A LEGAL REAPPRAISAL OF CUSTOMARY ADJUDICATORY SYSTEM IN NIGERIA*

INTRODUCTION

Customary law is uniquely one of the significant sources of the Nigerian legal system. It is said to be unwritten as opposed to English law which is written. It has been judicially described as:

> *The organic or living law in Nigeria regulating their lives and transaction. It is organic in that it is non-static It is regulatory in that it controls the Lives and transaction of the community subject to it. It is said that custom is a mirror of the Culture of the people. I would say customary law goes further to impact justice to lives of those subject to it.* [i]

The unwritten and unsystematic nature is aided by the misconception that Africa had no laws. The present essay attempts to debunk the ruse inherent in such assertion and posits that not only did Africa have laws; there existed acclaimed agencies for the maintenance of law and order in the respective communities together with virile machinery for dispute resolution. Trial under the native system is not a contest where the lucky winner takes all as is done under the adversary system of trial notable in modern States rather; it is designed towards the reconciliation of the parties. In this respect there is always a declaration that no one is entirely guilty or innocent.

The machinery of justice in Southern Nigeria is our primary focal point. In the light of the above, the paper shall examine the principal methods employed for the identification of an unknown criminal e.g. Oath-taking, Divination and trial by ordeal.

The paper particularly notes the contemporary recognition given to oath-taking by the courts in Nigeria and applauds the abolition of trial by ordeal. However against the odds of the persistent practise of trial by ordeal, it recommends more legislative activism to curb the excesses of the practice at the grassroots legal system. Natives have implicit confidence in the traditional method of adjudication especially with regards to oath taking and would not hesitate to swear their innocence before the 'Juju' or shrine of their locality. The growing need for the integration and consolidation of this system of justice is considered.

The paper therefore advocates the incorporation of the traditional method of the administration of oath under customary law into the main body of law in Nigeria especially in matters between natives who are subject to customary law..

BRIEF HISTORY OF CUSTOMARY ADJUDICATORY SYSTEM

The existence of native Law predates the ascendancy of colonial power in the colony of Lagos. Existing literatures on adjudication copiously written with native flavour are fairly unanimous with the contention that at the pre-colonial times a traditional mode of dispute resolution existed in plural forms; representing the various ethnic formations and rules in Africa. For instance, among the Ibo's, the role of Law enforcement was the primary duty of age grades, Masquerades and the Chief Priest. The enforcement exercise manifested in various forms namely, by parading, shaming and humiliating the offenders, in fact in a criminal offence like stealing "the offender was tied up for days

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[i] Oyewumi v Ogunesan.(1990)3 NWLR 182 at p. 20

without food, if caught red handed, he is carried about in the village with stolen property conspicuously exhibited while passers by ridicule and spite on him". [1]

[1] See Uchendu Victor C**,** ***The Igbo South East of Nigeria*** New York, Holt, Rinehart & Winston. (1965). pp 42-43. Also see Basden G. T**.** ***Among the Ibos of Nigeria***.London; Frank Cass & Co. Ltd. (1966) pp266-272.

THE IGBOS AND YORUBAS

There are various levels of offences in the Igbo land ranging from "Mmehe" (negligence) through "Alu" (Crime) to "Nso ani" (abomination). In the traditional Ibo enclave only two worlds of offences exist namely, those referred to as "Nso" and those which are not. In the words of Green, "Legal rules might be called ordinary human laws and those where breach is held to be not only illegal are of two main classes and are recognised as such. There are those which but also offence against a supernatural power particularly "Ala" (the land)… of the perpetration of an offence it would be said "Omeruru-ala" (he polluted the land). Such offences are usually said to be Nso (taboo) and are distinguished from merely natural offences[2]. The idea of fair hearing or natural justice is still practised. Generally an offender is punished only after hearing has taken place and the nature of every gathering is determined by the case at hand. Minor disputes are handled by the family heads and members whereas the major disputes between families or villages are handled jointly by elders, title men and chief priests of Ala and other reputable oracles. The reason for the above disposition stems from the Ibo cosmological optimism. That is the assertion that the physical word is intrinsic with ontological good. According to Okafor the Ibo song portrays the affirmation as follow:

"Oyooyo Uwa di ma
Oyooyo Uwa di ma
Chukwu Seare aka
Uwa agu.

