THE RELEVANCE OF CUSTOMARY CRIMINAL JUSTICE SYSTEM IN THE CRIMINAL JUSTICE ADMINISTRATION OF NIGERIA.

By

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ABSTRACT

This thesis discusses the relevance of some of the ideals of customary criminal law in the criminal justice administration of Nigeria. It highlights the shortcomings of the inherited criminal justice system and argues for search of solutions in customary law. The complex procedure and alien standards of the inherited system alienate the population and undermine their confidence in the system and its institutions. The inherited system ignores the continuity of the restorative and reparative sentiments in the people's expectation from the legal system.

The thesis argues for the incorporation of some of the substantive and procedural ideals of customary criminal law to the general framework of the criminal justice system and for community participation through community court, community policing and community correctional programmes.

DEDICATION

Dedicated to the memory of my mother, Late Mrs Rosita

Uwadinachi Akakwam who, in giving me life, surrendered her own life.

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I remain responsible for any errors or omissions contained in this work.

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INTRODUCTION

The Nigerian legal system in general and the criminal justice system in particular, has become a subject of public outcry. There is presently an unprecedented loss of confidence in the judicial system. Last year, this prompted the Federal Government to appoint a Committee[1] to probe into the remote and immediate causes of the growing contempt for the system. Because the criminal justice system impacts on the liberty and security of persons and their properties, it comes under greater attack than all other aspects of the legal system. One can confidently say that much of the loss of confidence in the judicial system springs from public discontent with the criminal justice system. The situation is assuming a crisis proportion and manifests itself in public reluctance to co-operate with the institutions of the criminal justice system particularly, the police and the courts. The police complain of reluctance or refusal of members of the public to serve as witnesses in court. Cases of people taking the law into their hands rather than reporting to the police are increasing.[2] The perceived ineffectiveness of the system has also led the people especially in the rural areas to employ various strategies such as the formation of traditional security or vigilante groups and resort to extra-legal resolution of criminal disputes.[3]

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[1]Known as "Committee on Public Confidence in the Independence and Impartiality of Courts of Justice in Nigeria"; it was inaugurated by the Attorney-General of the Federation on November 2, 1992. The Committee is headed by a retired Justice of the Supreme Court of Nigeria. See "Judicial Probe", West Africa, 6-12 Nov., 1992 at p. 1976.

[2]The beating and lynching of suspected criminals is a common phenomenon in most Nigerian cities these days For instance between 18-19 January, 1992, ten suspected robbers were lynched in the commercial town of Aba, Abia State by a mob acting as a Vigilante group; see West Africa, 3-9 Feb., 1992 at p. 209.

[3]Section 33(4) of the 1979 Constitution of Nigeria (or section 35(4) of 1989 Constitution) provides that any person charged with a criminal offence shall be tried by a court or tribunal established by law.

The problems of the criminal justice system are numerous but my concern in this thesis is to highlight those whose possible solution lies in embracing the ideals of customary criminal law. Offenders, victims and the society as a whole have their various complaints about the system. To the victims, the system is seen as primarily oriented to ensuring the protection of the accused while utterly neglecting the victims. In this way, victims see themselves as doubly victimized, first by the criminal conduct complained of and second by the legal process. Victims' anger is on the insignificant weight given to compensation and restitution by the system and the decline in opportunities for reconciliation. One becomes more sympathetic with this position when placed within the cultural context of the Nigerian people who are used to the customary law emphasis on compensation, restitution and reconciliation.

To offenders, while the system seeks to protect their liberty and ensure fairness, the cost of obtaining both can sometimes render access to justice more theoretical than real. The innocence of the offender may take so long to be determined, and in the meantime, he may be languishing in one of the despicable human cages called prisons and cells in Nigeria. The accused's financial status determines his/her treatment in the hands of the police and his access to legal representation. The Legal Aid Scheme is grossly inadequate. And for those offenders unlucky to be convicted, imprisonment is very probable and given the nature of Nigerian prisons, it is like being sent to hell.

To the society as a whole, the delay and congestion in the courts and prisons, and the very technical nature of the legal process unduly favourable to the accused, are factors which have contributed to the crime rate and general feeling of insecurity. Judicial

proceedings are out of tune with people's expectations and psychological disposition. It deprives the people the opportunity given under customary law to members of the community to contribute to the decision about the guilty party and how best to deal with him. The absence of community participation and the probable destruction of human relationships by the adversary process are felt more in the rural communities most of whose social structure and economic conditions have undergone little changes. To such areas the existing criminal justice system and its institutions are both physically and conceptually removed from them.

It is my contention in this thesis that the solutions to some of the problems of the criminal justice system may lie in the ignored customary criminal law. I argue for the articulation of a new paradigm for criminal justice along the ideals of the customary criminal justice system. Customary criminal is not identical in all parts of Nigeria, there exist differences in substantive content, details, etc. However, the basic philosophies are identical. The fundamental features of customary criminal law relevant to my discussion are largely similar in all parts of Nigeria. In particular, there are shared similarities in the process aspect of dispute settlement. To the extent that the discussion focuses on the common features of customary law, it is relevant to all parts of Nigeria. However, many of the references are to the southern parts of the country where the interplay is between the inherited system and customary law. In the northern states, the influence of Islamic law looms large and has almost obliterated non-Islamic customary law. Although the Islamic justice system shares some similarities with customary law, its main thrust is that it is accepted as ordained. Thus only cautious references are made to inputs of moslem

law. An important feature on the position in the northern states referred to in various parts of this discussion, is the reflection by their Penal Code and Criminal Procedure Code of some of the realities of the people of this part of Nigeria. Thus some moslem values and specific moslem crimes were included. Also some concessions were made in the procedural aspects taking into consideration indigenous circumstances. While these concessions did not go far, their inclusion is salutary.

Features of customary criminal law discussed here include the informality of procedure, reparation built around the practice of compensation and restitution, rehabilitation achieved by use of alternatives to imprisonment, and community participation. Worldwide, a new approach to criminal justice administration is growing and a new criminology emerging. Such ideas as informal forums for criminal dispute resolution, need for community involvement, compensation and restitution, decriminalisation, e.t.c. are acquiring new significance and attention in the developed Western nations. The interesting thing is that many of these 'new' approaches being emphasized in the developed world are similar to the ideas and practices of customary criminal law which we in Nigeria are abandoning.

The discussion in the thesis involves seeking answers to some or all of the following questions: Is the customary criminal justice system entirely objectionable? Should criminal justice in the English sense always mean justice in the indigenous sense? Has the bureaucratic, professional and technical adversarial system inherited from England fared well in the Nigerian environment? What can be done to preserve the best features of the inherited system while minimizing the defects? And how feasible is it to

incorporate aspects of the customary criminal law into the inherited system? The answers to these questions are relevant to the task of assessing the legitimacy of the criminal justice system. I argue that the question of legitimacy is important for the success of any criminal justice system. This is one advantage enjoyed by the customary criminal justice system over the inherited system. And legitimacy ultimately conduces to efficiency.

Chapter 1 gives some basic information about Nigeria and her legal system. It foreshadows the background to some of the problems of the legal system discussed in detail in later chapters. It describes Nigeria as essentially a rural society characterised by neglect of rural communities by successive governments. Lack of organised rural transportation, bad roads and absence of other forms of communication facilities hamper the effective policing of the vast rural areas in Nigeria by the modern legal system. The chapter also explains the colonial origin of the Nigerian legal system which as elaborated in later chapters accounts for most of the problems with the criminal justice system. It concludes that the Nigerian court structures, substantive criminal laws as well as rules of evidence and procedure are mere replications of those existing in England. The socio-economic marginality of the majority of the population is also identified as a factor affecting the overall penal outlook in Nigeria.

Chapter 2 reflects on the judicial process in pre-colonial Nigerian society. It provides an insight into some of the cultural stresses that influence societal response to crime. Did pre-colonial Africa have a distinct area of law called criminal law? It discusses some basic features in social control and the social structure that informed those approaches. The chapter ends with a critique of the customary legal order by examining

whether customary law is an impediment to development as often claimed and whether it cannot guarantee human rights and fairness. Some aspects of customary law which should have no place in modern Nigeria are identified.

Chapter 3, "Pathology of the Inherited System", is a litany of the shortcomings of the system which make it the subject of attack. Its emphasis on contention, its complex rules of evidence and procedure comprehensible only to the initiated as well as its tendency to proceed in a slow and ponderous fashion are but a few of the problems that alienate the system from the people. Non recognition of prevailing cultural beliefs in the determination of criminal responsibility and the application of alien standards of reasonableness are identified as some of the problems.

Chapter 4 continues the discussion on the shortcomings of the system by giving attention to an important aspect of the criminal process: punishment and victim remedy. It appraises the reparative content of the criminal laws and decries the overuse of the imprisonment option in sentencing. It concludes that the potential for accommodating indigenous conceptions of justice and indigenous processes within the larger criminal justice framework is integrally related to the extent to which the criminal law incorporates and gives substantial weight to the principle of restorative justice.

Chapter 5 defines the pathway to a more understandable and speedier criminal justice. It starts by examining past responses to the problems of the system and identifies some of the defects in those responses. It then articulates the normative and institutional relevance of customary criminal law. I identify some aspects of customary criminal law that could be incorporated into the court process of the modern system. Then I argue for

the use of community courts to demystify the legal process and bring understandable justice closer to the people. I also suggested other institutional adjustments and the recognition and use of various sanctions of customary criminal law. The chapter ends with comments on the role of the judiciary and legislation.

The observations in this thesis are not seminal. Some have been discussed in sociological, anthropological and legal literatures and such inquiries have helped to shape my thoughts. Milner's work[4] on the penal system in Nigeria has been helpful. He undertook a critical assessment of sanctions of customary criminal law and warned against premature dismissal of same on any pretext of their assumed inappropriateness for modern Nigeria without studying how far the society has changed. To his credit, he contended that there is much in the ideas of customary criminal law that could be used to enrich the modern system. I benefited from the writings of other Nigerians notably Adeyemi,[5] Elias,[6] Odekunle[7] and Oloruntimehin.[8] Adeyemi examined the operational problems of the Nigerian prisons and concluded that the existing prison system destroys any opportunity for independence and initiative in the inmates.[9] Odekunle[10] adopted

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[4]A. Milner, The Nigerian Penal System (London: Sweet and Maxwell, 1972) particularly chapters 2, 5 and 13.

[5]A.A. Adeyemi, "Nigerian Penal System: A Critical Appraisal", (1977) 6 Lagos Notes and Records, A Journal of African Studies, pp.54-75.

[6]T.O. Elias, "Traditional Forms of Public Participation in Social Defence", (1969) International Review of Criminal Policy, No. 27, pp.18-24.

[7]O. Odekunle, "The Nigeria Police Force: A Preliminary Assessment of Functional Performance", (1979) 7 Int'l J. of Sociology of Law pp. 61-83.

[8]O. Oloruntimehin, "Operational problems of modern penal justice in Nigeria" (1978) 5 Ghana Social Science Journal 88-92; "Social Change and the emerging legal structure", in Simi Afonja and T. Olu Pearce, eds., Social Change in Nigeria (England: Longman, 1984), pp. 207-231.

[9]Supra note 5.

a marxist approach in his study of the police organization in Nigeria. He argued that law enforcement in a capitalist system as exists in Nigeria can only be repressive. He concluded that while the Nigerian police records a dismal performance in the areas of crime prevention, investigation and provision of community services, they excel in paramilitary and establishment-protection function.

Internationally, I am drawn to the works done in respect of the aboriginal peoples of Canada, Australia and United States. Law Reform Commission reports and articles in Journals have considered the unsuitability of the Canadian criminal justice system for the aboriginal people. There are strong proposals for establishing a parallel justice system for them or for such reforms that will incorporate some of their values and practices into the modern system. I find particularly illuminating Michael Jackson's article.[11] There are shared similarities between some aspects of the aboriginal legal culture and the Nigerian customary criminal law. In many countries there have been studies expressing the need for allowing informal systems of justice outside existing formal systems.[12]

Legal research in developing countries is usually undermined by a dearth of statistical and survey data. This thesis is by no means free from that limitation. I have referred to books, journals, case law, statutes, papers presented at conferences, and other sources. I have also relied on my experience as a Nigerian who has observed the legal

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[10]Supra note 7.

[11]M. Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", (1992) U.B.C. Law Review Special Edition, pp. 147-238.

[12]See for instance, R. Danzig, "Toward the Creation of a Complementary, Decentralized System of Criminal Justice", (1973-74) 26 Stanford Law Review pp. 1-54.

system both as an ordinary citizen and as a legal practitioner. It is not unlikely that some people may disagree with my assessment and conclusions on some issues. However, everyone seems to agree that there are serious problems in the criminal justice administration in Nigeria.

CHAPTER ONE

OF NIGERIA, HER PEOPLE AND THE LEGAL SYSTEM.

1.1. Introduction:

This chapter gives some basic information about Nigeria. It deals with the geography, history and government, and the socio-economic structure of the Nigerian society. It discusses the history and other basic features of the legal system in general and the criminal justice system in particular. The chapter fulfils two main purposes: first, it gives the reader a general picture of Nigeria; second, and more importantly, it reveals some of the foundations of the problems faced by the criminal justice system. The unjust socio-economic structure of the society creates a criminogenic environment and any effort at crime control should give attention to this anomaly. Nigeria is still largely a rural society with over 81 per cent of her population living in the rural areas. Most of these areas are far removed from the impact of modern government and institutions including the legal system; and customary law and ties still regulate, to a large extent, the lives of people in these areas. This chapter argues that problems of rural poverty, transportation and illiteracy make more convincing the argument for a system of criminal justice that is not only within the reach of the people, but that also involves their participation. Rooted in the English Common Law, the Nigerian legal system exhibits such features as centralism, formalism and professionalism. While this chapter gives the foundations of

some of the problems, they are discussed in detail in subsequent chapters.

1.2. Geography:

Nigeria is one of the largest countries in Africa. It is the most populous black nation in the world with a population of over eighty-eight million.[13] It covers a total geographical area of 923,768 square kilometres and lies wholly within the tropics along the Gulf of Guinea, on the western coast of Africa. It is bounded on the East by the Republic of Cameroon, on the West by the Republic of Benin and on the North by Niger Republic. A land of lush vibrant vegetation, its climate varies from tropical at the coast to sub-tropical further inland. Temperatures are generally very high and increase as one moves from the southern to the northern part of the country resulting in a wide geographical variety in physical features. There are two marked seasons: the dry season lasting from November to March, and the rainy season from April to October. There are about 250 ethnic groups, the major ones being the Hausa, Ibo and Yoruba. While the groups differ in some respects, they also share basic common features especially in the traditional approach to social control.

1.3. History and Government:

The pre-colonial states of Nigeria included the Hausa-Fulani states of the North, the genotocracies of the Ibos, the Kanem-Bornu empire of the North-East, the Western monarchies of the Yorubas and the Benin Empire. Nigeria came under British rule in the

[13]The 1992 census figures put the population at 88,514,501, see West Africa 30 March- 5 April, 1992, p.540.

late 19th century and remained so until October 1, 1960 when she gained independence. She became a Republic in 1963 thus severing the final political link with her majesty's government in England. The country's political history is replete with military coups and counter coups. Between 1960 and January 1966, Nigeria operated the Westminster model of parliamentary democracy which was overthrown on January 15, 1966 in a military coup. The army remained in power till October 1, 1979 when it handed over to a democratic government modelled on the American presidential system. December 31, 1983 saw the country back under military rule. There is an on-going programme for transition to democracy which has been effected at state and local government levels and the military government is expected to finally disengage from politics by August 27, 1993.

Nigeria consists of thirty states and a federal capital territory; Abuja. There are over 600 Local Governments[14] in the country. As a federation, there is a division of power between the federal government and the states.[15] Under military regimes, this division becomes illusory as the Federal Military Government becomes omnipotent. Apart from the modern authority structures there exist the traditional forms of government headed by traditional rulers with varying degree of influence depending on the part of the country in question. Although in strict terms these traditional rulers are not vested with modern political power, it is clear that most often effective power over their subjects

[14]A Local Government is the third tier and smallest unit of government in Nigeria.

[15]The Constitution of the Federal Republic of Nigeria, 1979, as amended by the Constitution (Suspension and Modification) Decree, No.1 of 1984, (hereinafter referred as 1979 Constitution) specifies matters within the legislative competence of both the federal and state governments, see Second Schedule, Parts 1 & 2.

flows from them and sometimes conflicts with the formal lines of authority. Various kinship, village and tribal groups or associations also exercise influence over their members.

1.4. The economy and socio-economic structure:

The Nigerian economy is still largely agrarian. Before independence, virtually all the nation's foreign exchange earnings were obtained from the exportation of agricultural products such as cocoa, raw cotton, palm oil, palm kernel, groundnuts, groundnut oil, and rubber. Even by 1960, about 82.1 per cent of total export earnings of Nigeria came from this source, but by 1984 it had fallen to 2.3 per cent.[16] The fall was a result of the oil boom which made oil the major foreign exchange earner. At present over 85 per cent of Nigeria's foreign exchange earnings come from oil export, leading to a neglect of agriculture and the rural areas.

Nigeria is essentially a rural society with an estimated 81 per cent of her population living in rural areas.[17] Nigeria's economy has witnessed considerable modernization since independence but a major constraint on her development efforts has been the persistence of underdevelopment in the country's rural areas. In terms of their living conditions and the provision of physical and social infrastructures, the rural settlements suffer from severe neglect. Development efforts are concentrated in the few

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[16]J.O. Olagbaju and G.O. Adeseun, "The problem of declining agricultural export products", in S.A. Olanrewaju and T. Falola, eds., Rural Development Problems in Nigeria (England: Avebury, 1992), p.46.

[17]National Population Bureau, 1984, The Nigerian Fertility Survey 1981-82. (Principal Report vol.1 Methodology) International Statistical Institute, Hague, p.5.

urban centres. Rural transportation problem is chaotic. There is a lack of motorable road links, an absence of organised public transport and a very low vehicle ownership rate.[18] A survey by Ikporukpo[19] shows that less than 30 per cent of the rural settlements covered by the survey are located on roads (main or secondary) that are accessible all year round. In all of Nigeria 77 per cent of these settlements do not have any connection to a road.[20] Only 10 per cent of rural feeder roads are all-weather roads and 90 per cent still remain earth roads.[21] Some of these roads which result from footpaths widened by communal efforts, are narrow and unaccessible to motor vehicles during the rainy reason. Only those rural settlements located on main roads that link to the urban centres enjoy organised public transport.[22] Ikporukpo's study reveals that only 1.7 per cent of 1,285 respondents covered in a survey of twenty rural settlements own a car, 7.5 per cent own a motorcycle, 36.7 per cent own a bicycle, and 54.1 per cent do not own any means of vehicular transportation. Thus there is a tremendous mobility problem in the rural areas and this has its effect on the administration of justice. People have to travel long distances to obtain justice and with the delay in the justice system, it is not surprising that the people should complain about the system. Also the rural problem affects crime reporting

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[18]S.A. Olanrewaju, "The rural transportation problem", in Olanrewaju and Falola, eds., supra note 16, p.116.

[19]C.O. Ikporukpo, "The Management of the Rural Transportation Problem in Nigeria", The Quarterly Journal of Administration, vol.XXI No.1 & 2, p.58 (October 1986/January 1987).

[20]Ibid.

[21]T. S. Idachaba, et al, Rural Infrastructure in Nigeria: Basic Needs of the Rural Majority, Federal Department of Rural Development, Lagos, 1981.

[22]Ikporukpo, supra note 19, p.59.

in these areas where villagers will have to travel a long way to the nearest police station.[23]

The economic stratification of Nigerian society deserves mention. Nigeria is a country where a few have everything while the majority have nearly nothing. This creates pressure on the members of the lower strata to resort to deviance as a way of minimizing the socio-economic and political deprivations. Apparent in this economic stratification is a built-in discrimination in the law enforcement and judicial process. Thus the economically advantaged are much less likely to be arrested, they are less likely to be charged and if charged, the chances of conviction are appreciably lower.[24] Any meaningful effort at crime control in Nigeria must address this socio-economic injustice because the pre-disposing factors of crime are to a large extent rooted in man's existential circumstances.

1.5. The Legal System:

Before the British came to the area which is now known as Nigeria, each of the territories which together presently constitute the Federation of Nigeria had a system of administration of justice.[25] In most parts of the territory now constituting the northern

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[23]In the past five years, significant efforts have been made to improve rural transportation by the establishment of the Directorate of Food, Roads and Rural Infrastructure (D.F.R.R.I) charged with the construction of 60,000 kilometres of rural feeder roads. However, DFRRI roads are poorly constructed unpaved earth roads some of which are washed away during the rainy reason thus compounding the problem, see Olanrewaju, supra note 16, p 128

[24]O. Kayode and E.O. Alemika, "An Examination of Some Socio-Economic Characteristics of Inmates of a Nigerian Prison", (1984) 8 Int'l J. of Comp.and App. Criminal Justice, No.1, p.90.

[25]For a history of the Nigerian legal system, see C.O. Okonkwo, ed., Introduction to Nigerian Law (London: Sweet and Maxwell, 1980), chapters 1 and 2, A.O. Obilade, The Nigerian Legal System (London: Sweet and Maxwell, 1979), chapter 2, T.O. Elias, The Nigerian Legal System (London: Routledge & Kegan Paul Ltd, 1963)

states, the principal law administered by the courts was Moslem Law of the Maliki School the main sources of which were, and are still, in writing. In the territories now constituting the southern states and in some parts of the north, the law in force was unwritten customary law.[26] In 1861, Lagos[27] was ceded to the British Crown under a Treaty of Cession and in the following year it was made a British Colony. By Ordinance No.3 of 1863 the British Government introduced the main body of English law into the Colony effective from March 4, 1863. In 1876 a Supreme Court was established for the Colony of Lagos. The Supreme Court Ordinance[28] provided for the application of the "common law of England, the doctrines of equity and statutes of general application in force in England on July 24, 1874" by the court. Local laws and customs were also applicable provided they were neither "repugnant to natural justice, equity and good conscience"[29] nor incompatible with any local statute. The introduction of English law into the Colony of Lagos marked a turning point in the history of the Nigerian legal system.

On January 1, 1914, the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria were amalgamated to form the Colony and Protectorate of Nigeria. Three types of courts were created for the country, namely, the Supreme Court, The Provincial Courts and the Native Courts. Another Supreme Court

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[26]Obilade, ibid., p.17.

[27]Until 1990, Lagos remained the *de facto* capital of Nigeria.

[28]No.4 of 1876.

[29]This phrase became known as the "Repugnancy Clause".

Ordinance[30] was promulgated in 1914 which was identical to the previous ones except that it limited the Statutes of General Application applicable to Nigeria to those in force in England on January 1, 1900. Between 1914 and independence in 1960, reforms involved either the creation of new English-type courts or the abolition of certain courts and creation of statutory native courts.[31] The attainment of independence has brought further developments in the legal system but there has been no major overhaul by way of reconsidering the suitability of the system inherited. Neither the attainment of independence and Republican status nor the successive military interventions have significantly altered the court structure that existed before independence.[32]

The legal system and the judicial structure were given new life by the 1979 Constitution which designated the following courts as superior courts of record- the Supreme Court, the Federal Court of Appeal, the Federal High Court, a High Court of a State, a Sharia Court of Appeal of a State, and a Customary Court of Appeal of a State.[33] The judicial powers of the federation and the states are vested respectively in these courts.[34] States are authorized to establish such other courts with subordinate

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[30]No.6 of 1914.

[31]In 1954 when Nigeria became a Federation with three regions, the judiciary was reorganised to reflect the federal character of the country.

[32]Some changes include the abolition of appeals to the Judicial Committee of the Privy Council which took effect from October 1, 1963 when Nigeria became a Republic, the establishment of a Federal Court of Appeal and a Federal Revenue Court (later to be known as Federal High Court) by the military government.

[33]Section 6 (3) & (4) of 1979 Constitution, for the jurisdiction of these courts, see chapter VII of the Constitution; see also the 1989 Constitution.

[34]Section 6 (1) & (2) of the Constitution.

jurisdiction to the High Court as each State may deem fit.[35] The Constitution defines judicial powers as extending *inter alia* (a) to all inherent powers and sanctions of a court of law, (b) to all matters between persons, or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[36]

The judicial structure that has emerged from innovations and reorganizations since independence is a pyramid-like structure with one Supreme Court at the apex and numerous Customary and Area Courts at the base. Between the two ends of the pyramid are three grades of courts: the Federal Court of Appeal, the High Courts and courts of equivalent grade such as the Sharia Court of Appeal, Customary Court of Appeal, the Federal High Court and the Court of Resolution (which resolves questions of jurisdiction between the High Courts and Sharia Court of Appeal in the Northern States). The third grade within the pyramid is the Magistrate Courts and courts of equivalent grade such as District Courts found only in the northern states.

The sources of Nigerian law could be summarized as English law, Nigerian legislation, Nigerian case law and Customary law. The customary law of a community is a body of customs and traditions which regulate the various kinds of relationships between members of the community.[37] One important characteristic of customary law is that it derives its strength from its acceptance by members of the community as

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[35]Ibid., section 6 (4)(a). By this section, a State can establish magistrate courts, customary courts, area courts, etc, as it deems necessary within its jurisdiction.

[36]Section 6 (6)(a) & (b).

[37]G. Ezejiofor, "Sources of Nigerian Law", in C.O. Okonkwo, ed., supra note 25, p.41.

obligatory on themselves.[38] Because of the colonial experience customary law was reduced to an inferior role within the official legal system. The colonial government established the framework that governed the application of customary law and this was continued after independence. Thus courts are directed to observe and enforce the observance of native law and custom provided such native law or custom is not repugnant to natural justice, equity and good conscience. This phrase which dates back to the Supreme Court Ordinance of 1863 is now contained in the High Court Laws of various parts of the country.[39] The problem of applying the "repugnancy" phrase has been a serious one. The courts have not developed any general theory on the basis of which rules of customary law are to be tested, rather they have invalidated or sanctioned, in an *ad hoc* manner, a rule sought to be applied on the basis of their notion of what is fair and just.[40] A particular custom regarded by the courts as repugnant may not be so in the estimations of the people affected by that custom and such people may continue to live by that custom and to enforce, albeit by unofficial means, its observance.

Part of the problem is that the customs are assessed on the notions of English morality and justice. In 1948, Rt. Hon. Sir Sidney Abrahams, at a lecture delivered at the London School of Economics, stated:

Morality and justice of course mean British and not African conceptions of these.

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[38]See Eshugbayi Eleko v. Government of Nigeria [1931] A.C. 662 at 673.

[39]See High Court of Lagos Act, (Cap. 80), s. 27(1); Eastern Nigeria High Court Law, (Cap. 61), s. 20(1); Northern Nigeria High Court Law, (Cap. 49), s. 34(1); Western Nigeria High Court Law, (Cap. 44), s. 12(1). Section 14(3) of the Evidence Act adds a further requirement of conformity with public policy.

[40]Ezejiofor, supra note 37, p. 43; see generally, A.E.W. Park, The Sources of Nigerian Law (Lagos: African Universities Press, 1963) 69; D. Asiedu-Akrofi, "Judicial Recognition and Adoption of Customary Law in Nigeria", [1989] 37 American J. of Comp. Law 571.

> Were that not so British justice would be looking in two different directions at once.[41]

Rather than the accent of the people being the determinant of customary law, judicial validation or acclamation has become the determinant of officially enforceable customary law. One writer wonders whether judicial creation and modification of customary law on the basis of alien standards, which sometimes ignores widely accepted practices followed by a community, can still be considered as falling within the definition of customary law.[42]

The emergent legal system, in spite of the efforts made by the indigenous political authorities to initiate new and abolish some old legislation, can still be regarded as a miniature English legal system.[43] Thus the existing legal system does not significantly reflect the cultural and social backgrounds of the society. There is, therefore, the major problem of reconciling the laws and their operational machinery with the desires, socio-cultural demands and aspirations of the members of the society.[44] The achievement of a favourable environment for the economic exploitation of the colony informed the imposition by Britain of a centralized and highly formalized legal system. The police and prison system set up by the colonial masters and inherited by the independent nation were

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[41]Abrahams, "The Colonial Legal Service and the Administration of Justice in the Colonial Dependencies", (1948) 30 J. Comp. Leg. & Int'l Law (3rd Series, Parts 3 & 4), pp. 1-11, at 8.

[42]See Asiedu-Akrofi, supra note 40, p. 587.

[43]See F. Oloruntimehin, (1984), supra note 8, p. 221.

[44]Ibid., she attributes this to the fact that while some efforts were made to repeal and replace certain laws, no concrete efforts were made to review and reform the laws in general. This accounts for a considerable lack of respect for the law and a growing reluctance to utilize some of the machineries of the legal system such as the police and the courts which, as we noted in the introductory remarks, has become a serious concern for the Federal Government.

designed, not as agencies to serve the people, but as instruments for forcing on them acceptance of the exploitation. This philosophy of exploitation and oppression on which some of the basic agencies of law enforcement were founded continues to haunt the Nigerian legal system. Thus Odekunle's study of the Nigerian police force concludes that while the police in Nigeria records a very dismal performance in the areas of crime prevention and investigation, protection of law and order and provision of community services, it performs well in the paramilitary and establishment-protection function which was basically what it was conceived to do during the colonial days.[45]

The legal profession is a major player in the legal system. Before independence, persons wishing to practise law in Nigeria were trained in England and in English law. In 1962, the necessary machinery was put in place for the commencement of legal education in Nigeria.[46] Today, legal education is jointly provided by the faculties of law of Nigerian universities and the Nigerian Law School. The latter provides a one year practical training to all law graduates from Nigerian universities after which successful candidates are called to the Nigerian Bar. Legal education leans almost entirely on the inherited system and often shows contempt for customary law as a system of justice

1.6. Criminal Justice:

The Nigerian criminal justice system is an aspect of the legal system inherited

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[45]O. Odekunle, supra note 7, pp. 67-83. The question may be asked why the situation has remained same years after independence; the answer could be that those who possess the capacity to effect a change have an interest in the *status quo.*

[46]Following the recommendations of the Unsworth Committee on the future of legal profession in Nigeria, two enactments were passed- Legal Education Act, 1962 and Legal Practitioners Act, 1962- to indigenize legal education. Both Acts were repealed and reenacted (with amendments) by the Legal Education (Consolidation etc) Decree, No. 13 of 1976 and the Legal Practitioners Decree No. 15 of 1975. The latter enactment has been further amended.

from British colonial government. Criminal justice administration is State-controlled and criminal proceedings are instituted in the name of the state. This is reflected in the fact that the state or its agents is usually named in the heading of the charge sheets or information as the prosecutor.[47] The primary sources of the substantive criminal law in Nigeria are the Criminal Code[48] which applies to the fourteen southern states, and the Penal Code[49] applicable to the sixteen northern states. These are not the only sources of criminal law in Nigeria, however, for there exists a body of other statutes creating offences.[50] As noted above, the English common law, including the common law of crime, was introduced into the Colony of Lagos in 1863. However, it was in 1904 that the original criminal code was introduced into Northern Nigeria by proclamation. This code was extended in 1916 to the whole country after amalgamation of the country in 1914. The code in force in the southern states at present is basically the original code of 1904 with minor amendments. This original code had more problems operating in the northern states predominantly populated by moslems. As a result the Northern Government, in 1959 (on the threshold of independence) set in place a machinery for the production of a code that would reflect the values of the northern peoples, hence the birth of the Penal Code.

The Criminal Code was copied from the code introduced into the State of

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[47]In the Magistrate Courts the prosecution is brought in the name of the Commissioner of Police; in trials on information, the prosecutor is named "The State" or the "Attorney-General".

[48]Cap 42 of the Laws of the Federation of Nigeria, 1958.

[49]Cap 89 Laws of Northern Nigeria 1963.

[50]See C.O. Okonkwo, Criminal Law in Nigeria (London: Sweet and Maxwell, 1980) p. 3.

