



The Concept of Possession in Yoruba Customary Law and English Common Law: A Foundational Analysis

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Abstract

This paper undertakes a comparative analysis of the legal concept of possession within Yoruba customary law and English common law. Employing a doctrinal methodology, it examines the divergent conceptual foundations of possession in both systems. The study reveals that while English law meticulously distinguishes possession as a factual state from ownership as a proprietary right, creating doctrines such as adverse possession and relativity of title, Yoruba legal thought fuses possession with ownership, treating effective occupation as the primary evidence of entitlement within a communal framework. The paper further explores the impact of Nigeria's Land Use Act 1978 on customary landholding and analyzes how Nigerian courts navigate the tension between these two legal traditions. It concludes by reflecting on the implications of this conceptual divergence within Nigeria's hybrid legal system.

Keywords: *Possession, Yoruba Customary Law, English Common Law, Comparative Law, Relativity of Title, Adverse Possession, Land Use Act, Nigerian Legal System.*

1. Introduction

The concept of possession occupies a central place in any legal system that regulates rights to land. Yet, its meaning, scope, and relationship to ownership vary significantly across legal traditions. In English common law, possession is carefully distinguished from ownership, the former being a factual state of control, the latter being the ultimate proprietary right. In traditional Yoruba legal thought, however, possession and ownership are conceptually fused; effective occupation is not merely evidence of a right but constitutes the primary manifestation of entitlement within a communal landholding structure.

This paper undertakes a comparative analysis of these two conceptions. The research questions guiding this inquiry are: (1) How is possession conceptualized in English common law and Yoruba customary law respectively? (2) What are the philosophical and cultural foundations that explain these divergent conceptions? (3) How has Nigeria's Land Use Act

1978 impacted the operation of customary law concepts of possession? (4) How do Nigerian courts navigate the tension between these two legal traditions in contemporary jurisprudence?

The significance of this inquiry lies not only in its comparative value but also in its practical relevance to Nigeria's hybrid legal system, where courts must frequently navigate between common law principles and customary norms. For international scholars, understanding this interaction provides insight into the broader phenomenon of legal pluralism in post-colonial jurisdictions.

Methodology: This study employs a doctrinal methodology, which involves the systematic analysis of primary legal sources (judicial decisions, statutes) and secondary sources (textbooks, journal articles, and authoritative texts on customary law). The comparative approach is functional: it seeks to identify how each system resolves disputes arising from competing claims to land, and what role possession plays in that resolution. The study focuses on Yoruba customary law as practiced in

South-Western Nigeria, recognizing that Nigeria's ethnic diversity means that customary laws vary across regions.

The paper is structured as follows: Part II establishes a conceptual and philosophical framework. Part III examines possession in English common law. Part IV analyzes possession in Yoruba customary law, incorporating recent judicial authorities. Part V addresses the impact of the Land Use Act 1978. Part VI offers a thematic comparative analysis. Part VII concludes with implications for Nigerian jurisprudence and a bridge to the forthcoming paper on ownership.

2. Conceptual and Philosophical Framework

A. Defining Possession

Possession, in legal discourse, is notoriously difficult to define. Sir Frederick Pollock described it as "the external symbol of ownership,[1] while Oliver Wendell Holmes famously called it "the substantive fact upon which the law bases rights.[2] For analytical purposes, two distinctions are essential. First, the distinction between *possession in fact* (physical control over a thing) and *possession in law* (the right to possess recognized by law). Second, the distinction between possession and ownership, where the latter represents the ultimate or absolute right to a thing, encompassing the rights to use, exclude, and alienate.

B. Philosophical Underpinnings of English Common Law

The right of possession is otherwise known as *IUS POSSESSIONIS* it is the right an individual has now and which the law will protect notwithstanding that the holder of that right now is the true owner or not. The law was a tendency to protect the status quo. The law is inclined to protect the holder for the time being. There is also the right to possession this is otherwise known as *IUS POSSIDENDI*.

The continental jurists have worked out some theories on which we can hang one way or the other many of the decisions of the English Courts that involving the concept of possession. One of this jurists is Savigny according to him "we acquire possession bodily not by the mind alone, not by mind alone". Accordingly, for there to be possession, there must be physical control and mind control. The Roman jurist Paulus also prescribed two elements. The first is *Animus Domini* .i.e. intention to be the owner. If there is *animus domini*, there is possession; this is what Savigny has elaborated upon. The second element is what Paulus called *Corpus Possidendi* .i.e. the body control. However, we are of the strong view that the two elements are not always present. A man may be in physical control of a house and yet may not be aware of some items probably put there or forgotten there before he came into possession he is nevertheless in possession.