Translated as:

"*Beautiful the world extends*
Beautiful the world extends

If God withdraw his hands instantly
The world must end[3]".

The cosmos is an harbinger of intrinsic good upon which every act of negation is the negation of the cosmic order. In fact, similar expositions are grounded in different cultural trappings of the Nigerian polity e.g. among the Yorubas as recounted by a renown legal Scholar "Our fathers say in Oturun meji
Ologbon won O ta Koko omi s eti aso
Omoran kan O Mo ye ee pee le
Arinaka ko de bi on a gbe pekun
A difa f alabaun Ajapa
N' ljo to n K ogbon r ori ope ree ko si"[3a]
Translated:
The wise have not succeeded in tying
Water into a knot.
The learned do not know the number of sand of the earth.
No man has ever worked to the end of the road.
If a divination was performed by Mr. Tortoise
On the day he decided to gather all his wisdom and
hide it at the top of the palm tree."

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2 See Green M.M. ***Ibo Village Affair***, New York Frederick A. Praeger (1964) p. 99

3 See Okafor F. U. ***Igbo Philosophy of law*** (1992) Fourth Dimension p. 13. Also see Nanabuenyi Ugonna. **Ala and Discipline in Ibo Society**. Proceeding of the Fourth Annual Congress of the Nigerian Folklore Society. University of Ife, (1984) pp. 271-295. Nwala T.U. ***Igbo Philosophy***. Lantern Books. Lagos pp 76 -196.

3a Adigun L, *Equity in Nigerian customary law Towards Restatement of Nigerian customary laws.* Fed. Ministry of Justice Ed. Lagos (1991) pp 8-22,

In summary no one knows it all. Having explicated the fundamental application of equitable rules in relation to adjudication in pre-historical and historical Yoruba society. It remains to expatiate on the appeal system among the Ibo's.

A SYSTEM OF TRIAL AND APPEAL

The organisation of appeal is a reflection of "Ohacracy[4]. The aggrieved person takes an appeal to the head of the house of the offender or as the case maybe or a body of native arbitrators. If he is still dissatisfied he can continue the appeal to a second degree appeal group Amala. Opportunity still exists on constituted bodies having coordinate foundations as the "Age grades" the Dibie fraternity-(Divinity confraternity), title making societies, the Okonko or Manwu (Masquerade) society etc. When all these quasi judicial methods have failed to secure redress to the aggrieved person, he can then appeal to the Spirit world i.e the supernatural tribunal. This is the last "Court of Appeal". Justice is administered by swearing to the oracle. If after the passage of time the oath taker survives and is not, attacked by a terminal illness or death, he generally celebrates his innocence and victory. The natives have absolute faith in this method, and have implicit confidence on the justice more than the one given by the highest court of the land "the Supreme Court"

A Nigerian writer commenting on African Morality states as follows that:

> *"Every where African Morality is hinged on many sanctions. But the most fundamental sanction is the fact that Gods all seeing eyes sees the total area of human behaviour and personal relationships. God is spoken of as having eyes all over like a sieve*[5] .

In great support of the complex surrender to the will of Chuku (God) as a cardinal principle of Igbo justice Njaka commented that:

> *"Laws and order are maintained because the ancestors so desire and ala so command.*
> *And the ancestors so desire law and order because Chuku must approve of them*[6]

A typical illustration of a trial (civil or criminal) is the one portrayed in the legendry play by Chinua Achebe[6a]. It was matrimonial dispute that was reported to the elders of the community who summoned the parties concerned and after hearing evidence ordered the woman to return to the husband, on the condition that he must have sent palm wine to his in-laws.

It is important to note that the Buniforo people of the Bantu Kingdom of Uganda in East Africa[7], share the same culture of settlement of dispute with the reconciliation of the parties as the primary focal concern.