Queensland, Australia, in 1899. The Queensland code itself was based on a Model Criminal Code drafted in 1878 by a leading English criminal lawyer and jurist, Sir James Fitzstephen.[51] The Penal Code on the other hand was based on the Sudanese Code which was designed for a moslem community. The Sudanese Code was in turn modelled on the 1860 Indian Penal Code which had been drafted by Lord Macauley between 1834 and 1838.

The main sources of criminal procedure in Nigeria are the Criminal Procedure Act[52] which governs criminal proceedings in the southern states and the Criminal Procedure Code[53] applicable in the northern states. Neither statute contains provisions relating to criminal appeals. Thus procedures on appeal are to be found in the Rules of respective appellate courts.[54] Criminal procedure in Nigeria is accusatorial. This is reflected in the Constitution which provides that every person charged with a criminal offence shall be presumed to be innocent until proved guilty.[55] The Constitution makes further provisions to guarantee the liberty of the individual and to ensure a fair hearing for those accused of crime.[56]

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[51]The draft English code was intended to replace the English common law of crime but the British parliament never enacted it into law.

[52]Cap. 43 Laws of the Federation of Nigeria 1958.

[53]Cap. 30 Laws of Northern Nigeria. It should be noted that when the Criminal Procedure Act was first enacted in 1945 as Criminal Procedure Ordinance, it applied throughout Nigeria until 1960 when it was replaced in northern Nigeria by the Criminal Procedure Code.

[54]See, for instance, the Supreme Court Rules, 1977 and the Court of Appeal Rules, 1981.

[55]Section 33(5) of 1979 Constitution.

[56]See sections 32 and 33 of the Constitution, some of the sections are commented on in chapter 5 of this work

In the conduct of criminal proceedings, the position of the Attorney-General is of great importance. The Constitution vests the Attorney-General with authority to institute and undertake criminal proceedings against any person in any court of law in Nigeria other than a Court Martial.[57] The Attorney-General has the power to take over and continue any such criminal proceedings that may have been instituted by any other person or authority.[58] He also enjoys the power to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by him or any other person or authority.[59] These powers can be exercised by him in person or through officers of his department.[60]

A person can only be convicted of a written offence.[61] Customary criminal laws were abolished by the Independence Constitution. To be punished as a crime, any traditional offence must be contained in a written law. Thus indigenous concepts of crime and ways

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[57]See section 160 in respect of Attorney-General of the Federation and section 191 for those of States.

[58]The Police has the authority to institute criminal proceedings, see sections 4 and 19 of the Police Act (Authority to Reprint) Decree No. 41 of 1967. Prosecutions could also be commenced by private persons but this is rare, see section 59(1) of Criminal Procedure Act and section 143(e) of the Criminal Procedure Code. But all these are subject to the powers of the Attorney-General.

[59]Sections 160(1)(c) and 191(1)(c) of the Constitution. This power which is commonly referred to as *nolle prosequi* is within the absolute discretion of the Attorney-General and the court cannot inquire into the reason or justification of its exercise in any particular case; see State v. Ilori and Ors. (1983) 1 S.C.N.L.R. 94; Clarke v. Attorney-General (1986) 1 Q.L.R.N. 119.

[60]See Saka Ibrahim and Anor. v. The State (1986) 2 S.C. 91. It is routine for criminal prosecutions on information to be undertaken at the High Courts by the office of the Director of Public Prosecution. The Attorney-General can delegate a private legal practitioner to institute a particular criminal proceeding, see D.P.P v. Akozor (1962) 1 All N.L.R. 235, see also Saka Ibrahim and Anor. v. The State, supra. A federal offence can be prosecuted by a State Attorney-General only after express delegation by the Federal Attorney-General, see Anyebe v. The State (1986) 1 S.C. 87.

[61]Section 33(12) of the Constitution provides that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law. A similar provision was contained in the 1960 Independence Constitution.

of preventing, detecting and handling crime gave way to the "modern" criminal justice system. For instance, the detection of crimes and criminals through the use of oracles or certain ordeals are deemed repugnant by the inherited system. However, these were the significant means by which members of the indigenous society detected crimes and criminals especially when criminals could not be caught in the act.[62] Customary courts which, at least theoretically, are supposed to apply customary law are undermined by the uncertainty as to the extent of departure from English rules and practice which they can go without running the risk of their decisions being nullified on appeal as being repugnant.[63]

A major problem of the criminal justice system is that the substantive and procedural codes contain too many of the technicalities of English law as far as certain offences such as murder, larceny, official corruption, burglary, etc. are concerned. The result of such technicalities is the tendency for the code provisions to be divorced from the daily experience and expectations of the people.[64] The system is so adversarial in nature that it discourages many from using the courts. It is so expensive that access to justice has become difficult.

The courts mentioned under our discussion of the general legal system above have varying degrees of criminal jurisdiction, each depending on the law creating it. The High

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[62]Oloruntimehin, (1984) supra note 8, p. 222, she observes that these practices still exist in many rural areas and even in some urban areas of Nigeria at present.

[63]Ibid.

[64]See T.O. Elias, ed., Law and Social Change in Nigeria (London: Evans, 1972), pp. 80-101; O. Oloruntimehin, (1978) supra note 8, p.92-3.

Courts have unlimited criminal jurisdiction.[65] Neither the Supreme Court nor the Court of Appeal has any original jurisdiction in criminal matters. In the Southern States the Magistrate Courts are the judicial beasts of burden for they handle over 85 per cent of criminal cases.[66] In addition, there are courts of special criminal jurisdiction like Juvenile Courts, Coroners Court, Military Courts, Court Martial, Special Military Tribunals, etc.

1.7. Conclusion:

Nigeria is still largely a rural society with over 81 per cent of her population living in the rural areas. The predominance of the rural society implies, to an extent, the continued relevance of customary ties and the customary society. Problems of rural poverty, illiteracy and transportation have their impact on the administration of justice. The socio-economic stratification of the Nigerian society is so unjust that it conduces to criminal behaviour as many resort to crime because of utter deprivation. As part of colonial heritage, the legal system is imbued with formalism and professionalism. The application of customary is governed by the framework established by the received English law. Given the above circumstances, one begins to see the need for a justice system that is not only within the reach of the people but also involves the people.

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[65]Section 236(1) of the Constitution.

[66]In the Northern States the Area Courts handle over 90 per cent of the criminal cases.

CHAPTER TWO

REFLECTIONS ON THE AUTOCHTHONOUS JUDICIAL PROCESS IN PRE-COLONIAL NIGERIA

2.1..Introduction:

This chapter discusses some features of the judicial process in the pre-colonial Nigerian society. It answers the question whether traditional Africa, including Nigeria, had a body of criminal laws distinct from the civil law process. It argues that the misconceptions held by some writers in relation to criminal justice processes in traditional society are based on a misunderstanding of the reparative philosophy that influenced the process. The legislative abolition of customary criminal law has not successfully obliterated this area of law contrary to expectations. Instead, it has widened the gulf between official and "unofficial" law. There continues to be interpenetration between the inside-the-court formal system and the outside-the-court form of community justice. Customary criminal justice administration was characterized by informality of procedure, flexibility and significant community participation. The process was also quick and inexpensive. The dominant theme in the penal philosophy was repairing the victim's injury and reintegrating the offender as far as possible. This penal attitude is further elaborated in chapter 4 where it is juxtaposed with the provisions of the modern penal statutes. A critique of the customary legal order concludes the chapter. Is customary

criminal law incompatible with protection of human rights?

2.2..Is there an African Criminal Law ?

This question is necessary because of the tendency of some writers to suggest that traditional African societies did not have a distinct body of laws that could be referred to as criminal laws and/or a criminal justice system. One cannot perceive the relevance of the customary criminal legal order if one does not comprehend the existence of that distinct area of law. I shall approach this question at two levels: first, did traditional African societies have a distinct body of criminal laws, and secondly, does legislative abolition of such laws in most independent African states imply their non-existence in the social process of such states?

The assertion that there is no African criminal law is often predicated on a misconception of the reparative philosophy that dominated the traditional penal system. As we shall see shortly, restitution, compensation and reconciliation were the basic features that cnaracterized the deviance control mechanisms of traditional Africa. On this premise many writers justified their denial of the existence of a distinct body of laws that could be referred to as customary criminal laws. According to Driberg, the distinction between criminal and civil law was 'meaningless to the African and fruitful of misunderstanding'.[67] To him the only distinction known to traditional African law was the one between private and public law.

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[67]Driberg,"The African Concept of Law" 16 Journal of Comparative Legislation (3rd Series) p.231

Lord Hailey was less blunt when he stated,

> The African practice was to compensate the injured party in such a way as to leave him no worse off than he was before; it did not embrace,except in special circumstances,the idea that an offence was committed against the state.[68]

In this way African law is contrasted with the common law which sees the role of the criminal court as punitive and the civil court as compensatory. To the common law these roles are mutually exclusive and the criminal court should not be 'the medium of compelling people to pay their debts'.[69] The above conception of African criminal law is fallacious and has consistently been countered by different writers. According to Elias, "African law distinguishes between criminal and civil wrongs, between offences affecting the whole community as likely to disrupt its corporate existence and those left to the private arbitrament of the individuals concerned".[70]

In traditional Africa crime could be committed against the community, the individual and supernatural deities and the classification of offences followed these three broad categories. The conceptualization of an offence as being a wrong to the entire community was more prevalent in the northern Islamic tribes of Nigeria where centralization of political power was more common.[71] In eastern and western Nigeria, offences against supernatural beings were very common and sanctions included ritual expiation of guilt, and purification of the community- acts which have nothing to do with

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[68]Hailey, African Survey: Revised, 1957, p.625. This is typical of Maine's conception of early societies; See Maine, Ancient Law p.307-309 (World Classics ed.,1950).

[69]R.v.Peel, (1943)59 Times Law Report,274.

[70]T.O.Elias, Nature of African Customary Law (Manchester: Manchester University Press, 1956) p.213.

[71]Larsh Paul, "Criminal Law Reform in Nigeria. The Forgotten Hinterland", in Osgoode Hall Law School Term Papers, Law and Development: China and Africa, p.10.

a civil process. Such offences were viewed as affecting the existence of the entire community. In all parts of traditional Nigerian society various acts were treated as criminal but in punishing the offenders, efforts were made, wherever possible, not to estrange the offender and to compensate the victim. The notion of reconciliation and compensation does not detract from the criminal character of the acts. And much as they dominated African penal thought, the dispute settlement machinery was not wholly arbitrative in nature.

Central to Western penal thought is the idea of moral blameworthiness. It is the cornerstone of English criminal law. In traditional Africa, moral blameworthiness weighed little in assessing guilt or determining appropriate penalties for offences. The rights and wrongs of the case were not of exclusive concern, unlike the position in the modern legal system. The ultimate goal was usually the restoration of pre-existing cordiality. This little emphasis on moral blameworthiness may have partly induced the denial of the status of customary criminal law.

At the dawn of political independence most African countries abolished customary criminal law. Section 22(9) of the 1963 Constitution of Nigeria provides that

> No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law.[72]

Customary criminal law is unwritten and was therefore the target of the above legislation. It is one thing to legislate the abolition of customary criminal law and another thing to abolish it in the minds and attitudes of the people governed by such laws. The concept

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[72]See also section 33(12) of the Constitution of the Federal Republic of Nigeria,1979 as amended by Decree No.1 of 1984; section 35(11) of 1989 Constitution (yet to come into force).

of law in the life of large portion of the African population is more than just state legislation. This is particularly true in the Nigerian situation where the principal criminal statutes that replaced the customary criminal laws were based almost entirely on alien values. It is thought that the ideas and practices of customary criminal law have been swept under the carpet laid over them by the enactment of codes having their existence on exotic mores of colonial origin. But some of the problems encountered in the modern criminal justice administration point to the contrary.[73] It is not easy to obliterate inveterate attitudes and concepts of social existence by some legislation of which the majority of the people are ignorant. The inherited system, while importing alien norms, could not transform the entrenched beliefs and mores of the people.[74] Thus while in strict legal terms customary criminal law has been abolished, aspects of it continue to flourish in the lives of the people creating a divergence between official law and reality. To the ordinary members of the society whose knowledge of statutory law is very limited, customary law is the basic law they know and live with and which reflects their social values.[75] It was Holmes who said that the centre of gravity of legal development lies

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[73]For instance, some defences or explanations raised by some offenders in court are founded on some traditional beliefs even though the courts hardly countenance such. This is common in cases of allegation of witchcraft or use of other supernatural powers; see chapter 3 of this thesis.

[74]Statutory laws, case laws and notions of British justice have left little mark on the villages and some ideas of criminal responsibility and penal objectives developed in England through the centuries bear no relation to the lives of the people in these communities, see A. Milner, supra note 4, p. 29.

[75]"Unless there is sufficient rapport between the legal system and the society in which it operates, the formal enactment of a new system cannot lead to abandoning of the old. Only by continued, intensive police activity and persistent administrative and judicial overview can a change in mores be stimulated and with the relative isolation of many communities and the continued hazards of long distance communication, the process by which laws are recognised and assimilated into the culture is far from automatic and immediate", A. Milner, ibid., p 11 See also A.A. Adeyemi, "The Challenge of Criminology in a Developing Country: A Case Study of Nigeria", (1971) 10 International Annals of Criminology 149.

not in legislation, nor in juristic science, nor in judicial decision, but in society itself.[76] The Criminal Code in force in the states of Southern Nigeria, for instance, refused to recognise adultery as an offence whereas the society sees it as a very serious deviation requiring sanction. "As an interference with the fundamentals of domestic life it loomed large in customary communities and was almost always the subject of sanction."[77] In parts of the country the offender could suffer severe physical reprisals especially if the offence had been committed within the kinship group.[78] By colonial standards adultery was not seen as sufficiently reprehensible to warrant a criminal penalty hence it was not recognized as such. The post independence code left the situation unchanged. Thus in Aoko v. Fagbemi[79] the applicant was fined in a customary court in the former Western Region of Nigeria for adultery and made to pay compensation to the husband of the woman. He petitioned the High Court for an order quashing the conviction. The High Court granted his petition holding that adultery was no longer an offence as it was not defined in any written law.

Has the society ceased seeing adultery as a serious deviation from its social standards? The answer may be found in the following words of an eminent Nigerian

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[76]Quoted in H.R. Ehrmann, Comparative Legal Cultures (New Jersey: Eaglewood Cliffs, 1976), p.3.

[77]A. Milner, "The Sanctions of Customary Criminal Law", (1964-65), 1 Nigeria Law Journal 180. Also the belief in witchcraft still exercises the minds of the average population eventhough such beliefs were outlawed long ago by legislation.

[78]C.K. Meek, Law and Authority in a Nigerian Tribe (London/New York/Toronto:Oxford University Press,1950),p.218. Among the Ibos, adultery within the kinship was an abomination and therefore, a matter of public concern. On the other hand, adultery outside the kinship group was usually, but not always a private injury with which the general public were less concerned, Meek, p. 218.

[79](1961)1 All N.L.R.400.

Professor of criminal law:

> Attention should be given to the question of whether adultery ought to be made a criminal offence at least for persons married under their native law and custom if by their custom adultery is regarded as a crime. This might have the result of reducing those numerous cases arising from the villages in which the husband takes the law into his own hands by killing his wife's paramour.[80]

Even to the present day there are cases involving serious breaches of the law resulting from reactions against adulterous relationships. The Nigerian society believes that public morality is essential to its stability and continuance and to permit private acts of gross immorality is to undermine the foundations of the society.[81] The aggrieved husband or wife takes the law into his/her hands because the criminal justice system provides no remedy. In some villages such disputes are settled by the informal mechanism and the offender punished even though in strict terms such trials are illegal and will not stand if the offenders complain to the formal law enforcement agency. The consequences of the constitutional abolition of customary criminal law is that it left the village informal system totally unsupported, with no means of plugging the gaps at its weak points. Hence the system which the new laws were intended to abolish continue but in a less orderly form.

In most communities incest is seen as a taboo requiring purification. The rules of incest in the Nigerian society differs from the rules in most European societies. Even

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[80]C.O. Okonkwo, "A Note on the Reform of the Nigerian Criminal Code", (1964-65) I Nigerian Law Journal 299. (Emphasis mine).

[81]Adeyemi argues that it is hardly understandable that adultery which threatens the basic unit of the society, the family, should not be a crime simply because the law maker in the colonial country does not see it as crime. "The average Nigerian, and indeed African, man takes a more serious view of adultery than some men from other cultures may. If therefore, the criminality of an act should depend upon the gravity of its anti-sociality, then adultery should be among the top five or ten offences", supra note p. 160-1.

within Nigeria itself it may differ amongst communities or tribes. In some areas sexual relations are forbidden for people of the same village and in other areas it is not allowed between persons from two or more different villages if the villages believe that they share a common ancestral origin. Violations of such customary boundaries of sexual relations are still punished today independent of the formal legal system.

There are many other examples of abolished customary criminal laws still forming part of the lives of the people. Apart from the substantive customary laws, attitudes and sentiments towards customary judicial process and institutions still persist. Many cases, including ones viewed very serious by the codes, are sometimes settled by compensation without involving the official law enforcement agencies. Every legal system has its dose of discrepancies between law in the books and law in action and it seems that the wider the discrepancy the less efficient the system will be.

If, as is often contended, the advantage of having written offences is to achieve a reasonable amount of clarity by definition and to give people exact advance knowledge of the consequences of their acts, it is doubtful the extent this advantage avails the Nigerian populace given its high level of illiteracy. What percentage of Nigerians know of the existence of the code before they come into conflict with it? Worse still how many understand or appreciate its contents even after being in conflict with it? The history of Nigeria's modern criminal justice system is replete with contempt for customary law. If customary criminal law was abolished partly because it is unwritten and therefore arbitrary, then the codified criminal law should in essence have been a translation of indigenous values as much as possible rather than a large scale importation of alien

standards.[82]

It is true that a piece of legislation can be in advance of public opinion and aim at educating the public. Abolition of customary criminal law may have been meant to achieve this purpose. But it is a problem how far in advance of public opinion legislation can afford to be.[83] There can only be a limited success in any attempt to make the legal morality of the legislature or courts a precursor to the social morality of the people whose conduct is subject to the customary legal regime. Such is the case where an urban elite imposes its legal concepts on a custom bound peasant society. Legal engineering must take the social reality into account so as to create a congruence between official law and realities of the people's social life. Any major gap between generally-held concepts of social deviance and positive law as reflected in a code or judicial decisions is indicative of a potential weakness of the system and is directly relevant to public perception of the system.[84] The attitudes, beliefs, and emotions of the operators as well as of the users (and victims) of the legal system have much to do with the way in which it functions.[85] In this regard, there exists a close relationship between the concepts of legal and political culture. The psychological orientation of individuals and groups towards the political system and its institutions will always be relevant to the success of that system. The

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[82]At least the Penal Code and Criminal Procedure Code of the states of Northern Nigeria are examples, having, in recognition of local values, included specific moslem crimes and procedure.

[83]C.O. Okonkwo, supra note 50, p.24. The works of J. Bentham and F.k. Von Savigny provide contrasting paradigms of this proposition.

[84]P. Konz, "Public Participation in the Criminal Process", (1969) International Review of Criminal Policy, No.27, p.5.

[85]Ehrmann, supra note 76, p.9.

success of political institutions and processes depends on a successful socialization of a substantial number of the citizenry into the political culture. The legal culture shares this factor to a great extent.

Limited legislative intervention can be worthwhile in some instances. An example is where there is urgent need to curb practices that involve the likelihood of physical injury or death to persons. Therefore criminalizing some dehumanizing methods of trial by ordeal was welcome even though it is debatable whether it is the mere act of criminalizing such practices that discouraged people from doing them.

The question whether there is an African criminal law is an adjunct of the broader question whether customary law is law at all. There abound literary manifestations of the misjudgments of the social and juridical reality of past and present African society. According to Professor David for instance, "the regulation of internal relationships between members of a family or, in Africa, of a village or a tribe is a matter of mores not of law. Resolution of the conflicts which arise in these relationships is a matter of conciliation and arbitration; it is not the function of jurists operating in the courts".[86] On this issue one commentator reacted as follows:

> ...it is wrong and an injustice to African socio-political systems to put traditional law or customary law between quotation marks as though it did not constitute law in the true sense. It is equally wrong to state that the solution of conflicts in family, village and tribe is always a matter of conciliation and arbitration. This too represents a misunderstanding of African reality with its courts of chiefs and elders in the past and its customary, African, local, etc, courts in the present.[87]

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[86]R. David, "Critical Observations Regarding the Potentialities and the Limitations of Legislation in the Independent African States", in University of Ife, ed., Integration of Customary and Modern Legal Systems in Africa (New York: Africana Publishing Corporation, 1971), p.47.

[87]J. Keuning, "Some Remarks on Law and Courts in Africa", in University of Ife, ed., ibid., p.58-59.

To a positivist of the Austinian type, customary law may be no law at all. But to one who subscribes to the historical school of jurisprudence it is not only law but the most valid law. According to the historicist philosophy, law is a slow organic distillation of the spirit of the particular people among which it operates. It is not just a deliberately created product of some artificially contrived legislator.[88] Also, we learn from the Sociological school that law exists on more than one level and to penetrate its mechanisms it is not enough to limit our attention exclusively to the documentation of legal rules. We must come to terms with the underlying social norms which determine much of its functioning.

On the question of African criminal law being law or not, Milner's words remain instructive. He writes,

> Whether the customary criminal law process satisfies our criteria of criminal law or of law at all is not important. Function is of much more significance than analysis of content. The customary rules developed in response to situations of social conflict in order to resolve the conflict and prevent its recurrence. The sanctions brought to bear by the community upon the parties in conflict were designed to put pressure upon them to conform to the rules. If they were effective it does not matter very much whether we call them social or legal, or remedial or penal.[89]

Therefore, there is African criminal law and there may be much in the ideas of customary criminal law that is admirable and that could be copied by the modern penal system These ideas, after all, reflect basic ideals and, though developed to meet the needs of communities far removed in nature from those of today's cities, they may on examination

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[88]See generally Von Savigny, On the Vocation of our Age for Legislation and Jurisprudence, cited in R W Dias, Jurisprudence (London. Butterworths, 1985). One possible weakness of the Savignian approach is that it does not provide a way of changing decaying and outmoded customs thus making it difficult to distinguish between law and unenforceable custom.

[89]A.Milner, supra note 4, p.47.

give some guides in the direction of sound penal policy.[90]

2.3..Judicial Structure and Procedure.

In the pre-colonial Nigerian society the social institution responsible for law and order was the Chieftain system. The social control of infractions of the societal norms and mores was under the authority of chiefs, council of elders and religious leaders, and many of the responses to violations of values were rooted in religious beliefs. The operation of the societal norms was relatively simple and group-oriented. Among the Ibo of eastern Nigeria, new rules were usually discussed by the elders, especially in the market place or such common centres in the community where many members of the public could become aware of what had been discussed and inform others.[91] The judicial process was inexpensive and prompt. For example, among the Yoruba and the Benin minor criminal cases might be settled at any level such as the family head or the ward head while major ones are reserved for the highest judicial body which is the council of state.[92] With the Ibo society, minor criminal cases were usually dealt with instantly especially if the offender is caught *in flagrant delicto*[93] while major offences such as witchcraft,

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[90]Ibid., p.29.

[91]M.M. Green, Igbo Village Affairs (London: Frank Cass, 1961) 110. Among the Yorubas of south-western Nigeria new norms were discussed and passed to members of the society at different levels including the lineage, age-groups and the Oba's council, see F.N.A. Fadipe. The Sociology of the Yoruba (Ibadan: University Press, 1970) 311.

[92]Fadipe, ibid., p.312.

[93]Green, supra note 91, p. 112.

homicide and robbery were handled by the Council of Elders.[94] In conflicts where there was resort to community intervention, the most significant feature was that the whole community became actively involved in the settlement. Members of the community would assess the evidence, express opinions as to the rights and wrongs and offer suggestions on how best the dispute could be resolved.

The basic unit of social control was the family, hence most minor offences were settled at the kindred or clan levels by the elders. The family head represented the lowest tier in the court systems of traditional African societies. The intimate nature of the family group which must be maintained to ensure the economic and social progress of the group as a whole naturally necessitated a special mode of judicial process which should nurture and strengthen that group interest.[95] Therefore the primary concern of the family head was to maintain the cohesion of the family which was essential for the economic survival of the group. Nevertheless, while attempting to maintain the family cohesion through reconciliation he equally sought to do justice according to the laws of the land.[96] There were also the ward heads or sub-chiefs who had wider jurisdiction than the family heads and determined serious cases not within the jurisdiction of the family heads. In acephalous societies like the Ibos, the Council of Elders at the village level constituted the supreme judicial body while in non-acephalous societies the King was the highest

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[94]In Onitsha, such serious cases were reserved for the Obi's court, see I. Nzimiro, Studies in Ibo Political Systems (London: Frank Cass, 1972) 130-2.

[95]K.E. Quashigah, "Reflections on the Judicial Process in Traditional Africa", (1989-90) 4 Nigerian Juridical Rev. 3.

[96]Ibid., p.4.

judicial authority.[97]

At every level of judicial authority the procedure was largely informal and flexibility was maintained to such extent as was necessary to achieve an amicable settlement of the dispute. To an extent the process entails a bargaining relationship that aims not to determine that one side or the other breached the norm at issue but to find a compromise solution that will leave neither party so strongly aggrieved as to prevent future amicable relationships. In the resolution of disputes, emphasis was on social relationships rather than on strict right-and-duty issues which form the core of English legal procedure. Thus where the dispute on its resolution anticipated a continued relationship, the appropriate principle of decision-making will be what Laura Nader calls 'give-a-little, get-a-little'.[98] This can be illustrated with the following example: in a motor accident X (the driver of the car) killed Y (a farmer who was trying to cross the road). As the police and the family of the farmer were notified two types of legal proceedings were invoked: customary and the western-type legal proceeding. In the High Court, X was discharged and acquitted on a charge of manslaughter on the ground that the farmer was negligent in crossing the motor way. But the High Court decision did not end the matter. X's people and Y's people in a different customary proceedings negotiated a form of settlement in which X's people paid certain sum of money for burial

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[97]Green, supra note 91, p.132.

[98]L. Nader, "Styles of Court Procedure: To Make the Balance", in L. Nader, ed., Law in Culture and Society (Chicago. Aldine Pub. Co., 1969). Compare with plea bargaining in modern criminal trials which some how avoids the results of a 'winner-takes-all' process.

and reparation.[99]

The 'standard of relevance' under a traditional judicial process is wider. It enlarges discussion so that all factors affecting the grievances are brought into focus. This is not to suggest that there is no limit to what can be allowed or disallowed. The judges encourage all those with vital evidence relating to the case being heard to come forward and speak. Hearsay evidence was admitted in so far as it permitted those with vital knowledge of the facts of a case to testify even if they have no direct acquaintance with the events. "By being flexible in the receipt of apparently indirect evidence from all those who proffer it, the judges seek to obtain background information from persons in the community other than those immediately connected with the case before them. This often enables the court to assess the wider implications of the dispute against the background of the social milieu in which the parties live."[100]

Through this procedure, a wider community participation is secured in resolution of violations of the norms and the judges' approach made less technical. Judicial decisions arrived at through such wide community participation are perceived as a manifestation of the communal will rather than as something imposed by an impersonal authority.[101] The traditional judicial process guaranteed free flow of information through the narrative

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[99]This incident was cited by B. Uweru, "Case for Victims of Crime Support Scheme", in S. Adetiba, ed., Compensation and Remedies for Victims of Crime in Nigeria Federal Ministry of Justice Law Review Series, vol 5, 1990, p.133 at 140. While the western-style procedure is inflexibly committed to the right and wrong of the case, the customary procedure seeks to achieve a settlement having regard to the victim, the criminal and the community

[100]T.O. Elias, supra note 6, p. 21. Elias sees some analogy between such public participation and the anglo-American jury system which is designed to associate lay people with the administration of justice.

[101]S. Versele, "Public Participation in the Administration of Criminal Justice", (1969) No. 27, International Review of Criminal Policy 10.

style of testimony which contrasts with the narrow 'yes' and 'no' responses that often characterize the adversarial process. Under the adversarial process, the factual basis for the verdict may be incomplete and 'coaching' a witness may unconsciously fill gaps in a witness' memory that fit with the lawyer's expectations.[102] Truth was the primary goal of the traditional process and it was never subordinated to procedural rules. The inherited system, like other adversary systems has an inflexible commitment to procedural rules and generally truth-seeking is subordinated to procedure as the basis of the impartiality of the decision maker.[103] The judges' role in customary proceedings was not strictly passive. They were seen as trusted advisers of both parties and assisted them when they are unable to make their position sufficiently clear. The judge participated to such extent as is deemed necessary to produce the truth.

Oaths and ordeal were also vital aspects of traditional judicial process. As observed above, religious beliefs affected the processes of social control. In any given case where the evidence was insufficient or contradictory, resort could be had to the supernatural medium via the instrumentality of oaths and ordeal. Oracles could be consulted for detection of crime. It is interesting to remark that this kind of practice is still seen in most rural communities of Nigeria. Meek writes that the oath was "not merely a solemn asservation that the speaker is telling the truth- it is a self-imprecation

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[102]See Damaska Mirjam's comparison of adversary and non-adversary procedures for fact finding in "Presentation of Evidence and Fact Finding Precision", (1975) 123 University of Pennsylvania Law Review 1083-1106.

[103]Zuparic, Bostjan, "Truth and Impartiality in Criminal Process",(1982) 7, Journal of Contemporary Law 39-133.

charged with punishing power."[104] Refusal by an accused to take the oath was an indication of guilt while its acceptance by him/her was a proof of not guilty. In many cases it was the accused, eager to prove his innocence that demanded resort to oath.

Oaths were administered with objects or before such shrines held sacred by the community. In Igbo land the myth of the *ofo* still persist. The *ofo* is a sacred symbol in the form of a small wooden club usually bound with iron and possessed by the head of each lineage. Its invocation creates a solemnity that has a very positive impact on judicial proceedings. The formal oath or affirmation done in our modern courts is treated by the people as mere formality devoid of any solemnity or spirituality. The working of the traditional oath might be attributed to psychological rather than any other forces, nevertheless, it has been very effective. Even in modern times certain fetishes still exist before which no sane person would go to perjure himself because the consequences are always present for all to see.[105] A testimony to the persisting regard for the traditional oath in modern times is the recent call by one of Nigeria's foremost jurists Prof. Nwabueze for the traditional oath to be introduced at the swearing-in ceremony of our political leaders. He laments the failure of the oath of office normally taken by government appointees to check corruption by these officials. According to him, the main objects used in swearing, namely the Bible and the Koran, have failed to ensure adherence to the oaths taken because these objects have failed to exact that conscientiousness which they were meant to bring about. He then submits that there is

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[104]C.K.Meek, The Northern Tribes of Nigeria (London: Frank Cass & Co. Ltd., 1971), vol.1, p.264.

[105]Quashigah, supra note 95, p.9.

a need for a change of objects to include "suitable traditional jujus or other objects which can serve as effective sanctions in securing adherence to the oath of office under the constitution."[106]

Various ordeal methods were prevalent in traditional Africa. Some of those practised in Nigeria include the administration of sasswood poison or toxic beans, a needle or feather pushed through the tongue or ear, picking cowries out of boiling oil or water, or an axe-head out of a roaring fire with the bare hand, and dropping the suspect in a spirit infested or crocodile infested river.[107] Section 207(1) of the Criminal Code makes unlawful any ordeal which is likely to result in the death or bodily injury to any party to the proceedings. The inhumanity involved in certain ordeal methods makes their abolition salutary. However there is no doubt that some ordeal methods would be preferred today to the brutality and torture that characterizes police work in Nigeria and other developing countries. Some ordeal methods involved no inhuman practice at all, for example, the drinking of consecrated water.

2.4..Group Orientation.