Inhering is of the view that a possessor's physical relation to the thing is what matters. He disagrees with the idea that the elements of *Animus* and *corpus* must be present. According to him, a man may have possession whether he is aware of the subject's existence or not. What is necessary is the physical control of the *Res*. There is no need for an express intention to exclude others from the *res*. A mere intelligent consciousness of the fact suffices as *animus*. What is necessary is to stand in such

position or relationship to the thing that an average reasonable man would think that the person standing in relation to the thing is the owner. As Buckland put it, " a man possesses who is in relation to the thing ordinarily. His *animus* being merely an merely an intelligent consciousness of the fact".

By and large, it is convenient to say the English common law concept of possession traces its roots to Roman law, which distinguished between *possessio* (physical control with the intention to hold) and *dominium* (ownership).[3] Roman jurists required two elements for possession: *corpus* (physical control) and *animus possidendi* (the intention to possess as owner).[4]

This Roman inheritance was shaped by Enlightenment individualism. John Locke's labour theory of property posited that individuals acquire ownership by mixing their labour with unowned resources. Within this framework, possession became the visible evidence of labour and thus the foundation of legitimate title. The common law's emphasis on individual alienability the right to sell, mortgage, or transfer property, further reinforced the separation of possession (temporary) from ownership (permanent). A commercial society required clear rules for determining who could transfer what rights, and the distinction between possession and ownership provided that clarity.

C. Philosophical Foundations and Basis of Yoruba Customary Law

Yoruba legal thought rests on a fundamentally different philosophical foundation. In Yoruba ontology, land (*ilẹ*) is not a commodity but a sacred trust. It belongs to the ancestors (*awỌnbabanla*) who first settled it, the living who occupy it, and the unborn who will inherit it.[6] The Yoruba proverb "*Ilẹni àbùkíató soomolórúkọ*" (It is the land that is named before the child is named) reflects this primacy: identity and belonging derive from ancestral land.[7]

Within this framework, the living are custodians, not absolute owners. The family head (*Oloriebi*) holds land in trust for the lineage (*idile*). This custodial role precludes the concept of absolute individual ownership. Possession and ownership are fused because the person who effectively occupies and uses the land is the one fulfilling the custodial responsibility. To separate possession from ownership would be to create a distinction without meaning in a system where rights are defined by community recognition and ancestral continuity rather than by abstract legal categories.

3. Possession in English Common Law

A. Roman Foundations and Reception

The English common law absorbed the Roman bipartite structure through the works of commentators such as Bracton and Blackstone. Bracton, writing in the thirteenth century, defined possession as "*corporalis et naturalis*"--the physical holding of a thing with the intention to hold it as one's own[8]. Blackstone, in his *Commentaries*, maintained this distinction, observing that possession is the "*visible and external*" manifestation of ownership.[9]

B. Possession as Fact and the Relativity of Title

Salmond's theory distinguished between possession in fact and possession in law. He denied that there are two different conceptions of possession. According to him, possession in fact is the only possession in truth and fact. Possession in law is fictitious, he distinguished between possession of physical object which he tagged or christened as corporeal possession and possession of rights which called incorporeal possession. For corporeal possession there must be corpus possession and *animus possidendi*.

In English law, possession is fundamentally a fact rather than a right. However, it is a fact that generates legal consequences. The most significant of these is the principle of the *relativity of title*: a person in possession has a title good against all except the true owner. This principle was famously articulated in *Asher v Whitlock*, [10] where Cockburn CJ stated:

"If the person who has the possession has not the right, every other person who has not the right to turn him out is a wrongdoer; and as against a wrongdoer, possession gives a title. [11]

Thus, a possessor can maintain an action in ejectment against a trespasser, even though a third party with superior title could subsequently evict the possessor. This creates a hierarchical structure of possessory rights, where each successive possessor holds a title relative to those below but subordinate to those above. The Nigerian Supreme Court has affirmed this principle as part of the received English law applicable in Nigeria. In *Odigie v Ogunbor* [12], the court restated that "possession is a good title against all the world except the true owner."