The Yoruba's like every other African society thrives along the idea of the African jurisprudence that in a dispute, no party is totally at fault or completely innocent or blameless.

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4 A neological socio- political expression coined by the combination of Oha (meaning general assembly) and the prefix "cracy" . This is the pet word of Njake E.N**.** ***Igbo Political culture***. North Western County press (1974) p. 13. "Ohacracy" is extensively employed in the treatment of Okafor's Igbo philosophy of law.

5 Adegbola E. **.** ***Reading in African Humanities, African cultural development*** ed. Onyewengi (1978) P. 252.

6 Njaka Supra

6a Achebe C. ***Things Fall Apart*** (1974) pp 84,165. See Nnam N.,***Anglo-American and Nigerian Jurisprudence*** (1989) p.80

7 See J.H. M. Beeltic, '*Informal Judicial activities among the Buyoros* in Journal of African Administration vol. 4 pp. 188 – 195.

In pursuit of this rule, the Yorubas place a high value on reconciliation and towards this, everything possible is done to make sure that social relationship is not strained. At the end justice for them is not the winner takes all type. In the traditional adjudicatory process, it is in the search for truth that leads to adherence to the equitable principles of settlement so that at the end all parties would have been adequately pacified that no grumbling is left between the parties. The Yorubas place much emphasis on truth which for them is a mark of justice not only for men but also for God, the Almighty. The following verse was articulated by a writer[8] to buttress the belief of the Yorubas:

Orunmila mi ki looto
Ifa mo ni ki looto
Orunmila ni looto I'
Oba Orisa onisa oko fi nto ile aye
Ogbon ti olodumare n lo
Ogbon nla
Ogbon rabata
Orunmila ni oota ni iwa olodumare
Ooto ni Iduro
Iro lo subu sun sile
Ifa loofo Iro ni baje
Beni oroooto ki baje
Agbara nla agbara ajulo
Difa fun aye
Aye omo E le funre
Nwon ni ki aye o looto
Ko fi ooto inu han omo re
Nitori kiaye o loo ni gbede
Nitori ki aye o ma b
Translated as:
Orunmila asked "what is truth"
Ifa tell me "what is truth"?
Orunmila answered, Truth is the instrument of God in the high heaven,
With which He administers the earth.
The wisdom of olodumare
Great wisdom.
Truth is the character of olodunmare.
It is the truth that stands,
Untruth falls down.
Ifa said in truth lies decay and become corrupt.
But, the truth never decays
Great power the superior strength.
Performed Ifa divination for the earth,
The earth, the child of Elefure,
The earth was advised to cherish the truth
To show his children the path of truth
So that life may go on without rancour
so that life may be at peace[9].

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[8] Olayide Adigun . ***The Equity in Nigerian Customary Law***. Towards a Restatement of Nigerian Customary Laws, Federal Ministry of justice ed. Lagos, (1990) p. 12.

[9] See Olayide Adigun opcit p. 14

From the above passage or verse and its translation the Yoruba notion of truth as a means of harmonious relationship and co-existence hinged on justice cannot be over emphasized or over looked.

However, it is imperative to mention here that, when it has been found that one has committed an offence, as deterrence to others, the Yorubas have a number of ways by which such an offender is dealt with. e.g The offence of adultery in the Yoruba land, has two forms of punishment. The first form is to decapitate the offender, or secondly to use a charm called "Magun". This is a charm that is normally applied to an adulterous woman such that when she has sexual intercourse with an adulterous man, the later would fall off and die.[10] It must be noted that this practice even though of ancient vintage persists till the present time.

All matters related to the disruption of social equilibrium especially in relation to crimes must be reported to the king, chief or sub-chief (as the case may be) in the locality where the crime was committed. In civil matters, the injured party will make a complaint to a neutral elder where both parties to the dispute belong to the same family lineage. The elder will consider if the matter is of "sufficient merit to warrant his intercession"[10a.] .He will thereafter proceed to summon the parties and adjudicate accordingly. In land maters, intra-family disputes, inter-village conflicts or conflicts between the chiefs the matter goes directly to the king's court – the final arbiter. The Ogboni society is directly concerned with the administration of a kind of "Star Chamber" justice in certain cadre of political offences.