In any description of the judicial process in traditional Nigerian societies it is imperative to stress the group consciousness that characterized social relationships for

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[106]B.O.Nwabueze, "Ideological Foundation for a Viable Political Order for Nigeria",being paper presented at the National Seminar on a New Political Order for Nigeria, 16-18 April, 1986, organised by the Department of Public Law, University of Lagos, Nigeria, quoted in Quashigah, ibid., p.10 (footnote 53).

[107]Milner, supra note 4, p.46.

therein lies the basis of social control and crime regulations. For any criminal justice system and policy in Nigeria to be efficient it has to reflect this basic norm on which social control had been conceived in traditional societies. Individual behaviour was shaped by obligations to the family and community rather than by self interest. The group-mindedness served as a veritable deviance control mechanism as each individual saw the need to conform to the norms in order not to bring shame to his family, kindred or clan. Unfortunately, Nigerian penal policy makers too readily assume that such cultural trait is incompatible with modern individualized society.[108] But some modern nations were able to harness these cultural themes to conduce to stability in their legal and political process.[109] The extended family system is a phenomenon in both traditional and modern Nigeria. With no welfare arrangements, members of a family (in the widest sense of the term), still depend on their kin for support and the latter in turn exerts considerable control. The kin-group was a potent force in the legal machinery of traditional Africa.

A corollary of this group orientation is the element of collective responsibility in traditional penal thought and practice. The advantage of collective responsibility is that

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[108]Many criminologists have written on how all stages of criminal justice administration in Japan are influenced by such cultural themes as relativism and group orientation. Fenwick states that the group consciousness in the Japanese society not only keeps people away from deviance but also assists in amicable resolution of many criminal disputes outside the official legal system. An offender's parents or relations and in some cases his/her whole community may feel a high degree of responsibility and apologize or make restitution even though they have had no direct linkage with the violations in question.This is encouraged by the wide discretion vested in the institutions of the legal system. See C.R. Fenwick, "Culture, Philosophy and Crime: The Japanese Experience", (1985) 9 Int'l J. of Comparative and Applied Criminal Justice 72, J.E. Conklin, Criminology (New York. Macmillan Publishing Co., 1981) 239. See also C.B. Becker, "Social Control of Crime in Japan", paper presented at the 1982 Annual Meeting of the Academy of Criminal Justice Sciences, Louisville, Kentucky, p. 4, cited in Fenwick, p 73

[109]On how these can contribute to stability in the political process, see H. Eckstein, Division and Cohesion in Democracy; A Study of Norway (New Jersey. Princeton University Press, 1966), particularly chapters 5-7.

it makes the members of the community alert to their social obligations both by preventing the commission of offences by erring members and by helping the authorities detect wrongdoers in their attempt to evade the law.[110] The effect of a violation falls, not only on the offender, but also on his extended family and community. As a result all those likely to be so affected would be anxious to restrain the would-be wrongdoer or to extend sympathy towards him after the offence had been committed. "Such is the degree of social cohesion where kinship brings the members of a group together like a well-interlocked metal sheet of defensive armour."[111]

However, it must be noted that the concept of collective responsibility which implies, to an extent, the visitation of the infractions of an individual upon an entire group does not necessarily mean that traditional African jurisprudence does not distinguish between primary and secondary liability for offences against the law. Elias writes,

> No doubt, African sentiments attach great weight to the solidarity of the group as a necessary condition of the maintenance of the social equilibrium of the local community. Thus, ...if one of their member should incur the penalty of the

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[110]Apparently in recognition of the strength of this collectiveness, some penal statutes enacted by the colonial government in Nigeria contained provisions for collective punishment to be meted out to whole communities or villages in which some member(s) had committed an offence and remained at large. See Collective Punishment Law, cap. 22, Laws of Eastern Nigeria, 1963; cap. 24, Laws of Northern Nigeria, 1963; cap. 22, Laws of Western Nigeria, 1959. See also T.O.Elias, British Colonial Law: A Comparative Study (London: Stevens & Sons, Ltd., 1962), pp.177, 184-189. This Law was invoked in 1965 by the Government of the then Eastern Region of Nigeria when the Achina Community destroyed houses of the Akpo Community, kidnapped and killed some members of the said community in a dispute between the two communities. A collective fine was imposed on the Achina Community and part of this was paid as compensation to those members of Akpo Community who suffered personal injuries or damages to properties following the disturbance.

One must add that today the constitutionality of this Law is doubtful since the Constitution envisages criminal proceedings against individuals rather than a group of unidentifiable persons. See F. Nwadialo. "Compensating Victims of Arson and other Offences to Property", in S. Adetiba, ed., supra note 99 p. 200 at 203.

[111]Elias, supra note 6, p.19.

> payment of blood-money or compensation, other members of his group or family would come to his aid in meeting such an obligation. There is no doubt whatsoever in the minds of these other members, and certainly not in the customary law on the subject, that the primary liability is that of the wrongdoer himself alone, and that the other members are merely assuming secondary liability if he fails to pay either in part or as a whole.[112]

The group factor flows inevitably from the economic interdependence that characterized traditional societies. The changing economic relations may have reduced the force of these cultural themes, nevertheless, they still retain considerable potency that make them relevant in the modern society. The same spirit of traditional generosity could be recaptured and pressed into the service of any meaningful programme of social defence like probation work, suspended sentence and after-care of ex-prisoners.[113]

2.5..Traditional Penal Thought:

Various forms of punishment obtained in the traditional judicial process. The common objective of most forms of customary dispute settlement in Nigeria was the pacification of the contestants and the healing of the rift in the community caused by or causing the crime. Efforts were made to restore the basic harmony and solidarity or what is often referred to as "social equilibrium". This claim to restoration of equilibrium has been challenged by some writers.[114] Custodial confinement of offenders was not an

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[112]Elias, ibid.

[113]Ibid., p. 23.

[114]Sally Falk Moore has been very critical of this concept of maintenance of social harmony and equilibrium. She argues that the "social equilibrium" presentation of African disputational logic is a mixture of African self-idealization and colonial/anthropological political theory. Moore justifies her reservations on this theory on the

institutional feature of customary criminal law.[115] The idea of prison was an imported phenomenon particularly in the acephalous societies like the Ibos of Eastern Nigeria.[116] For offences that will be considered grave by western legal standards, such as murder, aggravated assault, rape, major larceny, and robbery, the common penal sanctions were equitable restitution to the victim, family, and community at large.[117] Restitution and compensation featured so prominently in the penal practices of Native Courts that Lord Lugard, then colonial Governor-General of Nigeria felt inclined to advise as follows:

> ...the form of punishment inflicted must be that which is most deterrent and most likely to suppress crime. Native courts must be instructed that the restitution of stolen property, or of an abducted person is not of itself a sufficient penalty...a punishment should always be added to restitution.[118]

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existence of factions, subsegments,superiors and inferiors and individual interests within the internal micro politics of traditional communities. According to her, what appears to be equilibrium from the outside is often a temporary moment of agreement in which a dominant segment of the group has prevailed and everyone recognizes that predominance and acquiesces in all public behaviour; see Moore, "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts", (1992) 26 Law and Society Review 11 at pp. 32-3.

It appears that Moore interprets the reference to social harmony as implying the existence of perfection in the traditional society and its dispute process. This is evident in her statement: "Is there any reason to postulate a harmonious, egalitarian, communitarian past, a Garden of Eden from which colonial intervention caused Africa to fall...? I doubt it", p.33. See also Moore, S.F. "Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-Help and Collective Responsibility", in M. Gluckman, ed., The Allocation of Responsibility (Manchester. Manchester Univ. Press, 1972). That the traditional judicial process emphasized social harmony does not mean that such harmony was always achieved. Confrontation was sometimes inevitable but this does not negative the assertion that achievement of social harmony was a primary goal. Even Moore admitted that this theory has some foundation in fact.

[115]Elias, supra note 6, p. 18. See also J.A. Arthur, "Development of Penal Policy in British West Africa: Exploring the Colonial Dimension", (1991) 15 Int'l J. of Comparative and Applied Criminal Justice 190.

[116]Arthur, ibid. There seem to be indications that some elementary ideas of confinement developed lately in the centralized Islamic societies of Northern Nigeria.

[117]Ibid.

[118]See Political Memoranda 1913-1918, Memo. V111, para.54 quoted in Milner, supra note 4, p. 92. Further comment on this penal practice is done in chapter 4 where the provisions of the Criminal Code, Criminal Procedure Act, the Penal Code and Criminal Procedure Code in relation to restitution and compensation are appraised. I also referred to some studies which show that the sentiments of many Nigerians are still towards this customary penal

The objective of social organisation in traditional Africa was seen as a constant striving for the ideal of mutual interdependence and well-being. Maintenance of social equilibrium of the community was seen as the ideal of government. Some writers see this as analogous to the objective of the modern concept of Rule of Law.[119] The process of reconciliation and consequent reconstruction of the relationship of the criminal and the victim, or the victim's relations, does not stop at the point of adjudication, but may go on until, by further mediation, if necessary, the breach is fully repaired.[120]

Individualized sentencing was much practised under customary criminal law. To ensure that the punishment did not socially alienate the offender from the community, the punishment was usually collectively administered by the agents of social control, the offender's family and the community at large.[121] There were also outlawry and ostracism as well as the death penalty for habitual offenders.

The argument usually advanced in dismissing traditional modes of punishment is that they cannot be effective in a modern social context, but as Milner[122] warns, we should try to discover how far the social contexts have changed before we can dismiss the traditional methods of enforcement as inappropriate in modern social contexts. He writes:

I believe that it is wrong to assume that merely because socio-economic conditions

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attitude.

[119]Elias, supra note 6, p.19.

[120]Elias, ibid., p. 23.

[121]Arthur, supra note 115, p.190.

[122]supra note 4, p. 379.

> have altered, traditional sanctioning attitudes are necessarily inappropriate in the modern law. Personal mobility, economic and industrial growth, improved educational facilities and rapid urban expansion have certainly altered community structure....Yet Nigeria is not a collection of large-scale or small-scale communities. It is both. It is a nation in a state of rapid but differential development, demonstrating extremes of urban anonymity and village cohesiveness. It is clear that a vast number of small, established village communities still exist, which have never been detribalized and in which there is much to suggest that traditional patterns of social control may still be relevant. It is also apparent that many migrant groups do not assimilate into their host communities but rather retribalize and retain both distinct residential segregation and cultural homogeneity. If traditional society itself has not become irrelevant to modern Nigeria, the ideas and ways of traditional society must remain relevant.[123]

Even in our urban areas the mere presence of some of the trappings of modern civilization is not enough to assume that the people had become assimilated into western culture. Jackson referred to this erroneous assumption in criticising the view of the majority of the Court of Appeal in the Canadian case of R. v. Naqitarvik[124] He decried the reliance by the Court of Appeal on surface realities such as the presence of electricity, telephones and the infrastructure of schools, nursing stations and police forces as evidence of the essential similarities between native communities and non-native communities. According to him, "the links within these communities between the past and the present, the continuity of deeply held values of sharing and cooperation, the respect for elders and the importance of maintaining community coherence through consensus decision making, are not signposted or visible to the eyes in the same way as evidence of outside intrusion,

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[123] Ibid., (emphasis mine). Chapter 5 contains comment on the relevance of the traditional society even in the urban areas of modern Nigeria.

[124] (1986), 26 C.C.C. (3d) 193.

in the form of telephones, nursing stations and mines."[125]

The advent of colonization had a manifold impact on traditional forms of social control, dispute settlement and penal practices. The social and cultural dislocations that came with the introduction of new forms of law and justice have become one of the legacies of western penal policy in Africa.[126] The impact is summed up as follows:

> Rationalized external court systems replace "council of elders" dispute settlement; zero-sum decisions and winning and losing a case replace mediation and the discovery of solutions acceptable to both parties in a conflict....Punishment becomes time served in an institution operated by the state (prisons) and replaces psychological sanctions of public shaming, or payment of damages.[127]

2.6..Critique of a Customary Legal Order

The negative attitude of Nigerian penal policy makers towards customary law and processes is often based on the notion that customary law and procedure are archaic and out of tune with changing realities and radically unsuitable for a modern society. Is customary law indeed bereft of growth? Put differently, had the alien system not been imposed on Africans, would their legal system still have been in the pre-colonial stage? The answer is no. Customary law is not static. It can and does adapt to changing

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[125]M. Jackson, supra note 11, p. 192.

[126]Arthur, supra note 115, p. 191.

[127]L. Lombardo, "Lessons from the Third World for Understanding American Criminal Justice", (1984), 8 International Journal of Comparative and Applied Criminal Justice 79.

conditions and its dynamism is not entirely attributable to the impact of the West.[128] Indigenous communities, far from respecting all the time all immemorial customs, are occasionally disposed to make departures even in fundamental rules, where these are considered to be in the social interest.[129] "Popular discussion with a view to securing general assent in favour of changes in old rules of customary law was not unknown under the indigenous legal system."[130] The Ibo of Eastern Nigeria are well known for this dynamism.[131]

It is rather unfortunate that the colonial process has impaired the capacity of the Nigerian legal system to rejuvenate itself from within. It is equally regrettable that part of the colonial heritage is the discrediting of customary law and indigenous judicial process by our elites. To be able to harness the tremendous potentials inherent in our indigenous judicial process we must discard our negative attitude towards them. A careful appraisal will show that some of the concepts or practices in modern criminal process of developed societies have striking analogies in the customary judicial process. It is true that the socio-economic changes brought by colonization made a wholly customary legal order unsuitable. It is equally true that the growth of customary law is gradual but as the

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[128]In Lewis v. Bankole (1909) 1 N.L.R. 81, Osborne, C.J. noted as follows:

> One of the most striking features of West African native law and custom...is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character. at p. 100-1.

Another important characteristics of customary law is that it derives its strength from its acceptance by members of the community as obligatory on themselves- Eshugbayi Eleko v. Government of Nigeria [1931] A.C. 662 at 673.

[129]F.A. Ajayi, "The Judicial Development of Customary Law in Nigeria", in University of Ife, ed., Integration of Customary and Modern Legal Systems in Africa (New York: Africana Publishing Corporation, 1971), p.116.

[130]Ibid., p.117.

[131]Green, supra note 91, p. 132.

Dutch would say, it is dangerous for one to jump further than the length of one's jumping pole. Economic development may have created some legal issues which a traditional system cannot handle without resort to the modern system. Therefore, certain crimes are beyond the comprehension of the indigenous judicial process.

One thorny question is, who should superintend the growth of customary law; who should declare when a particular custom had gone into desuetude? There is a preponderance of opinion that the judiciary should be endowed with distinctively creative functions in the evolutionary trend of customary law- leaving it to the judiciary to determine when particular customs have gone into desuetude. An account of the judicial development of customary law in Africa, including Nigeria, is replete with diverse approaches by judges in treating customary law. Some cases[132] reveal the application of the historical method of inquiry whereby one has to look back in order to find out what the customary law had been in the past; and once the position in the past is ascertained, the old rule is applied to the new situation without question. In other cases, the courts manifest their inclination to treat customary law as being in the process of evolution. Under this approach the courts take cognisance of changes where convincing evidence is produced of such changes and of its acceptance by the society whose life is to be governed by the new rule of customary law. The courts equally applied the repugnancy test to defeat many rules of customary law.

Each of the above approaches has merits and demerits. The enforcement of old rules by way of historical method of interpretation conduces to stability of the indigenous

[132]Amodu Tijani v. Secretary Southern Provinces 3 N.L.R.21. See also Oshodi v. Mariamo Dankolo, 9 N.L.R. 13.

social structure saving it from complete disintegration under the impact of the new and non-traditional aspects of life.[133] It also secures greater clarity and understanding of the rules. But, carried to its extreme, this approach may stultify progress and lead to the enforcement of rules no longer relevant to present social life. The repugnancy approach, while ensuring the conscionability of customary rules, suffers from the defect of imposing the legal morality of the courts as the precursor to the social morality of the people whose conduct is subject to the customary legal regime.[134]

The above brief account shows customary law as a living law. Would customary criminal law not have developed significantly if it had been given the opportunity?

Another crucial question is whether customary criminal law conduces to human rights protection. One may safely concede that some features of customary criminal law may not totally meet the human rights requirements of today's world. But the relevance of customary criminal law does not lie in the "primitive" aspects of it. Most disagreements with customary criminal law are with its methods rather than its philosophical conception. Placed on the scale, customary criminal law tilts heavily towards protection of human rights than otherwise. Fair hearing is the cornerstone of human rights protection and our account of the judicial procedure in traditional Africa shows the presence of those vital attributes of fair hearing- *audi alteram partem*, public hearing by competent body, and in most cases right of appeal to a higher body.

An aspect of customary criminal law that violates the human rights standard is

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[133]Ajayi, supra note 129, p. 123.

[134]Ibid.

'instant justice' or self help[135] normally resorted to where the offender is caught *in flagrant delicto.* According to Green, instant justice was not "mere mob violence but a recognised method of dealing with such a situation."[136] Commenting on the unsuitability of this in modern Africa, Quashigah writes,

> The general application of the instant justice method is not recommended for modern Africa because the self-regulatory aspect of traditional African society is absent in modern African society. In traditional Africa one can be sure that only the requisite punishment would be meted out to the culprit by the "mob" because they know the law and its extent but the same cannot be said for modern Africa; the mob in modern Africa has no "head", in fact many do not even know the nature of punishment prescribed for majority of offences and are therefore bound to be excessive.[137]

Recognition of customary criminal law does not mean recognition of instant justice as part of it.

The various ordeal methods that involved death or bodily injury or likelihood thereof to the accused have no place in modern Africa. Such are in conflict with human rights and were therefore rightly abolished. But the brutality and torture associated with police in modern Africa makes one wonder if the ordeals were not to be preferred. Quoting Quashigah again, "when put on the scale of justice... Article 4 of the Universal Declaration of Human Rights which provides that 'no one shall be subject to torture or to cruel inhuman or degrading treatment or punishment', would weigh much heavier in

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[135]Self-help as an enforcement procedure was commonly accepted in acephalous communities like the Ibos of Eastern Nigeria. Self-help did not necessarily indicate the denial of law, though sometimes it may have done. It was frequently seen as a perfectly satisfactory alternative to seeking a remedy in court, especially if the offender were found actually committing the offence. See Milner, supra note 4, p. 41.

[136]supra note 91, p.114.

[137]Supra note 95, p. 7.

the traditional African society than in modern Africa."[138]

An aspect of sanctions in traditional Africa may be most unwelcome today. That the social harmony or equilibrium could sometimes be sustained at the physical expense of another family member rather than the criminal himself is objectionable. The social status of an offender may affect the sentence and a strong man or family head could offer another member of his family as a substitute for execution. While agreeing that this cannot be tolerated in a modern society, one commentator explained its operation in traditional Africa on the principle *salus populi est suprema lex*; that having regard to the economic mode of production, to lose an influential family member will do greater harm to the family or lineage than when an ordinary member is lost.[139]

Common law Practitioners are too readily biased against any other system. Thus some Nigerian lawyers are biased against customary criminal justice system. To some lawyers, anything short of the rigid adversarial system cannot guarantee fairness in criminal trials.

2.7..Conclusion:

The traditional society faced the problem of deviant behaviour and had its ways of responding to such transgressions. Crimes seen as affecting the social or religious foundations of the whole community received more public attention. Customary criminal law has not been swept under the carpet by its legislative abolition but rather still

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[138]Ibid., p.10.

[139]Ibid., p.14.

regulates the lives of many, especially in the remote communities. Customary judicial process is informal, quick and cheap. It retains an extent of flexibility necessary to achieve amicable settlement. In the resolution of disputes, efforts are made to achieve reconciliation whenever possible. The community plays a leading role in the resolution of disputes. Customary law is not incompatible with human rights protection. Its informal procedure which facilitates disposition of cases enhances individual liberty. However, such practices as trial by ordeal, self-help, mutilation, etc. have no place in contemporary Nigeria.

CHAPTER THREE

PATHOLOGY OF THE INHERITED SYSTEM: BASIC SHORTCOMINGS OF THE SYSTEM

3.1..Introduction:

This chapter discusses some of the defects in the criminal justice system of Nigeria. There is no pretence to identify all the flaws, rather only the basic shortcomings that engender the most attacks against the system are discussed. There is no contention that the arguments raised here or the suggestions proffered in later chapters constitute a complete solutions to these problems. For instance, the pyramidal corruption in the police is an aspect of the grand moral decay of the Nigerian society and may persist irrespective of who holds the baton.

As expected, my predominant consideration is the context of indigenous circumstances. Therefore, some of the criticisms here may be inapplicable when placed in the context of other societies like Europe and America. However, the justness of a legal system must be decided against the background of the society in which it operates. The Nigerian criminal justice system is replete with the vestiges of colonialism and abundant evidence of aping of our colonial masters to the extent of being enslaved by rules that are palpably incompatible with indigenous circumstances. In the determination of criminal liability, little or no regard is given to the prevalent beliefs and practices of

the people. Community values are often ignored and the standard of reasonableness is anything but that of the ordinary Nigerian. As a result many crimes are kept outside the official system by many communities and since there is little policing in most rural areas, such crimes do not get discovered by the police.

Extreme legalism and undue adherence to technicalities combine with intractable delay to make the system unpopular both to the accused and to the public. Inefficiency and corruption within some of the conventional instrumentalities of law enforcement have robbed the system of the respect and cooperation of the public. There is a general feeling of insecurity from the activities of criminals and when they are prosecuted there is an apparent lack of faith in the ability of the system to render substantial justice, not just to the accused only but to the society as well.

3.2..The crisis of legitimacy in the origin and content of the criminal code.

> "Every community of men, as well as every individual, must govern itself according to its ideas of justice. What I should desire is, not by violence to change its institutions, but by reason to change its ideas"[140]

One of the basic problems of criminal justice administration in Nigeria derives from the alien nature of the substance of the criminal law, both the substantive and procedural content. The problem is not only that the system was inherited but that what was inherited differed markedly from what had existed. The Criminal Code and the Criminal Procedure Act were introduced with scant, if any, regard to the indigenous circumstances. If

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[140]William Godwin (1756-1836), cited in E.V. Mittlebeeler, African Custom and Western Law (New York: Africana Publishing Co., 1976) 1.

criminal law is an expression of the social and moral attitudes of a people, then one is inclined to ask: whose social and moral attitudes are expressed in the codes inherited from Britain?[141] The Nigerian spirit cannot be said to be expressed in the inherited criminal justice system. The content of the code engenders a crisis of legitimacy. One writer has put the problem as follows:

> In formulating offenses and justification for defences, it is the attitude of the colonial power that proved determinant. The moral attitudes of the society towards particular conduct was ignored unless such conduct was at the same time reprehensible by the standards of the colonizing power.[142]

He went further,

> The criminal code was enacted as an instrument of colonial policy, designed to achieve imperial uniformity, and to replace "barbarous customs and primitive morality" with the "superior morality" of the common law. Even in the customary criminal offenses recognised, it has been a negation of what their customary concepts stood for, and promotion of what the imperial government considered to be in the interest of good government.[143]

Therefore, through legislation the colonial state criminalized some customary practices that were still popular in the social system and decriminalized others prohibited by the people. With this position largely unaltered since independence there continue to be

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[141]Criminal law, as an instrument of social control, should reflect the culture and aspirations of the society in which it is functioning, Adeyemi, supra note 75, p. 152.

[142]A.G. Karibi-Whyte, "Cultural Pluralism and the Formulation of Criminal Policy", in A.A. Adeyemi, ed., Nigerian Criminal Process (Lagos: University of Lagos Press, 1977), p.12.

[143]Ibid., p.14. This problem is common to most third world nations that were victims of colonization. Writing about the same problem in the Indian system, Derrett aptly described the Indian legal system as basically "an import, a transplant, which acclimatized in a manner that its importers would never have wished; inadequate to perform the task required of it, yet only too adequate in creating problems not expected of it", J.D. Derrett, "Indian Cultural Traditions and the Law of India", in R.A. Sharma, ed., Justice and Social Order in India (1984), p.11.

conflicts in the justice system.

On public feelings about the judicial system, a renowned Nigerian jurist recently stated: "...I have no doubt in my mind that if a census is taken of non-lawyers who are present during court trials more than eighty percent of them will not hesitate to say that hardly has there been a single case in which justice has been done".[144] It is idle to say that a system whose justice is seen and accepted by lawyers alone while the people feel otherwise is in crisis. The judicial process is the human attempt to attain justice through the law. Whether the system actually achieves justice depends on a number of factors. Oputa[145] identifies four factors as prominent: the laws administered, the judicial officers, the legal profession and the peoples' conception of the role of law. The laws administered must be just laws not harsh and oppressive laws. It is submitted that laws which have little or no relevance to the basic postulates of a society could be oppressive though *prima facie* just.[146] In this, one begins to see the root of the problem.

One problem area is the determination of criminal responsibility of an accused when the commission of the alleged crime is induced by beliefs in the supernatural. Such

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[144]T.A. Aguda, Crisis of Justice (Akure: Eresu Hills Publishers, 1986), p.17. There is no empirical study to support this but I will not be surprised if, when such a study is undertaken, a higher percent emerges. Dr. Aguda spoke from his experience as a former Attorney-General of Nigeria and also a superior court judge; he had also been the chief justice of Botswana.

[145]C.A. Oputa, "Judicial Ethics, Law, Justice and the Judiciary", (1990) 1 Justice 52-53.

[146]A legal order is unjust if the majority of the people are so ignorant of that legal order that they are unable to avail themselves of its protection or else benefit therefrom, E.A. Hoebel, The Law of the Primitive Man (Cambridge Massachussettes: Harvard University Press, 1954) p.15.

beliefs which formed the major component of customary criminal law are still deep-rooted in a significant portion of the population. Thus in some criminal cases before the courts, the legal issues may be further confounded by the intrusion of beliefs in witchcraft, juju or other such supernatural phenomena. The attitude of the criminal justice system has been a rigid application of the common law of crimes without any cognisance being taken of the strong beliefs that have been the cause of such crimes.[147] In the determination of the reasonableness of a belief, western cultural standards have been applied instead of the cultural standards of the community of the accused.[148] Thus the crucial point which is the legal effect of supernatural beliefs on the criminal responsibility of those charged with various crimes committed as a result of such beliefs has always received little, if any, attention from the courts. In homicide cases, for instance, a verdict of murder is given. But applying the philosophy of the code itself, can such person strictly be said to possess the requisite mental element for murder? In traditional Nigerian society, the punishment for witchcraft is death carried out as an expression of the communal will to protect the society from the evil forces which the witch represents.[149] Driberg writes:

> The insidiousness of its operation and the illegitimate use which it makes of magic and the supernatural render the usual processes of law abortive, and the public law therefore does the only thing possible and eliminates the menace. Any of these

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[147]L.O. Aremu, "Criminal Responsibility for Homicide in Nigeria and Supernatural Beliefs", [1980] 29 International and Comparative Law Quarterly 112.

[148]See Gadam v. R. (1954) 14 W.A.C.A 442, the West African Court of Appeal stated that the courts must regard the holding of such beliefs as unreasonable.

[149]See A.K. Ajisafe, The Laws and Customs of the Yoruba People (1924), cited in Aremu, supra note 147, p.113.

anti-social crimes is punished by death because that is the only measure which can preserve society.[150]

The aim of this work is neither to justify nor condemn the holding of such beliefs. Suffice it to say that such beliefs have exercised, and still do exercise, hold on the mind of the average African, be he literate or educated.[151] My concern is the implications on the accused and the society of the present attitude of the law. Holding such beliefs as generally unreasonable leads to the accused being denied the benefit of some of the general defences under the criminal code.[152] For example, the defence of mistake of fact[153] requires the mistaken belief to be reasonable. In a criminal trial confounded by the belief in the supernatural, what standard of reasonableness should be applied to the accused? In Gadam v. R.[154], the accused had killed an old woman in the belief that the miscarriage and subsequent death of his wife had been due to the old woman's witchcraft. There was a finding of fact, which was undisputed, that the accused's belief was bonafide and that a belief in witchcraft was prevalent in the community in which he lived. He was convicted of murder. His appeal was dismissed on the ground that the mistake (or the

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[150]supra note 67, p. 236.

[151]Professor Aremu had stated that in his criminal law class 1976-77 session, more than 90 per cent. of the undergraduate class of 66 (average age 20 plus) believed strongly in witchcraft, see Aremu, supra note 147, p. 113 and footnote 4 therein.

[152]Chapter 5 of the Criminal Code contains such general defences as accident, mistake of fact, insanity, delusion, extraordinary emergency, irresistible impulse, self-defence, etc.

[153]Section 25 of Criminal Code.

[154]supra note 148.

belief) was unreasonable.[155] The court cited with approval a previous case, Ifereonwe v. R.[156] which had held that where a man kills another in the belief that he is bewitched by him, the mistake could not be regarded as reasonable. In Ifereonwe's case, the trial judge had stated as follows:

> I have no doubt that a belief in witchcraft such as the accused obviously has is shared by the ordinary members of his community. It would, however, in my opinion be a dangerous precedent to recognise that because a superstition, which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among a community, it is therefore reasonable. The courts must, I think, regard the holding of such beliefs unreasonable.

One is sympathetic to the concerns expressed by the court in the above cases but that does not treat the real issue of criminal responsibility in such cases.[157] The implication of the above cases is that the standard of reasonableness to be applied is that of the educated person who does not hold superstitious beliefs. Commenting on the above cases, Messrs. Okonkwo and Naish[158] described them as decisions of policy, based on the deterrent and educative theories of punishment and a belief in the maintenance of standards which many in the community cannot reach. They said:

> Now one may agree that certain standards should be maintained, and yet suggest that they should not be set impossibly high. When the legislature uses the word

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[155]It might be interesting to note that the appellate judges made a very strong recommendation for executive clemency.

[156]unreported, cited in Gadam v. R. supra note 148.

[157]Thus Aremu writes that "in considering, therefore, the liability of the individual accused in such circumstances, regard was thus not paid to settled principles of criminal responsibility, but to considerations irrelevant for the purpose of determining the personal criminal liability of the accused, such as fear, for example, that it would be a dangerous precedent to recognise such a belief as reasonable", supra note 147, p. 115.

[158]supra note 50, p. 106.

> "reasonable" does it mean, and are the courts to interpret it to mean, "what the ordinary man would regard as reasonable"? Or does it mean, "what the enlightened few would regard as reasonable?" To take the latter view is surely to do violence to the word reasonable.[159]

In English law, the standard of reasonableness has always been that of the ordinary English man.[160] In Nigeria, the standard should be that of the ordinary Nigerian having regard to the dominant beliefs and cultural norms prevalent in the society of the accused person. It is that standard, however difficult to ascertain, which is the safest to adopt, especially in a democratic society and especially in the criminal law, where punishment is the outcome of conviction.[161] The courts should adopt, as the standard of "reasonableness", the standard of the general community from which an accused comes, even if this involves their categorizing as "reasonable" opinions or beliefs unacceptable to the judges themselves and to the educated minority.[162] As Glanville Williams[163]

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[159]Ibid.

[160]Thus the reasonable man has been defined in England as "the man on the clapham omnibus" and in America as "the man who takes the magazine at home, and in the evening pushes the lawn mower in his shirt sleeves", cited by Greer, L.J. in Hall v. Brooklands Auto Racing Club [1933] 1 K.B. 205 at 244.

[161]Okonkwo, supra note 50, p. 106.

[162]Ibid.; On the court's reasoning that it is a dangerous precedent to hold a belief in witchcraft reasonable, the learned authors described such reasoning as confusing the issue, for, in their opinion, it is perfectly possible to hold a belief in witchcraft reasonable and yet to punish the killing of witches- in other words, it has to be asked, what is the accused's liability for killing a witch? cf. Aremu, supra note 147, p. 115, where he described Okonkwo's argument as non sequitur. Aremu submits that if belief in witchcraft is held reasonable, then the killing of a witch could hardly be held legally punishable.