C. Adverse Possession

The doctrine of *adverse possession* represents the ultimate fusion of possession and ownership, albeit only after a statutory period. Under the Limitation Act 1980, a person in adverse possession of land for twelve years acquires title against the paper owner. [13] The rationale is pragmatic: to prevent stale claims and ensure land is put to productive use. [14]

English courts have consistently held that adverse possession requires factual possession coupled with an intention to possess (*animus possidendi*), and that possession must be open, continuous, and without the owner's consent. [15] In *JAPye (Oxford) Ltd v Graham*, [16] the House of Lords reaffirmed that the doctrine operates to extinguish the paper owner's title after the limitation period, not merely to bar the remedy.

D. Distinction from Ownership

Despite these doctrines, English law maintains a clear conceptual distinction between possession and ownership. Ownership is the *jus disponendi* the right to alienate as well as the right to recover possession from any possessor without title. [17] This distinction enables complex property arrangements such as leases, where a tenant has possession while the landlord retains ownership, and trusts, where legal title is separated from beneficial enjoyment.

4. Possession in Yoruba Customary Law

A. Conceptual Foundations: *Ní* and *Olóhun*

Traditional Yoruba legal thought does not recognize the Roman law distinction between *possessio* and *dominium*. The primary term for both possession and ownership isn't "to have" or "to hold." A person whose land is recognized by the community as having effective control, and this control is itself the principal evidence of entitlement.

The term *olóhun* (owner/proprietor) derives from *olú* (lord or master) and *ohun* (thing). [18] However, the *olóhun* in customary law is rarely an individual with absolute rights. Rather, ownership is vested in the lineage (*idile*) or community, with the family head (*Oloriebi*) acting as steward or custodian. [19]

This conception was affirmed by the Nigerian Supreme Court in *Lewis v Bankole*, [20] where the court recognized that under Yoruba customary law, family land is held by the family head in trust for all members. Possession by individual family members is not adverse to the family's ownership; rather, it is an incident of their membership.

B. Effective Occupation as Title: *Ìgbàlẹ́*

Under Yoruba customary law, the strongest evidence of title is effective and continuous occupation. The concept of *ìgbàlẹ́* (settlement or establishment) denotes the act of settling on land, clearing it, farming it, and perhaps building upon it. Such acts constitute both possession and ownership.

In *Amakorv Obiefuna*, [21] the Supreme Court articulated the principles governing proof of title under customary law. The court held that a claimant could establish title through:

"traditional history, acts of ownership and possession extending over a sufficient length of time, numerous and positive enough to warrant the inference that the land is that of the claimant. [22]

Significantly, the court treated acts of possession as direct evidence of ownership, not merely as evidence of a possessory right subordinate to some ultimate title. This fusion of possession and ownership is a defining feature of Yoruba customary jurisprudence.

More recently, in *Ukpabiv Iwu*, [23] the Supreme Court reaffirmed this principle, holding that where a claimant has been in exclusive, continuous, and undisturbed possession of land for a long period, such possession is presumptive evidence of ownership. The court emphasized that under customary law, possession is not merely a factual state but the root of title itself.

C. The Communal Dimension: Family Land and Stewardship

The communal nature of landholding under Yoruba customary law further complicates any attempt to separate possession from ownership. Family land (*ilé idílé*) is owned collectively by the lineage. Individual members have rights of use and occupation, but they cannot alienate the land without the consent of the family. [24]

In *Ogunleyev Ogunleye*, [25] the Court of Appeal affirmed that possession by a family member is not adverse to the family. The court stated:

"A member of a family in possession of family land cannot acquire title by adverse possession against the family because

his possession is deemed to be the possession of the family." [26]

This principle was further elaborated in *AdisavOyinwola*, [27] where the Supreme Court held that a family member in exclusive possession of family land for decades does not thereby acquire individual title. The court reasoned that the family member's possession is permissive, deriving from his status as a member of the lineage, and cannot be converted into adverse possession without clear acts of repudiation communicated to the family.

D. Proof of Possession: Oral Tradition and Acts of Occupation

Because Yoruba customary law is largely unwritten, proof of possession and title relies on oral tradition and physical acts. The courts have recognized several categories of evidence:

Traditional history of first settlement

Acts of occupation: farming, building, and burial of ancestors

Receipt of homage from other occupants

Long and unchallenged possession

In *IdundunvOkumagba*, [28] the Supreme Court held that in claims to land under customary law, traditional history is admissible and may be sufficient to establish title, provided it is credible and consistent. The court emphasized that such history is often the only available evidence in customary land disputes.