A critical assessment deducible from the above method frustrate a utilitarian purpose and synchronises with the ultimate idea of fostering family harmony through the maintenance of peace and harmony among contending parties. Again, it is the import of law in African traditional judicial system to promote reconciliation which has the added advantage of promoting ever-lasting relationships based on love amongst individuals, groups and the whole society at large.

Needles to say that this method settles disputes and does not take pride in the declaration of the "guilty" or "innocence" as is done under the principal modes of disputation notable in the modern State. No one is absolutely guilty or innocent. The adversary method of dispute resolution affectionately lacks in this manner. Trials under this mode of adjudication are contests and operate on the same pedestal as the economic theories of demand and supply where the lucky winner takes all.

There were institutions exercising Judicial powers in the respective societies even though the laws were unwritten. The laws administered by these institutions were formulated by the political authorities of the respective communities which were consistent with their system of government. It is therefore not correct that prior to the arrival of the colonial powers the people in present day Nigeria were without law and order due largely to the absence of writing[11].

Distinction between Civil and Criminal Wrongs

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[10] D.Y.Oyeneye and Shoremi**,** ***Culture and Society in Nigerian Life and Culture*** (1984). p10

[10a] Elias T.O. ***The Nature of African Customary law***. Manchester Press,Manchester.(1972) P.217-271.

[11] The alien anthropologist and jurists were perhaps justified, for their perception was further complicated by the nature of native law which in its undiluted form was the exclusive preserve of the native remembrances (Sages) or those tutored on the untaught legacies of native jurisprudence, which was unwritten. See Okogeri G.O. ***"Ezi Okwu Bu Ndu" in Igbo customary law. Ezi Okwu Bu Ndu: Truth is Life. Interpretative Essays***, Edited Otakpor N. 'Uniben Studies in Philosophy vol. 1(2006) pp. 172-179

There were also clear distinctions under the customary adjudicatory system between civil wrongs and criminal offence as it is under the received English Laws[12]. The only difference lies on the fact that while the adjudicatory body is sitting to hear a civil case, it can order a criminal sanction if the act done is considered despicable or inimical to general members of the public, so that the offender may be deterred from committing similar offence another time. E.g. if a man destroys the farm crops of another, the victim will report him to the recognised authority mainly the Chief or the Elders of the area who will summon the offender and at the meeting, evidence will be led and at the end if the offender is found liable, he will be asked to make restitutions of the claim, and at the same time asked to pay a fine which in most cases will be perhaps a goat or sheep to the community. Because the act of destroying farm products is considered serious in the customary African Society, this is carried out so that no other member of the Society will commit such act again, a sort of deterrence! This practise is common amongst the Edos, Urhobo, Yorubas, Igbos etc.

The method of initiating a criminal trial was different from the civil cases. In the traditional customary system every member of the society is required to act as the police and it was therefore incumbent on any one who sees the commission of a crime properly so-called to report to the Chiefs, Kings (in chiefly societies) or Elders of the Community (in acephalous societies), who in turn arrange for the trial of the offender. Refusal to report the commission of a crime is also a crime in the traditional system.

The dysfunctions were more noticed in chiefly societies which had established judicial and Legislative institutions and law enforcement bodies. These were present amongst the Yorubas, Edos, Nupes and some other communities which had the tradition of chieftaincy institutions. But in acephalous communities where established formal institutions were absent, there were also laws made through adhoc institutions such as age grades exercising legislative functions. The enforcement of the laws was also done on adhoc bases which were usually peripatetic. The government was sometimes run by the old or age groups. The Ibos, Tiv etc. are in this group.

Hon Justice A.G. Karibi Whyte stated with respect to the difference between chiefly and non chiefly societies and the type of sanctions imposed for a breach as follows: “It follows therefore from the above analysis of the structure of our indigenous societies that the content of the conduct to be prohibited and the sanction attached to it will be reflected in the ability of the society to protect itself and its members from the aberrant and delinquent members of its group. Hence, it may well be that what constituted an offence in a Chiefly society may not constitute an offence in an acephalous society. It may in fact be that even where both societies recognise the conduct as an offence the sanctions may differ in kind, or severity”[13].