[163]In Criminal Law, The General Part, 2nd ed. (London: Stevens, 1961), p. 175, according to him, one may need to ask whether the accused believed the old woman he killed to be just an old woman with supernatural powers or not an old woman at all but an evil creature imbued with such powers. If the latter is the case, then it cannot be said

put it, in cases of the killing of witches it is arguable whether such killing amounts to the *actus reus* of an unlawful killing.

It is difficult to ignore the possible consequences of a recognition by the law of belief in witchcraft in the contemporary Nigerian society. But it is equally unfair to treat accused persons as though such beliefs have had no contribution to the commission of the alleged crime. My contention is that, even if the holding of such beliefs would not afford a complete defence, it should be a mandatory factor in mitigation of punishment. The subtle issues of criminal responsibility should not be sacrificed on the altar of criminal policy. Where such beliefs are established, the court should strike a balance between criminal policy and fairness to the accused by mitigating the harshness of the law. Thus in homicide cases, if the beliefs of the accused about the victim were materially conditioned by an honest fear of the supernatural, he should be convicted, if at all, of no more than manslaughter and the length of sentence would depend on the particular circumstances of the case.[164]

Aremu[165] has identified six variants of homicide resulting from belief in witchcraft and submits that the approach should be to consider if the accused could be availed of any of the defences under chapter five of the criminal code. For instance, in the category of cases where a supposed witch kills a person in the belief that she was

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that the accused intentionally killed a human being. See also Okonkwo and Naish, supra note 50, p. 108, where the authors arrived at the same conclusion; they cited a Sudanese case- Sudanese Government v. Abdullah, 1959 S.L.J.R. 1, where a similar reasoning and conclusion was drawn.

[164]Aremu, supra note 147, p. 116.

[165]Ibid., at p.112.

"ordered" to do the killing[166], such could be prima facie evidence of insanity[167] or insane delusions. In R. v. Alice Eriyamremu[168], the defence of insanity was rejected because the trial judge held that even if the accused was inflicted with mental infirmity at the time she committed the offence, yet the infirmity was not natural but was induced by her worship of juju/or witchcraft. Thus the court assumed that a self-induced insanity should not be a defence.[169] Also the court failed to consider whether the accused could be said to have been in "a state of mental disease", the other arm of the insanity provision.[170]

In cases where a supposed witch is killed for exercising witchcraft powers, possible defences should be mistake, self-defence and provocation.[171] It is not

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[166]see R. v. Alice Eriyamremu [1959] W.R.N.L.R. 270, where the accused, who had killed her albino grand-daughter, gave as the reason for the killing that she was instructed by her confederates in witchcraft.

[167]section 28 of the Nigerian Criminal Code provides: "A person is not criminally responsible for an act or omission if at the time of doing the act or omission he is in such a state of mental disease or natural mental infirmity as to deprive him of the capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission."

[168]supra note 166.

[169]Aremu criticized this decision, supra note 147, p. 117; see also section 29 (2) (b) of the Criminal Code by which insanity resulting from voluntary intoxication remains a defence.

[170]see section 28. supra note 167; under that arm there will be no question of the naturalness of the insanity.

[171]Aremu, supra note 147, p. 120; but as we noted above, for a defence of mistake to be meaningful in this instance, the standard of reasonableness must be that of the accused's community. There could be situations where the belief leads the accused to perceiving himself in such danger of immediate "attack" as to warrant his defending himself, in such case, section 286 of the Criminal Code which provides for self-defence

uncommon in many parts of Nigeria to see persons boasting to possess the power of witchcraft, claiming responsibility for certain mysterious happenings, and threatening harm to others by use of unseen forces.[172] Such claims could be provoking and unsettling.[173] At present it will be difficult to apply the defence of provocation to such cases because section 283 of the Nigerian Criminal Code which defines provocation requires an element of assault.[174]

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should be considered.

[172]section 210 provides inter alia:
"Any person who-
(a) by his statements or actions represents himself to be a witch or to have the power of witchcraft; or
(b) accuses or threatens to accuse any person with being a witch or with having the power of witchcraft; or ...
is guilty of a misdemeanour, and is liable to imprisonment for two years.

Part of the problem is that paragraph (a) of the above section is never enforced though such statements and actions are common in some parts of Nigeria. So the law acquiesces in such unsettling claims and threats only to intervene when it culminates into a bigger offence.

[173]Seidman writes that "the peculiar nature of witchcraft is that it presents an overhanging, omnipresent threat", "Witch Murder and Mens Rea" (1965) 28 Modern Law Review 46 at p.52.

[174]Aremu submits that a new provision on provocation is required in the Nigerian Criminal Code to cover cases where a person kills another in the belief that other has, by witchcraft or such like means provoked the first named person in the genuine belief that the person so killed has been responsible for the death or serious illness of another to whom the first named person stands in conjugal, parental, filial, etc relationship, or that the deceased has, by words said or things done given the impression that he has been responsible for the death or serious illness of a person within the above relationships to the accused, supra note 147, p. 126. In a Ugandan case, R. v. Fabiano (1941) 8 E.A.C.A. 96, the defendants believed that the deceased was a wizard who had killed members of their families. They caught the deceased, naked, crawling about their compound at night. The court found that the defendants genuinely believed (as would an ordinary person in the community) that the deceased was then and there practising witchcraft against them and allowed a defence of grave and sudden provocation in those circumstances.

There is need for a new judicial approach to (and new legislative provisions on) the issue of beliefs in witchcraft and the supernatural:

> ...criminal responsibility under the Nigerian Criminal Code should reflect the fact that majority of Nigerians still hold strongly to these beliefs and as (sic.) strongly believe in the potency of the supernatural. To determine, as the courts have been wont to do, issues of criminal liability without a consideration of the effect of such beliefs on the parties involved is to decide the issue of criminal responsibility in a cultural vacuum and to ignore thus the basic tenet of criminal responsibility that *actus non facit reum nisi mens sit rea*.[175]

In the neighbouring Cameroons, a new approach is already evolving after many years of disregard of the problem. On March 22, 1993, Professor P. Geschiere delivered a lecture[176] on "Witchcraft, Courts and Confessions in Cameroon" in which he recounted how contemporary Cameroonian courts are handling the issue which rather than falling into desuetude, was increasing in new dimensions. According to him, witchcraft accusations and rumours were suppressed by the colonial authorities but the present government seems more eager to intervene because witchcraft is seen as a dangerous form of "subversion", something that most African leaders fear and abhor.[177] For a decade

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[175]Aremu, supra note 147, p. 131.

[176]On the occasion of the Daryll Forde Memorial Lectures at the University of London, see the magazine, West Africa,April 19-25, 1993, p.663. P. Geschiere, a Professor of African anthropology and chairman, African Studies Centre at the University of Leiden has carried out extensive study on the subject of witchcraft in Cameroon.

[177]In Nigeria, during the period a gang of armed robbers "ruled" a part of the country, it was reported widely in the Nigerian press that the leader of the gang, Lawrence Anini and some of his lieutenants possessed magical powers and were capable of disappearing into thin air. This reports were believed even within the law enforcement circles and it affected the manner in which the said Anini was eventually arrested. Justifying police shattering of Anini's limb, the trial judge said as follows:

"In the situation brought by the Anini saga where, according to the mass media, the man Anini was not only clairvoyant but also clairaudient, a magician of some sort who could at will change to an animal, vegetable or mineral, the police did well to assure

now, he writes, courts in the Maka area of East Cameroon have sentenced so-called witches to long imprisonment and heavy fines. More interestingly, he noted that until the end of the seventies, it was rather the witch-doctors who risked persecution on the grounds of defamation and disturbing peace with their hints and accusations "but now some of them enjoy a degree of official recognition since judges have no alternative but to rely on their version and expertise which has been established as conclusive proof".[178] Furthermore, his extensive study revealed that witchcraft has assumed modern forms. In large parts of Cameroon, the modern forms of witchcraft (famla or ekong) related to rapid acquisition of wealth has caused a great deal of unrest. The witches do not devour their victims but turn them into "zombies" or automatons in order to sell them or put them to work on invisible plantations. He added that a factor that could be responsible for the continued belief in witchcraft in the modern context is the close link between witchcraft and kinship; the source of witchcraft attacks is first sought inside the intimacy of the family to the extent that in order for diviners to reverse attacks, family co-operation and unity is essential. This study, though primarily related to Cameroon, explains the situation in many African countries including Nigeria.

How has the attitude of the law in this respect affected the criminal justice administration in Nigeria? In his survey of criminological data on homicide in Southern

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the public that the person they had in their net was no other than Anini and to have done so the way they did", The Daily Times, January 10, 1986, p.3.

[178]West Africa supra note 176, p. 663.

Nigeria, Ertmann[179] noted the remarkable absence of traditional killings from his data and observed that within his six months stay in Nigeria, there were nine reports of ritual murders in newspapers which never resulted in police prosecution. In most rural communities "far removed" from the official justice system, with little or no impact of police work, the crimes that reach the justice system are those which the community of the offender regards as deserving punishment and which for some reason could not be handled internally.[180] Killings that would be defined as criminal under the code but are regarded as justifiable under customary law are conspicuously absent in crime statistics but those who are in contact with native communities consistently assert their existence.[181]

Thus where traditional attitudes conflict with the definition and interpretation of the criminal code, the indigenous community will not resort to the criminal justice system as a means of conflict solution; hence only very few of such cases end up in court. Ertmann then concludes that in criminal cases involving strong traditional beliefs, as long as the criminal law insists on a standard of reasonableness divorced from the context of the ordinary Nigerian, such cases will continue to be dealt with outside the criminal

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[179]Dietmar Ertmann, "Homicide in Southern Nigeria: A Survey of some Aspects of the Law and Criminological Data", (1979-82) 3-5 Warwick Law Working Papers, vol. 4, no.3, p.1, at p.10.

[180]In such communities, the standard practice is that when a crime is committed, there is usually a deliberate time lapse to enable the elders of the community to decide whether a report should be made or whether the matter could be settled outside the official system, Ertmann, ibid. p.9-10.

[181]ibid., p.23-24, examples are execution of thieves, witch-killings, ritual murders, etc.

justice system. In order to fight witch-killings and other forms of traditional homicide, the law must lower its standard to accommodate the values of the community. Only then will there be a chance that such offenses might enter into the criminal justice system.[182]

There are other specific conceptual differences between the norms codified in Nigerian criminal laws and the indigenous postulates. Excessive incarceration as a dominant sanction is perceived as cruel especially in minor offenses. The philosophical gulf between African customary law and the inherited system on the question of the individual and the community remains unbridged. The failure of the criminal code to emphasize reparative justice[183] remains one of the causes of dissatisfaction with the system. Also, there are sometimes conflicts between group loyalty and conformance with general social norms.

Section 370 of the Criminal Code[184] criminalized polygamy, a cherished normative behavior in Nigeria. If Nigerian values had been taken into account, the bigamy provision would never have found its way into the code. As one writer puts it, "... according to tradition, a Nigerian who marries a second or third wife is given a handshake and a pat on the back like a man who has scored a touch-down in American football".[185] It is not surprising that, in the many decades of the existence of this

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[182]ibid., p.25.

[183]See chapter 4, infra

[184]It provides for the offence of bigamy. The Penal Code of Northern Nigeria has no such provision.

[185]O.I. Ebbe, "Power and Criminal Law: Criminalization of Conduct Norms in a Colonial Regime", (1985) 9 International Journal of Comparative and Applied Criminal Justice 117, Ebbe sees criminal law as the expression of will of those in power, the ruling

provision, prosecution of offenders remains very rare[186] yet many Nigerians of all classes[187] have committed and continue to commit the offence.

Nigeria, like other developing countries in Africa, is described as a transitional society and it is often argued that the conflicts in the criminal process will disappear with development. Assuming, but without conceding, that they will disappear, one must nevertheless stress the lack of wisdom in ignoring the underlying alienation from and weakness of the justice system, particularly the criminal process. Malfunctions in the criminal process have serious repercussions on the social, legal and political tissue of any country, developed or developing.[188]

3.3..Procedural Problems.

This is another major problem of the criminal justice system. One critic of the criminal justice system in common law Africa summed it up thus: "its emphasis on contention, its complex rules of evidence and procedure intelligible only to the initiated and experienced as well as its tendency to proceed in a slow and ponderous fashion are

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class; thus the Nigerian criminal code with its British link is fraught with what was in the interest of the British officials to declare as being criminal.

[186]Thus in R v. Princewell [1963] 2 All N.L.R. 31, Reed, J., observed, "I have not been referred to, and I have been unable to find, a reported case on section 370 of the Criminal Code. In my experience on the bench...since 1946 I have not seen a prosecution under this section." This does not in any way make it less an offence.

[187]Even some judges, lawyers and police officers have more than one wife.

[188]Peider Konz, supra note 84, p. 4.

but a few of the obvious flaws which make the system vulnerable to abuse".[189] The accused and the witnesses are confronted with a procedure whose rules they do not understand and which often appear threatening to them. What follows is that, though a court may be physically close to a people, it may nevertheless be conceptually removed from them because they cannot comprehend what goes on. The efficacy of law depends much on the peoples' perception of its ability to provide justice and there is a link between the technicality of trial procedures and the public image of the criminal process. Also, the procedure often provides accused persons with an "escape route" even in the midst of compelling evidence. Thus Oputa[190] notes that it is the duty of the legal profession to reconsider how far our people (i.e., Nigerians) are happy and satisfied with the "justness" of our continued loyalty to the presumptions and procedures of anglo-saxon jurisprudence in our justice delivery.

At the first Commonwealth Africa Judicial Conference held in 1986[191], most papers presented by the Chief Justices of the participating nations emphasized the need

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[189]S.O. Gyandoh, "Tinkering with the Criminal Justice System in Common Law Africa", (1989) 62 Temple Law Review 1138. The developed common law nations are not left out in this complaints; for instance, in 1985, the English Master of Rolls described the machinery of justice in England as "far too slow, far too complex and far too costly", see Walker, "A Modern Master Canvasses Court Issues", (1985) Law Institute Journal 1204. For a similar comment on the U.S. justice system, see Burger, "The State of Justice", 70 American Bar Association Journal 62. If the adversarial system is still today bemoaned in England where it originated as being too complex and destructive, one wonders the appropriate phrase for the feelings of Nigerians to whom the system remains alienating.

[190]Supra note 145, p. 58.

[191]May 5-9, 1986 in Banjul, Gambia; Oputa referred to this conference in his article, ibid., p.59.

for a re-examination of the exclusionary rules of evidence, the right to silence, locus standi, and other aspects of the adversary system as a way of alleviating its negative effects in the African context. The English mode of judicial proof beyond all reasonable doubt has not served us well not because it is inherently bad but because our police machinery is not developed to the stage where the guilt of the accused can easily be established beyond any reasonable doubt. We shall discuss this problem under the following arbitrary sub-headings:

a) Abstract legalism and undue technicalities.

Some of the very complicated aspects of criminal procedure are found in provisions dealing with drafting and amendment of charges.[192] For instance, sections 157-161 of the Criminal Procedure Act which specify exceptions to the rule against misjoinder of offenses are anything but simple. Many years ago, Justice Bairamian commented on them as follows:

> It will be a blessing if when the new draft Ordinance is being considered the prolix and unwieldy provisions in the present sections 157-161 Criminal Procedure Act were replaced by something simple and compendious.[193]

In Nigeria, magistrate courts handle over eighty five percent of the criminal cases. Prosecutions in these courts are conducted by the police who have no legal training; many of the prosecuting police officers do not have more than basic education. Most often the

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[192]Trials in the Magistrate courts are commenced on charges; in the High Court, trial is brought on an "information".

[193]Edu v. Commissioner of Police (1952) 14 W.A.C.A. 163 at 168. It is unfortunate that the provisions were never replaced in the new Ordinance which is the Criminal Procedure Act.

charges drawn by these officers fail to meet the technical details required by the criminal procedure statute and results in many guilty persons being freed on these technicalities.[194] It is either that the charges do not represent the complaints or all the facts available to the police or that they are commenced under the wrong section of the law.[195] This problem also obtains in prosecutions by state counsel in the high courts.

In Azie v. The State[196], the accused, a medical practitioner at a government hospital demanded money from a patient before treating him. The matter was reported to the police and a marked twenty Naira (Nigerian currency) note was given to the accused. He collected it and was charged with the offenses of official corruption,

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[194]The Supreme Court, aware of the injustices these slips often cause, declared in Latifu Gbadamosi v. Queen (1959) 4 F.S.C. 181 at 183, as follows: "It does great disservice to the administration of justice, and to public respect for the law, when a guilty person escapes justice for reasons such as this, and we hope those responsible for these matters will realise the need for the greatest possible accuracy in the framing of charges and informations". Although this remark was made many years ago, the situation has unfortunately not changed.

[195]There is little or nothing a judge or magistrate can do in such situations because it has been held often that "when the prosecution has proceeded under the wrong section it is not for the court to strain the meaning of words so as to bring an offence within a section under which an accused has been wrongly charged....", per Kingdom, C.J., in Rex v. Udo Edem Eka 11 W.A.C.A. 39 at 41. This problem is not faced in prosecutions in magistrate courts in the northern states because under the Penal Code, charges are framed by the magistrate after the police has concluded evidence to establish the case for the prosecution. So such cases in the South where guilty persons escape justice merely because the guilt established differs from what is charged will not obtain. We must recall that the Penal Code of the North proceeded, at least to some extent, on the philosophy of what is good for the people in the light of their circumstance. In many occasions some members of the bench have recommended this approach to the South as a preliminary cure to the enormous injustices common in this area of the law, see O.A. Adeyemi, "A Day in the Criminal Court", in T.O. Elias, ed., The Nigerian Magistrate and the Offender (Benin City: Ethiope Pub. Corp., 1970), p.17.

[196](1973) N.M.L.R. 251.

extortion and demanding property with menaces contrary to sections 98(a), 99 and 406 of the Criminal Code. He was found guilty of official corruption and was acquitted of the other offenses. On appeal, the Supreme Court held that the accused ought not have been convicted of official corruption. It held that from the facts the accused ought to have been convicted of extortion because the complainant was an innocent victim and not an accomplice. However, as the lower court had acquitted the accused of the offenses of extortion and demanding with menaces, a conviction for these offenses could not be substituted[197] for the offence of official corruption. Thus the appeal was reluctantly allowed. One of the Justices of the supreme court lamented as follows:

> When an accused is put on trial for a criminal offence, it is the duty of the prosecution to support the charge(s) with evidence which will help to establish his guilt beyond all reasonable doubt. But he also has the responsibility that such an accused is arraigned under the proper section of the law as otherwise an accused manifestly guilty of a crime(s) may walk away free eventhough his guilt has been established to the satisfaction of the trial court as indeed the appellant in the instant case.[198]

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[197]The power of the Supreme Court to substitute a different conviction is limited; it can do so only for an offence on which the trial judge could have convicted "on the information or charge", see section 27(2) of Federal Supreme Court Act, 1960. However, section 26(2) enables the Supreme Court to order a re-trial where an obviously dishonest accused is going to escape punishment simply because of being charged wrongly. This power is subject to the conditions laid down in R. v. Abodundu (1959) 4 F.S.C. 70. The High Courts have power to order a re-trial, but in many cases a re-trial does not achieve a better result for either witnesses may not be willing to appear again or they have lost memory of the facts. In Lagos and the Western States, the High Court sitting on appeals from magistrate courts, has "power to alter the finding", subject to the condition that injustice must not be done to the appellant and the matters on which he had to defend himself under the original section should be substantially the same as those under the substituted section; see Omu v. Police (1950) 13 W.A.C.A. 103.

[198]Per Coker, J.S.C (Justice of the Supreme Court).

In Inspector General of Police v. Bakare[199], the accused was arraigned on a charge consisting of two counts of stealing and obtaining by false pretences. The trial magistrate acquitted the accused of stealing and convicted him of obtaining by false pretences. On appeal, Mr Justice Ademola held that the facts proved established the offence of stealing and not obtaining by false pretence. He therefore set aside the conviction for the offence of obtaining by false pretence but could not enter a conviction for the offence of stealing because the lower court had acquitted him of that offence.[200]

The inept framing of charges is almost inevitable in offenses dealing with official corruption because the Nigerian law on the subject of corruption is far from clear[201] and these are the offenses that arouse the greatest public interest. Prosecutors are always falling into error because of the difficult wording of the sections concerned; this is worse with prosecutions in the Magistrate courts conducted by police officers. Thus in Amaechi v. Commissioner of Police[202], the court said:

> We would only add, and repeat what has been said in the past, that the law relating to official corruption and kindred offenses is not easy and that the advice of the Law Officers should be sought, whenever possible, before proceedings are

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[199](1957) W.N.L.R. 123.

[200]The court held that though, the facts clearly establish the offence of stealing, to convict him will amount to resuscitating the charge on which he has been acquitted.

[201]see Okonkwo and Naish, supra note 50, p. 355. The offenses of official and judicial corruption are to be found in sections 98-112; 114-116; 404 and 494 of the Criminal Code. I do not consider it necessary to reproduce these voluminous sections here but it is enough for our purpose to state that they are some of the sections whose technicalities have always benefitted the accused to the disadvantage of the society.

[202][1958] N.R.N.L.R. 123 (C.A.)

taken.[203]

There is a conflict between the law and rules of procedure on the one hand and what the common man feels about justice on the other hand. Customary criminal law emphasized substantial justice not mere technical justice. If the above cases were to be under the customary criminal justice system, the accused persons would never have escaped justice in the face of convincing evidence of commission of an offence.

Rules of procedure help to reduce arbitrariness in the judicial system but slavish adherence to such rules often leads to absurdity especially in a developing country such as Nigeria.[204] Instances of this are common in the approach to the provisions of the code dealing with election and plea by accused at criminal trials. Section 304 of the Criminal Procedure Act provides that where a person is charged with an indictable offence before a magistrate court he shall be entitled to elect either to be tried summarily in such court or to be tried in a high court. The attitude of the higher courts to any

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[203]To obtain the advice of a law officer, the police from the various local divisions will have to send the files to the state capital where the Ministry of Justice is located. Having regard to the limited human and material resources available to both the police and the Ministry, this will be a difficult process. But the mistake is not exclusive to prosecutions by the police, informations preferred by law officers in the high courts are sometimes subject to the dilemma.

[204]Aguda, supra note 144, p. 17. See also Justice Eso's lament in Chinwendu v. Mbamali (1980) 3-4 S.C. 81 at 82. In Echeazu v. Commissioner of Police (1974) 2 S.C. 55, the Supreme Court, per Irikefe, (JSC), warned of the danger to the criminal justice system of allowing mere procedural rules designed to afford accused persons adequate safeguards to become "gratuitous escape routes" to freedom in the face of overwhelming evidence.

failure to offer election to the accused is extreme and undeserving. In Jones v. Police[205], after a charge was amended during trial and the accused was asked for a fresh plea, but was not put to his election afresh, the whole proceedings were declared a nullity. In the same way, the law on plea[206] has been carried to illogical extremes. Thus where an accused was not put to his plea, even though he defended himself (and even if with legal representation), the trial had been held a nullity.[207] In Nwafor Okegbu v. The State[208], the accused was charged with murder. He was found guilty and convicted by the trial court. His appeal to the Federal Court of Appeal was dismissed. But on further appeal to the Supreme Court, the latter allowed his appeal on the ground that when an amendment was made to the information by the addition of a third name to the two names of the deceased which appeared on the original charge, the new charge was not read to the accused for a fresh plea. But note that the accused had

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[205](1960) 5 F.S.C. 38; O.A. Adeyemi, supra note 195, describes the procedure as a clear evidence of the vestiges of colonialism, for as he observed, in England the requirement for an election is backed up by their history, there is no corresponding historical backing in Nigeria. Again rarely, if ever, does an accused person elect to be tried in the high court (they don't even understand this) where technicalities can be unbearable. There is therefore, no reason why a mere omission in this regard should carry such extreme consequences.

[206]See section 285(1) of the Criminal Procedure Act.

[207]See Busari v. Police, (1955-56) W.R.N.L.R. 1; in the indigenous context it is difficult to perceive what injustice an accused person who has fully defended himself could be said to have suffered by the omission to ask one question- are you guilty or not? Would it not have been expedient if we qualified section 285(1) copied from England with a proviso that where the accused has defended himself, any omission to take his plea shall not by itself be sufficient to vitiate the trial?, see O.A. Adeyemi, supra note 195, p. 21.

[208](1979) 11 S.C. 1.

in a written undisputed statement (tendered before the court), admitted that he had matcheted the deceased (he also mentioned him by one of the two names) and gave reasons for his actions. Yet the Supreme Court quashed his conviction and ordered a re-trial. This is the kind of justice the citizens are made to swallow in the criminal justice system. The case had lasted for almost six years when a re-trial was ordered. What will be achieved by a re-trial after six years when the witnesses may have either died, lost impression of the case or felt frustrated by the system?

The most instructive words on this point were offered by a Justice of the Supreme Court to a gathering of Nigerian judges and lawyers as follows:

> The judge should appreciate that in the final analysis the end of law is justice. He should therefore endeavour to see that the law and the justice of the individual case he is trying go hand in hand. The spectacle of law triumphant and justice prostrate, should be to him a sorry spectacle indeed. To this end he should be advised that the spirit of justice does not reside in formalities, nor in words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities. He should know that all said and done, the law is but a handmaid of justice, and inflexibility which is the most becoming role of law often serves to render justice grotesque. In any fight between law and justice, the judge should ensure that justice prevails.[209]

Because of the strict formalities of the criminal procedure, justice has come to depend on such external factors as the skill of the advocate and the ability of a party to prevent material evidence reaching the court.[210] The most fearful experience is the examination

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[209]C.A. Oputa, "Access to Justice", being paper delivered at the University of Ife (now Obafemi Awolowo University, Ife) Nigeria, cited in Oputa, supra note 145, p. 53. See also Lord Denning's statement on the proper role of a judge confronted with rules of law capable of producing injustice in a given case; Denning, The Family Story (London: Butterworths, 1981), p.174.

[210]Oputa laments: "If justice has to depend on external factors like the skill of an advocate, the ability of either side to produce or suppress evidence, then the procedure

of witnesses. Some feel that there is no difference between how the accused and the witnesses are treated while others see the same as unnecessarily complicating matters. It is not uncommon for vital witnesses to avoid appearing in court for fear of the harrowing experience in the hands of defence lawyers, the general court atmosphere and the procedures.[211]

A word may be said on the exclusionary rules of evidence like the rule against hearsay. The hearsay rule has proved dysfunctional in many of the countries of Africa to which it was exported as part of the common law.[212] Under the customary criminal justice system, any evidence which is relevant was admitted leaving it to the judges to decide on weight to be attached. At common law most of the exclusionary rules were introduced because trials were by jury; it was thought that being non-professionals, juries were likely to be prejudiced by some evidence. In Nigeria, as we shall see shortly,[213], we are denied the benefit of jury trial yet the criminal process remains slave to the exclusionary rules intended for jury trials. In some cases, judges have to pretend that some hearsay evidence is direct in order to get out of this rule.

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and technical rules producing such justice need urgently be looked into especially in developing countries like ours", Oputa, supra note 145, p. 58. In the Nigerian context, a good lawyer is one who wins ALL his/her cases, so it is not uncommon for some unscrupulous ones to go to "any length" to win cases.

[211]The nature of the trial process is such that sometimes one wonders whether it is the accused person or the victim that is on trial, this is not peculiar to Nigeria. See comments by P. Goldman, "Zundel and His Victims", Critical Legal Studies Newsletter, July 1988.

[212]Peider Konz, supra note 84, p. 6.

[213]infra

The language barrier cannot be left out. In Nigeria, English is the language of the law and the courts. Illiteracy rate is still high in Nigeria and proceedings have to be interpreted from one language to the other.[214] It is not disputed that the preservation of English as the language of the courts could save the nation a disintegration into a multitude of linguistic units. But this does not remove the dissatisfaction people feel when they cannot comprehend a process that could even order an end to their life. Even customary courts are made to adopt the same mode of expression.

b) Absence of jury trials

It is curious that in Nigeria we have a system of criminal law designed for operation where there is trial by jury, and yet there is no jury trial in Nigeria.[215] The common law recognised the need for a man to be judged by the standards of his day hence the institution of jury trial. Questions of fact are left to the jury. It decides the reasonableness of the accused's actions; questions as to whether the accused was negligent, provoked, etc. are also determined by the jury. In the determination of the questions of fact, the jury brings to the criminal process some flexibility and common sense in contrast with abstract professionalism. Juries are supposed to introduce an

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[214]It is the constitutional right of an accused person to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence, see section 33 (6)(e) of the 1979 Constitution of Nigeria. In practice, there are no trained interpreters and the courts make use of the court clerks who, in many cases do a very bad job, see, Adeyemi, "A Day in the Criminal Court", supra note 195, pp. 26-8.

[215]Okonkwo, supra note 50, p. 27. Trial by jury which existed only in Lagos was abolished in 1975, see Trial by Jury (Abolition) Edict, No.1 of 1975.

element of human compassion in the administration of criminal laws.[216] The result of the absence of jury trial in Nigeria is that many questions which were originally intended at common law for the jury are determined by the judge. The Nigerian judiciary is elitist in nature and there is a wide cultural gap between them and the population they are supposed to serve. The necessary compromise between the laity and legal professionalism in the administration of criminal justice is therefore lacking. Okonkwo writes:

> The jury system is by no means perfect, but it is surely more desirable that a man should have the right that discretionary issues in the criminal trial (e.g. issues of responsibility) should be decided by a panel consisting of his theoretical equals rather than by a single judge, who by reason of his position may be out of touch with community attitudes.[217]

The jury system also creates the enthusiasm of public participation and invests decisions with the authority of a truly communal will. This is particularly important in Nigeria where people had hitherto been used to judicial decisions by a group of people not just a single judge far removed from them in status. The words of a Tanzanian Prime Minister in this respect are instructive; he said:

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[216]Konz, supra note 84, p.7. Another writer goes even further: "The jury serves to moderate the intractable rigidity of legal norms by introducing the flexibility and flux inherent in the human and social factors in a case, pitting the facts as they exist against the mere letter of the law. It also strengthens the independence of the professional judges, protects them against pressures... and imparts to verdicts the authority of a more truly communal will", Severin-Carlos Versele, supra note 101, p.11.

[217]supra note 50, p. 27. This would be very helpful in cases involving traditional beliefs discussed above. In some developed systems of the industrial west, it is argued that today's jury is less likely to fulfil the role for which the concept was designed; that under prevailing conditions a lay group is less likely to be guided by compassion. Also that environmental factors, political, cultural and economic differences have influenced attitudinal patterns to the point where a jury is often less tolerant of social deviance than a professional judge, see Konz, supra note 84, p. 7; given the Nigerian context, this argument may not be applicable.

> ...many indigenous people in this country still remember the old system in decision-making that all their disputes were heard and decided by a group of people and not by a single person. It was a certain group of elders of a certain area who met either under a chief or any other leader and they, as a group, heard and gave decisions on all disputes brought to them, and because they took into consideration the social values prevailing in the area and because thoughts were given to the gravity of the dispute, including the social effects involved, eventually their decisions satisfied more people generally and this brought respect to such elders.[218]

c) Right to silence

A person accused of a crime is entitled to remain silent throughout his trial.[219] This right is deeply rooted in the common law system. There are at least two accounts of its origin; one account ascribes to it an ecclesiastical origin but a more familiar account associates it with the "Star Chamber". The latter describes the right as a response to the excesses of torture and inquisition associated with institutions like the Star Chamber.[220] Today in England there are debates as to the justification of the continued application of this right.[221] There is the abolitionist group and the group for its retention. Within the former, some argue that it should be abolished at both the pre-trial and trial stages while

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[218]Cited in Ghai, P., "Notes Towards the Theory of Law and Ideology: Tanzanian Perspective", (1976) 13 J.A.L.S. 31 at 91. This observation is applicable to Nigeria whose people, as we explained in chapter 2 above, had been used to decisions by a group of people.

[219]See section 33(11) of the Constitution of Nigeria, 1979 and section 159 of Evidence Act (Nigeria). The pre-trial right to silence is guaranteed by section 32(2) which reads, "Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice".

