstacles are not insurmountable. In my opinion non-essentialism adds complexity to academic endeavours and, in doing so, brings the complexity of law in society into a more appropriate arena for academic discussion. Non-essentialism may make research “more difficult” and may impose a level of self-reflexivity upon researchers that appears to be lacking in academia, but these impositions may expand the scope of knowledge available to academic disciplines.

A complex social reality that is unstable, fluid, and interchanging requires complex academic approaches that may not be “perfectly” definable, generalizable, or predictable. Above all, the production of knowledge in sociolegal disciplines needs to shift from unquestioned and taken-for-granted assumptions about “law” and “society,” and to rely more heavily on the interactions in society without which law could never exist. I
believe that more researchers need to confront the fact that without social interactions there would be no law, but that without law social interactions would continue; thus, social interactions take precedence in defining law and not vice versa.

**Women and Resistance in Northern Nigeria**

Some scholars have stated that the policies of colonial and contemporary African states toward women have ranged from mild lenience in instances where their activities contributed to the economic structures of the nation to forthright domination and attack when women proved themselves "uncontainable" (Jackson 1987). Manji (1999, 443) explains that "a corollary of the failure of the African ruling elites to achieve hegemony—and the consequent use of authoritarianism and force rather than consensus to achieve compliance—has been the search by subordinate groups within the state for means to resist its coercive tendencies." Such situations have been met with two main forms of resistance that are most relevant to women in Africa.

The first form of resistance is the practice of "exit," whereby withdrawal avoids confrontation with violent state policies and actions. This withdrawal is accomplished through the creation of a private realm in which non-state systems of law are employed. Both Fattion (1989) and Hirschmann (1981) address "exit" as a mechanism of resistance employed in many contemporary African nation-states. Parpart and Straudt (1989) provide examples more specific to women's relationships with African nation-states. They record activities in which women participate that the state finds difficult to regulate. These activities include "illegal" trading, creation of cooperatives, participation in prostitution, and implementation of informal mechanisms of communication and networks of support that aid in maintaining autonomy from the state.

While the "exit" strategy appears to be easier to implement in urban settings, rural settings incorporate a second form of resistance: a "secrecy and concealment" strategy, whereby women are able to create and implement their own laws and
governance techniques for economic and political survival (Manji 1999, 447). This form of resistance employs “exit,” but does so in ways that are less accessible to the majority of those not included in the participating subgroups. In rural settings anonymity is not enjoyed as it is in urban settings; thus, this form of resistance involves arrangements and agreements that, at times, are unspoken yet, upon implementation, are clearly established.

In identifying these two main forms of resistance, it becomes clear that it would be difficult and potentially impossible to build a legal pluralistic theory relevant to women in contemporary Africa without the incorporation of an understanding of resistance. Legal pluralism in these settings is largely a function of resistance to oppressive state laws that continue to mirror colonial modes of governance: “To summarize, writing on women and the state in colonial and post-colonial Africa indicates that the relationship of women to the state has been at best ambivalent, and at worst characterized by actual and symbolic coercion,” resulting in a distancing by women from the state, either through physical exit or through symbolic exit in secrecy and concealment (Manji 1999, 448). Thus, Manji concludes that the implementation of legal centralist theories would be highly problematic, due to their reliance on the state to define laws. I would add that the implementation of any “essentialist” conceptions of law in these social fields is just as problematic. Preconceived conceptions of “law,” especially ones arising from Western academic standards and cultural contexts, might theoretically “appear different,” compared with legal centralist theories, but would misrepresent situations and reach conclusions that are just as problematic.

Examples of such problematic conclusions are found in the contradictions reached through different forms of academic assessments. In discussing land rights and legal ownership of property in northern Nigeria, Ayua (1998, 237-238) reports that Islamic laws preserve women’s rights to ownership of land, but notes that these rights are often ignored. She concludes that “this pattern of behavior has tended to make women second-class
citizens. Most of the women have resigned themselves to their fate and have accepted the humiliating status accorded them by society. The few others... who would want to assert their rights or fight for them are discouraged for fear of being branded social deviants or rebels.” These conclusions come in direct contradiction of assessments of women’s roles, actions, and identities from a non-state-oriented form of legality. Examples of women’s participation in the informal and “socially moral” socioeconomic sector have been presented in contradiction to such disempowered conclusions about women in northern Nigeria. Void of an understanding of resistance strategies, assessments of law in northern Nigeria present a highly disempowered picture.