A notable writer in support of the above affirmed:

“In indigenous African societies, “the decision” to apply a penal sanction may rest with the people in general, with the elders, as in a gerontocracy with a limited number of judges or leaders, or with a single Chief or King from the above analysis, it is

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[12] Elias T.O. ***The Nature of African Law.*** Manchester University Press (1972) P.110. See Malinowski, ***Crime and Custom in Savage Society***.

[13] Karibi Whyte A G ***Criminal Policy, Tradition and Modern Trends***. Nigerian Law Pub. Ltd. Lagos (1988) p27 .

not correct that the adjudicatory system was in a state of flux as stated by Bohannon"[14] when he asserted the system was clumsy.

The most striking feature of the customary adjudicatory system is the speedy dispensation of justice. Hearing was done openly with all the parties and the witnesses hearing each other unlike the Western system of ordering witnesses out of court and out of hearing. Hear say evidence was allowed. Proceedings were conducted and judgement given instantly unlike the Western system which is fraught with the possibilities of endless adjournments and delays. The native judges apply the principles of restitution. This is done to make the victim (in most cases either party) not to lose. The offender is asked to pay the victim for the loss he has suffered whether in cash or kind, besides the penal sanction he or she may suffer for the offence he has committed. The main purpose was for deterrence and to foster the maintenance of social equilibrium. There was also a distinction between an intentional act and accidental act and each carries different sanctions. For example if a man kills another accidentally as when they go for hunting without the intention to kill, he will not be killed but will be made to be responsible for the deceased family. But where he kills intentionally, he will be sentenced to death by hanging instantly.

In all these, proceedings are taken and evidence given and decisions made. This will be easy to do when there is clear evidence to base the decision on or where an offender is caught in the act.

It is important to know that where an offender is a minor, he will be given a warning and sometimes punished by canning. Similarly, when the offender is insane, he will not be liable but his family may be made to pay for his action. This is not similar or synonymous to the principle of vicarious liability under the law of tort. It is perhaps a deterrent to compel the family to keep him in confinement. If the offence committed by the accused is so grave as to attract a crowd or the injured party into retaliation, the offender may escape by running into a sanctuary "such as a sacred grove or king's palace, chiefs or councillors residence, pending the case against him"[15]

The primary aim is the protection of the entire populace from the persistent act of retaliation or vendetta. As earlier stated, there was no police as done in modern state. The issue of crime investigation became necessary when an offender is not known. The methods adopted in finding out the person who commits an offence include Divination, Oath-taking and Trial by ordeal.

Divination

In many African societies, a victim of an offence for whom the wrong doer is not known call in the diviner to use his mystical wisdom to find out the person who commits an offence. Mediums or diviners are professional medicine men or native doctors who mediate between the known and the unknown and conjure the spirit of the ancestors in the other world. They had the power to speak to and relay messages from the spirits and ancestors in the world beyond. In each of the society the ontological and cosmological perception has an integral connection with the born and unborn, the spirit of dead ancestors, super natural beings and celestial beings as
members of the community. Because of this belief the diviner is highly respected.

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[14] Fortes &Evans Pritchards, ***African Political System*** (1940) p. xviii . See generally Keay and Richardson, ***The Native and Customary Courts of Nigeria*** (1966) p. 30. Sir Henry Maine, ***Ancient Law*** esp. P 174. Malinowski, ***Crime and Custom in Savage Society***.

[15] Elias.T.O. Op. cit. p. 21

Professor Mbiti[16] comments on the use of diviner as follows:

… "through a medium who gets in touch with the spirit world, a person may be directed to find a lost article or to know who stole his goods".

In a similar position Professor Bascom[17] observes that, "a factor probably operative in many other systems of divination, but which is of special importance for the Yoruba Ifa, is that in spite of the numerous occasions when diviners are consulted obvious decisions are made by individuals themselves".