[220]See generally, S.M. Easton, The Right to Silence (Alderton: Avebury, 1991), p.1. In the law of evidence the right is much more broadly conceived as both a right and a privilege, a privilege against self-incrimination.

[221]ibid., see particularly chapter 2 for articulation of the various sides of the debate.

others feel that it should be abolished at the trial stage only. Among those supporting the retention of the right, the majority feel that only a modified version of it should be retained.

My interest here is to place the operation of this right in the context of the indigenous circumstances. To the indigenous mind this procedural right is viewed with suspicion. I think the problem lies more in the fact that the judge is forbidden to draw inferences from the accused's silence.[222] Thus Aguda writes, "under our traditional system a judge would be justified in asking the accused person: if indeed you are innocent- I am prepared to believe you- but then what are the facts as you know or believe them to be? But this is precisely what a judge under our present system of justice cannot do".[223] The right is anachronistic, contrary to common sense and too protective of the guilty.[224]

Dealing with the right to silence, the first Commonwealth Africa Judicial Conference suggested that Commonwealth African countries consider introducing a method of admission of facts or settlement of issues before the commencement of any criminal trial.[225] This has the double advantage of shortening proceedings considerably

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[222]Section 159 of the Nigerian Evidence Act states that such silence by the accused shall not be made the subject of comment by the prosecution.

[223]Aguda, supra note 144, p. 11.

[224]Bentham asked; if a man, although really innocent, is unlucky enough to become the object of suspicion, "does he fly to any of these subterfuges?", J. Bentham, Rational of Judicial Evidence, The Works of Jeremy Bentham, Bowring edition, 454.

[225]My reference to this conference are taken from the limited reference in Oputa, supra note 145, p. 59.

and piercing the veil of silence which our present procedure bestows on the accused person. Above all, a system of admission of facts by an accused person is in consonance with native African jurisprudence which requires any one accused of a crime to state his own story. Recommending this for consideration by Nigerian lawyers, Justice Oputa stated: "Our people will understand this but they cannot comprehend a system where the prosecution does all the talking and the silence of an accused person is not of any adverse value against his case."[226]

In Nigeria it has been suggested that the best approach is that the trial court should not be deterred by the incompleteness of the tale (resulting from the accused's exercise of his right to silence) from drawing the inference that properly flows from the evidence it has received, nor dissuaded from reaching a firm conclusion by speculation on what the accused might have said had he testified.[227] It is sensible that a judge who observed the demeanour of an accused during trial be allowed the discretion to draw necessary

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[226]ibid., p.60. People tend to be outraged with a system in which information is avoided and truth incidental.

[227]A.L. Balogun, "Problems of Victims in the Administration of Justice: The Judicial Viewpoint", in S. Adetiba, ed., Compensation and Remedies for Victims of Crime in Nigeria, Federal Ministry of Justice Law Review Series vol.5 (1990), p.41; see also Edet Akpan v. The State (1986) 3 N.W.L.R. 225. In England, the Criminal Law Revision Committee strongly recommended changes to the right as applied in both pre-trial and trial stages. After noting that today the balance has swung so far in favour of the defendant that the measures which may have been justified in the past have now become a hindrance to justice, the Committee proposed such change as will enable inferences to be drawn by the judge or jury and that such silence could be treated as a corroboration of any evidence against him, see Criminal Law Revision Committee [1972] Evidence [General] Cmnd 4991. See also the Report of the Working Group on the Right to Silence, Home Office, C Division, London, July 13, 1989. For a critique of this right, see Glanville Williams, "The Tactic of Silence", [1987] New Law Journal 1107.

inferences. A judge will be able to conclude whether the silence is induced by timidity or by a deliberate intention to avoid relevant information. The brutality common with the police in most developing countries could be a justification for the retention of this right at the pre-trial stage but a similar argument cannot be canvassed for its continued application at the trial stage as today's courts do not apply torture and the like and trials are held in public.[228]

This right which is an offshoot of the presumption of innocence is usually a target of military regimes in Nigeria. Many Decrees of the military regimes derogate from the presumption of innocence.[229] The idea is that if the accused is required to show the existence or otherwise of certain facts (which are best within his knowledge), then he will not resort to silence.[230] The fact that this and other aspects of criminal procedure always form the target of Military Decrees may be a vindication of the general feeling that these distort the criminal justice system. When carried to illogical limits, the presumption of innocence produces unjust results. For instance, it has been held that where at the end of the prosecution's case there is not enough evidence to convict the accused, to ask the accused to put in a defence amounts to asking him to prove his innocence; and any conviction based on subsequent incriminating evidence revealed in the

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[228]Section 33(4) of the Constitution provides that criminal trials shall be held in public.

[229]See chapter 5 for a comment on some of the military Decrees.

[230]It should be noted that section 33(5) of 1979 Constitution which provides for the presumption of innocence contains a proviso to the effect that nothing in the section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts. But the criminal code and other criminal legislations have hardly utilized this proviso.

process of his so defending himself cannot stand.[231] In Chuka and Ors. v. State[232], ten persons were accused of murder. At the end of the Prosecution's case, a no-case submission was made on behalf of nine of the accused persons. The judge rejected the submission in respect of some of the accused persons and the trial proceeded. The first accused confessed committing the offence and gave incriminating evidence against the others. At the end of the trial seven of the accused persons were convicted. On appeal, it was held that the conviction of four of the accused persons cannot stand because there was not enough evidence against them at the end of the prosecution's case and they should not have been convicted on the subsequent incriminating evidence of the first accused person. To the lawyer this technicality is understandable but not to the public who followed the trial. Cases like this rekindle public distaste for the inherited rules of procedure.[233]

3.4..Inordinate delay

This is one of the most glaring problems of criminal justice administration in Nigeria. The hallowed maxim "justice delayed is justice denied" has become a hollow principle. On this it has been written:

The present incredibly slow process of judicial administration is frightening and

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[231]Okoro v. State (1988) 12 S.C.N.J. 191.

[232](1988) 7 S.C.N.J. part. 2, p.262. See also Mumuni and Ors v. The State (1975) 6 S.C. 79.

[233]The New Nigerian newspaper, (Aug. 1979) in its editorial suggested that the presumption of innocence should be abolished in criminal trials held in Nigeria and the indigenous practice in which an accused was made to prove his innocence substituted.

> oppressive- the poor feel the weight of the oppression far more than the rich. A judicial system which can permit a simple case, for example, of wrongful termination of employment to remain in the courts for over five years cannot be said to be running smoothly. Whatever happens at the end of such an aberration of court trial can hardly be said to be justice.[234]

Some of the causes of the delay are inherent in the adversary procedure while others are external factors. There is no doubt that the pressure of work on the judicial system has increased tremendously in recent times and is bound to go on increasing. Increased urbanization, increasing participation in modern economic activities, greater western education and ideas and other factors have all combined to increase people's awareness of their rights against other citizens as well as against the state.[235] But the number of courts and judicial divisions have also increased significantly during the period. The volume of judicial work is just but one of the causes of delay in the justice system.

In all the courts in Nigeria, proceedings are recorded in long hand by the judge or magistrate. Thus the speed of a trial depends very much on the speed with which the presiding judge or magistrate can commit the proceedings to paper.[236] In many of the cases, the parties- the accused and complainant- and their witnesses are illiterates and their testimony will have to be interpreted to the court even if the judge understands the local language. The tedious recording of court proceedings in long hand not only slows the court process, it also warps the concentration of the judge on the line of evidence. The suggestion for the introduction of electronic recording is attractive but seemingly

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[234]T.A. Aguda, supra note 144, p. 41.

[235]O.O. Aguda, "The Judicial Process in Nigeria: The Recording of Court Proceedings", (1990) JUS vol.1 No.8, p.19.

[236]ibid., p.20.

unaffordable both in terms of material costs and the technical know-how for adequate maintenance. It has also been suggested that verbatim reporters could be used.[237]

One writer[238] identified some of the causes of delay in the Nigerian courts as: corruption in the police force[239]; the rules of evidence and procedure; undue legalism of appellate courts which many times order re-trials in cases which they could have finalised themselves and want of probity on the part of some judicial officers.

a) Loss of Material Evidence:

Exhibits are either lost at the police stations or disappear while in court custody. This could be with the connivance of unscrupulous police officers or court clerks. These days criminals attack court premises to steal and consequently destroy exhibits or to stage commando-style rescue operations of comrades standing trial.[240] At the magistrate courts where prosecution is conducted by the police, the transfer of a prosecuting police officer can, in the Nigerian context, cause embarrassing delays. Sometimes files are not properly maintained for continuation by another officer. Some delays are caused by the difficulty in obtaining the attendance of investigating police officer where such officer has been transferred out of the state or police division.

b) Corruption:

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[237]See ibid., pp.21-25, for a discussion of the likely difficulties in introducing electronic recording or use of verbatim reporters in Nigeria.

[238]Aguda, supra note 144, pp. 39-40.

[239]See later part of this chapter for the image of the Nigerian police in the context of the criminal justice administration.

[240]Nigerian Tide, 22 May 1986.

This is the bane of the Nigerian society. It cuts across all sectors of the society and affects the socio-economic, political and justice administration. Law enforcers particularly the police, are prone to bribery; court bailiffs, typists, library staff, etc. are to some extent lacking in probity, motivation and commitment, thus contributing to delay of justice.[241] The receiver of a bribe may resort to delay to frustrate vital witnesses into losing interest in the case. The public feel outraged when those in whom they have entrusted their care turn round to extort them. The matter is made worse by the state of the law on official corruption which, as we commented above, is anything but clear.[242] Thus legal process against culprits often do not produce fruitful results. This further irritates the public and diminishes confidence in the system.

c) Shortage of money, personnel and equipment:

The courts are understaffed, under-financed and ill-equipped for the proper discharge of their duties.[243] The Nigerian judiciary does not have financial independence. Judges still have to go cap-in-hand begging the executive for money needed for the day-to-day running of the courts. As such monies are not always forthcoming, the judiciary often gets handicapped in its daily business; there may be no money to pay the travelling allowances of personnel and witnesses who travel from far to testify. Under the prevailing economic conditions most magistrates do not have cars and therefore have to rely on the grossly inefficient public transport to get to work from

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[241]Aguda, supra note 144, p. 40.

[242]See the reference in note 201 above.

[243]Aguda, supra note 144, p. 39.

far places.

The cost of delay in the justice system can be very enormous. The memories of witnesses diminish with lapse of time and, unable to give coherent account of the events, many guilty persons get acquitted to the amazement of the public.[244] Prisons get overcrowded with remand prisoners who have been refused bail. This aggravates the already intolerable prison conditions in Nigeria.[245] Furthermore, delay could lead to judgment not fulfilling its role. In common law tradition, every judgment fulfils or ought to fulfil two paramount roles- it declares the law as well as educating the public about the particular subject involved in a case at hand. People like to see what is done with those who commit crimes. This double message of judgment can only be achieved when the difference in time between the events leading to the particular case and judgment is minimally reduced.[246]

3.5..Access to Justice

A poor criminal defendant is at an obvious disadvantage in adversary-type

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[244]In Canada this has been put thus: "[J]ustice diminishes with time because both the number of available witnesses and the clarity of their memories diminish with time. Furthermore, a money reward granted four years later is insufficient remedy for the litigant; the acquittal of a citizen after a year of anxiety is scant justice; and the conviction of a heroin trafficker two years after his offence was committed does not jibe with the citizens concept of justice", P. Millar and C. Baar, Judicial Administration in Canada, at p.196.

[245]See chapter 4 of this work for the state of Nigerian prisons.

[246]See C.F. Nyalali, "Advances and Obstacles in the Administration of Justice in Tanzania", cited in S.E. Mchome, "Towards A Communitarian Approach to Crimes: The Quest for An Effective, Less Expensive but Understandable Community Oriented Criminal Justice System", 1991 Queen's University LL.M thesis, unpublished.

procedures where the quality of legal counsel plays a major role in producing evidence and in trial proceedings. Poverty and lack of social status also colour the attitudes of law enforcement agencies. Access to justice is an adjunct of the rule of law which postulates equality before the law. Section 33 of the 1979 Constitution of Nigeria guarantees every person the right to fair hearing. Of what practical value is such a constitutional guarantee where access to justice is limited? Access to justice means more than the physical presence of a court next to the citizen's house. It encompasses a compendium of other things- the citizen's comprehension of the justice system, his understanding of the institutions and in many cases the affordability of legal representation. This has been put more attractively thus:

> A just legal order is a hollow shell if a minority or an individual is denied access to that legal order, access in the sense of understanding the law and its procedures, access in the sense of being capable of effectively utilizing the law, access in the sense of participating in the rule-making process, and access in the sense of experiencing positively the benefits of his society.[247]

Many Nigerians are living below the poverty line. A poor person accused of a crime who can neither understand the criminal process enough to defend himself effectively nor afford legal representation cannot be said to have had access to justice. Poor victims of crime who under the present criminal justice system cannot recover adequate compensation become doubly victimized when they cannot afford the cost of a separate civil suit to recover same. Such de-facto discrimination impairs the popular image of the system.

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[247]Marasinghe and Conklin, ed., Essays in Third World Perspectives in Jurisprudence (Singapore, 1984), p.431, (emphasis mine).

There is a legal aid scheme in Nigeria which has not been efficient. The Legal Aid Council is empowered in accordance with sections 6 & 8 of the Legal Aid Act 1976[248] to assign counsel to indigent persons whose income does not exceed 1,500 naira (Nigerian currency) per annum for offenses listed in schedule 2 of the Decree. There are two main shortcomings to the scheme. The first is that it is available for only a few offenses mentioned in schedule 2 of the Decree: murder, manslaughter, malicious or wilful wounding or inflicting grievous bodily harm, and assault occasioning actual bodily hurt. Persons charged with aiding, abetting, counselling and procuring, being an accessory to, attempting to or conspiring to commit any of the above offenses are also entitled to legal aid. There is no legal aid for the vast majority of other offenses. Secondly, there is a tendency for lawyers to whom cases are assigned under the scheme to be lackadaisical in the conduct of such cases perhaps because the scheme not only pays poorly but sometimes payment is not forthcoming at all. In a number of cases the Supreme Court has decried this attitude which negatives the essence of the scheme. In Udofia v. State[249], the counsel assigned to defend the appellant charged with murder handled the case carelessly. He was absent from court nine times during the trial. As a result the trial judge assigned the case to another lawyer. The appellant was convicted. On appeal, the Supreme Court held that counsel in the instant case failed to discharge his duty diligently thus rendering

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[248]As amended by the Legal Aid (Amendment) Act 1979 and Legal Aid (Amendment) Decree 1986.

[249](1988) 7 S.C.N.J.118.

the right of defence of the accused hollow and meaningless.[250]

The relevance of the customary legal order in this regard is that its institutions are usually physically, procedurally and conceptually within the reach of the poor who constitute the majority. At least the accused can dispense with legal representation without suffering any disadvantage. Where people cannot have access to civil and criminal justice, they resort to self-help, street and mob violence, which adds to the problem of the justice system. It is therefore in the interest of society to expand access to justice. In the Nigerian context this is not achieved by merely creating new judicial divisions and appointing more judges; for as I have observed, the nature of the judicial system vis-a-vis the society is such that even if each household is given a court the members of the household may still be "far" from that judicial institution. Much as such measures will be good if complimentary, what is needed is a restructuring of the system to accommodate traditional structures and institutions hence the customary criminal justice system has to be revisited.

3.6..Policing

Effective law enforcement and crime reporting need a sensitive relationship between the members of the community and the police, a relationship which builds respect for socio-legal norms and for the police as supporters of these norms. It is very unfortunate that in many Nigerian communities this relationship does not exist: allegations

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[250]See also Okosi and Anor. v. The State (1989) 1 N.W.L.R. Part 100, p.642, where the Supreme Court noted that it was unfortunate that such a serious case of murder was handled by counsel with such levity; see per Oputa, (JSC), at p.663.

of police dishonesty and brutality to suspects and witnesses are all too common.[251] Perhaps no other institution matches the police for public impact, shaping everywhere the image of and assessment of the legal system and the state. Temporally and procedurally, the police are the officials most proximate to crime; they are supposed to be the primary and leading figures in the law-enforcement process; they are supposed to be primarily responsible for the prevention, investigation, and detection of crimes as well as the apprehension of suspects; their honesty, integrity, and observance of procedural laws in handling offenders have deep implications for the final outcome of cases, for people's liberties, and for the degree of respect the average citizen has for the law.[252] It is the common perception of many members of the public and the press that the police are, routinely and systematically, corrupt, inefficient, and not interested in protecting people or property.[253] In his systematic assessment of the police in Nigeria, Odekunle concludes:

> The value and worth of a police force are best determined by the amount and quality of protection it offers the people and by the degree of confidence and cooperation it enjoys from the average citizen. On these two yardsticks, the

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[251]Milner, supra note 4, p. 2; C.O. Okonkwo, The Police and the Public in Nigeria (London: Sweet and Maxwell, 1966) pp. 5-6.

[252]F. Odekunle, supra note 7, p. 61 at 62.

[253]General descriptions of the state of relations between the police and the community in Nigeria can be found in M.H. Carter and Otwin Marenin, "Law Enforcement and Political Change in Post-Civil War Nigeria", (1981) 9 Journal of Criminal Justice pp. 125-49; and P.E. Igbinovia, "The Police in Trouble: Administrative and Organizational Problems in the Nigeria Police Force", (1982) 28 Indian Journal of Public Administration pp. 334-72. All these confirm a very poor public image of the police. Also stories on crime and the police in Nigeria are a staple of the Nigerian mass media; daily newspapers, weekly and monthly magazines and special investigative studies all attest to public outcry against the police.

Nigeria Police Force falls far short of optimum standards.[254]

On crime prevention, investigation and apprehension of offenders, the general feeling is that the police have done and continue to do badly[255] In most cases the police do not have valid and reliable information on crime and criminals. It hardly operates a patrol system in actual practice.[256] This is worse in the rural areas and has prompted most communities to reintroduce their vigilante groups for quasi-policing. Due partly to gross limitations in human and material resources, the police are removed from the "when", "where", and "how" of committed offenses.[257]

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[254]F. Odekunle, supra note 7, p. 61. One may ask whether the situation has improved in recent years; the stunning revelations in 1986 during the reign of some gang of criminals and steady press contributions in this area show that the situation is only but deteriorating. Only few months ago, apparently responding to the weight of public outcry and press outburst, the Inspector-General of police directed the public relations unit of the force to fashion a blue-print for an "aggressive and sustained involvement" of members of the public in police work. He also emphasized the need to monitor the complaints procedure for prompt disposal of public complaints against members of the force, see West Africa, 19-25 April, 1993 at p.649.

[255]In the absence of recent official study, we rely on press reports, public demonstrations, official statements of public officers and independent surveys by researchers; See also R.R. Wushishi, "Problems of Victims in the Administration of Justice: Law Enforcement Perspective", in S. Adetiba, ed., Compensation and Remedies for Victims of Crime in Nigeria, Federal Ministry of Justice Law Review Series vol.5 (1990), p.197 where the police paper presented at the conference stated that among the major reasons given by victims for non-reporting of crimes to the police is that they believe that the police are grossly inefficient.

[256]See Federal Republic of Nigeria, 1974, p.87; A. Bamishaiye, "The Spatial Distribution of Juvenile Delinquency and Adult Crime in the City of Ibadan", (1974) 2 International Journal of Criminology and Penology p.66- "The Nigeria Police Force is an essentially static means of law enforcement and there is little patrolling of a "beat" as in Britain and United States".

[257]Odekunle, supra note 7, p. 66; The further removed it is, the more it requires public cooperation. The police-population ratio is a problem; in 1980 it was put at 1: 1500 and one policeman to a geographical area of 15 square kilometres. However, this

There is also the widespread belief that he who tries to be of assistance in the investigation of an offence is involved in the crime. There are instances of innocent persons being unreasonably treated or even detained on trying to assist the police. Valuable properties of victims rot away or are fraudulently handled at police stations in the name of investigation.

It is the perceived systemic corruption in the police force that harms most the image of law enforcement in Nigeria. In a study by Ekpenyong[258], many convicted armed robbers alluded to police complicity in many of their operations. The results of the study find corroboration in numerous press reports of instances of such complicity[259] and further in the Anini/Iyamu episode. In 1986 a gang of criminals led by one Lawrence Anini held the nation to ransom. When eventually he and some other members of his gang were caught, their trial revealed the extent to which some police members had, not only contributed to their success, but also shared in their booties. There was glaring evidence of receipt, by the robbers, of logistics, ammunition, guns and specialized information from the police.[260] This is not an isolated case but an unmatched

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ratio has definitely improved now.

[258]S. Ekpenyong, "Social Inequalities, Collusion, and Armed Robbery in Nigerian Cities", (1989) 29 British Journal of Criminology 21 at 32, the study involved interview of 340 of the 732 condemned robbers in five prisons in the South and respondents gave police collusion as the secret of their success.

[259]See Newswatch, 29 Sept. 1986; Sunday Concord, 21 Oct., 23 Nov., 12 Dec. 1986 and 18 Jan. 1987; African Concord, 16 Dec. 1986; Life Magazine, April 1986, etc.

[260]A Chief Superintendent of Police, Mr. George Iyamu was tried and executed with the robbers; he had supplied weapons to the gang, ran a gang of robbers of his own and suppressed information given by citizens on robbers.

corroboration of the pyramidal corruption in the Nigeria Police Force. As expected, the post-Anini period further widened the drift between the police and public. People felt that reporting a crime to the police is like reporting one criminal to another comrade in crime and that it is a sure way of letting off a criminal. Thus many cases are kept out of the criminal justice system.

The implication of this negative view of the police by the public is that even legitimate/honest mistakes made by the police in criminal prosecutions in the courts are mistaken for the secret understanding between them and the criminals. A re-organization of the police force was undertaken in 1986 yet the problem has persisted. To be meaningful, any re-organization must address the police-community question. It is in this respect that one begins to think of a community oriented policing framework.

3.7..Conclusion

As stated at the beginning of this chapter not all flaws in the system have been discussed. The problems associated with the penal policy are discussed in the next chapter. Attention has been given to such aspects that make the criminal process look unnatural and hypocritical having regard to the fact that Nigerians have had their own fixed ideas and concept of justice before the imposition of foreign values and concepts of justice.

In the areas of conflict between cultural loyalties and the criminal code, the criminal justice system has ignored the effect of such beliefs and practices in the determination of criminal liability thereby depriving accused persons of defences that

would otherwise be available. There has to be a re-examination of both the judicial approach and the substantive content of the laws otherwise such cases will continue to be dealt with outside the official system. In the absence of effective policing, the new norms can only become part of the people if the system adopts an approach and a standard that encourages the people to bring such cases into the system.

The highly technical nature of the criminal process has been its biggest undoing. It breeds lack of comprehension of the norms of the criminal law and makes delay inevitable. The problem has been that those responsible for criminal justice policy in Nigeria were not selective in copying the English rules of evidence and procedure, thus they copied even those that have special significance only in their history. Rules of procedure, rather than being handmaids of justice, have become for us a "brooding omnipresence in the sky"[261] There is always a bad feeling when accused persons escape justice as a result of minor errors by the prosecution or the court which errors are themselves necessitated by the technicalities in the process. That the conviction of a serious offender who has defended himself fully at the trial should be quashed on appeal merely because he was not asked at the beginning: how do you plead?, seems curious. It is immaterial that such is wholly acceptable in England. If, as stated by a former Chief Justice of Nigeria, "the true test of fair hearing is the impression of a reasonable person who was present at the trial whether from his observation, justice has been done in the

[261]Per Aniagolu, (JSC) in Okeowo v. Milgo (1979) 11 S.C. 138 at 152.

case"[262], then many Nigerians feel that injustice is done in many cases- injustice to the accused in some cases but injustice to the society in most.

There is no access to justice when a majority of the population can neither understand the laws and procedures nor afford legal representation. The agency through which cases are introduced into the criminal justice system, the police, have lost the respect, trust and cooperation of the public. The present trial process allows information to be avoided. A trial judge or magistrate has to be very cautious how he/she assists in discovering the truth for fear of being accused of "descending into the arena".[263] Whereas under the customary criminal justice system there is nothing wrong with that.

All these combine to disfigure, debase and deface the administration of criminal justice in Nigeria. There is an apparent and understandable suspicion by the public that the law is not for their benefit but a burden imposed on them by the relevant powers. Aguda provides us with a summation as follows:

> This is a time for sober reflection. There is an urgent need to examine the contents of our laws, more especially our rules of evidence and procedure in the light of the minimum content of the concept of justice as will be found acceptable to the generality of our people. In this exercise of re-examination we must call in aid the traditional rules of evidence and procedure and not shun them as being contrary to western concepts of justice or even as being contrary to our constitution. We made the constitution, and we must feel able to amend it if our concept of justice so demands.[264]

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[262]Per Ademola, (CJN) in Isiyaku Mohammed v. Kano Native Authority [1968] 1 All N.L.R. 424 at 426.

[263]See Okeduwa v. State (1988) 4 S.C. 110; Onuoha v. State (1989) 2 N.W.L.R. Part 101, p.23.

[264]Aguda, supra note 144, p. 23.

CHAPTER FOUR

PUNISHMENT, COMPENSATION AND VICTIM REMEDY IN NIGERIAN CRIMINAL LAW: THE NEED FOR A NEW APPROACH.

4.1..Introduction

This chapter discusses an important aspect in the criminal process. The problem with the Nigerian penal policy is two-fold: a dominance of incarceration and utter neglect of victim remedy. This is part of the colonial legacy and constitutes one of the aspects of the criminal law that breeds more public discontent. The discontent is rooted in the fact that the penal policy contrasts greatly with the surviving traditional sentiments and practice of reparative criminal justice. The victims' anger is that the criminal justice administration concentrates almost entirely on the offender and does nothing to assuage the victims of his/her crime. This is better understood when placed within the cultural milieu and the practice under customary criminal law. Also it is felt that the attention given to the offender notwithstanding, the penal policy leaves him with little or no chance of rehabilitation.

In recent years, developments in penal policies world-wide have been in two main directions: first is the emphasis on the rehabilitation of offenders; in this respect, the use of non- institutional options is encouraged and, where incarceration is necessary, the prisons are organised in such a manner as to help reform the offenders. Secondly, there is a growing realisation that criminal justice is not complete with the punishment of the offender; the direct victims of crime are equally entitled to justice in the form of compensation and restitution. Criminal justice administration in Nigeria is yet to embrace these shifts in penal thought.

This chapter argues that the Nigerian penal policy is divorced from the cultural imperatives which ought to shape such policy. In particular, it fails to harness the salient penal philosophy of reconciliation and re-integration implied in the wide use of compensation and restitution in customary criminal law. Instead, the penal scene has been dominated by incarceration in spite of the fact that the Nigerian prison system lacks what is necessary to rehabilitate the offenders. The chapter reviews the reparative remedies in the Nigerian penal statutes. I argue for a move towards reparative justice which in this context refers to balancing the interests of the offender, the victim and society, i.e. repairing the injury to the victim and seeking to re-integrate the offender into the community.

4.2..The Quest for Reparative Justice: A Surviving Traditional Sentiment:

> ...Justice is not a one-way-traffic. It is not for the appellant only. Justice is not even a two-way-traffic. It is really a three-way-traffic- justice for the appellant accused of the heinous crime of murder; justice for the victim, the murdered man...and finally justice for the society at large- the society whose social norms and values had been desecrated and broken by the criminal act complained of.[265]

The central idea in the above statement embodies the general notion of justice as understood and practised under customary criminal law. Penal policy at customary law exhibited a commitment to reconciliation. It is this quest for reconciliation that explains the dominance of compensation and restitution as penal options.[266] The basic objective

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[265]Per Oputa, (J.S.C) in Godwin Josiah v. The State, (1985) 1 N.W.L.R. 125.

[266]See generally chapter two above.

of customary criminal law was to have the offender "repair" the injury to the victim so that both can re-commence their harmonious relationship in the society. "[Compensation] is so deeply ingrained in the thinking of the African used to customary law that a penalty which satisfies the state but does nothing to compensate the victim makes no sense at all."[267] Customary criminal law adopted a tripartite approach by which the sanctions and remedies affecting the offender, the victim and the community were awarded in one and the same trial. It did not identify the interest of the victim with that of the society. In this way, victims of crime were not used as mere objects of the criminal process for the benefit of the state or community. The trial court or tribunal at customary law did not appear to have any discretion whether or not to make the award of compensation. Where injury had resulted from criminal conduct, compensation had to be paid to the victim. This was mandatory. In the same way restitution was treated as both automatic and adequate in all cases where the stolen property could be traced and restored to its owner.[268]

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[267]W. Clifford, "The Evaluation of Methods Used for the Prevention and Treatment of Juvenile Delinquency in Africa South of the Sahara", (1963) no. 21, International Review of Criminal Policy 26. It may be interesting to refer to an incident that took place in a Tanzanian court as reported by Elias- In the old Tanganyika (now Tanzania), a man who had completely incapacitated his victim, a father of ten children, by injuries caused to him by criminal negligence, was convicted and sentenced to a term of imprisonment. When the court registrar explained to the family that the end of the proceedings had been reached by the imprisonment of the offender, and that nothing more was to be done by the court in the case, an elderly male relative of the victim was heard to have remarked ruefully:

> "This judgment is contrary to custom and to natural justice, since only the government will benefit from putting the man to some labour....There is no benefit to his wife and children."- T. O. Elias, supra note p.20.

[268]Milner, supra note 4, p. 37.

How have the social and economic dislocations brought by colonization and modernization affected these traditional sentiments for compensation and restitution in criminal trials? The writings of scholars[269] and studies[270] in some states in Nigeria show that this sentiment is still very strong among the people. In its Report, the Commission on the Review of the Administration of Criminal Justice in Ogun State of Nigeria stated as follows:

> The Commission was impressed by overwhelming evidence adduced before it that the main concern of a victim in theft cases centres on the return of his property, after the recovery of which he develops cold feet as regards any further invocation of the criminal process.[271]

The Report went further:

> Reparation was favoured by several witnesses and was widely suggested as a suitable method of concluding criminal trials. It was suggested that it should be used in cases involving personal injury (including assaults and sexual offenses), property offenses, particularly where the property is either damaged or destroyed,

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[269]Elias, supra note 6; A. Adeyemi, "Towards Victim Remedy in Criminal Justice and Administration in Nigeria", in S. Adetiba, supra note 99, Milner, supra note 4. A small-scale research by Odekunle on victims of crimes show that most victims of crime in Nigeria prefer restitution and compensation to the sentencing of their victimizers to imprisonment or fine, see F. Odekunle, "Victims of Property Crime in Nigeria: A Preliminary Investigation in Zaria", (1979) 4 Victimology: An International Journal No. 2, p.236.

[270]See the Report of the Commission on the Review of the Administration of Criminal Justice in Ogun State of Nigeria, (1981). In her Ibadan study, Oloruntimehin reported as follows: "...the reluctance to deal with cases through a system which tends not only to apportion blame to a party but also to issue punishment, example, fine or imprisonment (which might lead to bitterness and strained relationships) is very strong", see O.O. Oloruntimehin, "The Difference between Real and Apparent Criminality", in A.A. Adeyemi, ed., Nigerian Criminal Process

[271]See the Report of the Commission, paras. 3.11.2.2.2.1. Many cases of theft or malicious damage to property reported to the police are not processed for trial in the courts because the victims and the offenders had decided to "settle" their cases either by means of restitution or compensation; see Adeyemi, supra note 269, p. 294.

or can no longer be found....[272]

This finds support in the proceedings of a National Conference on "Criminal Justice: Restitution, Compensation and Remedies for Victims of Crimes in Nigeria"[273] which strongly recommended a re-examination of Nigeria's penological policies taking into consideration the principles and practices of our traditional criminal justice system on compensation and restitution for victims of crimes.[274] This continued preference for these aspects of customary criminal law sanctions is because the people see it as having a greater potential for real resolution of the grievances created by the criminal conduct.