In studying resistance and organizational strategies among factory workers in Kano, a state in northern Nigeria, it was found that female involvement in the formal labour process was sufficient to form a class consciousness, but it did not extend to a formal consciousness of gender discrimination. It was thus concluded that, “in order for this class consciousness to generate a gender dimension built into it, the women must also be able to understand that the additional disadvantages which they suffer have to do with their gender, an experience which sets them aside from their male colleagues” (Abdullah 1997, 65). On a formal level Abdullah asserts that a gendered understanding does not emerge into formal strategies of organization to fight patriarchal oppression.

On a more informal level Shebi (1997) identifies liberation for women in Nigeria as beginning with empowerment through identity, role, and development. As women work on developing their identities through autonomous networks and organizations, Shebi places a symbolic value on “the start of liberation for our women, liberation from the inhibiting identity and role of our culture, which men have imposed on them and which has enslaved them for ages” (133). It becomes apparent that the views held in relation to women, resistance, and their relationship to law are greatly influenced by the understanding (or lack of understanding) of resistance. It also becomes evident
that in the formal realm women are viewed as largely oppressed and degraded, while in the informal realm they appear to be self-regulating and autonomous. These contradictory conclusions destabilize the academic approach to studying law in northern Nigeria, and illustrate that the conclusions reached rely heavily on the focus and orientation of the researchers.

Legal centralist and classical legal pluralist paradigms, with a heavy focus on formal law (state and customary), are not equipped to assess the "informal" lives that women lead. On the other hand, the new legal pluralist framework, while encompassing the ability to recognize and address the "informalities" and their relevance, may not be equipped to address the oppressions that do occur due to formal legal policies and implementations. In addition, the formal/informal dichotomies employed by legal centralists as well as by classical and new legal pluralists present academic frameworks so reliant on categories and divisions that they become unable to learn about the complexities of law in northern Nigerian societies.

A non-essentialist legal pluralist methodology works best in this setting, for it allows women in northern Nigeria to present the relevance of informality while addressing the elements of formal oppressions they face. In entering the social field without preconceived definitions of what constitutes "law," and what is "formal" or "informal," researchers in this framework are more able to portray representative understandings of the relationships between women and law.

CONCLUSION: THE RELEVANCE OF NON-ESSENTIALIST LEGAL PLURALISM FOR RESEARCH ON WOMEN IN NORTHERN NIGERIA

For women in northern Nigeria the boundaries between formal and informal social control are blurred. Sharia and the practice of purdah work in conjunction with cultural, social, and economic factors. It appears that all forms of social control/law in this
setting are fluid and interchangeable: they do not exist as separate academic categories. In addition, women in northern Nigeria lead lives that are radically different from those of women elsewhere in the nation: Hausa women in the north live in social and at times formal political seclusion. In northern Nigeria women in rural settings face different circumstances than women in urban settings. In such differences lies a methodological dilemma only if an academic framework looks to dichotomize and generalize findings. Any attempt to understand women and law in Nigeria may require a specialized approach to producing knowledge, with an acceptance that diversity in social settings and experiences does not equate to "problems" in methodology.

The most appropriate ideological framework to address these issues appears to be a non-essentialist one. It rejects the need to rely on dichotomies between categories and does not work to generalize its findings. Non-essentialist researchers approaching this social field, with an understanding that law's essence exists solely in the experiences and beliefs held by women in the region, will be able to approach such overlapping "categories" more readily. Because non-essentialism encompasses a realm of goals focused on "identifying" (not defining) law, any generalizations beyond that have yet to be established by the people whom researchers are attempting to understand. In this framework of analysis women in northern Nigeria are able to present their experiences with law according to their specific social, cultural, political, and legal circumstances.

It has been shown that the assumption that generalizations and themes can aid in creating a better understanding of social realities and their intersections with law is based on a presupposition that there exist implied collective social realities, that there are "themes" that govern social life. These assumptions reduce an understanding of "society" to a monolithic as opposed to a complex and diverse entity. At times discussions about "law" seem to disconnect from social realities in society. Researchers become overridden by the "essence" of their ideological
assumptions and lose touch with "law" as it is created in society. Discarding that "essence" may allow for more representative research and theories.

Classical, new, and non-essentialist legal pluralisms have been presented in this chapter according to the ideological foundations of their frameworks, the definitions of law they employ, the boundaries they set in defining their methodological expectations, and, finally, the applicability of their theories to women living in contemporary northern Nigeria. Tamanaha's (2000, 2001) non-essentialist version of legal pluralism provides a theoretical framework that is flexible enough to allow for research to define law, to attribute power appropriately to different forms of law (as is relevant to the specific social settings), and to create opportunities for understanding that are analytically and instrumentally sound within the legal pluralist paradigm.