Because of the peoples absolute believe in the existence of the ancestors, gods etc., and their power to punish or even kill the offender, out of fear of sanction, some unknown criminals will confess, before the consultation of the diviner or sometimes at the venue. Thereby giving the impression that the oracle has exposed the offender.

Divination is practised in almost all African societies but it is most popular amongst the Yorubas, Ibos, Edos and Urhobos of Nigeria. There has been no scientific or empirical proof of this method of crime detection; paradoxically the diviner has never claimed to be scientific but spiritual.

Oath-Taking

Oath-taking is a common method of dispute resolution under the African adjudicatory system. This procedure was the last resort when all other forms of dispute resolution have failed. It is used by persons who are bound by their custom and tradition from time immemorial. It is administered by the Chief Priest of the community in the presence of their Elders where the parties concerned will be asked to take the oath either at the shrine of their deity or any other prescribed public place like the market place. The parties to the dispute will take a piece of Kola nut or any other thing that may be prescribed. Sometimes a condition will be attached to the oath -taking, for example that any of the parties who dies within a specified period will be deemed to have lied or that if the person who took the oath and survived after one year will be the owner of the property in dispute. Among the Esan tribes in Edo State if there is a dispute as to the ownership of a cash crop, the parties will be asked to dig the root of the crop and any of them who chew the root and swallow the water will take the crop. In most cases a person who knows that he is lying will decline to swear the oath because sanction is between him and the spiritual forces.

It is important to state that this method of oath-taking was often used both at arbitration panel or trial of criminal matters under the customary adjudicatory system. The Nigerian courts have reportedly accepted that decisions arrived at during customary arbitration decided by means of oath-taking is legal and binding on the parties and none of the parties concerned will be allowed to resile from the decision.

In the case of **Onwusike v Onwusike[18].** Betuel P.J. held as follows: "this decision given by the elders, authorised by custom to settle such disputes, and exercising their customary functions, as a result of the submission of the parties to their jurisdiction, unless clearly wrong in principle, is binding on them". I hold that decision of the Udiuhu- Umuegbe family meeting, Ndinhu Umegbe Alaeyi – Ogwa Mbaitoli is based

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16 Mbiti**,** ***African Religious and Philosoply***.Heineman. London. (1969) p 172.See generally Diamond A.S., **Primitive Law**. Also Morison T., ***The wachanga of Kilimanjaro***. Journal of royal African Society Vol.32 No. 127 (1933) pp 141-2.Compare common divination used in U.S.A. called "***Map dowsing***" Which usually involves the use of a pendulum to locate something hidden. See Skeptical Inquiry (2005).vol.29,No.4, P.19. Also Encyclopedia of Mystical and Paranormal Experience, New York: Harper Collins,155-157. Nickell Joe, Psychic Sleuth Without a Clue.(2004) Skeptical Inquiry Vol 28, No.3 pp.19-21et seq.

17 Bascom, Journal of Royal Anthropological Institute vol LXXI(1941) pp 43-54 Similar opinion is expressed with the same vigour by T.O. Elias Supra . See generally Emiola A,The ***Principle of African Customary Law***. Emiola Publishers, Ogbomosho (1977) pp34-45.

18 (1962) 6 ENLR. 10 at p. 14

on the ratio, law and custom prevalent in the area and is binding on the parties. It is a final and not an interlocutory decision …"

Similarly, in the case of **Chukwu obaji & 2 ors vs Nwali Nweke Okpo & ors**[19] Uche J. held that in this part of the country, the swearing on juju is very much in vogue even in these modern days among native population. This is native jurisprudence showing a belief which regulates the jural life of the people, a man staking his life to assert his right in the highest appeal to conscience. A decision of the elders embodying this is pure and simple arbitration by native customary law… the swearing on the juju to determine the ownerships of the land in dispute and the survival of the binding period of the plaintiffs' representative operate as res-judicata in favour of the plaintiffs against the defendant".