The burial of ancestors on land is particularly significant. In Yoruba culture, land where ancestors are buried is regarded as family land *par excellence*. [29] The presence of ancestral graves is powerful evidence of long-standing family possession and ownership. In *OwhondavEkpechi*, [30] the Supreme Court affirmed that evidence of ancestral burial on disputed land is compelling proof of family ownership, as it demonstrates that the family has exercised possessory and proprietary rights over generations.

E. Recent Judicial Affirmations

The principles articulated in the foundational cases have been consistently reaffirmed by Nigerian courts in recent decades. In *UdevNwara*, [31] the Supreme Court held that where a party relies on traditional history to establish title, the history must be cogent, credible, and consistent. The court further held that acts of possession such as farming, building, and collecting rents corroborate traditional history and may independently ground a claim of ownership.

In *OkonkwovOkonkwo*, [32] the Court of Appeal addressed the relationship between possession and family ownership, holding that a member of a family who has been in exclusive possession of family land for a long period may, in certain circumstances, be deemed to have acquired a possessory right that the court will protect against third parties, though not against the family itself. This decision illustrates the nuanced approach Nigerian courts take in reconciling individual possessory rights with communal ownership structures.

5. The Impact of the Land Use Act 1978

No analysis of possession in Nigerian land law would be complete without addressing the Land Use Act 1978 (Cap L5, Laws of the Federation of Nigeria, 2004). The Act, promulgated by military decree, radically altered the legal framework for landholding in Nigeria by vesting all land in each state in the Governor, who holds it in trust for the people. [33]

A. Statutory Overlay on Customary Landholding

Section 1 of the Act provides that all land in each state is vested in the Governor. However, section 36 recognizes customary rights of occupancy, defined as "the right of a person or community lawfully using or occupying land in accordance with customary law." [34]

The effect of the Act has been the subject of extensive judicial interpretation. In *OgunleyevAdesanya*, [35] the Supreme Court held that the Land Use Act did not abolish customary law rights but rather superimposed a statutory framework upon them. The court stated:

"The Land Use Act did not destroy the customary law concept of family land. What it did was to vest the radical title in the Governor while preserving the customary right of occupancy in the family." [36]

B. Possession and the Customary Right of Occupancy

Under the Act, a customary right of occupancy may be established by proof of long and undisturbed possession. Section 36(2) provides that a person shall be deemed to be in lawful occupation of land if he has been in occupation for a continuous period of not less than twelve years. This provision has been interpreted by the courts as incorporating the customary law principle that long possession confers title.

In *OkonkwovOkonkwo*, [37] the Court of Appeal held that a person in possession of land for over twelve years under the Land Use Act acquires a customary right of occupancy that the court will protect. The court emphasized that the Act did not displace the customary law principle that possession is the root of title; rather, it gave statutory recognition to that principle.

C. Judicial Reconciliation of Customary and Statutory Frameworks

Nigerian courts have developed a body of jurisprudence reconciling customary law concepts of possession with the statutory framework of the Land Use Act. In *OjomuvAjao*, [38] the Court of Appeal held that while customary law governs family land, the common law concept of possession may be applied to determine the rights of individual family members who have been in exclusive occupation for a long period.

More recently, in *OkonkwovOkonkwo*, [39] the Supreme Court held that the Land Use Act does not preclude a claimant from relying on customary law to establish title. The court reaffirmed that traditional history and acts of possession remain valid means of proving ownership, provided such ownership is recognized as a customary right of occupancy under the Act.

6. Comparative Analysis: A Thematic Approach

A. Conceptual Architecture: Fused vs. Bifurcated Conceptions

The most fundamental difference between the two systems lies in their conceptual architecture. English law adopts a bifurcated approach: possession is a fact that generates rights, while ownership is a distinct and superior proprietary interest. This separation enables sophisticated property arrangements but also creates complexity, as seen in the doctrine of relativity of title.

Yoruba customary law adopts a fused approach: effective occupation is not merely evidence of a right but is itself constitutive of ownership. The community recognizes the person whom the land who occupies and uses it as its *solóhun*. This fusion reflects the communal and functional orientation of Yoruba landholding: land exists to be used, and the user is the owner.