To what extent are these basic features of customary criminal law reflected in the inherited criminal justice system? In answer to this, we proceed to appraise the reparative remedies in the Criminal Code and Criminal Procedure Act.

4.3. Critique of Reparative Provisions and Practices under the Basic Nigerian Penal Statutes.

"From statutory provisions, through procedural laws, to penal sanctions, modern criminal justice systems appear to emphasise the safeguarding of the rights (and

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[272]Ibid., paras. 3.11.3.2.

[273]The proceedings have been published under the title, Compensation and Remedies for Victims of Crime in Nigeria, Federal Ministry of Justice Law Review Series, (1990) vol. 5, edited by S. Adetiba. It was the first time such a national conference was held on such topic in Nigeria; we shall make extensive reference to the papers presented at this conference.

[274]See the Resolutions of the Conference, ibid., xiii.

"interests") of offenders but utterly neglectful of the rights and interests of their victims".[275] Existing provisions on compensation and restitution are grossly inadequate, they relate to a very few offenses and apply in limited circumstances. Above all they are not mandatory[276] as was the case under customary criminal law. But inadequate substantive provisions apart, the procedure[277] whereby only the state and the offender are recognised as the parties in a criminal process tends to synonymize the victims' interest with those of the state.[278] A corollary of this approach is the avowed demarcation between the criminal process as a punishing process and the civil process as a remedying process. This approach works hardship on the average Nigerians because it implies that a victim who wants redress has to resort to a separate civil action- a process that involves expenditure of time and money in terms of court charges and lawyers' professional fees. How many average Nigerians can afford this? Lamenting this

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[275]F. Odekunle, "Restitution, Compensation and Victims' Remedies: Background and Justifications", in S. Adetiba, ed., supra note 99, p.152. The same approach is reflected in the 1979 Constitution of Nigeria where all the provisions relating to criminal trials are devoted to the accused and nothing for the victims; see section 33.

[276]It has been held that the discretion should be exercised judicially and judiciously, see Namo Tsaku & Ors. v. The State (1986) 1 N.W.L.R. Part 17, p.516.

[277]Adeyemi refers to this as the dichotomous approach as distinct from the tripartite approach at customary law, see supra note 269, p. 293.

[278]This is common with most anglo-based criminal justice systems. Thus Schneider writes that "even though the state, due to its monopoly of punishment, sets itself as the avenger in lieu of the victim, it seems to have forgotten only too often the victims' tragical fate as well as his interest in satisfaction, and, even more important, material compensation", H.J. Schneider, "The Victims' Position in Criminal Law and Criminal Procedure: Main Problems" (1985) 4 World Society of Victimology Newsletter, no.1, p.32. In many parts of continental Europe, a victim is entitled to enter appearance as "partie civile" with right to legal representation to safeguard his/her interest and to obtain necessary remedies.

state of affairs in his address to the National Conference on Victim' Remedies, Nigeria's president, I.B. Babangida asked "Must we at this time and age, on the threshold of the twenty-first century allow this unfair state of affairs to persist. Should we not start to consider how, once an offender has been adjudged guilty of a crime, he can be made to compensate his victim without the latter having to expend time and money to seek redress in a civil court?"[279] The duplication of proceedings inherent in the present approach adds to the congestion and consequent delay in the courts. Also, it is not in conformity with the traditional concept of dispute settlement because the victims' obscure position undermines the attainment of real settlement. The victim feels unending hostility towards the offender because the injury has not been repaired even though the offender has been convicted and punished.

There is a general tendency for victims to show little or no enthusiasm in the criminal process if at the end their interest will be ignored.[280] Let us now discuss the specific provisions in the statutes on this matter.

a) Compensation.

Perhaps the most undeveloped area of the modern criminal justice system in Nigeria is that of compensation as a criminal sanction in addition to or in substitution for

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[279]Address by the President of the Federal Republic of Nigeria to the Conference on "Criminal Justice: Restitution, Compensation and Remedies for Victims of Crime in Nigeria", June 28, 1989.

[280]Studies in Canada and Europe show that victims' image of the police and courts improved with provision and actualization of compensation, see J. Vennard, "Compensation by the Offender: The Victims' Perspective", (1978) Victimology

other forms of sanctions.[281] The Criminal Procedure Act (hereinafter C.P.A.) has only three woefully fragmented and inadequate provisions that could be said to relate to compensation. However, a critical look at the provisions shows how little they can offer to the victims of crime. Section 256 of the C.P.A. provides:

> If in any case before a court one or more persons is or are accused of any offence and the court by whom the case is heard discharges or acquits any or all of the accused and the judge or magistrate presiding over the court is of the opinion that the accusation against any or all of them was false and either frivolous or vexatious, the judge or magistrate may for reasons to be recorded, direct that compensation, to such amount not exceeding twenty Naira as he may determine, be paid to the accused or to each or any of them by the person upon whose complaint the accused was or were charged.

Section 261 of the C.P.A. provides:

> Where in a charge of stealing or receiving stolen property, the court is of the opinion that the evidence is insufficient to support that charge, but that it establishes wrongful conversion or detention of property, the court may order that such property be restored, and may also award damages; provided that the value of such property and the amount of damages shall not together amount in value to twenty Naira.

The substance of section 435 provides that on making an order of conditional or absolute discharge or for probation, the court may, in addition, order the offender to pay damages for injury or compensation for loss, not exceeding twenty Naira or if a higher limit is fixed by an enactment relating to the offence, that higher limit. There is also section 255(1) C.P.A. which empowers the court to order a convicted offender to pay costs to the prosecutor (not to the victim).

These are the provisions which are supposed to replace the practice under

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[281]O. Agbede, "Modalities for the Enforcement of Financial Compensation for the Victims of Crimes", in S. Adetiba, ed., supra note 99, p.27. This is indeed a paradox having regard to the general societal sentiments in favour of compensation.

customary criminal law. They are inadequate not only in terms of the amount to be awarded but, more importantly, in the scope and circumstances of the award. The compensation under section 256 is to be made in favour of a discharged accused; costs ordered under section 255(1) are payable to the prosecutor and not to the victim. Both sections 261 and 435 deal with situations where the court will not proceed to conviction. Therefore, there is really no provision for compensation as a form of sentence after a conviction.[282] The sum of twenty Naira (less than US$1) which is the maximum recoverable is derisory and there is no power to review it to suit the realities of our time.

The position in the Northern States is relatively better though not altogether satisfactory.[283] Both the Penal Code and the Criminal Procedure Code (hereinafter C.P.C.) applicable in the sixteen northern states specifically provide for compensation as a sentence after conviction. Section 78 of the Penal Code provides:

> Any person who is convicted of an offence under this Penal Code may be adjudged to make compensation to any person injured by his offence and such compensation may be either in addition to or in substitution for any other punishment.

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[282]Commenting on the above provisions, Karibi-Whyte, (Justice of the Supreme Court of Nigeria) stated, "the Criminal Procedure Act contemplates payment of costs to the prosecutor. It does not seem to me that any compensation is envisaged in favour of the victim of a criminal offence. And this is so even where it is widely assumed that the court can rely on the provisions of section 255(1) in relation to costs and section 435(2) in relation to damages for injury or compensation for loss", see A.G. Karibi-Whyte, "National Policy on Compensation to Victims of Crime: How Desirable?", in S. Adetiba, supra note 99, p. 264.

[283]The fact that in many instances we find the law in the Northern states preferable to the South vindicates that worthy exercise in 1959-60 by which the Northern Region government set out to produce two codes of criminal law and procedure which took into consideration, albeit minimally, local values, sentiments and circumstances.

Section 365 of the C.P.C. provides:

> Whenever under any law a criminal court imposes a fine, the court may, in passing sentence, order that in addition, the offender shall pay a sum (a) in defraying the expenses of the prosecution; (b) in compensation in whole or in part for the injury caused by the offence, where in the opinion of the court substantial compensation is recoverable by civil suit; (c) in compensating an innocent purchaser of property which has been the subject of an offence and who has been compelled to give it up; (d) in defraying the medical expenses of any person injured by the accused in connection with the offence.

The above two sections are clearly better than those of the Criminal Procedure Act. They do not restrict the courts to any figures as to quantum of compensation and they are clear as to the availability of compensation as a sentence after conviction. However, they have their own defects as well. The phrase "any person injured by his offence" used in section 78 of the Penal Code could be interpreted as applying to a person suffering physical injury only, thereby excluding all other types of injury;[284] it has been suggested that extending the meaning of "injury" to include "loss" would better serve the ends of justice.[285] Also, there is some inconsistency between section 78 of the Penal Code and section 365 of the Criminal Procedure Code. Section 78 purports to make compensation available "in addition to or in substitution for any other punishment", but when one tries to enforce a compensation order under this section, one finds that section 365 allows enforcement only if the compensation order is additional to a fine.[286] Under the

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[284]Similar words in the Penal Codes of some East and Central African countries had been so restrictively construed, see R. v. Tadeo, 1923-60 ALR Mal. 837.

[285]Milner, supra note 4, p. 118; Adeyemi suggests that the phrase "injury, loss or damage" be substituted for the word "injury", see supra note 269, p. 305.

[286]Milner describes section 365 as a total frustration of the good sense of section 78 both in logic and practice for he asks "why should compensation only be available if the offender is fined?", Ibid., p.120. These limitations notwithstanding, the position in the

Criminal Procedure Code recovery of compensation in a criminal trial is no bar to further civil action, however, the civil court must take into consideration any sum paid or recovered as compensation in the criminal action.[287]

b) Restitution:

Restitution relates to the return or restoration of movable property either stolen or otherwise dishonestly acquired or taken without permission.[288] It enables the victim to be returned to the status quo before the injury was done. It also prevents any unjust enrichment from criminality. Restitution was a popular sanction under customary criminal law. The provision for it under the present system is not altogether satisfactory. By section 270(1) of the C.P.A. an owner of stolen goods may be required to pay for his own property in order to have it restored where such has fallen into the hands of an innocent third party. Although this requirement may have been intended to protect bonafide purchasers for value without notice, it would have been better if the provision allowed the owner take back the goods while the innocent purchaser is compensated from the asset of the offender.[289] Adeyemi proposes draft legislation on restitution which I

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north is better than the south.

[287]See section 366 of the C.P.C.

[288]See section 270(1) of the Criminal Procedure Act and section 357(1) of the Criminal Procedure Code.

[289]cf. with the position under the Criminal Procedure Code which provides that the bonafide purchaser be compensated from money found on the offender. But one wonders why the source of compensation should be limited to money found on the offender; why should his/her asset not be available to recoup the bonafide purchaser?

consider elaborate enough to achieve the objective of reparative justice.[290] Nigerian courts should make greater use of restitution as a disposition method either alone or in addition to fine, binding over or conditional discharge rather than imprisonment. When restitution is ordered in addition to a fine, it neutralizes the very object of the crime which is unjust enrichment and the fine inflicts on the offender further pecuniary loss. This is bound to be more effective than imprisonment which tends to be very conducive to the development of recidivism in Nigeria.[291]

c) Compounding of Offenses:

This is a process whereby a victim of crime is allowed to decide to settle the dispute with the offender without necessarily involving the official judicial process. "It signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution...."[292] The process was common in the traditional judicial process of many parts of Nigeria. The Criminal Procedure Code provides for compounding of offenses.[293] There is no equivalent provision in the Criminal Procedure Act applicable in the southern states, yet as Adeyemi[294] observes,

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[290]See Adeyemi, supra note 269, p. 302-3.

[291]A.A. Adeyemi, "Administration of Justice in Nigeria: Sentencing", in the Proceedings of the National Conference on Law Development and Administration in Nigeria (LAWDEV '87), vol.11, p.28.

[292]Per Prinsep J. in Murray v. Queen-Empress (1893) I.L.R. 21 Cal. at 112.

[293]Section 339 of Criminal Procedure Code. The procedure is culturally sensitive to the extent that it offers a close approximation to customary procedure.

[294]supra note 269, p. 316.

there is abundant evidence indicating the growing ambit of private compounding of serious offenses, including rape and homicide, where satisfactory settlement has been struck between the parties.[295] Compounding of offenses is different from mere withdrawal of prosecution. While the latter is an official decision of the agents[296] of the criminal justice system, the former has the complainant and the offender as the main actors. Also, their consequences differ; whereas a person whose prosecution has been withdrawn may be liable to fresh prosecution on the same charge[297], the compounding of an offence has the effect of an acquittal.[298] This process promotes the pacification of the contestants and the healing of the rift caused by or causing the crime thereby promoting reconciliation. It saves the offender the stigma of conviction. The victim is saved the agony of the criminal process.

A monetary consideration is not a prerequisite for compounding. An unconditional apology may be enough if it is what the victim wants. In Nigeria, however, it is common for compounding of offenses to be accompanied by payment of compensation. Section 339 of the Criminal Procedure Code sets up two levels of compounding: specified minor

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[295]It is known that an undertaking of all burial expenses, plus ample compensation to the dependants and other members of the family have resulted in many homicide cases not reaching the police, let alone the courts. Similarly, payment of hospital bills and adequate compensation produce the same results in rape and defilement cases; Adeyemi, ibid. This practice is common notwithstanding that the section 127 of the Criminal Code makes compounding of felonies itself an offence.

[296]For example, the Attorney-General can terminate a criminal proceeding by entering a *nolle prosequi*, see sections 160 and 191 of 1979 Constitution.

[297]See section 253(3) of Criminal Procedure Code; sections 73(3), 74(3) and 75(3) Criminal Procedure Act. See also R. v. Adedoyin (1959) 4 F.S.C. 185.

[298]Section 339(8) Criminal Procedure Code.

offenses[299] may be compounded by the parties themselves, and specified offenses of a more serious nature[300] need additional consent of the court to be compounded. It is significant to note that the Code does not include offenses of a public nature as compoundable. It has been suggested that an improved version of the provisions of the Criminal Procedure Code on compounding be adopted for all parts of the country.[301] The High Court Laws of the various states of the federation contain provisions allowing the criminal courts to promote reconciliation and facilitate the settlement of proceedings for common assault or any other non-aggravated offence on terms of compensation or otherwise. But it is sad that the judges and magistrates do not often harness the potentials of these provisions.

4.4..The Dominance of Incarceration in Nigerian Penal Practice:

In his extensive study of the criminal justice administration in colonial and post-colonial Nigeria, Milner[302] noted that the basic attitudes displayed in the application of the British-type criminal law by the introduced courts are repressive and oriented

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[299]The Code includes under this list such offenses as causing hurt, minor assaults, some forms of trespass, adultery, enticement, defamation and allied publication offenses, criminal intimidation, insult intended to provoke a breach of the peace, and criminal breach of contract of service.

[300]Under this list are such offenses as grievous or aggravated hurt, wrongful restraint or unlawful compulsory labour, aggravated trespass and insult to the modesty of women.

[301]See Adeyemi, supra note 269, p. 309. The list could be expanded to allow for more compoundable offenses. I am informed that this proposition is receiving considerable attention in an ongoing process for a review and possible unification of the Codes of Northern and Southern Nigeria.

[302]Supra note 4, p. 91.

towards deterrence. The sentencing attitude of Nigerian courts is influenced by the legislative philosophy expressed in the penal laws, loyalty to English common law training, and inadequacy of infrastructure and personnel for non-institutional methods.

The legislative objective in Nigerian penal statutes is expressly punitive. In some cases, minimum prison sentences are made mandatory by the law creating the offence thereby depriving the courts the discretion to use alternatives.[303] The Nigerian criminal law follows the philosophical model of the Benthamite neo-classical utilitarian tradition.[304] With deterrence as the main objective, imprisonment (which is seen as the most deterrent)[305] becomes the most used option. Nigerian judges and magistrates have been described as "prison-happy".[306] Their attitude cannot be divorced from their

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[303]But legislating savage minimum penalties can be counter productive because the police may be reluctant to arrest and/or charge suspects, see Adeyemi's Note in (1969) 3 Nig. L.J. 172 at 174 on the reactions to the Homicide by Reckless or Dangerous Driving (Summary Trial and Punishment) Edict 1968 which prescribed a minimum sentence of ten years imprisonment and maximum of life imprisonment for death caused by dangerous driving. Also the courts may in such cases resort to subtle points to avoid convictions, see Milner, supra note 4, p. 56 and the cases cited in notes 38-41.

[304]See M.A. Owoade, "Reform of Sentencing in Nigeria- A Note on Compensation, Restitution and Probation", in S. Adetiba, ed., supra note 99, p. 123. According to Bentham's "pleasure and pain" principle, pleasure derived from criminality must be combated with pain in terms of punishment to create deterrence.

[305]However, imprisonment has failed to produce penitents in the Nigerian situation. It has been shown that for a majority of criminals that overcrowd the Nigerian prisons, de-institutionalized sentences would do, see F. Odekunle, "De-institutionalization of Sentencing in Nigeria: Prospects and Problems", (1983) Law Reform, A Journal of the Nigerian Law Reform Commission, No. 13, pp 6-41.

[306]See Adeyemi, supra note 269, p. 305. See also "Crime and the Quality of Life in Nigeria" being the Nigerian National Paper to the Sixth United Nations Congress; the paper decried the general attitude of adopting the part of least resistance i.e. imprisonment and/or fine without making effort to utilize other alternatives provided in the penal laws.

English law orientation. This is corroborated by the fact that the customary courts manned by non-lawyers are known for their wide use of non-custodial methods.[307] However, the judicial attitude can be partly explained on the lamentable lack of supportive institutional framework for the realization of the few alternatives provided for in the codes.[308]

The general outlook of the Nigerian penal scene must be placed within the context of its colonial origin in order to understand its inappropriateness for a post-colonial Nigeria. The British colonial rule was an economic adventure based on a relationship of domination and exploitation sustainable only by repressive laws and a punitive correctional system.[309] Thus British penal policy in Nigeria was not even congruent with the focus emerging in Europe, including Britain, at the time.[310]

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[307]See Milner, supra note 4, pp. 100-1.

[308]This is a common problem in the penal scene of most West African countries whose legal system can be traced to Britain; thus Arthur writes, "Even though aspects of modern correctional policies such as rehabilitation, probation, parole, and community corrections are recognised theoretically as part of the penal policy in West Africa, in practice, no concerted efforts have been made to incorporate these into the existing penal framework", J.A. Arthur, supra note 115, p. 200.

[309]But why has this heritage continued to haunt the post-independence Nigerian legal and criminal justice systems? Probably because colonial domination was replaced with local domination and exploitation which also needed repressive laws for its sustenance hence the nation's criminal justice system and its statutory base have undergone little change since independence.

[310]For instance it was not until 1952 that the idea of rehabilitation was even theoretically expressed as part of correctional policy in Nigeria whereas the same has been practised in England since the publication of the Gladstone Report on Condition of Prisons in 1895.

a) The Nigerian Prisons and the Dilemma of Incarceration:

> The Nigerian Law Reform Commission described Nigerian prisons as follows:
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> Nigerian prisons are too congested, and poor ventilation is one of their glaring features; prisoners and detainees are cramped together in cells with no adequate accommodation provided. Hardened criminals are made to live together with first offenders and the type of treatment meted to the latter by the former is unimaginable. Prisoners sleep in double decker beds with no mattresses and pillows provided. In these congested cells, not all the prisoners are fortunate to be provided with beds. The unlucky ones are made to sleep on dirty, bare floors. The cells stink with hot, uninviting air oozing out at intervals from the cells to the immediate environment.[311]

The federal government has expressed great expectations in the role of the prison system as a correctional centre.[312] But this is in theory only, for as Igbinovia has observed, "rehabilitation exists in name only; prison facilities are unfit for human habitation, and prison violence, abuses, homosexuality and recidivism are pervasive."[313] This is corroborated by the Report of the Nigerian Law Reform Commission which stated further that:

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[311]Nigerian Law Reform Commission, 1983; Report and Draft Bills for the Reform of Prisons in Nigeria, Lagos, Nigeria. It is unfortunate that the very government never lived to carry out the reforms proposed by the Commission having been overthrown in Dec. 1983.

[312]A Prison Manual of 1980 described criminals as "disoriented members of the society. When apprehended and sent to prison, they should be reformed or reoriented to once again become useful members of the society", see Federal Republic of Nigeria (1980) The Prison Manual. See also "The Correction of Imprisoned Offenders in Nigeria" being paper presented by the Nigerian Director of Prison Services at the International Conference on "Crime and Crime-Control in Developing Countries," University Conference Centre, Ibadan, July, 1980, where the Director stated that the Nigerian Prison Service had accepted in principle the need for reformation and rehabilitation of the imprisoned offenders.

[313]P.E. Igbinovia, "The Chimera of Incarceration: Penal Institutionalization and its Alternatives in a Progressive Nigeria", (1984) 28 International Journal of Offender Therapy and Comparative Criminology 23.

> From all indications, the Nigerian prison system, as at present is not geared toward the reformation of prisoners to enable them live a more useful life. Instead our prison system appears more punitive and retributive, and therefore, is not in a position to help reform prisoners. Perhaps, this is why the rate of those returning to prison for the second, third and even fourth term imprisonment continues to be on the increase.[314]

Congestion has been a peculiar problem of the Nigerian prison system. But more annoying is the fact that a considerable percentage of daily prisoners in Nigeria are suspects awaiting trial. For instance, in 1979 about sixty one percent of the total prison population was composed of unconvicted prisoners.[315] In 1981, a House of Representatives Internal Affairs Committee reported that there were 21,100 inmates in prison serving jail terms and more than 13,000 awaiting trial.[316] The situation has deteriorated since then.[317] A total of 5,000 inmates died in prisons across the country

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[314]Nigerian Law Reform Commission, supra note 311. Our prison system was conceived on a poor foundation having been intended by the colonial masters as custodial facilities used to send offenders out of circulation to satisfy the "security consciousness" of the colonial predators. They were not conceived as reformation centres. The system remains haunted by this heritage.

[315]E.O. Alemika, "The Smoke Screen, Rhetorics and Reality of Penal Incarceration in Nigeria", (1983) 7 International Journal of Comparative and Applied Criminal Justice 141.

[316]The report stated that the large number of persons awaiting trial was the major cause of congestion in the country's prisons, see "36,069 Prisoners in 126 Jails", West Africa, 27 April 1981, 947.

[317]In March 1986, the total prison population in the country was 54,509 while the total capacity of the 132 prisons was 28,000, see The Mail, 28 Sept. 1986. The situation as at 1989 is best expressed in the following caption of one of Nigeria's best magazines, "Nigerian Prisons, Living in Hell", Newswatch, June 19, 1989.

in 1991 alone.[318] Apparently feeling the urgency of the situation, the Internal Affairs Minister, last year, ordered the quick completion of twelve new prisons already under construction in different parts of the country to decongest the old ones.[319]

The major problem seems to be the lack of coherent policy among the various institutions of the criminal justice system. Thus the Minister of Internal Affairs recently confessed that prison congestion would continue to be a problem until Nigeria's legal and police systems were overhauled.[320] A Director of Nigerian Prisons had once lamented as follows:

> As at now the legislature, the judiciary and the police still believe that the goal of imprisonment is punishment...on the other hand, the Nigerian Prison Service believes that the goal of imprisonment should be reformation. Although in 1971, the Federal Military Government issued a white paper saying that the goal of imprisonment should be reformation there has been no change in the statute books.[321]

The consequences of poor prison conditions on the prison output are manifold; because

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[318]"Prison deaths", West Africa, 7-13 Sept. 1992, p.1535-6; this was even described by the Minister of Internal Affairs as a declining mortality rate. See also "Abortive Jail-break", West Africa, 6-12 April 1992, p.597, where the Controller of Prisons revealed that several of the prisoners were suffering from tuberculosis and mental illness.

[319]"Prisoners' Welfare", West Africa, 17-23 Feb. 1992, p.293. One can only note that the solution does not lie in constructing more prisons for it will take only few months for the new prisons to suffer the fate of the old ones.

[320]West Africa, 24-30 Aug. 1992. The preponderance of unconvicted prisoners (who might have been detained for months and sometimes years) in the prison system reflects the inefficiency or shortcomings of other arms of the criminal justice system such as the courts and the police. Alemika describes Nigerian prisons as "civil barracks" for the underprivileged who could not afford legal representation in the face of hostile police and the courts, see E. Alemika, supra note p.142.

[321]See Director of Prisons, Nigerian Prisons Service, "The Correction of Imprisoned Offenders in Nigeria", supra note 48, pp. 19-20.

it is difficult to keep inmates of various categories separate, first offenders "graduate" from prison as tougher criminals and recidivism has become a serious problem with the Nigerian prison system;[322] because of the congestion, more attention is given to security than to reformation. The prison department is worried about the increasing use of imprisonment by the court in spite of the reality of the Nigerian prison situation.

Why has incarceration continued to dominate the Nigerian penal scene? Customary criminal law and sanctions were hurriedly abolished as being incompatible with modern Nigeria thus depriving the inherited system useful lessons that would have been learnt from the customary process. The few alternatives provided for in the statutes are not supported with the necessary institutional framework. Again this is partly because Nigerian policy makers look for structures in the western model while ignoring existing traditional framework. The desire should be to restructure judicial sentencing to incorporate the best of traditional Nigerian practices and at the same time take advantage of the skills of modern penology.

4.5..The Pathway to Reparative Criminal Justice in Nigeria:

In this chapter we have identified two main problems of the penal practice in Nigeria as neglect of victim remedy and undue stress on deterrence leading to an over-use of incarceration as a punishment option. These lead to other problems like prison congestion and consequent recidivism. But what can be done to redress these problems

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[322]See Federal Republic of Nigeria, Prisons Annual Report, 1984. See also S. Ekpenyong, "Social Inequalities, Collusion and Armed Robbery in Nigerian Cities", (1989) 29 Brit. Journal of Criminology 21.

that continue to plague the system?

There have been suggestions for the establishment of a National Compensation Scheme of the kind in many parts of Europe and America. This is laudable but the question is: can the nation afford it? Can such a scheme be successfully implemented in Nigeria or shall it go the way of other bureaucracies? At best the nation may afford such a scheme for a very few offenses like armed robbery, but what happens to a host of other offenses not covered? In this regard we feel that the solution involves more than setting up a compensation scheme. The judicial process itself must be fully harnessed before looking elsewhere for a supportive scheme.

A compensation scheme that largely involves the state bearing the burden and the offender not doing so, will fall short of the idea of compensation in traditional Africa. Clifford[323] writes that it is doubtful whether this transfer of responsibility would meet African conceptions of the way to deal with offenders. But he also realized that the effectiveness of the compensation system as practised under customary criminal law depended much on the kinship pattern of social life. With the decline in this pattern of social life in many parts of the country, especially the urban areas, some alternative to the kinship system must be resorted to.[324] In these circumstances, Clifford suggested a penal structure of a kind which would allow an offender to work off his debt to the

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[323]An Introduction to African Criminology (Nairobi: Oxford University Press, 1974), p.206.

[324]However, it seems that there is still much of this social pattern that could be exploited in modern Nigeria. Owoade proposes a slight procedural shift towards socio-family ties in the sharing of compensatory dispositions but never of criminal liability; M.A. Owoade, supra note 304, p.130.

person offended. Where this is tied to the semi-release of prisoners so that they can earn a living to pay such compensation, there would be a continuation of the traditional principle of compensation.[325] The criminal justice system must be able to obtain from the offender as much of the reparation as possible while leaving it to the state to supplement where necessary.[326]

The starting point should be a revision of the substantive and procedural penal legislations in Nigeria. Restitution and compensation policy cannot be successfully grafted on to an unredeemed colonially inherited legal system.[327] The revision envisaged here will entail widening community participation in the criminal justice system by vesting customary courts with criminal jurisdiction.[328] Such courts have always had a

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[325]Clifford, supra note 323.

[326]According to Karibi-Whyte, what is needed is a device, cheap, effective and beneficial to the victim, which at the same time would bring home to the offender the revulsion of the state and the society at his anti-social conduct and a reasonable undoubted reflection of the interest of justice as a whole, supra note 282, p. 307. "A combination of a state-oriented compensation and a direct accused-victim compensation on a typological differential basis", Owoade, supra note 304, p. 129.

[327]F. Odekunle, "Managing Nigeria's Crime Problem", (1977) 19 Nigerian Journal of Economic and Social Studies, No.3, p.357. Justice Nasir spoke in the same vein when he retorted, "It is therefore, almost impossible to single out the victims' rights in crimes of violence for any meaningful reform in an antiquated atmosphere of criminal justice. Interim measures to alleviate the suffering of victims of crime may be started but I believe we have no alternative to a wholesale revision of our penal legislations", Hon. Justice M. Nasir, "Criminal Justice: Restitution, Compensation and Victims' Remedies", in S. Adetiba, supra note 99, p. 19.

[328]This will be elaborated in chapter 5. Many nations strongly share the view that victims, offenders and their communities should be involved at the earliest stage and to the fullest extent possible in the administration of criminal justice, see Van Ness, "A Restorative Future for Criminal Justice", being paper presented at the conference of the Society for the Reform of the Criminal Law, August 1988 in Ottawa, Canada.

reputation for applying restitution and compensation as dominant features in their sentencing pattern to the satisfaction of victims and offenders alike.[329] Freed from the technicalities and procedural limitations of the modern courts, the customary courts could ensure quick dispensation of reparative justice.

There is also a need to encourage criminal dispute resolution outside the official justice system. The provisions for compounding of offenses at the victims' instance which already exist in the Northern states could be a model for the rest of the country. This would afford greater chances of real forgiveness which might instill some hope in the offender that he is not totally unwanted by the community. In many minor offenses, a victim could feel a whole world of good if the offender could just wholeheartedly apologize for the wrong; but an opportunity to do so may not obtain in the adversary atmosphere typical of the formal criminal procedure.[330]

The current passive role of victims in criminal trials is a barrier to the realization of reparative justice. If compensation and restitution were to be accorded a place in the criminal process, then a greater victim participation in the process becomes necessary.

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[329]Thus Milner stated, "Compensation and restitution have always been popular and acceptable means of disposing cases in Nigeria, much more in customary courts than in the British", see A. Milner, "The Future of Sentencing in Nigeria", (1971) 10 International Annals of Criminology 248.

[330]In some parts of the United States, many communities have established citizen dispute centres as alternatives to the criminal justice system, see B. Alper and L. Nichols, Beyond the Courtroom: Programs in Community Justice and Conflict Resolution (Lexington: Mass Lexington, 1981). These centres allow victims of certain minor crimes to obtain redress from the offenders through mediation or arbitration without the formality, delay, expense, and harsh effects of the usual combination of criminal and civil proceedings, see L.L. Lamborn, "Victims in the Criminal Justice Process: An American Perspective", in S. Adetiba, ed., supra note p.92.

In a country like Nigeria with majority of its citizens living in real poverty, such a procedure holds out a lot of hope. Adeyemi presents the case as follows:

> Drawing upon our traditional acceptance of reconciliation as the aim of our traditional criminal justice system, it becomes imperative that the victim must become a party in the criminal process and he must be a full participant at both the pre-trial, trial and sentencing stages of the criminal process. In our Nigerian environment, with the low economic level of our citizens, and our sentiments for victim remedy in criminal cases, there can be no further justification for a rigid separation of the criminal process as merely a punishing process, and the civil process as a remedying process....it is desirable for...the criminal court to order remedy for the victim in one single trial, where the accused has been found guilty. This will avoid duplication of proceedings and thus reduce expenses for the state, the victim and the offender. Secondly, the trauma will be restricted to only one experience for both the victim and the offender...the congestion in the courts will thereby be removed.[331]

The word victim should bear a liberal interpretation so that in appropriate cases it will include the privies and dependants of the direct victim of the anti-social conduct.[332] This accords with the United Nations Declaration on Justice for the Victims of Crime and Abuse of Power.[333] To ensure that increased victim participation in the criminal process does not unfairly prejudice the accused person especially regarding the determination of compensation, the accused should be allowed to raise such defences as contributory negligence etc. which would have been available to him in a purely civil proceedings.

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[331]Adeyemi, supra note 269, pp. 296-7.