Also, in the case of **Agu vs Ikewibe**[20] Karibe Whyte held on the effect of a customary arbitration as follows: "It is well accepted that one of the many African customary modes of settling dispute is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon subsequent acceptance by both parties of the suggested award which becomes binding only after such signification of its acceptance, and from which either party is free to resile at any stage of the proceedings up to the point. This is a common method of settling disputes in all indigenous Nigeria Societies"

What is important under dispute resolution was to make sure that the parties voluntarily submit to the adjudicatory body and there was no duress of any kind. The conditions under which the arbitration body can be legal was clearly stated in the case of **Nka vs Onwu**[21] that the parties must (1) voluntarily submit to the arbitrators, (2) agreed to be bound by the decision, (3) none of them withdrew midstream and agreed with the decision when it was taken. There after none of then can resile from the decision taken and can act as res-judicata to future proceedings.

The use of oath to resolve thorny legal problems where there is paucity of other forms of proof is recognised by the courts. This is illustrated in the case of **Oparaji v Ohanu**[22] where the Supreme Court held that where parties to a dispute voluntarily submit to an arbitration according to customary law and agree expressly or by implication that the decision of the arbitration would be accepted as final and binding, it would not be open to either party to subsequently resile from the decision so pronounced. In a similar case, the Supreme Court described the forum where the oath is taken as one which by custom is invested with judicial aura.[23] The Supreme Court also in a recent decision, in the case of **Onyenge v Ebere**[24] held that oath-taking before "Ogwugwu Shrine" Okija, which is a form of native arbitration in accordance with the custom and tradition of the people is legal and binding.

There is thus unwaveringly exposed, within the purview of the array of cases considered, the truth that oath taking is a valid process under customary arbitration. Perhaps, the major difference and advantage between the use of oath in customary judicial process and oath taking under the adversary system of adjudication, is that under the customary system it operates on the same pedestal as a form of trial whereby

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19 (1978) 1 IMSLR 258

20 (1991) 3 NWLR (Pt. 180) 385 at 407

21 (1996) 40/41 L.R.C.N 1303 at 1305.

22 (1999) NWLR (pt.618) 290. See generally Narebor D, ***Customary Courts Their Relevance Today***,Benin City : Ilupeju press (1993).

23 **Uzowulu v Ezeaka** (2000) All FWLR (Pt 46) 932.

24 (2004) All FWLR (PT219) 98, See **Ohiaeri v Akubueze** (1992) 2 NWLR (PT221)1, Also Kupolati, Okija Crossroad in Legal Civilization. The Guardian, Tuesday, October 19 2004 p. 78,See **Nwede V Unenye** (1991) 1 CCALR 80**, Umeaku V Agunweje** (1991) 1CCALR 149.See however a contrary opinion in **okpuruwa V Okpokam** (!988) 4NWLR (PT. 90) 554. " I hold that there is no concept known as customary or native arbitration in our jurisprudence" per Uwaifo J.C.A. This opinion in the light of the current Supreme Court decision with due respect is without support.

an unimpeachable judgement is delivered whereas in the latter it is only a condition for giving evidence which the judge may believe or not.

Trial by Ordeal

Trial by ordeal as a judicial method for the ascertainment of the truth and discovery of an unknown criminal was very common during the pre-colonial epoch. Professor Adewoye[25] pontificates that "Ordeals were of many kinds, varying from one community to another. There was, for instance, the "Oyin Lele Egbele" ordeal among the Urhobos and Itsekiris on the Niger Delta. A fowl's feather was besmeared with some juju; if the feather quile easily passed through the tongue of a defendant or accused person that was believed to be an indication that a false charge had been laid against the person. In criminal cases among the Kalabari as among the Urhobos on the determination of witchcraft an accused person could be asked to swim across a creek full of crocodiles. He was judged innocent if he came out alive…"[26].

One can imagine an innocent person's torture at such an ordeal. The torture is akin to a ghastly histrionic experience. This to our mind is manifestly uncivilised and primitive, for it provides comparatively no objective method of testing the truth or falsity of any standard.