B. Temporal Dimension: Adverse Possession and Long Occupation as Substantive Title

Both systems recognize that time can transform possessory rights into full ownership, but the mechanisms differ. In English law, adverse possession operates as a limitation period: after twelve years, the paper owner's right of action is barred, and the adverse possessor acquires title.^[40] The underlying rationale is procedural and pragmatic: the law does not assist those who sleep on their rights.

In Yoruba customary law, long possession is not a limitation doctrine but a substantive principle: occupation over a sufficient period, especially when combined with acts of development and ancestral burial, constitutes ownership *abinitio*. The Supreme Court in *Akinyemiv Odugbesan*^[41] affirmed that a person who has been in undisturbed possession of land for generations cannot be dispossessed by someone claiming through traditional history alone.

C. Evidentiary Framework: Documentary and Oral/Physical Evidence

The evidentiary frameworks of the two systems reflect their underlying concepts. English law prioritizes documentary evidence: title deeds, land registry entries, and written contracts. Possession may supplement documentary title but rarely substitutes for it.

Yoruba customary law, by contrast, treats physical acts of possession as primary evidence. Oral testimony, traditional history, and physical markers (such as farms, buildings, and graves) are the principal means of proving entitlement. The courts have recognised that requiring documentary proof in customary land cases would effectively deny justice.^[42]

D. Alienability and Stewardship: Individual vs. Communal Rights

English law conceives of possession and ownership as individual rights. A single person can possess land, and a single person (or corporation) can own it. This individualistic orientation enables clear demarcation of rights and facilitates commercial transactions.

Yoruba customary law conceives of possession and ownership as inherently communal. The individual's possession is derivative of lineage membership. This orientation ensures

continuity and prevents alienation of family heritage, but it can create uncertainty when families disperse or when members seek to assert individual rights.

7. Summary, Conclusion and Implications

The comparative analysis reveals that the divergent conceptions of possession in English common law and Yoruba customary law are not merely technical differences but reflect deeper philosophical commitments. English law, rooted in Roman jurisprudence and Enlightenment individualism, treats possession as a factual precursor to ownership, enabling complex commercial transactions but creating conceptual complexity. Yoruba customary law, rooted in communal ontology and ancestral continuity, fuses possession with ownership, treating effective occupation as the primary evidence of entitlement.

The Nigerian courts, operating within a hybrid legal system, have developed a jurisprudence that attempts to synthesize these traditions. The Land Use Act 1978 added another layer of complexity, creating a statutory framework that coexists with customary law. The courts have generally sought to preserve customary law concepts while accommodating the statutory requirements of the Act.

This paper has demonstrated that the concept of possession differs fundamentally between English common law and Yoruba customary law. English law maintains a careful distinction between possession as fact and ownership as right, creating a hierarchical structure of relative titles. Yoruba customary law fuses possession and ownership, treating effective occupation as the primary evidence of entitlement within a communal framework.

The philosophical underpinnings of these divergent conceptions are rooted in distinct legal traditions: Roman individualism in the case of English law, and communal custodianship in the case of Yoruba law. These philosophical differences continue to influence contemporary jurisprudence, as Nigerian courts navigate between the two systems.

The Land Use Act 1978, while radically altering the statutory framework for landholding, did not abolish customary law concepts of possession. The courts have interpreted the Act as preserving customary rights of occupancy, and have continued to apply customary law principles regarding proof of possession and title.

The implications of this study extend beyond Nigeria. For scholars of comparative law and legal pluralism, the Nigerian experience illustrates the challenges and possibilities of maintaining customary legal traditions within a post-colonial hybrid system. For practitioners, understanding the conceptual differences between possession in customary and common law is essential for effective advocacy in land disputes.

The forthcoming paper on ownership will extend this analysis, examining how the concept of ownership operates within both systems and how the Nigerian courts have developed principles to reconcile competing conceptions. Together, these papers aim to provide a comprehensive

comparative analysis of property concepts in Nigeria's dual legal system.

TableGlossary of Yoruba Terms

Term	Meaning
Àdúgbo	Neighbourhood; quarter; territorial unit
Idile	Lineage; extended family
Ìgbàlé	Settlement; establishment; effective occupation
Iléídílé	Family land; lineage land
Ní	To have; to hold; both possession and ownership
Oba	King; traditional ruler
Ofin	Law; custom
Oloriebi	Family head
Olóhun	Owner; proprietor

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