[332]This will accord more with the extended family system and dependency that characterize family structures in Nigeria. On perspectives of victims, see generally, T. Pickard and P. Goldman, Dimensions of Criminal Law (Toronto: Montgomery Publications Ltd., 1992) chapter 1.

[333]United Nations, Department of Public Information, DPI/895, August, 1985; according to the said Declaration, the term "victim" should include, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Above all, there is a need for a change in judicial approach to sentencing. For a few serious offenders, imprisonment may well be appropriate but for a vast majority of others, it should be a last resort. Courts should be willing to explore other alternatives to imprisonment.[334]

[334]Such as committal into the hands of a chief or family head, seizure of property, communal labour e.t.c; these are discussed in chapter 5.

CHAPTER FIVE

TOWARDS A PEOPLES' PHILOSOPHY OF LAW

5.1..Introduction:

Having reflected on the traditional judicial process and delineated the causes and dimensions of the disenchantment with the inherited criminal justice system, this chapter articulates the normative and institutional relevance of the customary criminal justice system in the criminal justice administration of modern Nigeria. One is mindful that a hundred years legal experience cannot be easily shrugged away; so one does not suggest a total dismantling of the inherited system notwithstanding its obvious shortcomings. My approach is to suggest aspects of the indigenous system that could be introduced into the ordinary courts to make them more relevant to the society. But more importantly also, is the suggestion for a new framework of truly indigenous courts that will not only carry justice to the people but will be the forum for norm clarification and re-education of the populace. The relevance of customary criminal justice system to the other institutions of the criminal justice system- the police, prisons etc. are discussed.

I will first reflect briefly on some of the past institutional and other responses to the perceived shortcomings of the inherited system. Why did those responses not make any significant impact on the system? Are there lessons to be learnt from the past responses in forging a new reform direction?

5.2..Past Responses to the Inadequacies of the System:

In Nigeria, the responses to the problems in the administration of justice have been very conservative. It is arguable if anything that has taken place since independence in respect of the legal system can be described as a reform. The status quo has always been maintained. Typical responses to the problem of court overload have been the call for and creation of more courts,[335] appointment of more judges, production of more lawyers and recruitment of more police officers. The problem of prison congestion is responded to by the construction of new prisons[336] that sooner than later suffer the same fate of the pre-existing ones. But according to Fisher,[337] many authorities have come to the conclusion that only people who are involved in and are aware of the community can act as effective forces in crime prevention, and that "simply increasing police and court capacity will not solve the problems presently plaguing the criminal justice system." Of more interest to us here are such past responses as the establishment of customary courts and the tribunal system that has characterized Nigerian military regimes. The constitutional provisions on individual liberty and fair hearing in criminal

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[335]On the structure of the courts, there have not been any major efforts to displace the colonial model in favour of indigenous ones. Most changes have been merely cosmetic in nature- rechristening some of the old courts or simply fitting some newly-created courts into the old system, see G.N. Vukor-Quarshie, "Post-independence Developments in Nigeria in the Field of Criminal Law and Procedure, as well as the Courts System" (1985-86) 6 Yearbook of African Law 207.

[336]For instance,last year the Internal Affairs Minister ordered quick completion of twelve new prisons in Nigeria to decongest the existing 123 prisons, see "Prisoners' Welfare", West Africa 17-23 Feb. 1992 p. 293.

[337]A. Fisher, "Community Courts: An Alternative to Conventional Criminal Adjudication" (1975) 24 American University Law Review 1253.

trials, which ought to have been a cure to most ills of the system, will be commented on.

During colonial rule indigenous courts had existed with newly established British-type courts. These indigenous courts exercised both civil and criminal jurisdiction.[338] This arrangement was carried into independence in 1960.[339] Nigeria's experience with the First Republic[340] indigenous courts was far from satisfactory but this has to be explained in the context of the structure carried over from colonialism.[341] To pacify traditional rulers and other local leaders, the British gave them many judicial powers and control over local courts while at the same time ignoring the traditional checks on them.[342] These courts thus became political weapons of the local elites and traditional rulers and this position was carried into independence. It was not surprising that these

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[338]In the Northern region the native courts had a wide jurisdiction and could impose the death sentence for homicide.

[339]The Native Courts in the Northern Region were renamed Area Courts while the Eastern and Western Regions continued with their own local courts as customary courts.

[340]Because of incessant military intervention in Nigerian politics, the term "republic" is used to describe each era of democratic government. The first republic is the period between independence in 1960 and the first military intervention in 1966.

[341]The colonial model of indigenous courts had in many cases combined the executive and judicial roles in a single native ruler or institution, e.g. in the Northern region, there were some courts (the Chiefs Courts) with unlimited jurisdiction but which were presided over by automatic right as a function of holding certain executive positions.

[342]This was part of the trick of the so-called indirect rule. In the north the indigenous courts were so tied to the Emirs that they became instruments of oppression in their hands; the chiefly areas of western Nigeria were found most compatible with the indirect rule system and their rulers were granted inflated powers; the "stateless" societies of Eastern Nigeria (particularly the Ibos) were badly misunderstood and were thus crammed into the new model regardless of the fit, see H.M. Carter, "Prospects for the Administration of Justice in Nigeria: Courts, Police, and Politics" in C.S. Whitaker, Jr., ed., Perspectives on the Second Republic in Nigeria (Massachusetts: Crossroads Press, 1981) 29.

courts became the object of public outcry. There were gross political and operational abuses which tarnished the image of the local courts.[343] So when the army struck in January 1966, the local courts were one of the targets for "assault" by the junta and the structure and operation of these courts in some parts of the country were reviewed and reorganized.[344] In the north where the abuses were most pronounced, certain grades of the courts were abolished and general control taken away from the Native Authorities and placed in the Chief Judge of the region. Reforms were also undertaken in other parts of the country.

It was after the civil war in 1970 that the local judiciary suffered its worse assault in history. For the first time, East Central state[345] in the former Eastern region abolished the customary courts.[346] In some states these courts were deliberately rendered less significant by stripping them of most of their jurisdiction. But in a brief

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[343]See B.O. Nwabueze, Judicialism in Commonwealth Africa: The Role of the Courts in Government (London: C. Hurst, 1977), p.275, on the "blatant use of the native or customary courts as instruments in the power struggle".

[344]See A.O. Obilade, "Reform of customary courts system in Nigeria under the military government", [1969] Journal of African Law 28; "Jurisdiction in customary court matters in Nigeria: a critical examination", [1973] Journal of African Law 227.

[345]Nigeria had earlier in 1967 been split into states bringing an end to the regional structure.

[346]See Magistrates' Courts Law (Amendment) Edict, 1971, No.23, and the High Court (Amendment) Edict, 1971, No.22. Section 16(1) of the former repealed the Customary Courts (No.2) Edict, 1966, the Local Government and Customary Courts Service Board (Establishment) Edict, 1966 and all subsidiary legislation thereunder. The effect of the section, therefore, was to revoke in relation to the East Central State the machinery for the creation of customary courts and the appointment of their personnel, see E.I. Nwogwugwu, "Abolition of Customary Courts- The Nigerian Experiment", [1976] J.A.L. 3, for a critical review of this hasty action.

time it was realized that this was a wrong approach. In states where the courts had been abolished, people were finding the delays and expenses in the ordinary courts intolerable. The federal government set up a Customary Courts Reform Committee which, after eighteen months of investigation and collation of views from the public recommended that the customary courts be reconstituted in those areas where they had been abolished. At present the power to establish such courts rests with the government of each state. Many states at present have customary courts. But these courts have been unable to make an impact on the criminal justice administration because most of them have very little criminal jurisdiction and, sharing such jurisdiction concurrently with the regular courts, they are often by-passed by the police who conduct criminal prosecutions in the lower courts. They are mirror-images of the ordinary courts adopting the strictly adversarial process and suffering from constant intimidation by lawyers who are allowed to appear before them. In Imo State, for instance, the Customary Court Edict provides that in criminal proceedings the customary courts shall follow the rules and procedure in the Criminal Procedure Law which guide such proceedings in the regular courts.[347] The result is that the courts fail to reflect the indigenous or traditional models of dispute resolution. The Customary Courts face the problem of uncertainty as to how much they can depart from English rules and practice without running the risk of having their decision overturned on appeal or review by the inherited courts. Using the Imo State Edict as an example again, the Customary Court of Appeal is empowered to set aside the

[347]See section 73(a) of the Customary Court Edict (No.7) of 1984 as amended by the Customary Court (Amendment) Edict, 1987.

decision of a Customary Court in any criminal matter notwithstanding that such decision is correct under customary law.[348]

Another feature in the past institutional responses is the emergence of special tribunals in the administration of criminal justice. Tribunals handling criminal cases have proliferated under successive military regimes in Nigeria. Although section 33[349] of the Constitution of Nigeria gives legitimacy to tribunals other than the ordinary courts, they have never been employed under democratic regimes. The tribunals are seen as aberrations associated with military governments. We need only refer to a few of these tribunals and the Decrees establishing them in order to highlight certain features common to almost all such tribunals.

The tribunals and their enabling Decrees have always given attention to, inter alia, two main problems of the criminal justice system: delay and complexities of the rules of evidence which enthrone technical justice in place of substantive justice. The Robbery and Firearms (Special Provisions)(Amendment) Decree[350] required police investigation into offences under the Decree to be concluded no later than seven days after the arrest of the offender, and the proceedings of the tribunal must also be concluded within seven days

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[348]See 59(2) of Edict No.7 of 1984.

[349]Section 33(4) of the 1979 Constitution provides that "when any person is charged with a criminal offence, he shall...be entitled to a fair hearing within a reasonable time by a court or *tribunal.*" (Emphasis added).

[350]No.28 of 1986 which amended the Robbery and Firearms(Special Provisions) Decree, 1984. The first Robbery and Firearms Decree was promulgated in 1970 in response to unprecedented rise in the incidence of armed robbery after the Nigerian civil war.

from the date of its first sitting.[351] This may not be realistic in all cases[352] but the provisions helped immensely in the speedy disposition of cases. On the trial procedure, some of the Decrees either obliterated or watered down the presumption of innocence and removed some of the limitations on the admissibility of evidence of accomplices. Section 1(3) of the Exchange Control (Anti-Sabotage) Decree, No. 7 of 1984 placed on the accused the onus of proving that any payment made or anything done was with the permission of the appropriate authority.[353]

Speedy dispensation of justice and concern for substantive justice are features of the tribunals which one can commend to the ordinary courts. On the substantive ·ntent of criminal laws the military has always left retrogressive marks. Most of their penal legislation are retroactive in operation, contain exceedingly harsh sentences (with statutory minimum) and allow no right of appeal.[354] The military has always tinkered with the criminal justice system but its impact has been very limited. This is because none of the

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[351]See sections 7(3), 8 and 10(5) of the Decree. See also the Special Tribunal (Miscellaneous Offences) Decree, No. 20 of 1984 which provides for investigation to be concluded not later than 28 days after the arrest of the accused and proceedings to be concluded within 14 days of the tribunals first sitting, (s. 3(A) and s. 4(A)(1) and (2).

[352]For cases where it is not possible to meet the deadline, there is a saving clause in section 10(6) which stipulates that failure to comply with the time period shall not invalidate any prosecutions under the Decree.

[353]See also the Recovery of Public Property (Special Military Tribunals) Decree, 1984 as amended which places on the public officer charged, the onus of proving that there was no unlawful enrichment. This particular tribunal was set up to recover the vast wealth of the nation embezzled by the politicians of the Second Republic. It could convict for alternate offences not charged.

[354]See generally M.A. Owoade, "The Military and the Criminal Law in Nigeria", [1989] 33 J.A.L. 135.

military governments has ever undertaken a total overhaul of the system,[355] instead, their attention had been on a few offences and some of the tribunals created by them are ad hoc. The majority of criminal offences still remain with the regular courts. The tribunals seem to be operating on the periphery thus not seriously affecting the criminal process. The common crimes known to the Nigerian public- assault, petty theft, occasional murder etc- are of no interest to the tribunals.

The 1979 and 1989 Constitutions contain provisions on pre-trial release which ordinarily ought to take care of the over-representation of unconvicted persons in the prisons. Section 32(4)(a) of the 1979 Constitution[356] requires any person arrested or detained for a criminal offence to be brought before a court of law within a reasonable time, and if he is not tried within a period of two months from the date of his arrest or detention, he shall be released (without prejudice to any further proceedings that may be brought against him) either unconditionally or upon such conditions as are necessary to ensure that he appears for trial at a later date. This provision was intended to depopulate the prisons, inspire the courts and police to quicker dispensation of justice, and to safeguard individual liberty. Unfortunately, there has not been any significant

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[355]Perhaps, Ghana's Public Tribunal System introduced by the revolutionary regime of Jerry Rawlings represents the most determined efforts by any government in anglophone West Africa to fashion viable substitutes for the institutions and processes inherited from colonialism. However, it failed to harness the potentials of the customary judicial process which can be more enduring. For a critical analysis of the Public Tribunal System in Ghana, see S.O. Gyandoh, supra note 189, pp. 1131-1174.

[356]Section 34(4)(a) of 1989 Constitution.

difference.[357] This is corroborated by the recent words of the Minister of Internal Affairs to the effect that unconvicted prisoners will continue to be over-represented in Nigerian prisons unless and until the police and court systems are completely overhauled.

None of the past institutional responses has been of sufficient dimension required to cure the many ills of the inherited system. The rules of procedural and substantive criminal law have shown the greatest resistance to change.[358] This is not surprising because the legal profession which is in the best position to lead the drive for change has a stake in preserving the legal status quo. Nigeria's criminal justice system needs more than a cosmetic or half-way reform. It needs the use of grassroot indigenous institutions that will not only widen the scope of public participation but will also narrow the gap between formal law and the sense of justice and fairness entertained by the Nigerian people.

5.3..The Relevance of Traditional Society:

Milner[359] asserts that so long as traditional societies remain relevant in modern Nigeria, customary law, practices and sentiments will remain relevant in modern Nigerian

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[357]Some courts so restrictively interpret this provision as to rob it of the good intentions of the drafters, see E.K. Quashigah, "Constitutional Protection of Pre-Trial Release: The *Onu Obekpa v. C.O.P.* and *C.O.P. v. Amalu* Controversy", (1989-90) 4 Nig. J.R. 16.

[358]Section 363 of the Criminal Procedure Act perpetuates the colonial bond by providing as follows:

> "The procedure and practice for the time being in force in the High Court of Justice in England in criminal trials shall apply to trials in the High Court in so far as this Act has not specifically made provisions therefor."

[359]supra note 4, p. 379.

communities. In determining the relevance of customary criminal law, one must first assess how relevant customary societies are in modern Nigeria.

In the rural communities which hold 81 per cent of the nation's population there is continued existence of the customary way of living. Most of these communities feel little impact of the police, courts and other institutions of the formal legal system and still depend primarily on the "extra-legal" indigenous institutions for the settlement of civil and criminal disputes. Extended family and kinship still retain some relevance in social control in such communities.

But is the traditional society, and *a fortiori*, customary law of any relevance in the urban areas of Nigeria? Among lawyers concerned with the development process in Africa, two assumptions are commonly made: 1) that urbanization is a one-dimensional phenomenon leading inexorably to urbanism on a Western model, and 2) that customary law and customary dispute-settling institutions have no place in urban Africa.[360] The consequence of the first assumption is the general tendency to disregard some important features unique to the growth of urbanism in African cities including Nigeria. For instance, there is abundant evidence of the fact that in the development of Nigerian cities, there is a strong tendency towards retribalization instead of detribalization.[361] In his

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[360]See D.N. Smith, "Man and Law in Urban Africa: A Role for Customary Courts in the Urbanization Process", [1972] 20 American Journal of Comparative Law 223.

[361]See the account of the Western Ibo by Okonjo in Lloyd, Mabogunje and Awe, eds., The City of Ibadan (Cambridge: Cambridge University Press, 1967) chapter 7; the people of Southern Nigeria who live in the North still today largely retain residential segregation and homogeneity, an example is the *Sabon Gari* (strangers' quarters) communities in Kano city and Kaduna. The same applies to Hausas living in the South, an example is the *Ama Hausa* (Hausa quarters) in Owerri Township, see also Cohen,

innovative study of the mining and administrative centre of Jos, Nigeria, Plotnicov[362] argues that the most significant aspect of urbanization at the individual level is the incorporation, within a single person, of western and traditional goals and forms of behaviour, each held as distinct and appropriate for specific times and places.

Tribal ties are strong in Nigerian cities. This fact is evident in the preponderance of tribal and ethnic associations which play adjustive, facilitative and quasi judicial roles for their vast membership. Smith[363] argues that "the spontaneous growth of ethnic associations and their spontaneous assumption of these functions suggests that urban governments within a number of African states may have failed to provide viable alternative institutions acceptable to the urban African." The cultural discontinuities in the cities lead to the rise of new institutions that approximate those obtainable in the rural areas from which the town dwellers had come. Writing on these associations, Lloyd observes that "the [association] members [are] anxious to keep their disputes away from the urban police and courts (which may employ alien concepts of law in resolving

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Custom and Politics in Urban Africa; a Study of Hausa Migrants in Yoruba Towns (Berkeley: University of California Press, 1969) for account of the Hausa community of Sabo, Ibadan.

[362]L. Plotnicov, Strangers to the City: Urban Man in Jos Nigeria, (1967) p.274. The lesson from most sociological literature on African urbanization is that in the urbanization process selection of values and of personal and institutional arrangements is frequently "additive" and not necessarily "substitutive", see Herskovits and Bascom, "The Problem of Stability and Change in African Culture", in Bascom and Herskovits, eds., Continuity and Change in African Cultures (Chicago: University of Chicago Press, 1959), p. 6.

[363]Supra note 360, p. 234.

them)..."[364] Offodile cites the case of the Ibo union in Makurdi which decreed that members shall not take legal steps without first bringing the matter before the association. The regulation was so effective that "Ibo people entirely deserted the courts except when drawn there by members of different tribes".[365]

Lloyd went further:

> With regard to the settlement of disputes, it is not unusual for the ethnic associations to apply the customary law of their home areas. They are themselves anxious to preserve the reputations of their own ethnic groups and will take strong measures to prevent any member from damaging them by theft or drunkenness.[366]

At a time the Social Welfare Department in Eastern Nigeria adopted the practice of handing over juvenile delinquents, caught in theft or otherwise, to the elders of appropriate ethnic associations.[367]

The foregoing shows that even in the urban areas, the ways and ideas of the traditional society remain relevant. Kin or group solidarity is much more a fact of social and economic life in Africa than in the West.[368] The urban people develop initiatives which sought to make the old values and processes work in a modern context in order to provide the balance of continuity and change. It will be an interesting exercise to undertake an

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[364]P. Lloyd, Africa in Social Change 199 (1967), cited in Smith, supra note 360, p. 235.

[365]Offodile, "Growth and Influence of Tribal Unions", (1947) 18 West African Rev.; see Smith, ibid.

[366]Supra note 364, p. 199.

[367]Ibid., 199-200.

[368]See W. Clifford, supra note 323, p. 203.

extensive study of how the potentials of these associations can be harnessed into official social control.

5.4..The Relevance of Customary Criminal Law:

According to Milner[369] customary criminal law will continue to be relevant to the modern Nigerian penal system for the following reasons:

a) social control in many Nigerian communities has changed little in the last one hundred years because industry, commerce, urbanization and education have had little impact on vast areas of the country. Statutory laws, case laws, and notions of British justice have left little mark on the villages; and certainly some of the ideas of criminal responsibility and penal objectives developed in England through the centuries bear no relation to the lives of people in these communities.

b) there may be much in the ideas of customary criminal law that is admirable and that could be copied by the modern penal system.

c) a lot that happens in the modern indigenous courts cannot be understood without reference to customary ideas.

It is intended here to consider the institutional and normative relevance of customary criminal law in the modern Nigerian penal system. The relevance to the various agencies of law enforcement- the courts, police, prisons, etc., is considered. First we consider aspects of customary criminal process that could be adopted and adapted by the modern British-type courts. Then we argue for a decentralization of the criminal

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[369]Supra note 4, p. 47.

justice system to accommodate such institutions that could truly approximate the indigenous ideas and practices.

a) The Courts.

It was Allot who said that what is best in African customary law and procedure, far from being abrogated, should be examined for its potential contribution to modern procedure as "a source of universal inspiration".[370] The Nigerian approach to law reform has always been based on foreign models. No effort has ever been made to introduce any aspect of the customary justice process into the inherited courts. The attitude of lawyers towards customary law is that of contempt for a worthless thing which should be abandoned and replaced by English law whole and undefiled. Even in civil procedure the approach since independence has been that of integrating the procedures of the customary and regular courts purely on the "modern" model of the regular courts.[371] It is my contention that time has come for mutual borrowing that will minimize the discontinuities between the two systems.

One feature of the customary process that could most usefully become part of the inherited courts' procedure in Nigeria is the "activist" role of the court in the proceedings.[372] Nigerian courts have carried too far the notion of passivity of the judge

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[370]A. Allott, "The Future of African Law" in H. Kuper and L. Kuper, eds., African Law: Adaptation and Development.

[371]See R.A. Bush, "Modern Roles for Customary Justice: Integration of Civil Procedure in African Courts", (1974) 26 Stanford Law Rev. 1123 at 1138.

[372]See Bush, ibid.; Bush's commentary is on civil procedure but I do not see any reason why his useful suggestions cannot apply to the criminal process.

as an umpire such that even the few provisions in some statutes[373] that allow slight participation have been so restrictively interpreted to discourage any meaningful participation by the judge or magistrate.[374] The adversary model is a contest which presupposes equality of the parties and in which the parties to the battle are expected to play their game well or lose to the clever party. Unfortunately, reality does not always reflect theory.[375]

An activist role for the judge will benefit both parties to the criminal process especially in a developing country like Nigeria. For the accused person (particularly those unrepresented by counsel) such an approach will minimize the obvious disadvantage in which he/she is placed. Prosecutions in the high courts are conducted by state counsel so that an unrepresented accused is pitched against a lawyer in the battle. In such circumstances, a more than passive role for the judge will be most appropriate. The court should be able to take an active role in the examination of prosecution witnesses and to advise the accused on the type of witnesses that will best serve his/her cause. Not only will such approach reduce the imbalance, it will also create a familiar procedural

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[373]Section 222 Evidence Act empowers the judge or magistrate to put questions to witnesses; section 200 C.P.A. and section 237(1) C.P.C. empower the court to call or recall and re-examine witnesses.

[374]See Okeduwa v. State (1988) 4 S.C.N.J. 110; Onuoha v. State (1989) 2 N.W.L.R., Pt. 101, p.23; Okorie v. Police (1966) L.L.R. 134.

[375]In Canada this issue has been expressed as follows:

> "...the adversary system presupposes for success some equality between the parties and when this is lacking the truth becomes too often the view of the more powerful. Most judges will confess to the frequent temptation to reach out and even the match but the system cautions against such practice",

D. Stuart and R. Delisle, Learning Canadian Criminal Law, 2d ed. (Toronto: Carswell, 1986) p.55, (emphasis mine).

atmosphere in which the outcome will be more understood and justice seen to be done.

To the state and victim the approach will reduce the number of guilty persons who escape justice because of minor errors that result from the incompetence of the prosecution. This is particularly important in the magistrate courts where prosecution is conducted by the police and whose inexperience in most cases has been a cause of concern.[376] The magistrate should be free to advise the prosecution on such blunders that could lead to undeserved acquittals. I am not suggesting that a trial judge or magistrate should become the prosecutor, rather I am making a case for allowing him/her to intervene to prevent the defeat of a party because of inability, rather than because of the merits of the action. To the anglo-trained lawyer, this will be unwelcome, but one's concern here is the socio-economic and cultural imperatives of the Nigerian people.

Another area in which the customary criminal law notions and practices could be considered is in respect of the exclusionary rules of evidence and procedure inherited from English law. For instance, the inherited courts could reconsider the scope of the accused's right to silence by introducing some of the reforms suggested in chapter three of this work to bring it in line with native African jurisprudence.[377] The rule against hearsay evidence ought to be relaxed. The customary criminal law practice which admits

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[376]See O.A. Adeyemi, supra note 195, p. 19.

[377]A system of admission of facts or settlement of issues before commencement of trial. This is in consonance with native African jurisprudence and was favoured at the First Commonwealth Africa Judicial Conference in Banjul, Gambia; see chapter 3, supra

all evidence relevant to the issue helps to get to the root of problem.[378] I am not suggesting that convictions be based entirely on hearsay evidence for that was not the case even at customary law. Relevancy should be the determinant of admissibility. At present it is not uncommon to see judges pretending that a particular piece of evidence is direct just to get out of the difficulty of having to reject a very useful testimony.[379]

Also there should be ways and means of absorbing the conciliatory aspect of the traditional judicial system into the modern penal justice system. In a society with a strong sense of community and kin-feeling, the strictly adversary model is at disadvantage. To the average Nigerian, it is difficult to retain good relations with a person after having a dispute with him processed through the courts.[380] Reconciliation is a most unusual

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[378]But the use of out-of-court personal knowledge of the judge which was common and acceptable at customary law is not practicable in the modern court situation. Under the indigenous system, the judge(s) would have been respected members of the community of the parties who by their position must have some knowledge of the background facts which usually assist them in the just determination of the cases. This is not so with the professional judge who as a matter of practice is posted far from his/her community.

[379]See Konz, supra note 4, p. 6, who observes that the hearsay rule has proved dysfunctional in many African countries to which it was exported as part of colonialism. According to him, witnesses in those societies are usually unwilling to give direct testimony.

[380]For instance, a victim of spousal assault may wish the wrong redressed but still may not want an adversary battle in court. She avoids the court process because it leaves her with little or no chance of the relationship continuing, and that relationship with her spouse may be more important to her than any injury she may sustain in it. Any prosecution against the victim's wish would likely fail; see the Canadian case, R. v. Moore [1987] N.W.T.R. 47 and comments in T. Pickard and P. Goldman Dimensions of Criminal Law (Toronto: Edmond Montgomery Publications Ltd., 1992) 14. It is my feeling that a less adversarial court atmosphere may take care of this type of conflict between the desire to save a relationship and at the same time have the wrong redressed.

power for courts in a system based on modern English law to exercise.[381] But if we stop thinking of courts as adjudicators, and view them instead as part of a therapeutic process aimed at conciliation of disputants or reintegration of deviants into society,[382] then we shall begin to see a role for courts in this respect. This is a salient attribute of customary criminal law that should not be allowed to fall into desuetude in our hurry to become like western societies.[383]

The above suggestions are intended as palliative for reducing the dissatisfaction with the inherited courts by introduction of some indigenous components. Let us now turn to the need to use indigenous institutions in dispensing criminal justice.

b) Community Courts (Village Moot):

If the institutional dimension of the legal system is as important as its normative dimension, then the need for a court structure and system whose procedure and philosophy the people comprehend and through which the people can interact directly

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[381]G.H. Boehringer, "Alternatives to prison in East Africa", (1971) 10 International Annals of Criminology 91 at 115. Little wonder then that the provision in the High Court Laws of the various states of Nigeria encouraging the courts to promote reconciliation in cases of common assault or other offences of personal nature, has been grossly under-utilized.

[382]R. Danzig, supra note 12, p. 42. In his research paper submitted to the Canadian Law Reform Commission, Professor G. Parker echoed a new criminology which demands for a replacement or at least a modification of the conflict model with greater emphasis on the co-operative method of resolving and controlling community problems, see Parker, "The Law of Probation", in Law Reform Commission of Canada, Community Participation and Sentencing (1976) at 88.

[383]India and Japan are reputed for their efforts and successes in installing the mediatory methods of the traditional legal system into the Western legal system, see D. Wilson, Asia Awakes (Harmondsworth: Penguin, 1972) p. 24.

with the law cannot be overstressed.[384] We had above noted some of the problems with existing experiments with customary courts. A situation where a Local Government Area[385] is allowed only one of these courts creates the question of availability of such courts. Also, the environment of the existing statutory customary courts differs markedly from that of the "extra-legal" indigenous institutions which they are meant to replace. We advocate the creation of community courts of a truly customary nature. In a typical Nigerian community, each village has an assembly which serves as a forum for discussing its affairs and resolution of disputes. Such territorial definition could form the basis for the establishment of community courts. In the alternative, each electoral ward could be allowed a community court. Having regard to the exigencies of today's Nigeria, there is a need for a statutory framework to provide legal teeth for such courts.[386] To avoid old mistakes, the community courts must be allowed such degree of procedural informality that will enable them fulfil the objective of their creation.[387] The courts should operate

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[384]B.De Sousa Santos, "From Customary Law to Popular Justice", (1984) 28 Journal of African Law 95.

[385]Some Local Government Areas are three times or more the size of Kingston and lack effective communication network. In Imo State, the Government realized this and the 1984 Edict was amended to enable the Governor establish more than one customary court in a Local Government Area as he deems fit.

[386]A good model of such statutory framework is the "Customary Law and Primary Courts Act", 1981 of Zimbabwe which creates both community and village courts. The community courts are vested with fairly extensive criminal jurisdiction, see s.14 of the Act. For a discussion of this statute and the courts created thereunder, see Andrew Ladley, "Changing the Courts in Zimbabwe: The Customary Law and Primary Courts Act", [1982] 26 Journal of African Law 95.

[387]It is the processes of dispute settlement that form the critical distinction between customary courts and the English- type courts. Therefore, if the former should be made to follow the processes of the latter, then the former cannot meet the yearnings of the

on the principle of restorative justice; the very legitimacy of an indigenous judicial institution rests on its ability to facilitate reconciliation of the disputants. Many advantages will derive from the use of community courts in the criminal justice system.

The community courts will afford the widest possible lay participation in the criminal justice process. The need for greater community involvement in crime control is topical worldwide. In Canada, the Cawsey Task Force summed it up as follows:

> The Task Force recommends that the criminal justice system be brought back to the communities it serves. One of our findings is that the criminal justice system has become too centralized and legalistic and generally too removed from the community. As a result, communities are unable to identify with the system....The involvement of the community in all aspects of that system is an integral requirement for the successful return of the criminal justice system to the community. Without involvement and responsibility, the community will never identify with the system and without such identification the system becomes a meaningless oppressor of the community.[388]

The fact that these courts will be presided by members of the community knowledgeable in their social structure and relationships could provide additional legitimacy. Efforts should be made to ensure that appointments to these courts do not become an exercise of state patronage which could turn the courts into instruments of political oppression. It

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people. In this respect it is unfortunate that Customary Court Edict of 1984 requires the Customary Courts to follow the rules and procedure contained in the Criminal Procedure Law which regulate summary trials in Magistrate Courts, see section 73(a) as amended by Edict No. 9 of 1987. A better position is found in the Zimbabwean approach where section 17(1) of its 1981 Act referred to above provides thus: "a Primary Court shall not be bound by any law relating to civil or criminal proceedings and in any case not provided for in this Act or any regulations made thereunder, the proceedings of a Primary Court shall be conducted, having regard to customary judicial practices, in as simple and informal a manner as is reasonably possible and as, in the opinion of the presiding officer, seems best fit to do substantial justice."

[388]Cited in M. Jackson, supra note 11, p. 229.

could be preferable to democratize the appointments to the courts. Such practice will nurture the principle of democracy which will in the long run impact on the whole political system.[389]

A community court can go beyond the surface issues to deal with the real cause of the conflict. The court would begin with the recognition that people's problems may be resolved or intensified- if not caused- by the milieu in which they dwell. Operating in that milieu, the court is designed to stimulate emotional and tangible support from the people among whom the disputants live and on whom they depend.[390] The participation of the community members serves to bring social pressure on the parties to accept the resolutions and on their families, relatives and kinsmen to play their role in preventing further deviance. Emphasis will be on conciliation rather than adjudication of guilt. Danzig writes:

> Our present courts are characterized by social distance between judge and litigants, rules of procedure which narrow the issues under discussion, and a resolution which ascribed guilt or innocence to a defendant, but a moot emphasizes the bonds between the convenor and the disputants, it encouraged the widening of discussion so that all tensions and viewpoints psychologically- if not legally- relevant to the issue are expressed.[391]

The community courts will become centres for the gradual dissemination of new

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[389]This may be what the Nigerian Head of State had in mind in 1978 when, after paying tribute to the indigenous courts for their good work, he expressed hope that they will become the centre of political stability in the second republic.