Non-essentialist legal pluralism appears to be most relevant for research on women and law in northern Nigeria because of the flexibility it affords in definitions of law, and the power it relinquishes from academic professionalizations of law to the lived realities and experiences of Hausa women who produce and implement law in Hausaland. The applicability of non-essentialist methods has not been attempted on a wide academic scale, and, as the number of scholars who undertake non-essentialist research expands, the lack of structure in this framework may result in conclusions that are difficult to compare. This may result in the production of knowledge that is difficult for academic institutions to understand.

These problems clearly fall within the realm of academia and are not directly correlated to problems in "society"; thus, changes need to occur in academia, and perhaps, if those shifts are sufficient, social problems and social triumphs can begin to be better understood in the "social sciences." Until then the majority of scholarly works emerging in Western academic settings will continue to misrepresent, misunderstand, and wrongfully analyze African social settings.
NOTES

1 Resistance in this context is non-conforming responses to attempts to control, dominate, and subjugate.

2 Kuhn states that theorists "whose research is based on shared paradigms are committed to the same rules and standards of scientific practice. That commitment and the apparent consensus it produces are prerequisites for normal science, i.e., for the genesis and continuation of a particular tradition" (1962, 11).

3 "State" being a single structure with unifying institutional bureaucracies.

4 The census is controversial since many ethnic groups believe that their populations were not properly accounted for in the official population reports. The north/south divide has been increasing with the most recent assertions that Kaduna (in the north) has a larger population than Lagos (in the south).


6 See https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html. [Consulted October 25, 2007.] Again, these "official" statistics are disputed in Nigeria: with both Christians and Muslims claiming a majority population, and more people adhering to "traditional" spiritual practices, but doing so in secrecy due to the stigma associated with missionary and colonial dehumanization of African spiritual practices.

7 These "official" figures have been disputed by the US Bureau of Democracy, Human Rights, and Labor, which found in its human rights report (2005) that 58 percent of women were literate (US Department of State 2005).


9 The Hausa are one of the three dominant ethnic groups in Nigeria. Historically, they resided in what is now Niger and the northern regions of Nigeria, Benin, Togo, and Ghana. The majority of Hausa people in Nigeria continue to live in the northern region, and thus the northern states are often referred to as Hausaland.

10 Power in this context is formal, and is measured through wealth and access to land/home ownership rights.

11 As the Nigerian naira became less valuable, prices were increased throughout the nation, and economic difficulties for families were on the rise.
Kano is one of Hausaland's largest urban centres. It is one of the oldest and most populated cities in Nigeria.

She did not report a specific age. Wall (1998) did report in her study of Hausa women that some girls who are premenstrual are married in some Hausa societies.

The same law was substituted word for word when Nigeria was created.

The onus of proof was on the party who wanted to use customary laws to prove that English law would result in substantial injustice (Bentsi-Enchill 1969, 28).

Classical legal pluralists (e.g., Hoebel and Gluckman) concluded that societies without political organization (as they recognized it) were societies lacking in law. Bohannon (1967) asserts that different categories, when implemented, would reveal law among tribal societies and organizations.

With Bohannon accusing Gluckman of distorting reality by relying too heavily on English in his work, and Gluckman responding that his audience is English and accusing Bohannon of alienating scholars (Gluckman 1973).

Gluckman insisted that the English language was sufficient for categorizing non-Western legal systems, while Bohannon insisted that much of the essence of non-Western legal systems is lost or transformed in translations into English. Bohannon encouraged researchers to learn the language used in the region of study and to use that language when presenting categories of law. Gluckman insisted that this was impractical and unnecessary.

As a function of the dichotomized framework in which it functions.

Hill is one of the very few women who participated in classical legal pluralist research.

As recognized by classical legal pluralists.

New legal pluralists expanded legal pluralist research to include Western nations. They concluded that colonialism in Africa may have provided "obvious" legal plurality, as colonial law came to exist alongside customary law, but they added that, with the expansion of the definition of law to be centralised in "culture," legal pluralism is a reality in all societies, including the North American ones.

This is done in both classical legal pluralism and legal centralism.

The three subgroups that she presents are property ownership, maleness, and race.

Few new legal pluralists present an understanding of African social structures as "formal," mainly because the term "formal"
has historically been associated with colonial structures. It was constructed as such by classical legal pluralists. While new legal pluralists have challenged these constructions by emphasizing the relevance of the “informal,” they do not deconstruct the very existence of “formal” and “informal” categories.

26 Not all social interactions are “functional”; some are dysfunctional, some uneventful, some minor, some major, and so on.

27 Private here is identified as fields functioning outside the realm of public, state-defined and state-regulated social fields.

REFERENCES


This page intentionally left blank