Trial by ordeal which method borders more on the proof of innocence or guilt than on fact finding was a universal phenomenon. Its existence is not peculiar to the continent of Africa. A renowned legal scholar provided a more holistic perspective to the matter under review when he said inter alia:

> "*All human societies have at one stage or the other of their legal development employed the ordeal for the judicial determination of the guilt*"[27]

On the contrary it is pertinent to note however, that legislative apparatus has made unlawful the practice of trial by ordeal in Nigeria. According to the Criminal Procedure Act:

> ' *The trial by ordeal which is likely to result to death or bodily injury to any party to the proceeding is unlawful*'[28]

It is important to note that, against the background of the imposed sanction, the obnoxious practice - the primitive order of ordeal still finds vivid expression among the native people in the rural areas in Nigeria. It is our view that the legislative impact is a welcome development in the Nigerian legal system. However there is an increasing

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25 Adewoye O. **B *The Judicial System In Southern Nigeria*** 1854-1954 .London, Longman (1977) P.8.

26 Ibid.

27 Elias T.O.,***Nature of African Customary Law***. Manchester, Manchester University Press (1952) p 234. See also P.A. Talbot, The Peoples of Southern Nigeria111. pp 622-3. ' For much of the middle ages, the English courts did not find facts at all rather they presided over an ordeal' per Farrar J., ***Introduction to Legal Method*** Sweet and Maxwell (1984) p. 59. For a comprehensive survey see Okogeri G. O. Adversary and Inquisitorial Systems of Trial- A Re-Appraisal Vol..8 (1997/2000). University Of Benin Law Journal. pp 1-23

28 Section 207 Criminal Procedure Act 2000. It is not clear whether the method of ordeal which is not likely to result in death or bodily harm is permissible under the law. eg Widows Ordeal.(As is applicable in many customs in Nigeria, a widow is incarcerated within specific boundaries before and during the period of burial and mourning or made to drink the water gotten from the bath of the deceased. The exercise may not result to death or bodily harm).This customary practise continues unabated and affects the socio-economic fabric of the national life of the people in Southern Nigeria. E.g. among the Edos, Ibos Yorubas etc.

need for more legislation to curb the excesses of this practice at the grassroots' legal system.

Conclusion and Suggestion

The present treatment has attempted a reappraisal of the principal methods of customary adjudication among the chiefly societies eg. The Yorubas and the non chiefly societies eg. The Igbos in Nigeria. This distinction has practical implication to customary practices in the entire Southern Nigeria.

It has also holistically surveyed the civil and criminal methods of adjudication and made a superficial distinction with the principal mode of adjudication operating in modern States, notably the adversary system of dispute resolution. It further exposes the necessary ingredients of native jurisprudence which is the search for the truth intertwined with the principle of the reconciliation of the parties. The principle under review has the added advantage of maintaining family harmony, by the wholesome declaration that no one is entirely guilty or innocent. The natives hold this view as sacrosanct.

Various methods employed for the identification of unknown criminals were laid bare such as divination, oath-taking and trial by ordeal. In the final analysis it is evident from the overall survey that judicial recognition is given to oath-taking under customary law.

Customary laws in Africa employ all or most of the methods identified for the judicial determination of the guilt. Though trial by ordeal is a criminal offence in Nigeria, its persistent practice in the grassroots legal system is a cause for great concern. A case has thus been made for legislative activism to curb the seeming excesses in our legal system.

Since oath-taking in the English courts is flaunted with impunity and reckless abandon, we recommend that natives be subjected to the various methods for the administration of oath used in their locality. This will save time and perhaps end the endless delay associated with trials in the courts. It is also capable of reducing the financial expenses incurred by litigants. Additionally truth will be easily discovered.

To achieve the onerous task of adopting the method of oath-taking according to customary law, we recommend that the extant edicts or laws be amended to accommodate the suggestion that oath-taking in accordance with native law be used in matters between natives (who subscribe to the regime of native law) in the open court without the necessity of giving evidence. The experiment should commence first with the Customary Courts (e.g. Area Customary Courts in Edo State) and subsequently the gains from the experiment should be extended to English Courts in Nigeria.