[390]See Danzig, supra note 12, p. 46. Writing about the Kpelle Moot in Liberia, Gibbs states that the very presence of one's kinsmen and neighbours demonstrates their concern and gives a sense of group support to the parties; "The Kpelle Moot", (1963) 33 Africa 1, abridged and reprinted in Law and Warfare 277 (P. Bohannan ed., 1967).

[391]Ibid., p.42-3, (emphasis mine). Although Danzig was writing on the criminal justice system in the United States, the observation is true of the Nigerian situation.

values and norms at the grassroots. Serious cases of conflict between the law and traditional beliefs which have always been hidden from the formal legal system will come to be exposed and discussed before these courts in the light of modern circumstances. Thus they will become instruments for public education, zones of struggle between old and new ideas.[392] This may be what Christie meant by his argument that lay-oriented courts offer "opportunities for norm clarification" where the nature of law and its appropriateness can continually be debated, identified and supposedly changed.[393] This will be of particular advantage in the Nigerian situation because part of the problem of the criminal justice system is that its processes are not understood, so the new norms are not effectively communicated.

There will be the crucial question of what will be the jurisdiction of the community courts and what law will they administer? Any conduct violative of the rights and freedoms of persons and property within the community should be within the court's

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[392]This will bridge the gap between customary law and the inherited law. Certain changes in approach to social control are better achieved through education and persuasion than by enactment of repressive laws. Changes brought about in this way are usually more enduring. Gibbs states that the customary Kpelle Moots of Liberia play a therapeutic role in that "like psychotherapy, they re-educate the parties through a type of social learning brought about in a specially structured interpersonal setting", Gibbs, "The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes", (1963) 33 Africa 1 at 6.

[393]N. Christie, "Conflicts as Property" in C. Reasons and R. Rich, eds., The Sociology of Law: A Conflict Perspective (London: Butterworths, 1978). Christie feels strongly that lay-oriented courts are better forums for the resolution of the conflict between law and justice. This argument is supported by Z. Bankowski and G. Mungham, "Lay people and Law people and the Administration of the Lower Courts", (1981) 9 International Journal of the Sociology of Law 85 at 97.

jurisdiction. The statute could spell out a range of offences[394] triable by such courts and could thus exclude very serious offences which require the attention of the state.

On the law to be administered, the ideal thing will be for the community courts to apply customary law. But since the Constitution requires all offences to be written, a very simplified code could be produced specifically for these courts while allowing the Local Governments to take care of necessary local variations by way of bye-laws.[395] In this way the constitutional requirement for all offences to be written will be maintained. The participation of the Local Governments in creating offences could be restricted to categories of crime with less of what Danzig calls "externalities".[396] A statute could

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[394]Such offences could include petty thefts, slander, unaggravated assaults, creating nuisance, disturbing public peace, public drunkenness, refusal to participate in community-organised work e.g. community sanitation works, violation of community mores like desecration of a traditional shrine, etc. Danzig's program for a community court is too restrictive; he prefers such courts handling only victimless crimes, but this should be understood in the light of the society for which he was writing; Fisher criticizes Danzig's work on this ground, see Fisher, supra note 1286-1287. The courts proposed in this thesis should handle true crimes in addition to victimless crimes if it is to be relevant to the society. The offences specified in the 3rd Schedule to the 1984 Edict could be a modest start for community courts.

[395]The Obafemi Awolowo University, Nigeria had at one time commenced the project of codifying the various customary laws in Nigeria but it had to abandon this for lack of funds.

[396]Thus Danzig asks, "So long as externalities are minimal, shouldn't each community be free to define its own crimes?", supra note 12, p.14-5. And Milner has also written as follows:

> "The political and economic advancement of Nigeria may well lie in the elimination of local differences and creation of a stronger sense of national purpose. But in a matter such as control of crime, although there may be some national purpose, the most effective means of enforcing it may vary from community to community...."

"The Future of Sentencing in Nigeria", (1971) 10 International Annals of Criminology 250. (emphasis mine).

specify the conditions under which an offence triable by the court could be diverted to the formal courts.[397]

An appellate structure could be established which allows appeals from the community courts to customary courts at the Local Government level and further to the Customary Court of Appeal manned by trained lawyers. Having appeals to another level of lay court will afford further opportunity for expression of the ideals of indigenous settlement while the Customary Court of Appeal will serve to remedy any grave injustices committed by the lay courts.

Practical difficulties and conflicts are bound to occur but such will be minimized with time. One must give a note of caution that it will be unfair, self-defeating and contrary to the principle upon which these courts are conceived if their performance should come to be evaluated in terms of professional criteria. It will not be surprising if vested professional interests fail to see anything good in such courts. However, one thing certain is that a community court would scarcely do any worse than the institutions it seeks to replace.

c) Community Policing:

The idea of community courts cannot be undertaken as a unilateral reform. There

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[397]For instance, if a stranger will be prejudiced in the community court, such person could be tried by the formal courts. Apart from such exceptions, it may be preferable to confer some kind of exclusive jurisdiction on the Community Courts. A situation where the professional courts exercise concurrent jurisdiction over all matters triable by Customary Courts (e.g. section 75 of 1984 Edict) does not augured well for the latter. The police who conduct prosecutions in lower courts deliberately by-pass these courts and take matters to the other courts.

must be corresponding adjustments in other institutions of the criminal justice system.[398] Arguing for adjustments in the police work, Bankowski and Mungham[399] asked the following questions: "What do the police actually do? What are the present criteria of successful policing?" Could these be usefully revised towards a style which lays more emphasis on mediation and conciliation, instead of concentration on arrests?" Before the advent of the modern police force in Nigeria, there existed policing arrangements which varied from community to community. Are these no longer relevant in modern Nigeria?

The reality at present is that because of the perceived limitations of the Nigerian Police Force, community-based preventive policing thrives in varying degrees in different parts of Nigeria. Many rural areas rely on community vigilante groups for their security. Such groups usually made up of adult males of specified age range patrol the community at night in rotating groups. They are sustained by the community and employ various traditional ways in achieving effective policing of their areas. They arrest criminals, sometimes administer quick sanctions like flogging, depending on the case and circumstances. Even in the cities, the inability of the police to protect citizens has become very evident and manifests itself in the upsurge of vigilante groups in the cities. The police force has come to recognise the indispensability of these groups in various

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[398]Danzig warns that decentralizing one component while leaving the others untouched could create friction, supra note 12, p. 6; Bankowski and Mungham, supra note 399, p. 98.

[399]Ibid. p. 96.

communities, hence official police policy in recent years has been to encourage them.[400] However, there is a need for real legal backing so that members of these groups would have legal protection should problems arise from the performance of their work. Such law will also check any excesses.

One should not be seen as advocating the creation of another professional police at the community level. The community watch groups foster reconciliation more than generating unnecessary cases into the criminal justice system. In certain order maintenance roles requiring insight into the mores of the community and sensibility to the personalities involved, such groups can do better than the professional police. In this way they give expression to the traditional philosophy of restorative criminal justice. If their activities are streamlined with the work of the community courts proposed in this thesis, then real community based justice system would have begun.

There is also a need to improve the relationship of the professional police with the community. This is particularly important in Nigeria where the general practice is to assign police personnel to posts outside their home region. This practice has its advantages,[401] on the other hand it has increased the aloofness of the police from the population.[402] Effective performance of some aspects of police work may require close

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[400]See Wushishi, supra note 255.

[401]It is argued that the disinterested restraint of the policeman and his role as an embodiment of authority are aided by the fact that he is not a resident of the precinct in which he works, see Danzig, supra note 12, p. 7.

[402]In many cases the police officer neither understands the language nor appreciate the nuances of the environment in which he/she works. This may have informed a policy of the Federal Government in 1989 to return all police officers of specified ranks to their states of origin.

interaction and rapport with other community agencies and personalities such as Chiefs, *Ndi Nze na Ozo*, Elders, etc.

The Nigerian police should begin an inquiry into the possibility of incorporating some traditional methods into their investigation of crimes. Quashigah[403] has suggested a possibility of integrating those aspects of the ordeal process in traditional Africa which have been tested and certified genuine and which do not involve any bodily harm to the suspects into modern police investigations. While not pushing this proposal too far, it deserves to be examined to determine the possibility.

d) Corrections and Rehabilitation:

If the creation of community courts is to be meaningful, they should be allowed to apply a broad range of sanctions deemed relevant and effective within the cultural milieu concerned. Influenced by traditional ideas and attitudes, the community courts will prefer de-institutionalized sentencing with the primary aim of re-integrating the offender into the community. But the relevance of customary criminal law in this sphere is not restricted to the community courts;[404] the modern courts could be made to benefit from

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[403]Supra note 95, p. 10; he referred to such methods as using consecrated water to wash the face of the culprit (this was popular with the Anlo Ewe of Northern Ghana) or the drinking of water from a sacred shrine in the community or water mixed with earth from the community shrine as was the case with the Borgu of Northern Nigeria. An official report in 1906 acknowledged the amazing effectiveness of the "Borgu Oath" which was actually an ordeal, see reference to this in T.N. Tamuno, "Traditional Police in Nigeria", in A. Ade Adegboola, ed., Traditional Religion in West Africa (Ibadan: Daystar Press, 1983), pp.188-9.

[404]In discussing the relevance of customary criminal law sanctions for the reform of the inherited codes in Africa, Junod favours the use of "the family or village

the ideas of sanctions of customary law.

In chapter four, I emphasized the need for a well defined policy on compensation and restitution because of their sociological relevance to the indigenous Nigerian society. This is an area most directly related to the customary process and should be used and developed in order to make the modern procedure more consistent with traditional views, and therefore more acceptable to the vast majority of the people.[405] The modern criminal law must accept and possibly expand compensation and restitution as forms of penal treatment so that, depending on the circumstances of a case, they could be applied as sanctions alone or in addition to other criminal sanctions.[406] This will enhance the restorative content of the criminal law and the public image of law enforcement. It will also reduce prison congestion.

In his illuminating work on sanctions of customary criminal law in Nigeria, Milner referred to the potential for social control that resides in what he calls "the broad social sanctions of customary law", such as public disapproval, ostracism, and similar

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court...which could easily be adapted, even in the rural areas to restitution in nature by work", see H.P. Junod, "Reform of Penal Systems in Africa", (1966) 2 E.A.L.J. 32-3.

[405]Boehringer, supra note 381, p. 116. Junod describes restitution as an African living concept which can be used to spectacular effect if it is made the centre of penal and penitentiary policy, Junod, ibid., p. 33.

[406]The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power enjoins member states to review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases; see para. 9 of the Declaration, DPI/895- August, 1986.

pressures that are brought to bear.[407] He stated that his concern is simply to ask that these pressures always be recognised. "The question whether the offender has suffered enough is not always too near the sentencer's mind. If it is not, the penalty imposed may simply be unnecessary, for the social sanction will already have done its work".[408] But Boehringer[409] suggests that our concern must go deeper, to ask whether these kinds of social pressures cannot be utilized as a modern form of sanction, indeed as an alternative to imprisonment- or to any other form of punishment. He adds, "it seems to me that these are extremely potent sanctions which,if properly utilized and organized, may go a long toward establishing an effective system of social control not seen in the West".[410] As I have noted earlier in this work, part of the problem is the tendency to resort to hasty conclusions as to the inappropriateness of traditional sanctions in modern social contexts without an empirical study on how far the social context has changed.

An effective use of traditional sanctions must necessarily entail local variations. The community courts will be more easily attuned to this. For the modern courts, it may require the use of assessors to advise the judge or magistrate on the sentence most

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[407]A. Milner, supra note 77, p. 173; see also Milner, note 4, particularly chapters 2 and 13. But such sanctions are effective where the community of the parties are involved. In some way, the trial in the professional courts and subsequent imprisonment in a jail outside the community permits the offender to avoid the very people whose presence is most likely to give rise to shame and remorse. For a similar observation in respect of the aboriginal communities of Canada, see R. Ross, "Cultural Blindness and the Justice System in Remote Native Communities," cited in M. Jackson, supra note 11, p. 209.

[408]Ibid.

[409]Supra note 381, p. 123.

[410]Ibid.

appropriate in a given circumstance. The Nigerian penal system must embrace fully the concept of individualization of sentence. As far as practicable, courts must be given complete power to impose sentences calculated to deal effectively with individuals before them. Milner proposes a bridge between the relevance of traditional penal methods and the idea of individualization of sentence. He writes as follows:

> The bridge is this. that an individual offender must be considered not as an isolated human being guilty of committing certain acts, but as a part of the elaborate sub-cultural context within which his crime is committed and its effect felt. If a distinctive traditional remedy genuinely stands a chance of resolving the problem, it should be open to the court to use it. Just as one can fairly readily accept that a sanction should be widely available...if it is of some value for dealing with an individual case, so too sanctions should be widely available if they can be shown to be effective and acceptable within individual cultures. Once they are available, they can be used as the cultural circumstances of individual cases dictate.[411]

The advantage of the above is that it enables such traditional sanctions to be excluded in social contexts and areas where they are not relevant.

Whatever the extent of social and economic change, the old values of close fraternal bonds (kinship, extended family etc.) which once made members of a family or community readily assume responsibility towards and on behalf of one another, both in good times and in bad, will be found worth being adopted and adapted.[412] Before the advent of the modern centralized system, the traditional system employed the extended family and kinship in treatment of offenders. Thus an offender can be committed into the

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[411]supra note 4, p. 380.

[412]Elias, supra note 6, p. 23.

hands of a chief, family head or an elder in the community as a sanction.[413] While the process of social change continues to loosen the ties of kinship and of common patrimony so that the old personal roles of the judge, the criminal and the injured are ceasing to be applicable in certain situations, a case can still be made out for a re-examination of contemporary attitudes towards the offender with a view to discovering basic analogies in the traditional judicial approach to the problems of criminality and deviant behaviour in general.[414]

An important lesson which should inform any reform of Nigerian penal system is that those modern alternative methods of treatment which approximate the traditional ideals will be easily adaptable because of existing receptive anchors. Thus such methods like probation, parole, etc., lend themselves admirably to easy adoption in Nigeria. According to Elias, there is a real need for the greater employment of probation in Nigerian penology, if only because of its sociological and psychological relevance to African societies.[415] But what kind of probation will best reflect the Nigerian situation? Writing on African societies generally, Clifford[416] notes that the work of probation

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[413]See Adeyemi, supra note 75, p. 170. See the case of R. v. Narqitarvik (1986) 26 C.C.C. (3d.) 193, for a discussion of this type of sanction in Arctic Bay, an aboriginal community in Canada.

[414]Elias, supra note 6, p. 23.

[415]T.O. Elias, "Traditional and Modern African Criminal Policies", (1971) 10 International Annals of Criminology 329, being a supplementary note to Elias, ibid. Probation can be likened to the traditional method of committing the offender into the hands of a chief or an elder. To Clifford, the better use of probation, its extension and improvement, is a fundamental part of any plan in Africa to adopt and redirect the penal system to fit local and modern conditions, Supra note 323, p. 202.

[416]Ibid.

officers need not be as individually direct as it has been in industrialised societies. The offender could be reached through his community or group relationships.[417] In a rural community, an elder or a chief may be a better probation officer than a trained personnel depending on the circumstances. In the urban areas, ethnic associations may in appropriate cases be involved in correctional programmes.

Also, the idea of open-prisons which existed in northern Nigeria could be re-considered for integration into the correctional programmes. The Kanuri Prison is an outstanding example of a successful experiment with the open-prison system.[418] By this system, offenders are organized in camps or prison farms, and put to some form of productive labour for the period during which they are supposed to be undergoing punishment. It has the advantage of making offenders feel free to move about and to participate as if they were only members of a gang of labourers engaged on specific public works; the fact that the work they do is intended as a form of punishment for their transgression is remembered only incidentally.[419] A report to the Nigerian government in 1967 stated: "Thus in many ways the "climate" of an open prison lends itself more readily to the "community" ideal and the process of social learning...."[420]

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[417]Thus kin groups, age-groups and town unions can be utilized in probation programmes as well as in after-care services for ex-convicts.

[418]Elias, supra note 6, p. 22; unfortunately, the idea was not spread to include more prison facilities in the country, see Igbinovia, "The Chimera of Incarceration, etc.", supra note 313, p. 30.

[419]Ibid.

[420]"The Report of the Working Party on Police and Prison Services in Nigeria", (Lagos, Federal Ministry of Information, 1967), cited in Elias, ibid.

Other traditional methods like communal labour, counselling and seizure of property should also be available for use in appropriate cases. Among the Ibos and Edos of Nigeria, counselling was largely used as a mode of redress in domestic quarrels (even spousal battering) and in conflicts among kinsmen.[421] One may add that there is no guarantee that these will become more efficient methods of treatment; but even if they do not, they have the advantage of saving offenders from the dehumanization of incarceration.[422]

5.5.. Customary Law, Justice, Rule of Law and the Constitution:

A major problem in the application of customary law has been the practice of subjecting it to the test of conformity with the so-called English notion of "justice, equity and good conscience." It is this practice that led the Nigerian legal system to prefer technical justice to substantial justice professed by customary law. Customary law must be evaluated through the monocles of the Nigerian society and not otherwise. There is therefore, the need for a home-grown standard against which customary law would be gauged. One commentator has suggested that the Nigerian constitution and the requirements of the rule of law could become the standards towards which customary law should conform.[423] Thus in evaluating a given custom, the courts should consider its

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[421]See Onwuejeogwu M. Angulu, The Social Anthropology of Africa: an Introduction (London: Heinemann, 1975), he compares this with similar practice among the Cheyenne of North America.

[422]Igbinovia, supra note 313.

[423]D. Asiedu-Akrofi, "Judicial Recognition and Adoption of Customary Law in Nigeria", [1989] 37 American Journal of Comparative Law 592.

place in the community, its value and influence and then whether it conforms to the spirit of the constitution and the rule of law. Using the constitution as the standard will make a difference only if the constitution itself reflects the consciousness and aspirations of the Nigerian people. If the constitution is again largely a copy-work of western societies enthroning alien standards, it will be like putting old wine in new wine skins. The advantage of applying the constitution as the gauge is that it engenders uniformity but as we have cautioned earlier, in matters of social control, uniformity should be pursued where necessary and attainable. We should be guided by the words of that great African, St. Augustine, who said: "In necessities, unity; in doubtful things, liberty; in all things, charity."[424]

Greater caution is even required when applying such concepts as the rule of law and human rights to customary law. Much as these concepts are seen as universal, their western version or formulation need not be swallowed whole by other societies. In its western conception, the rule of law seeks to enthrone individual liberty against anything else. It emphasizes due process of law and separation of powers. Its main concern is not justice *per se* but certainty and non interference except in accordance with laws enacted by state institutions. Indigenous Africa's conception of right and freedom has the community as the starting point.[425] Therefore, in subjecting customary law to the test of the rule of law, it has to be resolved whether the rule of law ought to reflect the

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[424]Cited in S. Poulter, "African Customs in an English Setting: Legal and Policy Aspects of Recognition", [1988] 31 Journal of African Law 225.

[425]J. Cobbah, "African Values and the Human Rights Debate: An African Perspective", (1987) 9 Human Rights Quarterly 309-331.

popular ideology and African values of collectivism or the western approach. An example of how these concepts should be treated vis-a-vis indigenous customs and institutions can be drawn from the United States Supreme Court's words in Hurtado v. California[426] on the English Magna Carta; the court said:

> There is nothing in the Magna Charta [sic][that] ought to exclude the best ideas of all systems and of every age. [Any] legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of legislative power, in furtherance of the general public good, which regards and [preserves] principles of liberty and justice, must be held to be due process of law.[427]

5.6.. Judicial Attitude:

Since the proposals put forth in this work, while broadening the base and acceptability of the criminal justice system, will leave the inherited courts in operation, it becomes necessary to comment briefly on the need for a new attitude by Nigerian judges. Part of the problems of the justice system can be blamed on the insensitivity of judges and magistrates to the peculiarities of the Nigerian society. Much as independence of the judiciary is cherished, it does not mean that judges should be neutral on the basic issues of the society. There is need for an understanding by the judiciary of the people and their problems- problems of rural poverty; of mass illiteracy; of ethnic, religious and cultural diversities. These are the problems which the judiciary will have to tackle and

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[426](1984) 110 U.S. 516.

[427]Reprinted in G. Gunther, Constitutional Law (New York: Foundation Press, 1985) 421 (11th ed.).

deliberate upon in its use of law and the legal system to produce and enhance justice.[428] This issue had been echoed long ago by a respected African statesman and former President of Tanzania, Julius Nyerere, when he stated as follows:

> Justice demands many things....And it demands an understanding by the judiciary of the people and by the people of the judiciary; for without this mutual understanding the people's basic sense of justice in their relations with each other may be outraged by the very instrument which they have created to implement justice....The fact that judges interpret the law makes it vital that they should be part of the society which is governed by that law otherwise their interpretation may appear ridiculous to that society and may lead to the whole concept of law being held in contempt by the people.[429]

Nigerian judges and magistrates must see law as a means to an end, not as an end in itself. An increased judicial sensitivity can help in dispelling the sense of helplessness and frustration which the people feel presently about the judicial process.

The origin of the Nigerian legal system makes it doubly necessary for such judicial caution and sensitivity in applying the laws and procedures. Lord Denning warned long ago that:

> ...the common law cannot be applied in a foreign land without considerable qualifications....It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk....In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications

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[428]Oputa, supra note 145, p.60. He adds that it is for the Nigerian lawyer to determine whether, in resolving the peculiar problems facing our people, there is an urgent need to shed off foreign rules and procedures which are not relevant to our peculiar needs and circumstances.

[429]J. Nyerere, Freedom and Socialism (Oxford University Press, 1968) p.110.

is entrusted to the judges of these lands. It is a great task.[430]

This should be the guiding principle in the application of the inherited system of justice. We could take those principles of manifest justice but throw away those "refinements, subtleties and technicalities" not suited for the Nigerian folk.

There is need for a continuing judicial re-education to severe some of the uncritical but entrenched beliefs in those subtleties of the adversarial model that are not necessary in the Nigerian situation. Also it calls for a significant revision in the curricula of legal education. Subjects like criminology and penology should be taken as compulsory courses in the law faculties in Nigeria.

5.7.. The Role of Legislation:

While it is true that judges, as interpreters of the law can do a lot to make the law and legal system more relevant to the society, legislators have an equal, if not greater, role in this respect. It is their duty to ensure that the normative and institutional foundations of the legal system reflect the basic postulates of the Nigerian society. Until recently, the statute books were filled with pre-1900 English Ordinances exported to Nigeria during colonial rule. Legal systems could mutually borrow from one another but legislative wisdom lies in the ability to adapt what is borrowed to local circumstances. Law is converted into a reactionary force once it is regarded as an abstract concept which, in some mysterious way, is universally applicable to the economic and social

[430]See Lord Denning in Nyali Ltd v. A.G. [1955] All E.R. 646 at 653; he was construing a proviso in a Kenyan colonial statute which provided that common law is to apply "subject to such qualifications as local circumstances render necessary".

conditions of the country in which it is applied.[431] In most cases a definite legislative policy is lacking, leading to lack of coherence among the various institutions of the legal system. It is important to realize that the potential for accommodating the ideas and processes of customary criminal law within the criminal justice system lies in the extent to which the criminal justice system incorporates the principles of restorative justice. One of the most difficult tasks facing criminal policy makers in Nigeria is the evaluation of different penal methods; nevertheless it is imperative that an attempt be made. Any reform should seek the widest possible public input.

5.8.. Conclusion:

Past responses to the dilatoriness of the criminal justice system have been inadequate. The solution lies beyond the creation of more of the inherited courts, appointment of more judges and production of more lawyers. It lies beyond the construction of more prisons and recruitment of more police personnel. At best these could give temporary respite to the system. That the fairly elaborate constitutional provisions to secure the liberty of the individual have failed to make a significant difference in the number of unconvicted prisoners shows the extent of institutional reform required in the system. Tribunals created by military regimes, not only handle a few selected offences, but are seen as aberrations and therefore fail to impact on the general criminal justice system. Existing customary courts in some states are either denied criminal jurisdiction or made to function in a manner that contradicts the very reason for

[431]K. Nkrumah, (1962) 6 Journal of African Law 103.

their creation.

The vast majority of Nigerians live in rural areas that have experienced little impact of the modern courts and professional police. Community courts hold promise of being more conveniently located, more considerate and much faster in processing cases than the formal courts. And because their procedures are familiar to the people, they could become centres for norm clarification and re-education of the public. The use of non-custodial sanctions by these courts will significantly reduce the congestion in Nigerian prisons. Those Nigerians who feel reluctant to invoke the criminal justice system because they do not want the offender to be harmed will find the community courts attractive. The guiding philosophy will be restorative justice.

The customary criminal justice system could be a source of inspiration for a better criminal justice administration in Nigeria. But we must become critical of every bit of what we inherited. It is time to ask ourselves whether a heavily centralized, wholly professionalised criminal justice system is the best for Nigeria. We must begin to think about the community in social control. The Nigerian government has in recent times tested the community concept in rural infrastructural development and found the result very positive. This should be extended to social control. It is a strange irony that while the West is advancing towards some of these ideas of a decentralized justice system, African countries are doing just the opposite. Referring to this irony, Cohen wrote:

> Just when Western crime control rhetoric is talking about "community" and extolling the virtues of mediation, conciliation and informal dispute resolution, the third world appears to be abandoning such methods and moving towards a

centralized, bureaucratized and professional criminal justice system....[432]

[432]S. Cohen, "Western Crime Control Models in Third World: Benign or Malignant?", (1982) 4 Research in Law Deviance and Social Control p.85 at 86-7.

CONCLUSION.

> The efficacy of law ultimately depends upon society's perception of its ability to provide justice. People respect legal institutions which they consider fair and which they helped shape. They accept sanctions which they believe to be just and which relate to their personal and cultural beliefs. The perception of fairness is shaped by the systems established to enforce and apply the law, and a sense of justice flows as the end result of the processes which those systems impose on an alleged offender.[433]

I have tried to show that the Nigerian criminal justice system lacks most of the conditions necessary for the efficacy of law as prescribed in the above quotation. To the extent that alien standards and notions are adopted and incomprehensible procedures followed, the people perceive the system as unfair. Because sanctions do not reflect the cultural sentiments of reparation and reconciliation, they tend to be unacceptable or ineffective. The institutions of the criminal justice system, the police, courts, and the legal profession contribute to the shaping of the negative public perception of the system. These engender the general feeling that the end result that flows from the system is anything but justice. The result of the discontent is reflected in public reluctance to report crimes to the police, private settlement of even serious criminal offences, reluctance or even refusal to co-operate with the police especially to serve as witnesses, and sometimes people taking the law into their hands by beating or lynching suspects.

I have argued for a return to some of the ideals of customary criminal law as a possible solution to some of the shortcomings of the criminal justice system and a way

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[433]Moana Jackson, "The Maori and the Criminal Justice System, *He Whaipaanga Hou*- A New Perspective, Part 2, cited in M. Jackson, supra note 11, p. 169.

of improving its legitimacy and public acceptance. I argued that the customary society is still relevant in modern Nigeria and that the country is essentially a rural society. Rural mobility is impaired by absence of all-season roads and organised transportation and this affects accessibility to the modern institutions of the criminal justice system. The socio-economic marginality of the majority and the attendant *de facto* discrimination in the attitude of law enforcers, particularly the police, has nurtured a culture of distrust and lack of co-operation by the public. This in turn creates some operational difficulties for the institutions. I identified some of the problems of these institutions with the philosophy of exploitation and repression that informed their colonial foundations and the need to break with the past in this respect. I equally sympathized with these institutions whose efficiency is also hampered by inadequate resources and lack of motivation.

The criminal process has become so complex and technical that it is not understood by the people. There are so many subtleties and refinements that are glaringly irrelevant to indigenous circumstances. In many cases technical justice falls below the expectations of the people who look to the system to dispense substantial justice. Some provisions of the Criminal Code, especially those dealing with corruption are so abstract that their application is rendered difficult thus leading to endless acquittals even in the face of manifest guilt. The results in some cases are so appalling that the judiciary is held in contempt. The strict adversary style makes dependence on professionals inevitable and in a country where the majority are so poor that they cannot afford legal representation, access to justice becomes theoretical. I criticised the penal practice of the system for its overuse of incarceration, lack of concern for victims, and inability to promote

reconciliation. I emphasised the surviving traditional sentiment for compensation and restitution and argued that this should become the focal point of Nigeria's penal policy. There should be increased resort to sanctions of customary law and such other modern alternatives that approximate some traditional practices. Sanctions that serve best are those that have sociological and psychological relevance to the people.

I appraised past responses to the problems of the system and identified some of the defects in those responses. Existing customary courts are mere images of the regular courts and haunted by the uncertainty as to how far they can depart from formal rules and procedure without having their decisions nullified on appeal or review. Tribunals are seen as abberations characteristic of military governments and because they are not concerned with the street crimes that dominate the criminal justice system, they fail to make enduring impact on the whole system. However, speedy disposition of cases and preference for substantial justice are a few of their features that one can commend to the ordinary courts.

In arguing for a new concept of criminal justice administration I articulated the normative and institutional relevance of customary criminal law. In particular I argued for a new framework of community courts of a truly indigenous character. Unlike the practice with existing customary courts, the new community courts should be allowed a wide latitude to adopt customary procedures and practice; also they should be free to apply a wide range of sanctions which they consider more effective in their communities. With such courts justice would become not only physically, but also conceptually within the reach of the people. The community courts will be less bureaucratic and their

procedure will be more familiar to the people. This is why reforms based on customary criminal law are to be preferred. They will allow for greater community participation which will in turn enhance the legitimacy of the system. The community courts could become forums for norm clarification and zones of struggle between old and new ideas by which the community filters out those aspects of its social control and practices inconsistent with present realities. There is also need for other institutional adjustments especially in the concept of policing. The realities presented by the shortcomings of the criminal justice system have already led to spontaneous growth of communal policing in various forms. There should be a way of streamlining the efforts of such groups so as to reduce the antagonisms of the professional police.

The major set-backs to an enhanced status for customary justice system are the ill-conceived notions that it impedes development and may not guarantee human rights. It is also argued that it undermines the achievement of uniformity in administration of law and thus impairs the unity and cohesion of the nation. I have argued that the proposition that customary law impedes development is based on our one dimensional conception of development as being what it takes to become like the Western industrial nations. Customary criminal law will enhance rather than impair human rights. My contention is not for a wholesale reconstruction of the traditional society. There is no going back to forms of brutality- cutting hands or ears, throwing into the forest or river, killing of twins or "abnormal" beings, or other inhuman ordeals. But there is an urgent need for a return to restorative criminal justice, to compensation and restitution and to the community. My contention is for a search for solutions to contemporary problems which are firmly

anchored in processes which reflect the deep currents of cultural continuity which have survived in the midst of enormous changes. While uniformity of laws and their application is to be cherished, in matters of crime control and administration the best ways of achieving effectiveness may vary from community to community. The present problems in the criminal justice system are too great a cost to pay for uniformity. Uniform application of laws could in some instances amount to systemic discrimination.

I have not suggested abolition of the existing system. A hundred years experience with the inherited system cannot be easily shrugged away and moreover, the complexities of modern economic life put certain matters beyond the capacity of the customary system of justice. The inherited courts could concentrate on those things which they can do best while leaving the bulk of the street crimes to the informal courts. I also suggested certain features of the customary criminal law that could be incorporated into the inherited courts to reduce their alienation from the population.

There is need for a redefinition of the nation's policy with respect to the fundamental purpose and principles of criminal law. Such a redefinition should be broad enough to encompass many initiatives of customary criminal law.

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